



Brief outline of bill N° 5730 modernizing the law of 10th August 1915 on commercial companies

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Introduction

- Most important reform of the law of 10th August 1915 on commercial companies since its existence. It affects:
 - all forms of companies
 - at every moment of their existence
 - management
 - shareholders' rights
 - third parties' rights
- Inspiration: mainly Belgian law and to a lesser extent French law



Plan

I. Société anonyme

1. Management
2. Financing methods, capital structuring
3. Shareholders' meetings
4. Minority shareholders' rights

II. Société à responsabilité limitée

1. Incorporation
2. Financing methods, capital structuring
3. Management
4. Shareholders' meetings

III. Société par actions simplifiée

IV. New certainties

V. Remaining questions

VI. Miscellaneous



I. 1. Société anonyme: management

1. Management structure

- Board of directors of 2 members for SA of only 2 members
- Management committee (comité de direction)
 - Delegation by the board of directors of the management (except general politics and duties reserved by law to the board of directors) to a management committee
 - exclusive powers to the management committee!
 - board of directors supervises the management committee
 - several members: appointment, dismissal, duration of mandate, etc. as set out in the articles or by the board

2. New duties and liabilities of the management

- Seat in the board of directors, conseil de surveillance, directoire, *comité de direction* of a SA, *manager*, *collège de gestion* or *comité de direction* of an Sàrl, *presidency* of a SAS held by a legal entity:
 - duty of such legal entity to appoint a permanent representative



I.1. Société anonyme: management

- **Conflicting interest provision** (SA, SAS, Sàrl):
 - a direct or indirect patrimonial interest in a decision of the management
 - inform the statutory auditors or the *réviseurs d'entreprises*
 - description of the nature of the transaction, the justification to it and the patrimonial consequences for the company in the minutes of the meeting
 - mention in the management report or annex
 - report of the statutory auditor or *réviseurs d'entreprises* describes the patrimonial consequences for the company of the transaction
 - Legal action by the company in order for a transaction to be declared void if the other party knew or should have known of the violation of this provision



I.1. Société anonyme: management

- (Art. 59 LSC) **Joint and several liability** towards the company and third parties for the violation of the law of 19th December 2002 on the companies' register and the annual accounts
- **Loss of half of the corporate capital** (article 100 LSC)
 - Loss of the net assets which become less than half of the share capital
 - Convening of a shareholders' meeting
 - Special report to the shareholders of the proposals of the management in order to redress the financial situation
 - In case of non convening: rebuttable presumption that the damage of the company or a third party results from such non convening.



I.2.Société anonyme: financing methods, capital structuring

- Issue of subscription rights (bons de souscription autonomes)
 - Issue of shares below par value
 - In case of increase of share capital: give priority to shareholders
 - Shares of unequal value
 - Selling restrictions (in the articles or any other document) of shares and securities
- Sale prohibition allowed if time limit and not contrary to corporate interest



I.3. Société anonyme: shareholders' meetings

- **Confirmation of current practice:**
 - For OGM: no quorum, majority of votes
 - Attendance list
 - Right of management, statutory auditor and réviseur to attend the GM's
- **In case of videoconference:** at least one shareholder or proxyholder in Luxembourg
- **Right to adjourn the GM if 10% of share capital (currently 20%)**
- **New exceptions to one share/one vote principle:**
 - Issue of registered shares with 2 votes
 - Articles may limit the number of votes of the holders of units at OGM and EGM



I. 4. Minority shareholders' rights

- **Minority action** (SA, SAS)
 - Court action by one or more shareholders or holders of securities holding at least 1% of the whole votes who have not given the discharge to management at the GM
 - Actio mandati, against the members of the board of directors, directoire or conseil de surveillance
 - Purpose: reparation of the damages caused to the company
- **Squeeze out** (SA, SAS)
 - SA whose certificates giving voting rights are listed or have been listed in the past, and
 - a person holding directly or indirectly 95% of the share capital, representing 95% of the voting rights: may buy out all the remaining holders of certificates (grand-ducal regulation to determine the way to determine the price and to preserve the equal treatment of the holders)



I.4. Minority shareholders' rights

- **Reverse squeeze out** (SA, SAS)
 - Same conditions than under the squeeze out provisions
 - minority shareholder may compel the majority shareholder to buy him out
- **Exclusion of a shareholder** (SA, SAS, Sàrl)
 - Shareholder holding 30% of the votes
 - may ask the judge to exclude another shareholder for just cause
 - judge determines the price to be paid by the first shareholder to the excluded shareholder
- **Withdrawal of a shareholder** (SA, SAS, Sàrl)
 - Any shareholder may ask for just cause the judge to compel other shareholders who are at the origin of such cause to sell him out



I.4. Minority shareholders' rights

- **Inquiry rights** (applicable to all forms of companies)
 - One or more shareholders representing at least 10% of the share capital or 10% of the votes:
 - ask in writing questions to the management on any management decision of the company, or the consolidated companies
 - If no answer within a month: legal action by such shareholder(s) in order to appoint an expert who will provide for a report of such management decision. Judge may decide the report to be published.



II.1.,2. Société à responsabilité limitée

1. Incorporation

- No more max. number of members
- Contributions in kind:
 - valuation by an independent auditor
 - liberation within 5 years
- Contribution of skills possible (*apports en industrie*)
- Duties of the notary: same checks than with an SA

2. Financing methods and capital structuring

- Non-voting shares (regime similar to the SA but no cap of 50% of share capital)
- Public or private issue of bonds
- Convertible bonds: agreement of bondholders, buyers or heirs of such bonds by the members according to procedure of art. 189 LSC



II.2.,3. Société à responsabilité limitée

- Issue of nominative units which do not represent share capital (*parts bénéficiaires*)
- Articles may cap the votes at the shareholders' meeting
- Issue of nominative units which do not represent share capital (*parts bénéficiaires*)
- Acquisition of own shares, upstream guarantees

3. Management

- Management board
- Board held by visioconference, tel-conference etc.
- Circular resolutions (cf. hereafter)
- Day-to-day manager
- Management committee (*comité de direction*)



II.4.,5. Société à responsabilité limitée

4. Shareholders' meetings

- Means of holding the meetings: cf. SA
- Art.189 becomes mandatory. Procedure also applicable to the dismembrement of shares. Required majority may be lowered to max. half of the shares

5. Miscellaneous

- For small Sàrls: freedom of choice to appoint either a statutory auditor or a réviseur
- Withdrawal, exclusion, enquiry rights: cf. SA



III. Société par actions simplifiée (SAS)

- New form of company inspired by French law
- Company incorporated by one or several shareholders with limited liability;
- Unanimity to transform an existing company into an SAS
- Articles of incorporation set out:
 - the conditions pursuant to which the company is managed (responsibility of art.59 LSC not applicable to SAS!)
 - articles determine the decisions that need to be taken by a shareholders' meeting (exceptions: increase, decrease or redemption of share capital, dissolution, merger, spin-off, transformation, appointment of a statutory auditor, decisions as to the annual accounts and the profits)



III. Société par actions simplifiée

- Unless otherwise provided by the LSC, SAS is governed by the provisions of the société anonyme
- No right to issue convertible bonds
- Tax treatment? Most likely, like a société anonyme



IV. New certainties

- **Circular resolutions** (SA, Sàrl, SCA)
 - not possible for approval of annual accounts, use of the authorised share capital and any other transaction mentioned in the articles
- **Simplified dissolution by the sole shareholder (mandatory?)**
 - no liquidation; universal transmission of the patrimony
 - creditors may ask the court for securities
- **Meetings of management bodies and shareholders' meetings by means of telecommunications if articles allow so; vote by mail**



IV. New certainties

- Management decision to **move the corporate seat** within the country if articles allow so
- Regime of the respective rights of the **usufructuary and the bare owner of shares** (mandatory?)
- Regime for all companies for the **annulment of meetings** (shareholders' or bondholders')
- **Voting agreements** for shareholders' meetings in principle valid (SA, Sàrl, SAS?)
 - For a defined or undefined period of time
 - Party to voting agreement may at any time ask the judge to withdraw for just cause from the agreement
 - Forced execution of the agreement by the courts?
 - Voting agreements for management bodies?



IV. New certainties

- **Regime of transformation of companies**
 - Allow transformations that are currently not possible
 - Protect third parties' rights
 - Protect shareholders



V. Remaining questions

- Authorised share capital by an Sàrl? Probably no.
- Reduction of share capital for an Sàrl: stick to a blocking period of 30 days for the payment? Creditors' right to ask for securities?
- Redemption of share capital by an Sàrl?
- Interim dividends for other companies than a SA?
- Distinction listed/unlisted companies?



VI. Miscellaneous

- **Entry into force**

- For new companies: straight away
- For preexisting companies: 24 months to conform the articles to the new law
- At a later stage: a code of companies



For any further questions, suggestions, input:

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