

# Organising the management and delegation of powers within a/an (international) non-profit association

FAIB lunch-debate

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# I. Why KOAN?

## A. General overview

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- **Personal** and **regular** contacts
- **High** responsiveness
- Partner **availability**
- **Competitive** and **predictable** fee budgeting
- Services **adapted to your needs**
- We **take position**
- Our meeting rooms and secretarial support **at your service**
- We advise **on all your legal requirements**
- Our **international network at your disposal**



# I. Why KOAN?

## A. General overview

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- KOAN founded in October **2004**
- **Independent Belgian** law firm
- Offices in **Brussels** and **Paris**
- **International global network** ([www.multilaw.com](http://www.multilaw.com))
- Team of **30** complementary lawyers
- Industry focused and **full service = one-stop** for our non-profit clients
- **National & international** clients

# I. Why KOAN?

## B. Non-Profit and Trade Associations Team

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- Membership bodies/NPA/INPA
- Foundations
- Trade entities
- NGOs
- Multidisciplinary
- Fundraising & grants
- Tax deduction & VAT

# I. Why KOAN?

## C. Your team

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## II. Introduction

### A. Purpose

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- Only non-profit associations (“NPAs”) and international non-profit associations (“INPAs”)
- Check = does **your** practice meet the **legal requirements**?
- Optimisation of the organisation = **case-by-case**
- Reflection on the internal functioning processes and the respective task allocation:
  - Purposes
  - Activities
  - Size
  - Funding
  - History
  - Staff

## II. Introduction

### B. Practical common thread

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- **Three** situations/examples as **common thread** for our presentation:

- Conclusion of a contract for the organisation of an event in the amount of 50,000 EUR



- Purchasing two computers



- Hiring a new employee





## II. Introduction

### C. General principles

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Decision power	Representation power
Body competent to make decisions	Body competent to represent the (I)NPA vis-à-vis third parties

- Sometimes, decision power and representation power **match**
- Other times, decision power **≠** representation power



### III. Bodies and related powers

#### A. NPA

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#### **Law of June 27, 1921 regarding the non-profit associations, the foundations, the European political parties and the European political foundations (“Law”)**

Two legal mandatory bodies	<ul style="list-style-type: none"><li>• General assembly (“GA”)</li><li>• Board of directors (“BoD”)</li></ul>
Two legal optional bodies	<ul style="list-style-type: none"><li>• Person(s) entrusted with the daily management</li><li>• General representation body</li></ul>
Optional statutory bodies	<ul style="list-style-type: none"><li>• President</li><li>• Treasurer</li><li>• Executive Committee</li><li>• Audit Committee</li><li>• ...</li></ul>

# III. Bodies and related powers

## A. NPA

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<b>Law</b>	
<b>Two management bodies</b>	<b>Three representation bodies</b>
<ul style="list-style-type: none"><li>• BoD</li><li>• Person(s) entrusted with the daily management</li></ul>	<ul style="list-style-type: none"><li>• BoD</li><li>• Person(s) entrusted with the daily management</li><li>• General representation body</li></ul>

## A. NPA

### A.1. GA

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- Art. 4 Law, powers reserved to the GA:
    - To amend the articles of association (“AoA”)
    - To appoint and revoke the directors
    - To appoint and revoke the statutory auditors and, if need be, to determine their remuneration
    - To grant a discharge to the directors and the statutory auditors
    - To approve the budget and the annual accounts
    - To dissolve the NPA
    - To transform the NPA in a company with a social purpose
- + Any powers entrusted to the GA by the AoA

## A. NPA

### A.1. GA

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- If nothing provided for in the AoA, the Law reserves two supplementary powers to the GA:
  - The appointment of the liquidator(s) in case of voluntary dissolution
  - The determination of the allocation of the net assets in case of voluntary or judicial dissolution

# A. NPA

## A.2. BoD

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- Art. 13 Law grants the residual powers to the BoD
- **Residual powers** = powers which have not been reserved to another body neither by Law nor by the AoA
- BoD manages the business of the NPA and represents the NPA in all judicial and extra-judicial deeds
- Law reserves the following powers to the BoD:
  - To submit the annual accounts of the NPA to the GA
  - To file the annual accounts with the National Bank of Belgium
  - To convene the GA

# A. NPA

## A.2. BoD

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- AoA shall detail the extent of the powers of the BoD
- **Division of tasks** between the directors (e.g. president, vice-president, treasurer, secretary, etc.)
  - Only **internal effect**
  - **Specific liability**
- **Restrictions to the powers** of the BoD are not opposable against third parties, even if they are published
  - Only **internal effect**



## A. NPA

### A.3. Person(s) entrusted with the daily management

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- Law provides for the possibility to delegate the daily management powers to a specific body = person(s) entrusted with the daily management
- **Enforceable** vis-à-vis third parties, if **published**
- AoA shall provide for the following modalities towards the body entrusted with the daily management:
  - Appointment
  - Termination of the mandate
  - Extent of the powers
  - Manner exercising the powers (i.e. individually, jointly or as a college)



## A. NPA

### A.3. Person(s) entrusted with the daily management

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- Daily management = **no legal definition**

- **Supreme Court**, February 26, 2009

*“les actes de gestion journalière sont **ceux qui sont recommandés par les besoins de la vie quotidienne de [l’association]** et ceux qui, en raison tant de leur peu d’importance que de la nécessité d’une prompt solution, ne justifient pas l’intervention du conseil d’administration lui-même”*

- 1) Acts for the daily business/life of the NPA
- 2) Acts of few importance AND urgent = cumulative criteria

## A. NPA

### A.3. Person(s) entrusted with the daily management

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- Assessment *in concreto*:
  - Purpose NPA
  - Size NPA
  - Activities carried out
  - Nature of the operation
  - Economic impact
- Several persons entrusted with the daily management → AoA:
  - Min and max number
  - Act individually/act jointly/collegial body
- AoA or decisions of the BoD limiting the powers of the person(s) entrusted with the daily management → Only **internal effect**



## A. NPA

### A.3. Person(s) entrusted with the daily management

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Legal terminology	
Person(s) entrusted with the daily management	
<i>Third party</i>	<i>Director</i>
“Director General”, “Secretary General”, etc.	“Managing Director”
<p>→ Third parties being entrusted with the daily management <b>should not</b> be called “Managing Director” nor “Executive Director”</p>	
<p>→ “Secretary General” ≠ “Secretary”, i.e. a director with specific powers</p>	

## A. NPA

### A.4. Optional statutory bodies

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- Remuneration committee
- President
- Finance Committee
- Audit committee
- Scientific committee
- Nomination committee
- Working groups
- Ad-hoc committees
- ...

# A. NPA

## A.4. Optional statutory bodies

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- AoA can provide for the possibility to create committees/working groups (hereafter: “WG”)
- AoA or the body empowered to create a WG shall provide for:
  - Mission
  - Composition
  - Powers
  - Conduct of meetings and governance
  - Convening modalities and drafting of agendas
  - Quorums and voting procedures
  - Drafting of minutes
- WG shall not represent the NPA vis-à-vis third parties
- WG acts under the responsibility of the body which decides to create it

# A. NPA

## A.5. Representation of the NPA

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- Potentially, three representation bodies:
  - Mandatory:
    - **BoD**
  - Optional (if provided for in the AoA):
    - **General body of representation; AND/OR**
    - **Person (s)entrusted with the daily management**
- If the AoA provide for these three representation bodies
  - Each representation body is within the scope of its power, empowered to represent the NPA, as the case may be, concurrently
- No need to evidence the existence of a special mandate

## A. NPA

### A.5. Representation of the NPA

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- NPA acting via its representation bodies is **irrevocably bound** regardless of the fact that the decision has been validly adopted within the NPA
  - Exception = Representation body has not acted within the scope of its powers
- NPA can question the **personal liability** of the member(s) of the representation body who has acted in breach of the AoA

## A.5. Representation of the NPA

### A.5.1. BoD

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- Except in case of contrary provision in the AoA, BoD has the power to represent the NPA vis-à-vis third parties and in court
- Exercise of the representation powers according to the AoA:
  - Individually = signature of any director/one director specifically
  - Jointly = signature of two directors (i.e. four eyes principle)
  - “Collégialement” = signature of the majority of the directors
- Restrictions to the representation powers of the BoD are not opposable against third parties, even if they are published



## A.5. Representation of the NPA

### A.5.2. General representation body

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- Art. 13 Law provides that the representation of the NPA in all judicial and extra-judicial acts can be delegated, according to the rules provided in the AoA, to one or several persons, directors or not, members or not, acting individually, collectively or as a “college”
- Delegation of the representation powers to the general representation body is:
  - **Valid**, if provided for in the AoA
  - **Enforceable**, if:
    - General delegation of powers
    - Publication in the Annexes to the Belgian Official Gazette (“ABOG”) of the appointment of the person(s) entrusted with the representation power and the end of their mandates

## A.5. Representation of the NPA

### A.5.3. Person(s) entrusted with the daily management

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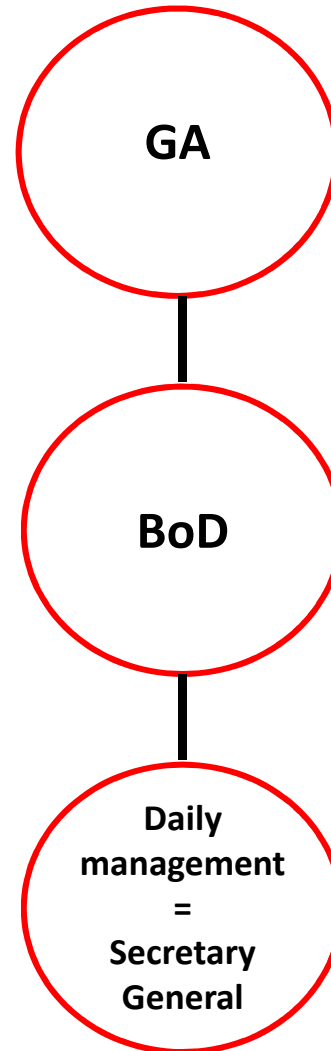
- Person(s) entrusted with the daily management represent the NPA within the scope of the daily management
- AoA or decisions of the BoD limiting the powers of the person(s) entrusted with the daily management = no external effect



# A. NPA

## A.6. Overview of the bodies

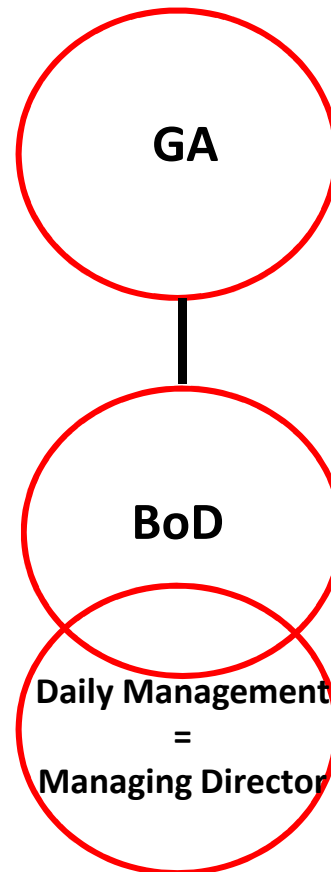
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# A. NPA

## A.6. Overview of the bodies

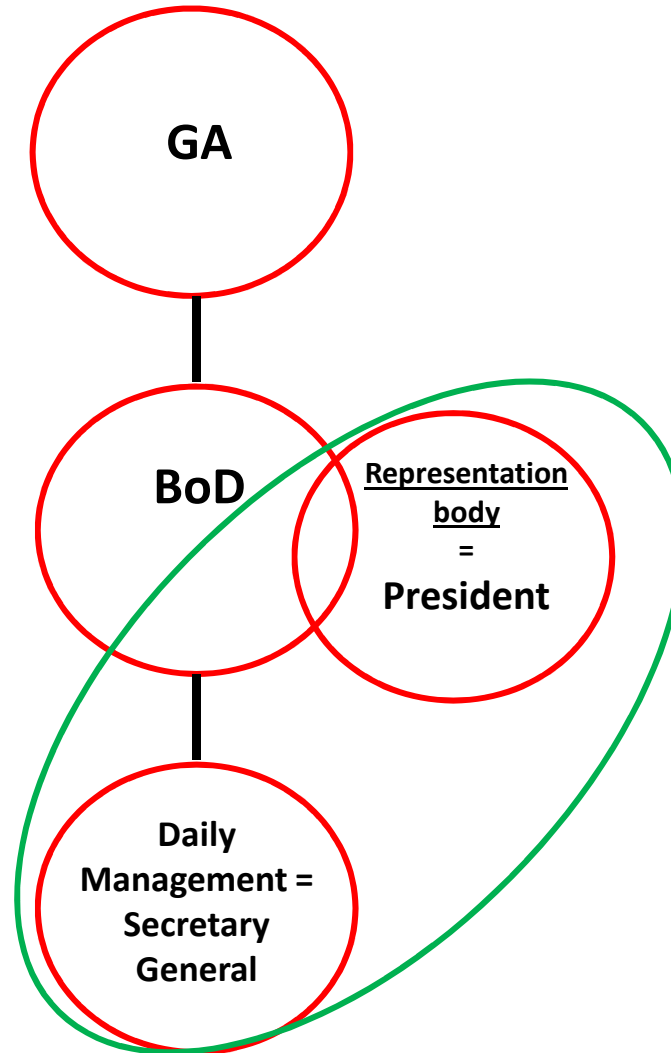
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# A. NPA

## A.6. Overview of the bodies

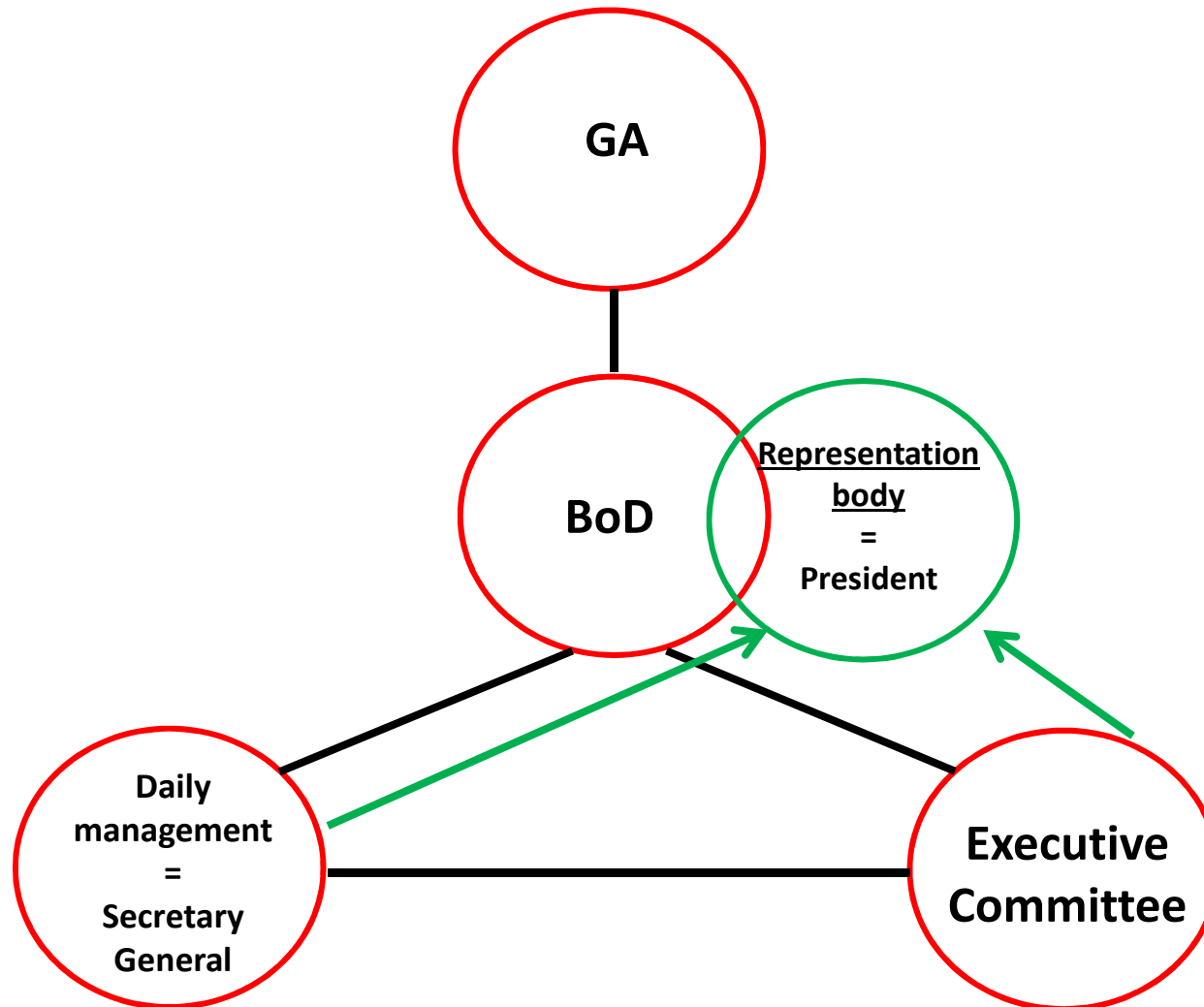
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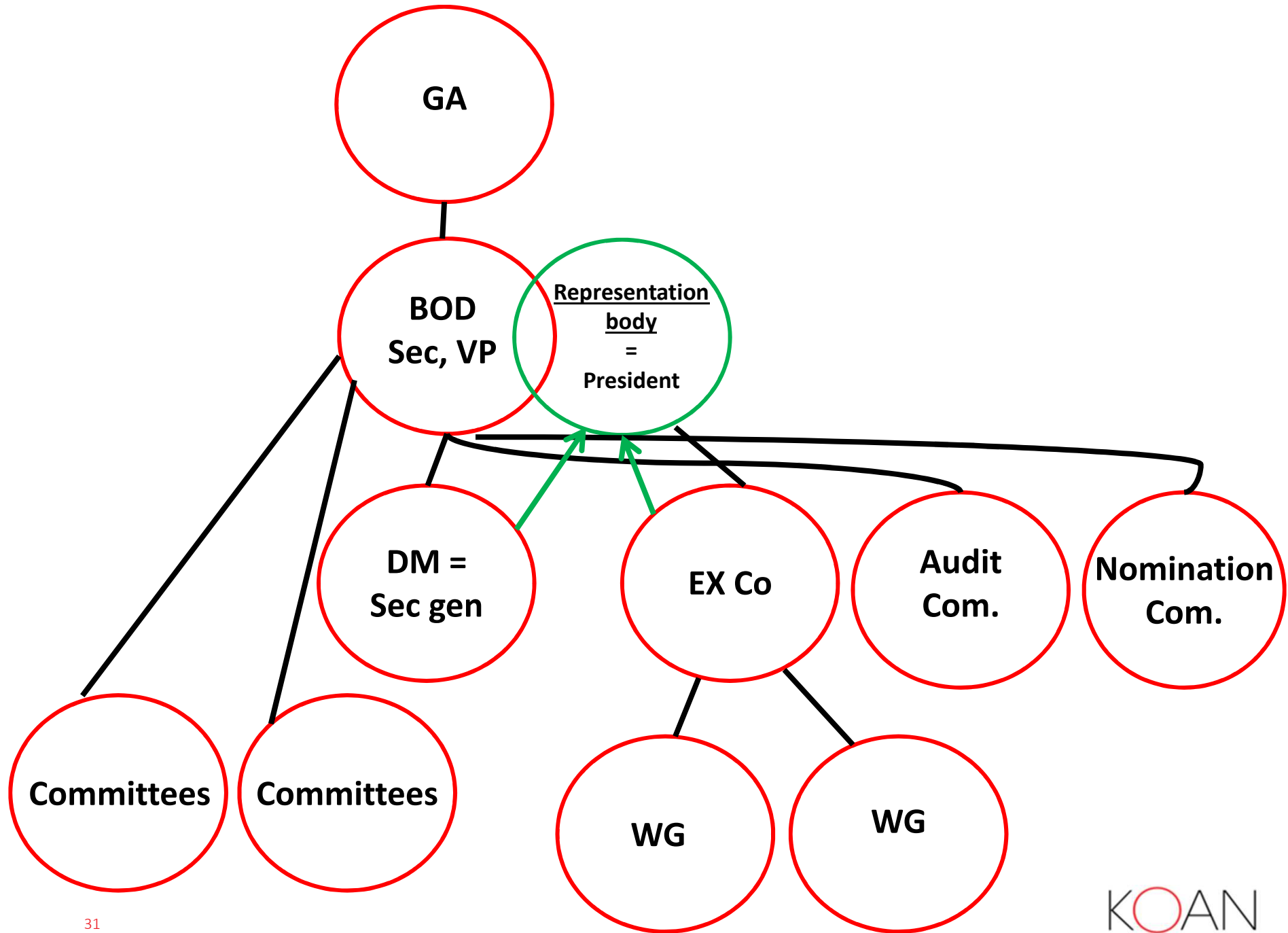


# A. NPA

## A.6. Overview of the bodies

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# III. Bodies and related powers

## B. INPA

Law	
Two legal mandatory bodies	<ul style="list-style-type: none"><li>• General governing body (“GA”)</li><li>• Management body (“BoD”)</li></ul>
Optional statutory bodies	<ul style="list-style-type: none"><li>• Person(s) entrusted with the daily management</li><li>• General representation body</li><li>• Audit Committee</li><li>• Finance Committee</li></ul> → Freedom

- INPA = **great flexibility**
  - If no rules in AoA: Law no subsidiary rules (>< NPA) → AoA must provide for complete and detailed rules
- Law does not entrust any body with the **residual powers**
  - Important: AoA entrusting residual powers to the GA or BoD



## B. INPA

### B.1. GA

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- Law: powers reserved to the GA:
  - To approve the annual accounts and the budget
  - To appoint the statutory auditors
- AoA shall provide for the other powers of the GA

## B. INPA

### B.2. BoD

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- Law: powers reserved to the BoD:
  - To draft and to submit the annual accounts and the budget to the GA
- AoA shall provide for the other powers of the BoD
- NPA >< Division of tasks between the members of the BoD and limitations of the powers of the BoD are **enforceable** against third parties, if they are **published**
  
- *See slides re NPA*
  - *Division of tasks*
  - *Person(s) entrusted with the daily management*

## B. INPA

### B.3. Optional statutory bodies

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- Examples:
  - **Daily management body**
  - **General representation body**
  - Remuneration committee
  - President
  - Finance committee
  - Audit committee
  - Scientific committee
  - Nomination committee
  - Working groups
  - Ad-hoc committees
  - ...

*See NPA (item A.4.)*

## B. INPA

### B.4. Representation of the INPA

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- Law does not entrust the representation power to one of the bodies of the INPA
- The general representation power of the INPA can be granted by the AoA to:
  - The GA AND/OR the BoD
  - One or several person(s), members of the BoD or not, members or not
- Delegation of the representation powers enforceable against third parties, if publication in the ABOG of the appointment of the person(s) entrusted with the representation power and the end of their mandates

# III. Bodies and related powers

## C. Filing and publication formalities

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- Enforceable vis-à-vis third parties = complying with **filing and publication formalities**

	<b>Filing formalities</b>	<b>Publication formalities</b>
Principle	Each association has a file at the clerk's office of the commercial court of the judicial district of its registered office	Certain documents filed must be published in the ABOG (excerpts)
Timing	Law: no timing (except for annual accounts' filing, i.e. 30 days as of approval). Filing within a reasonable period  "Reasonable period" = within one month of the event causing the obligation of filing	Law: no timing. Publication within a reasonable period

## C. Filing and publication formalities

### C.1. Filing formalities

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- Document to be filed by a/an (I)NPA:
  - AoA and modifications thereto
  - Coordinated text of AoA
  - Deeds regarding (re)appointment / termination / revocation of directors, persons entrusted with the daily management, legal representative(s) and statutory auditor

## C. Filing and publication formalities

### C.2. Publication formalities

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- Documents to be published by a/an (I)NPA:
  - Articles of association (and amendments thereto)
  - (Excerpts) minutes regarding the (re)appointment/termination/revocation of:
    - The directors
    - The person(s) entrusted with the daily management (not applicable to INPA's, but recommended)
    - The persons empowered to represent the association
    - The statutory auditor (not applicable to INPA's, but recommended)

## IV. Special power of attorney

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- Who: any body
- To whom: director, member or third party
- What: specific acts
- Specific PoA: only for limited operations >< general and long-term operations
- Attorney in fact must evidence:
  - His/her/its PoA
  - The fact that the PoA has been validly granted = by the competent body of the (I)NPA
- Attorney in fact commits to the (I)NPA only within the limits of his/her/its PoA



## IV. Special power of attorney

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- General practical advices:
  - Always written PoA
  - Keep track and recorded the PoAs
  - Be systematic and consistent (e.g. when granting new PoAs the BoD shall revoke all past PoAs)
  - Be precise and clear (who, what, when, how)
  - Supervision of the attorney in fact by the principal
  - Filing/publishing or not?

## V. Apparent agency and *de facto* director

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- Apparent agency = conduct of a pretended attorney in fact that causes to third parties to believe the attorney in fact is authorized to carry out actions on behalf of the principal, when this is not the case.  
Consequently, the principal may be legally bound by apparent agency
- **4 conditions:**
  - 1) An **apparent situation**: an apparent power of representation of the attorney in fact which does not match the reality
  - 2) An apparent agency **attributable** to the attorney in fact
  - 3) Third party = **good faith**
  - 4) Third party shall suffer **damage** due to the apparent situation

## V. Apparent agency and *de facto* director

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- (I)NPA managed by one or several persons who is/are not officially appointed as director
  - This person acts as director taking decisions which should be taken by the BoD → ***de facto* director**
    - *De facto* director is to be considered as a validly appointed director by the (I)NPA and third parties
    - His/her/its liability is at stake
- If you act as a director you may be considered as a director

# VI. Sanctions

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- Decision not valid
- Liability of the directors/person(s) entrusted with the daily management/etc. and liability of the (I)NPA (see item V)
- If (I)NPA did not fulfil its filing and publication formalities:
  - Blocking situation with bank, real estate agency, notary public, administration, etc.
  - Not enforceable vis-à-vis third parties
  - Gift/inheritance to the association will not be authorised by the Ministry of Justice
  - Amendment of the purpose and activities will not be authorised by the Ministry of Justice
  - Legal proceedings introduced by the association are suspended for a period of time determined by the Court

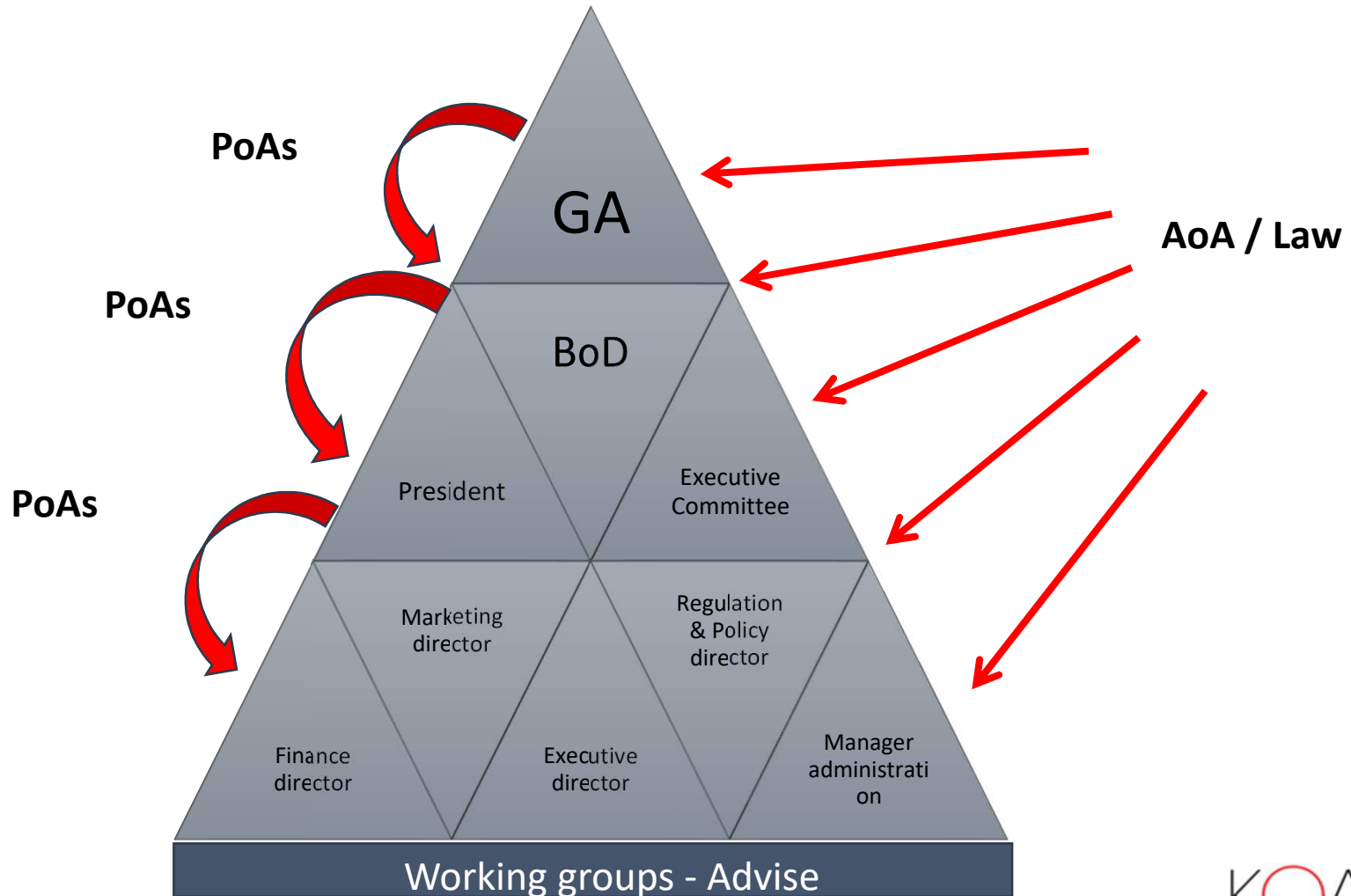
# VII. Good governance & practice

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- Good governance = best processes for making and implementing decisions
  - ➔ It is not about making “correct” decisions, but about the best possible process for making these decisions
- Especially relevant for INPA
- Separation between the functions
- Checks and balances
- **Four eyes principle**
- Delegation of powers shall be **specified**
  - **Quantitatively**
  - **Qualitatively**

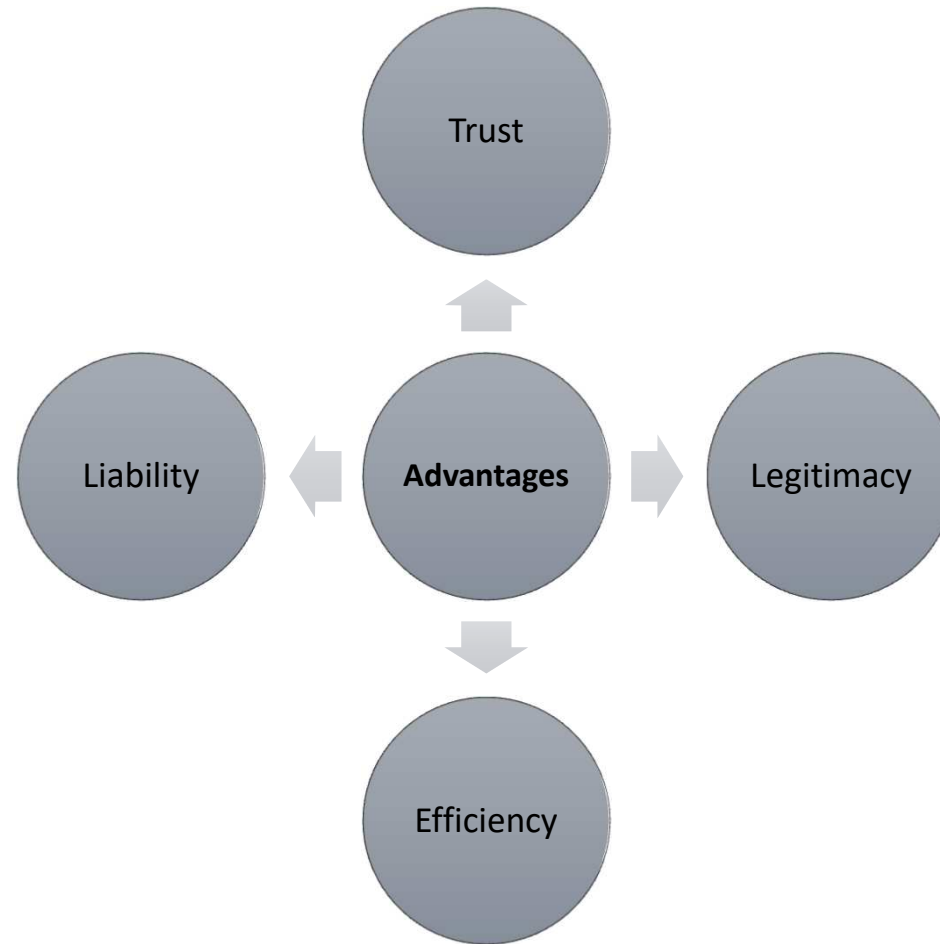
# VII. Good governance & practice

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## VIII. Why is this important?

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be associations  
be.brussels 



<sup>5<sup>m</sup></sup> **European Association summit 2017**   
30 & 31 May  
[www.easummit.brussels](http://www.easummit.brussels)

visit.brussels   




# Thank you




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