



Company Law

**Getting ahead of
new requirements together**

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Foreword

After an almost decade-long legislative process, the company law of 10 August 1915 was finally modernised by the law of 10 August 2016.

The modernisation of the company law offers more freedom and flexibility on certain aspects but also sets up new legal requirements at the management level and in the working relationship with *Réviseurs d'Entreprises*.

The purpose of this brochure is to summarise the main legal requirements affecting company management and *Réviseurs d'Entreprises*. Therefore, not all the amendments introduced by this new law are included.

We encourage you to use this brochure when assessing how the working relationship with your *Réviseur d'Entreprises* is affected by the legal changes.

Enjoy your reading!

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Context

The law of 10 August 2016 on commercial companies ("the Law") has been effective since 23 August 2016 and modifies:

- the modified law of 10 August 1915 on commercial companies
- the modified law of 19 December 2002 on the Trade and Companies Register and the accounting and annual accounts of undertakings
- extracts of the Civil Code (Title IX "Companies")
- the law of 24 May 2011 on the exercise of certain rights of shareholders at the general meetings of listed companies

The Law affects all types of companies. In this brochure, we will focus on:

- public limited liability companies
(*sociétés anonymes* or *S.A.*)
- corporate partnerships limited by shares
(*société en commandite par actions* or *S.C.A*)
- private limited liability companies
(*sociétés à responsabilité limitée* or *S.à r.l.*)
- simplified joint stock companies
(*sociétés par actions simplifiées* or *S.A.S.*),
the new form of company introduced
by the Law

A transition period of 24 months is granted to already existing companies to adapt their articles of incorporation. Laws and regulations in force prior to the Law shall continue to apply to existing companies with regard to provisions of their articles of incorporation that are not compliant with the Law. However, for those provisions of the articles of incorporation which are compliant with the Law, the Law shall be applicable immediately.

The Law shall automatically apply in its entirety to companies incorporated after its entry into force.

1. New requirements applicable to all types of companies

1.1 Questions from shareholders to management

The minority shareholders of a company have the right to ask questions to the management as follows:

Management

- ▶ One or more shareholders representing at least 10% of the voting rights may ask questions to the management, in writing, relating to one or more acts of management of the company and its subsidiaries.
- ▶ In the absence of an answer within one month, these shareholders may request the appointment of one or more experts to the court. These experts will submit a report on the act(s) of management concerned.
If the request is accepted, the court's decision determines the scope of the assignment and the powers of the experts.
The judge determines whether the report should be published.

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- ▶ A copy of the answer must be provided to the *Réviseur d'Entreprises* (RE).

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1.2 Transformation of companies

Any company can now be transformed into another legal form subject to the below requirements:

Management

- ▶ Prior to the transformation, the management must draw up management accounts as follows:
 - They should be dated less than 6 months prior to the date of the general meeting (GM) where the transformation is agreed upon.
 - The last annual accounts can be used if dated less than 6 months before the GM.
 - **For limited liability companies:** if the net assets are less than the corporate capital, the difference must be disclosed in the accounts.
- ▶ For certain types of transformations, the management must also draw up an explanatory report on the proposed transformation, which is announced in the agenda of the GM called to resolve the matter.

The management accounts should be attached to this explanatory report.
- ▶ The explanatory report is not required if a waiver is agreed on by all the shareholders.

In cases where the explanatory report and the RE report are not required, the management accounts may also be waived by the shareholders.

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- ▶ For certain types of transformations into a S.A. or S.C.A., the RE must issue a report on the management accounts of the company, indicating in particular whether net assets have been overestimated.

The management should analyse the nature of the transformation to be able to determine whether or not a RE report is required

In the absence of any of the above-mentioned reports, the decision of the GM on the transformation would be declared void.

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1.3 Simplified liquidation

The sole shareholder of a company may dissolve that company at any time. This triggers a universal transfer of all the company's assets and liabilities to the sole shareholder. The so-called simplified liquidation (dissolution without liquidation) is subject to the following requirements:

Management

- ▶ In the context of the simplified liquidation, certificates should be obtained from the following public administrations:
 - central social security administration
 - direct tax administration
 - registration tax and VAT administration

Those certificates confirm that the company is in compliance with its obligations relating to the payment of social security contributions and taxes.

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- ▶ The RE is not required to issue a report on this type of liquidation.

2. New requirements applicable to S.A. and S.C.A.

2.1 General meetings of shareholders (GMs)

At least one GM must be held every year. The GM must be held within 6 months of the end of the financial year. The Law introduces the following amendments:

Management

- ▶ The members of the management may be convened to GMs which they have not called.

- ▶ The convening notices for every GM must be published on the *Recueil Electronique des Sociétés et Associations* (RESA) and in a Luxembourg newspaper at least 15 days before the meeting.

- ▶ The convening notices must be communicated to all the shareholders at least 8 days before the GM.
This communication should be made by post unless the addressees have individually agreed to receive the convening notices by another way of communication.

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- ▶ The RE may be convened to the GM.

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2.2 Responsibilities of the management

The management is now allowed to create committees and delegate certain responsibilities as follows:


Management

- ▶ The board of directors (BoD) may create committees and determine their composition and duties.

- ▶ The articles of incorporation may authorise the BoD to delegate its management powers to an executive committee or to a chief executive officer.
However, this delegation may not comprise:
 - the general policy of the company
 - the actions reserved for the BoD by other provisions of the Law

- ▶ The directors, the members of the executive committee and the chief executive officer are liable to the company for the execution of the mandate given to them and for any misconduct in the management of the company's affairs.

- ▶ The directors and members of the executive committee are jointly liable towards either the company or any third parties for damages resulting from a violation of the law or the articles of incorporation.



Remember that the RE is required to communicate specific matters (e.g. deficiencies in the control environment) to those charged with governance.



2.3 Conflict of interest

If a director has a financial interest conflicting with that of the company, the below requirements must be met:

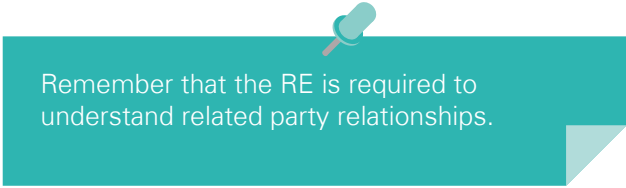
Management

- ▶ If a director has a direct or indirect financial interest in a transaction that conflicts with the interests of the company:
 - he/she must advise the BoD thereof
 - he/she must request mention of his/her statement in the minutes of the meeting
 - he/she may not take part in the deliberation on the conflicting transaction

- ▶ At the next GM, before any other resolution is put to vote, a special report must be made to the shareholders on conflicting transactions.

- ▶ If the company has a single director, the conflicting transactions need only be mentioned in the minutes.

- ▶ If, due to conflicts of interest, the number of directors required by the articles to decide and vote on the relevant matter is not reached, the BoD may decide to bring the decision on that matter before the shareholders at the GM.



Remember that the RE is required to understand related party relationships.

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2.4 Actions of the shareholders against the management

The minority shareholders of an S.A. or S.C.A have the right to take actions against management under the below condition:

Management

- ▶ A minority action against the management may be brought by one or more shareholders representing at least 10% of the voting rights.



2.5 Loss of half of the capital

If, as a result of losses, the net assets of the company fall below half of the capital, the management must perform the following actions:

Management

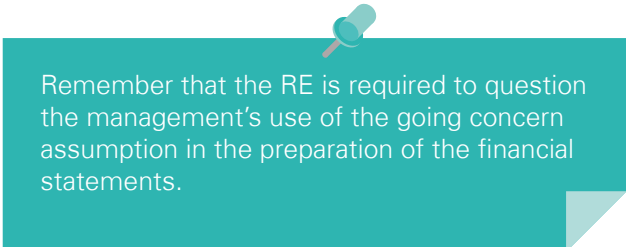
- ▶ The management must call a GM within a period of 2 months to decide on the possible dissolution of the company and possibly on other measures disclosed in the agenda.

- ▶ The management must prepare a special report which:
 - explains the causes of the net assets falling below half of the capital;
 - justifies actions proposed by the management; and
 - describes the measures planned in order to remedy the financial situation of the company, if the management proposes to continue business.

The report must be announced in the agenda of the GM. Any shareholder is entitled to obtain a copy of the report 8 days before the meeting. Failure to draw up this special report invalidates the decision of the GM, unless all the shareholders of the company agree to waive such a report.

- ▶ The same rules must be observed if, as a result of losses, net assets fall below 25% of the capital.

- ▶ In the event of any breach of these provisions, the management may be declared personally, jointly and severally liable vis-à-vis the company for all or part of the increase of the loss.



Remember that the RE is required to question the management's use of the going concern assumption in the preparation of the financial statements.

2.6 Contributions in cash by set-off of receivables (convertible bonds)

At least 25% of each share must be paid up in one of the following ways:

- by way of a contribution in cash, including by a set-off against claims on the company which are certain or of a fixed amount and due and payable
- by way of a contribution in kind
- by way of incorporation of reserves, profits or share premiums

The conversion of convertible bonds is regarded as a contribution in cash payable by way of a set-off against a claim on the company, and shall be subject to the same conditions as a contribution in cash.

Management

- ▶ The shareholders can allow the management, within the authorised capital, to issue convertible bonds or any other debt instruments convertible into capital or subscription rights.

The decision by the management to issue that kind of instrument must be taken during the authorisation period granted by the shareholders.

This decision reduces the available amount of the authorised capital accordingly.

The conversion of convertible bonds or the exercise of subscription rights may occur after the end of the authorisation period.

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- ▶ The RE is no longer required to issue a report for:
 - contributions in cash payable by way of a set-off against a claim on the company (i.e. conversion of convertible bonds)
 - incorporations of reserves, profits or share premiums

The management should analyse the nature of the contribution to be able to determine whether or not a RE report is required.



2.7 Issuance of shares below par value

Shares can be issued below their par value, subject to compliance with the below requirements.

The purpose of the issuance of this type of share is generally to allocate free shares or shares under market price to employees.

It is however very important to ensure that the operation is in the best interest of the company.

Management

- ▶ The management must issue a report detailing the terms of the operation (i.e. the issue price of the shares and the financial consequences of the transaction for the shareholders).

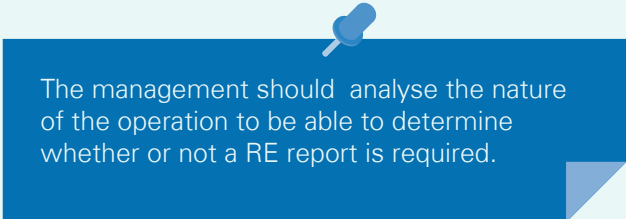
When the issuance of shares below par value is on the agenda of a GM, this must be expressly specified in the convening notice.

- ▶ This type of transaction may also be carried out within the authorised capital under the following conditions:
 - the delegation to management must include an authorisation to perform such kind of issuance; and
 - the management's report should mention the minimum subscription price of the shares to be issued within the authorised capital.

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- ▶ The RE must issue a report on the financial and accounting information contained in the management's report in order to inform the shareholders at the GM voting that proposal

Failure to provide this report would invalidate the decision of the GM, unless all the shareholders of the company have waived the report.



The management should analyse the nature of the operation to be able to determine whether or not a RE report is required.

3. New requirements applicable to S.A.S.

This new legal form of company is subject to rules similar to the S.A., but which differ on two main points:

- The shares of a S.A.S. cannot be listed or offered to the public.
- A S.A.S benefits from greater contractual freedom.

Management

- ▶ Rules applicable to a S.A. are generally applicable to a S.A.S. too, with the exception of the provisions concerning management and powers and duties reserved for general meetings (increases or reduction of capital, mergers, demergers, dissolution, transformation, appointment of RE, etc.)


Those provisions must be set out in the articles of incorporation and may be more flexible than for a S.A.

- ▶ The management functions of a S.A.S. are entrusted to a president and, if foreseen by the articles of incorporation, one or several directors.

Where a legal entity is appointed as president or director of a S.A.S., it designates a permanent representative to exercise that duty in the name and for the account of the legal entity.

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- ▶ A S.A.S. is subject to requirements on the control of its annual accounts by a commissaire or REA depending on the size of the company.



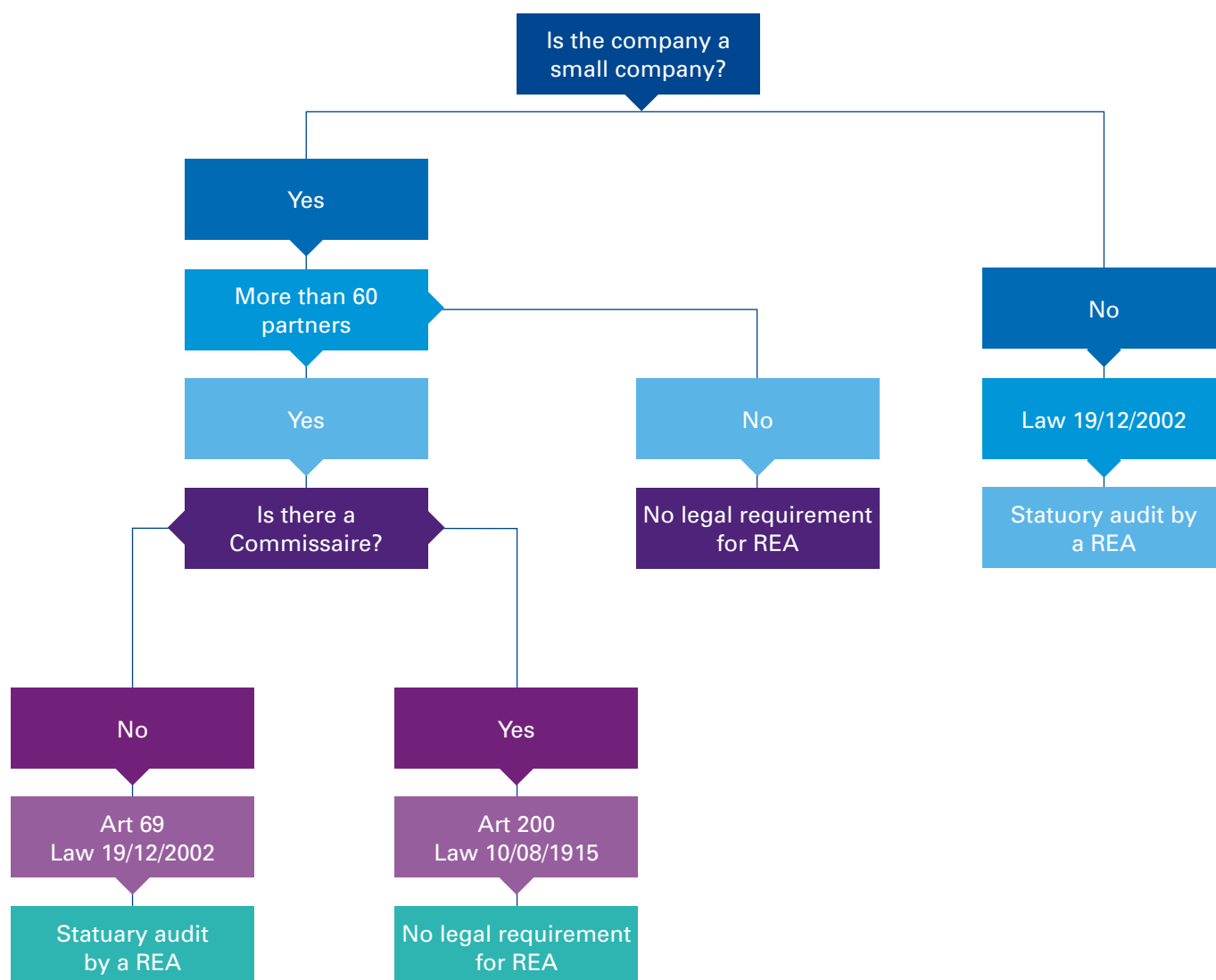
The management should compare the size of the company with the legal thresholds to be able to determine whether or not a RE report is required.

4. New requirements applicable to S.à r.l.

4.1 Change of criteria determining audit requirements

For a small S.à r.l., the requirement to appoint a commissaire has increased from 25 to 60 members. Audit requirements have changed accordingly.

The criteria for a statutory audit by a *Réviseur d'Entreprises agréé* (REA) are described below:



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4.2 Interim dividend distribution

No interim dividends shall be paid unless the articles of incorporation authorise the managers to do so. Any such payment shall, in addition, be subject to the following conditions:

Management


- ▶ The management must prepare interim accounts showing that the funds available for distribution are sufficient.

- ▶ The amount to be distributed must not exceed the sum of the following elements:
 - + total profits made since the date of the last-approved annual accounts
 - + profits carried forward
 - + reserves available for this purpose
 - losses carried forward
 - amounts to be allocated to a reserve as per the law or the articles of incorporation

- ▶ The decision of the management to distribute an interim dividend may not be taken more than 2 months after the date of the interim accounts.

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- ▶ The RE, if there is one, shall verify whether the legal conditions to pay an interim dividend have been satisfied.



The management should ensure that the articles of incorporation authorise the distribution and that the above conditions are met to determine if the interim dividend distribution is allowed.

5. Summary of RE reports

✓ Applicable
✗ Not applicable

Form	Art.*	Type of report	To be issued by RE?
S.A., S.C.A.	26-1	Report on a contribution in kind (CIK) at the time of the incorporation	✓
	31-2 (-31-1)	Report on change of legal form from a S.A. into a S.E. (or S.E. into a S.A.)	✓
	32-1	Report on increases of the subscribed capital: By off-set of receivables, incorporation of reserves By other CIK	✗ ✓
	26-1, 32-1(6) 32-4	Report on issuance of convertible bonds	✓ (in kind)
	32 (6)	Report on issuance of shares below par value	✓
	72-2	Report on the payment of interim dividends	✓
	151	Report on liquidation	✓
	266	Report on draft merger terms	✓
	294	Report on draft division terms	✓
S.A.S.	26-1	Report on a CIK at the time of the incorporation	✓
	32-1	Report on increases of the subscribed capital by means of CIK	✓
	32 (6)	Report on issuance of shares below par value	✓
	72-2	Report on the payment of interim dividends	✓
	151	Report on liquidation	✓
	266	Report on draft merger terms	✓
	294	Report on draft division terms	✓
S.à r.l.	151	Report on liquidation	✓
	198bis	Report on payment of interim dividends	✓
	266	Report on draft merger terms	✓
	294	Report on draft division terms	✓
	308bis-17	Report on change of legal form into S.A., S.C.A.	✓

* Articles refer to the law of 10 August 1915 on commercial companies.

Glossary

BoD	Board of directors
CIK	Contribution in kind
GM	General meeting of shareholders
RE	Réviseur d'Entreprises
REA	Réviseur d'Entreprises agréé
S.A.	<i>Société anonyme</i> (public limited liability company)
S.à r.l.	<i>Société à responsabilité limitée</i> (private limited liability company)
S.A.S.	<i>Société par actions simplifiée</i> (simplified joint stock company)
S.C.A.	<i>Société en commandite par actions</i> (corporate partnership limited by shares)
S.E.	<i>Société Européenne</i> (european company)



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