



THE COMPANY LAW

KEY CHANGES FOR PUBLIC AND PRIVATE LIMITED COMPANIES

AWAKENS

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- ❑ Based on the law of 10 August 2016 (amending in particular the law of 10 August 1915)
- ❑ Focus on SARL and SA companies (monist system)
- ❑ As from 23 August 2016, the law is immediately applicable to:
 - new companies (which must hence be incorporated with articles of association compliant with the amended company law); and
 - existing companies (however, if specific clauses of their current articles of association require an adaptation to comply with the amended company law, such clauses will remain applicable until their amendment, which must however be carried out within a timeline of 24 months i.e. **23 August 2018**).

OVERVIEW



- I. VOTING RIGHTS
- II. SHARE TRANSFERS
- III. FINANCING INSTRUMENTS
- IV. GOVERNANCE
- V. SIMPLIFIED DISSOLUTION



VOTING RIGHTS



- ❑ **Former regime: voting rights were untouchable**
 - One share = one vote
 - Impacts on default mechanism: voting rights cannot be suspended or removed
 - Non-voting shares not possible in SARL
 - Non voting shares in SA : possible but subject to restrictions (e.g. not more than 50% of the share capital)



- ❑ Flexibility in allocation of voting rights through shares of unequal nominal value – new!
 - Abolishment of the requirement that all shares are of equal value
 - Impact on voting rights in the SA
 - > Each share = number of voting rights proportional to the portion of share capital it represents, one vote being attributed to the share representing the lowest nominal value – **see example**
 - > BUT : the articles may still provide for “one share - one vote”
 - > Can effectively lead to multiple voting rights – **see example**
 - Impact on voting rights in the SARL
 - > No exception to “one share - one vote” principle

VOTING RIGHTS



EXAMPLE:

Shareholder A: 10 shares of EUR 1 each > 1 vote/share > 10 votes

Shareholder B: 1 share of EUR 10 each > 10 votes/share > 10 votes

If the 1 vote equals 1 share principle is maintained:

Shareholder A: 10 votes

Shareholder B: 1 vote

> Both paid 10 but A ends up with multiple voting rights!



- ❑ **Non-voting shares: increased flexibility**
 - No longer limitation to 50% of the share capital
 - No longer requirement for preferred financial rights
 - Financial rights to be stated in the articles of association
 - Limited cases where non-voting shares recover voting rights :
 - > deliberations likely to change the rights attached to non-voting shares
 - > resolutions to decrease the share capital and dissolve the company
 - Still SA only



- ❑ Right for the management to suspend voting rights of shareholders
 - To be included in the articles of association
 - Scope : shareholders in breach of their obligations under
 - > the articles of association
 - > any contract providing for obligations of a shareholder e.g. contribution agreement
 - > shareholders' agreement?
 - The articles must clearly set out the cases where the voting right can be suspended, to avoid the risk of a challenge of the actions of the board by the “defaulting shareholder”



- ❑ **Right for shareholders to waive voting rights**
 - To be included in a document other than the articles of association
 - Temporarily or definitively / in full or in part
 - Personal : not transmitted in case of transfer of shares
 - Effective towards the company as of notice (notice required!)



- ❑ **Voting agreements - increased legal certainty**
 - General statutory recognition for SA and SARL
 - NOT valid if (limited cases of nullity):
 - > contrary to corporate interest
 - > contrary to company law
 - > vote as instructed by the company, a subsidiary, any organ of such companies, or to approve any proposals of such corporate body
 - No limitation in time: voting agreements with unlimited duration are possible but N.B. may be terminated by either party with sufficient notice
 - In case of non-compliant voting agreement:
 - > nullity of the vote
 - > nullity of the resolution (except if no influence on the result of the vote).



SHARE TRANSFERS



❑ Former regime

- Statutory shareholder consent for third party transfers (SARL)
 - > Art 189 : *“Shares may only be transferred to non-shareholders with the approval of the general meeting of shareholders representing at least $\frac{3}{4}$ of the share capital”*
 - > Impact on proposed exit e.g. drag/tag mechanisms, leaver provisions
- Statutory free transferability of shares in SA / SCA



❑ SARL - approval of share transfers – new !

- New consent threshold: $\frac{3}{4}$ of the shares; the articles of association may lower this threshold to $\frac{1}{2}$ of the shares
- Consent given in a shareholders' meeting or by written resolution if < 60 shareholders
- New process in the case of approval refusal :
 - > The other shareholders may purchase the shares proposed for transfer or have the shares purchased by a third party within 3 months from refusal (6 months if extended by court)
 - > The company may also purchase the said shares and reduce the share capital
 - > Terms and conditions of the purchase are as set out in the articles of association or as determined by the courts
 - > If no redemption/repurchase : exit possible
 - > Is a lock-up still possible?
- (NB: Beneficiary shares with voting rights = shares for the purpose of this article)



- ❑ Lock up - first refusal - first consent clauses : increased certainty
 - Lock up : must be limited in time
 - First refusal / first consent clauses : consent / refusal procedure must not exceed 12 months
 - Transfers made in breach of provisions of articles = null and void



FINANCING INSTRUMENTS



- ❑ Tracking shares : increased legal certainty
 - Statutory recognition of the possibility to issue tracking shares (in all companies)
 - To be inserted in the articles of association (notably rules regarding profits allocation/ delimitation of underlying assets)
 - Limits:
 - > Tracking shares ≠ “compartments” > cannot fully segregate assets & liabilities
 - > prohibition of the “*clause léonine*”
 - > Art- 72-1 and 72.2 applicable i.e. if total net assets not sufficient for distribution, then no distribution to a class of tracking shares



❑ Beneficiary units in a SARL- new!

- SARL may issue beneficiary units (for example as an alternative to non voting shares, which are not possible in a Sarl)
- Only to determined holders
- The articles of association must define the rights attached to the beneficiary units (complete contractual freedom to determine financial rights attached to BU)



- ❑ **Authorised capital in SARL – new!**
 - To be provided in the articles of association
 - Idem as SA BUT only for
 - > Current shareholders, or
 - > Third parties previously approved (idem transfer of shares)



- ❑ Capitalisation of receivables against the company : no longer audit report – new!
 - Former regime: contribution of a receivable against the company is considered as a contribution in kind – audit report needed in the SA
 - New regime : considered as a contribution in cash paid by offsetting of receivable against the company – audit report no longer required
 - Condition : receivable is certain, liquid, enforceable



GOVERNANCE



- ❑ Delegation to an executive committee – introduction of legal framework
 - By the board of directors (if authorised by the articles of association)
 - Scope : management powers but NOT
 - > the general strategy of the company
 - > all of the powers attributed to the board of directors
 - Possibility of joint or individual representation powers
 - Conflict of interest process
 - Permanent representative in case of appointment of a legal person
 - Liability according to the rules of article 59
 - SA only



❑ SAS – New !

- Governance rules : as provided by the articles of association
- Management :
 - > Rules re. board of directors in the SA are NOT applicable
 - > Chairman
 - Freely provided in the articles of association (e.g. designation and revocation)
 - Represents the company towards third parties / limitation of powers is not enforceable against third parties
 - Conflict of interest process, permanent representative
 - Same liability rules as in the SA
- Collective decisions of shareholders
 - > Rules re. GM in the SA are NOT applicable
 - > Freely provided in the articles of association
 - > Collective decisions of shareholders remain mandatory for specific matters at the conditions specified by the articles of association.



- ❑ **Abolishment of double majority in SARL for EGM – new!**
 - Former regime
 - > Double majority : (i) majority (in number) of shareholders (ii) representing $\frac{3}{4}$ of the share capital
 - New: abolishment of double majority in favour of “shareholders representing $\frac{3}{4}$ of the share capital”



- ❑ **Increase of maximum number of shareholders in SARL – new!**
 - Former regime : 40 shareholders max
 - New : increased up to 100 shareholders
 - If such threshold is exceeded for any reason, the company must adopt another legal form within one year



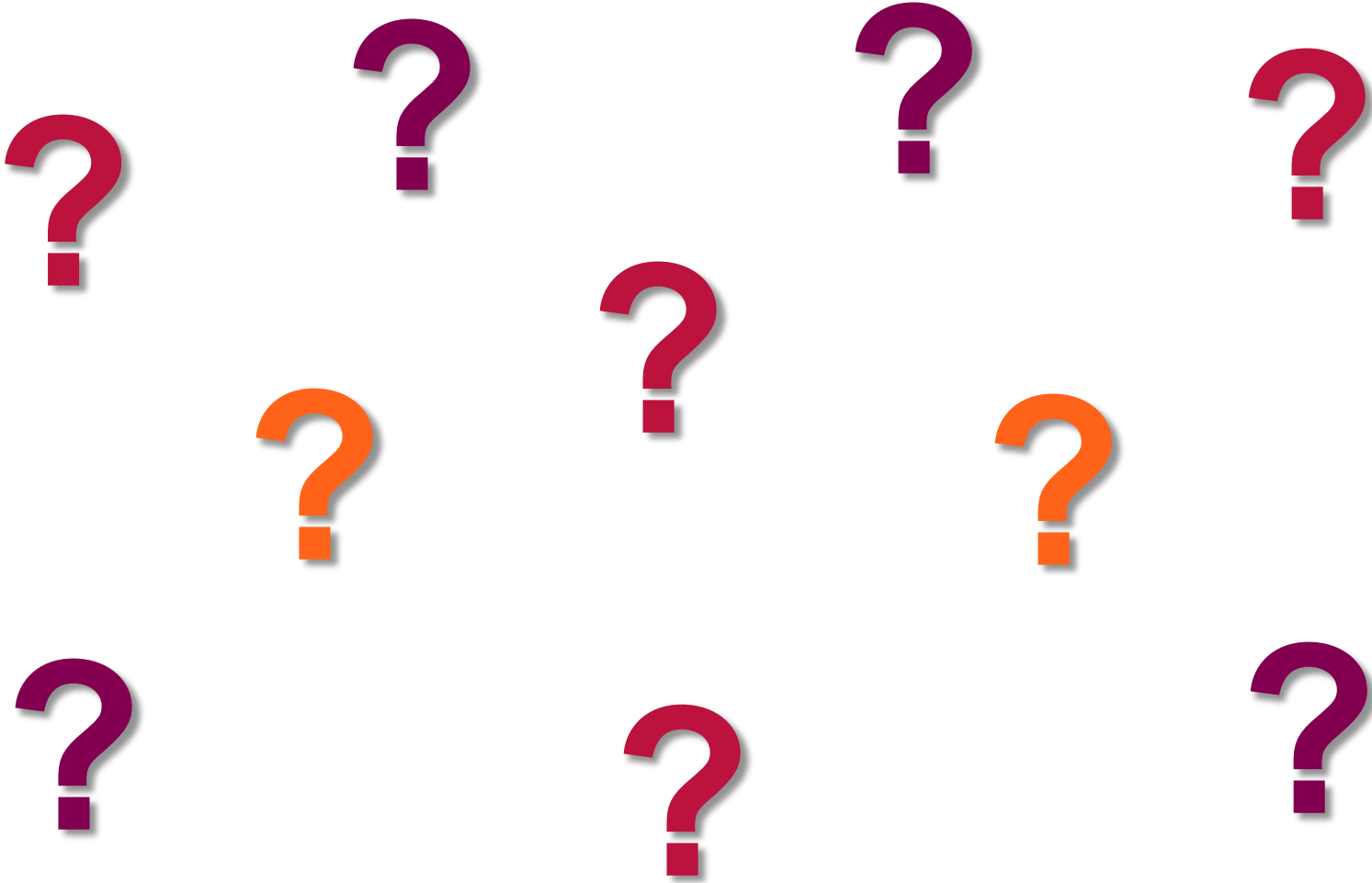
SIMPLIFIED DISSOLUTION

SIMPLIFIED DISSOLUTION



- ❑ Process of dissolution without liquidation in the case of a sole shareholder – statutory recognition
 - Possibility to resolve upon a dissolution with transfer, by universal transmission, of all assets and liabilities to the sole shareholder without liquidation.
 - Right for the creditors to request securities within 30 days as of the publication of the company's dissolution, but will not impact the date of effectiveness of the dissolution
 - Various certificates required from public institutions, e.g. tax administration, social security

QUESTIONS ?



Thank you

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