

**Governance under the new Company Code:
What you should know**

Overview

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3.	New rules on the members of the different bodies	Céline Tallier, Senior Attorney
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9.	Conflict of interest rules	Wim Dedecker, Counsel
10.	New competences of the committee of independent directors	Olivia Szerer, Junior Associate
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**Governance under the new Company Code:
New models of governance**

Constance Dumortier

Option 1 One-tier system

Option 1A Board of directors (current system)



- Collegial board of directors
- Default regime
- Executive committee (*directiecomité/comité de direction*) abolished

Option 1B Sole director



NEW

- Sole director
- In listed companies, the sole director must be NV/SA with a collegial board (option 1A or option 2)

Option 2

Two-tier system – Supervisory board and management board

NEW

- Two collegial bodies
- Respective powers (**no overlap**):
 - Supervisory board supervises management board, defines general policy and strategy and holds all the competences specifically allocated to the BoD by the CAC
 - Management board has the residual (operational) competences



**Governance under the new Company Code:
New rules on the members of the different
bodies**

Céline Tallier

Employees?

- One-tier system - members of the BoD: no
- Two-tier system - members of the Supervisory Board and members of the Management Board: no
- Daily management functions: permitted
- Other functions: permitted

Two-tier system : no joint membership

- Joint membership is permitted in the current “two-tier system”
- No joint membership in the CAC two-tier system
- Credit institutions and insurance enterprises: board of directors and management committee - directors being members of the management committee

Independent directors

- New definition
 - General legal criterion
 - Specific criteria to be provided for in the 2020 Belgian Code on Corporate Governance
 - presumption
 - “comply or explain”
- In a two-tier system, members of the Supervisory Board
- No variable remuneration

**Governance under the new Company Code:
Gender parity in listed companies and public
interest entities**

Stefania Sacuiu

1. One-tier structure (7:86)

- At least 1/3rd of the members of the BoD must be of a different gender
- The gender of a board member that is a legal person is given by the gender of its permanent representative
- The minimum required number of board members of a different gender is rounded up or down to the nearest whole number
- Economic sanctions in case of non compliance

2. Sole director

The sole director must be NV/SA with a collegial management body (7:86) → the gender parity requirement applicable to the BoD is applicable to the management body of the NV/SA-sole director (7:101)

3. Two-tier structure

The gender parity requirement applicable to the BoD is applicable to the supervisory board (7:106)

**Governance under the new Company Code:
Legal Entities as Directors**

Charlotte Schaumans

Appointing Legal Entities

- Where?
 - In management body
 - Sole director
 - BoD
 - Management Board /Supervisory Board
 - For daily management
- Obligation to appoint permanent representative

Permanent Representative

- Must be an individual
 - No cascade
 - Must not be a shareholder, director, officer or employee of the legal entity-director
 - Subject to same conditions as director
 - Jointly liable with legal entity-director
- No duplication
- Sole director: may appoint substitute permanent representative

Legal Entity-Sole Director of Listed Companies

- Legal entity-sole director must be NV/SA with collegial management
- Application of the legal rules applicable to the board of directors:
 - independence, remuneration, diversity
 - conflicts of interest

**Governance under the new Company Code:
Dismissal of directors – what can the AoA
provide for ?**

Jan Vreys

From 1873 until the CAC

- NV/SA: Dismissal “*ad nutum*” – seen as a protection of shareholders, thus mandatory law.
- Result : No protection (in terms of notice period, indemnity, special majority...).



The new CAC (1/2)

- Dismissal “*ad nutum*” maintained as default option but ceases to be mandatory law.
 - The GM has the right to grant a notice period **or** grant an indemnity in lieu of notice – but AoA can exclude this right.
 - AoA may provide that dismissal always requires a notice period or an indemnity.
 - Even so, dismissal without notice or indemnity remains possible for “*cause*” (“*justes motifs/wettige redenen*”).

The new CAC (2/2)

- **NV/SA with sole director**
 - Sole director may or may not be appointed in the AoA.
 - **Optional** clause in the AoA: consent of the sole director is required for the sole director's dismissal.
 - Even if this clause is specified in the AoA: no absolute protection for the director:
 - GM is always entitled to dismiss the sole director for cause (“*wettige redenen / justes motifs*”) – note: same majority as for an amendment of AoA; or
 - after minority shareholders' suit to remove the director for cause (10% or 3% of the share capital).

**Governance under the new Company Code:
Directors' liability**

Valérie Simonart

A. Caps (art. 2:57) (1/2)

- All members of administrative bodies and day-to-day managers
- All wrongful acts and liabilities, subject to exceptions
- Towards the company and third parties
- Between EUR 125,000 and 12,000,000 (depending on the company size)
- By damaging event

A. Caps (art. 2:57) (2/2)

- Exceptions:
 - Frequently occurring minor faults, gross faults, faults committed intentionally or with the intent to cause damage
 - Withholding tax on professional income, VAT, tax evasion and social security contributions
 - Liability in another capacity

B. Indemnification agreements (art. 2:58)

- No limitation beyond art. 2:57
- The company and its subsidiaries cannot exempt directors from their liability or indemnify them in advance

Liedekerke

wolters
waelbroeck
kirkpatrick

Women on board

26 March 2019

Changes to the decision-making procedure

Ellen Vermeire

Brussels • London - www.liedekerke.com

- Alignment of the decision-making procedure with actual practice
 - Digital communication
 - Written procedure BoD
 - Definition of daily management

- Digital communication
 - E-mail communication between company and shareholders, directors and statutory auditors
 - Website of company
- Written procedure BoD
 - Possible for all decisions except those excluded in AoA
 - Tax consequences

- Definition of daily management
 - CAC provides for definition
 - Daily management includes:
 - actions and decisions in the context of **day-to-day business** of a company
 - actions and decisions not requiring intervention of BoD because of (i) **minor importance**, OR (ii) **urgent character**

**Governance under the new Company Code:
Conflict of Interest Rules**

Wim Dedecker

Introduction

■ General

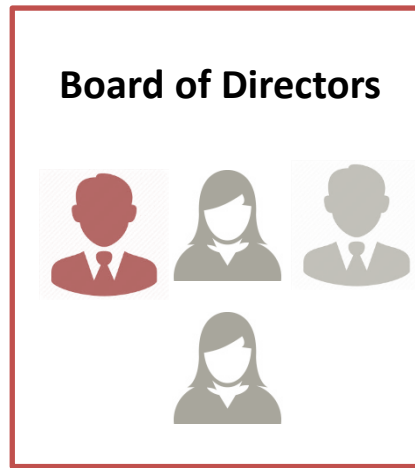
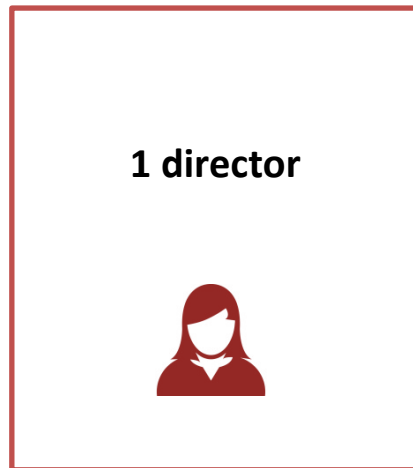
- Requirement of a pecuniary conflict remains
- Current exemptions (95% held company and usual transactions) remain
- Disclosure regime remains the same (inform other directors, board minutes/special report, disclosure to the statutory auditor, statutory auditor report)
- Sanctions

■ General duty to abstain

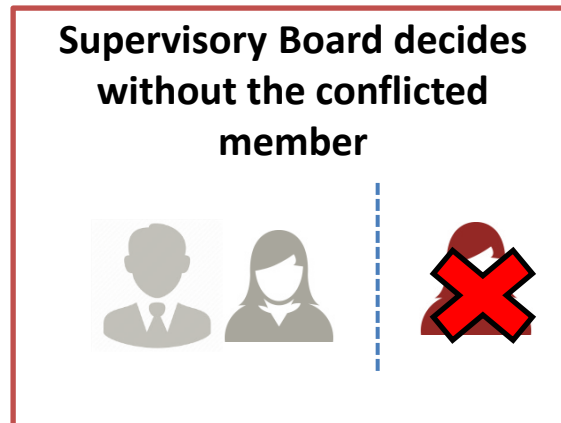
- Duty on the conflicted director to abstain from participating in the discussions and voting (also for non-listed now) - - - **Leave the room**



Who decides? (one-tier)



Who decides? (two-tier)



**Governance under the new Company Code:
New competences of the committee of
independent directors**

Olivia Szerer

“524 Procedure” : committee of independent directors

- Brief reminder of the existing regime (524 CC)
 - Transaction between:
 - a) A listed company (or its subsidiaries); AND
 - b) A listed company’s affiliates other than its subsidiaries

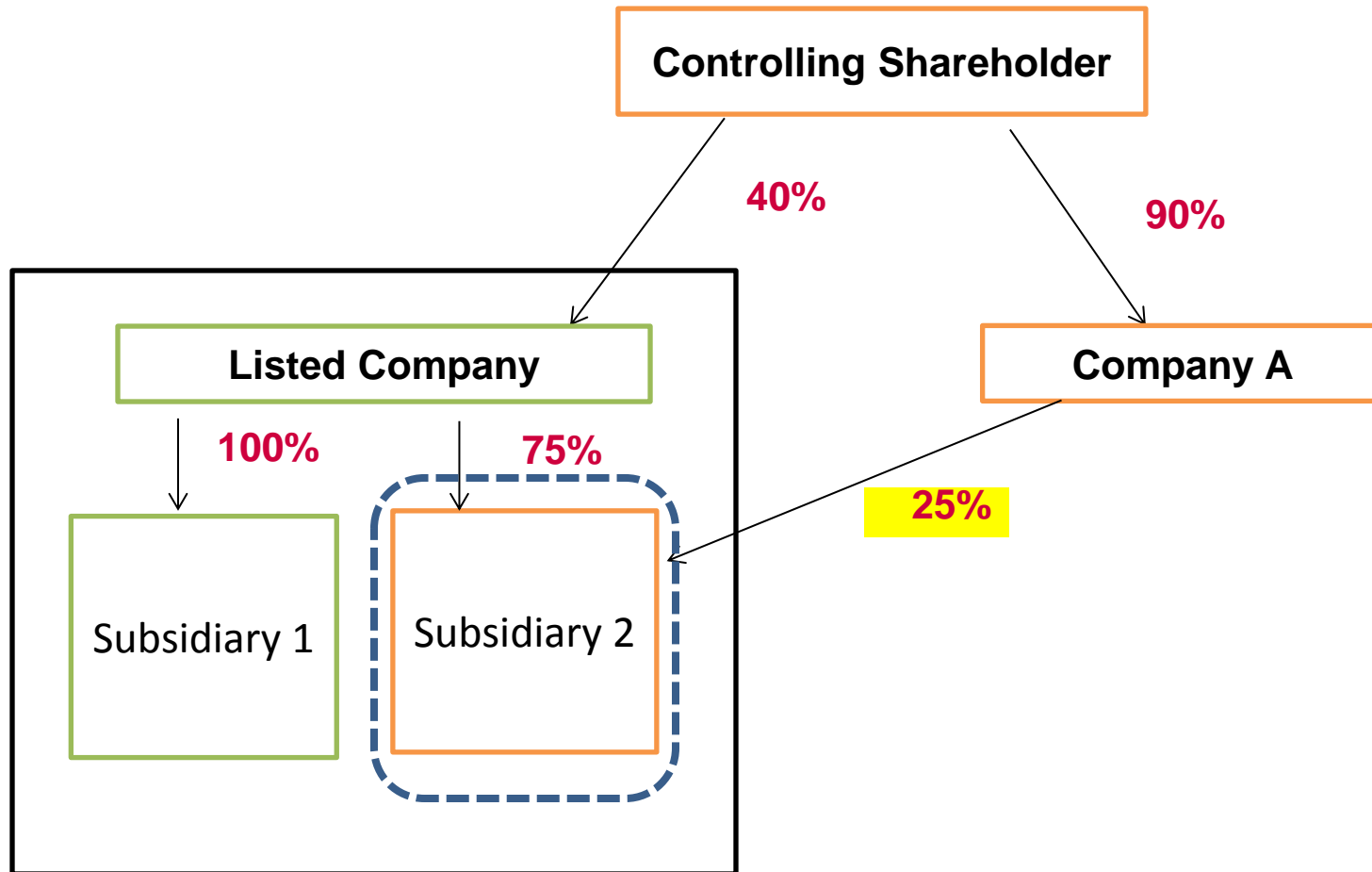
 - Must first be submitted to a committee of independent directors

“524 Procedure” → 7:97 CAC

- ***Scope is extended*** to cover:
 - Transactions with subsidiaries of which the controlling shareholder owns 25% or more

 - Board proposals for:
 - Contribution in kind, of a branch of activity or of all assets and liabilities ;
 - Merger, demerger and assimilated transactions

“524 Procedure” → 7:97 CAC



**Governance under the new Company Code:
Vote at the General Meeting**

Jacques Meunier

Non listed companies

- *“Welcome to the multiple votes paradise”*
 - By default, 1 share = 1 vote
 - But AoA can deviate from this rule
 - Amending AoA (3/4th majority)
 - 1 share can have 2, 3, 4, ... 50 or more votes
 - Imagination is the limit
 - Transparency in the share register
 - In the AoA (not in the SHA only)
 - Issuance exclusively by GM (not the BoD)



Listed companies

- Loyalty double voting shares
 - AoA must be amended (2/3rd majority)
 - Fully paid-up and registered shares
 - Uninterrupted holding during 2 years
 - Starts when the shares were held as registered shares
 - Authorised transfers (universal, certification or affiliated person)

Other points of attention

- Abstention votes at EGM
- Shares without voting rights
- Classes of shares: be prudent because paradise could easily become hell

**Governance under the new Company Code:
Transitional regime**

Valérie Simonart

A. CAC

- Publication of the Law: existing companies: opt in (with effect as from 1 May 2019 at the earliest)
- 1 May 2019: new companies: CAC
- 1 January 2020 :
 - Application of mandatory provisions of the CAC
 - At the first modification, obligation to align the AoA with the CAC
- 1 January 2024: ultimate date to align the AoA

B. Directors' liability

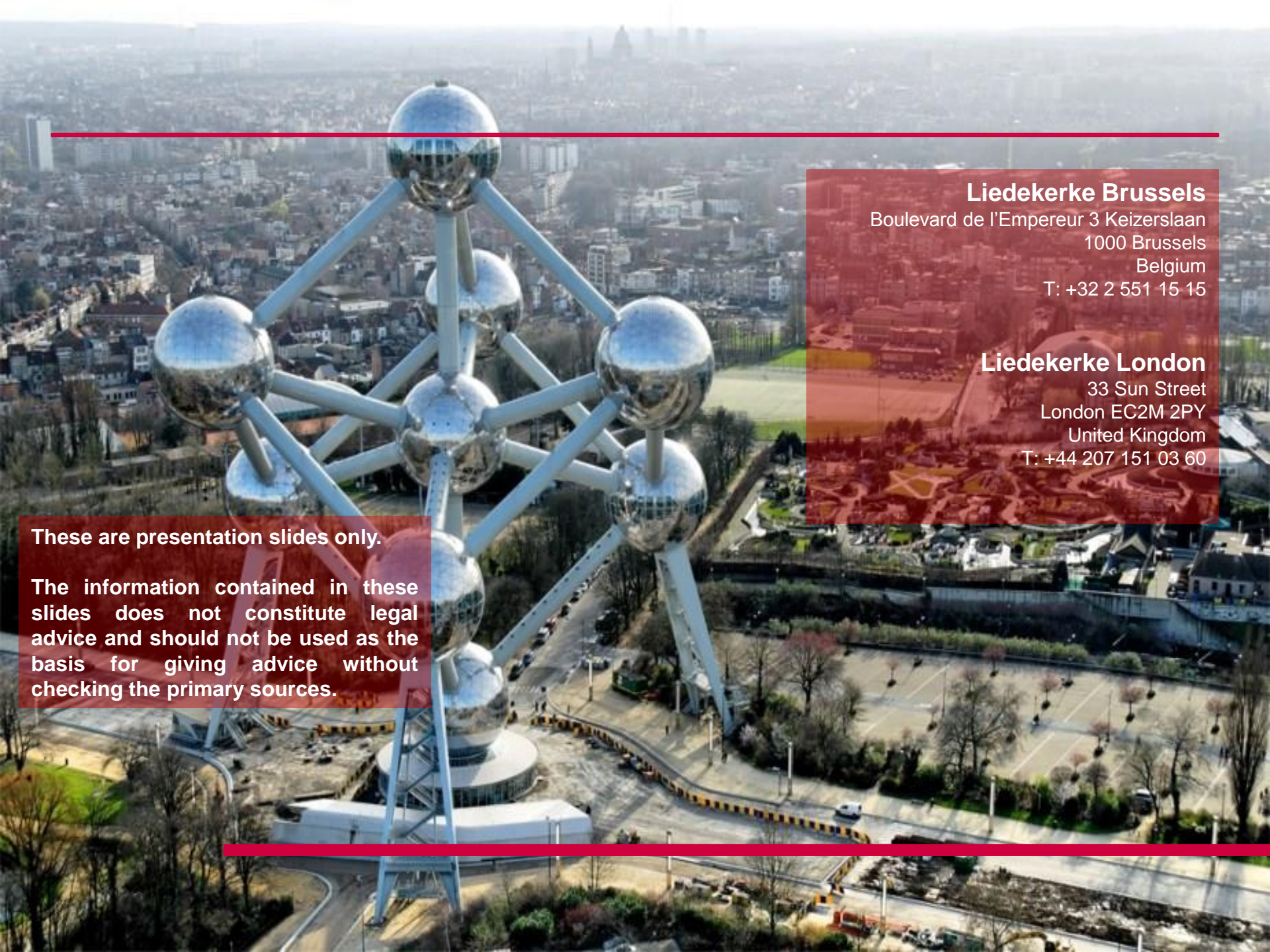
- Principle: application of the law in force at the time the wrongful act was committed
- Application of art. 2:57 (caps) to the wrongful acts committed after the CAC becomes applicable to the company, i.e. 1 January 2020 or earlier (if opt-in)

C. Ongoing agreements

- Principle: application of the law in force at the time the agreement was entered into
- Exception : mandatory provisions of the new law apply for the future
- Application of art. 2:58 (indemnification agreements) to the wrongful acts committed after the CAC becomes applicable to the company, i.e. 1 January 2020 or earlier (if opt-in)

Thank you

for your attention



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