

Legal aspects of starting a company

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VUB Starter Seminar - 14 November 2017

Table of contents

- How to start a company
- How does a company work
- How can a company attract employees and managers
- How can a company attract investors
- Q&A

I. How to start a company from a legal perspective

Different options

- As a physical person
 - One (or more) person(s) business
 - Factual association
- As a legal entity
 - Legal entity – not a company
 - Company

One (or more) person(s) business

- Most easy way to start-up a business
- No “capital” requirements, no reporting obligations
- Limited administrative obligations and a simplified bookkeeping
- But unlimited liability ! (no distinction between personal belongings and the assets of the business)

Factual association

- Non profit sector
- Contract between 2 or more persons in which they agree to cooperate for a non profit purpose
- But: no separate legal personality, no separate assets, liabilities and rights -> unlimited liability
- E.g. sport club, student group, carnival group

Legal entity

- Distinction between profit and non profit legal entities:
 - Non profit
 - E.g. non profit associations, foundation
 - Non profit objective and commercial activities should not be the main purpose
 - Profit
 - Companies
 - with limited liability
 - with unlimited liability

- Advantage of a legal entity:
 - Possibility to limit your liability
 - Separate rights and liabilities (= legal personality)
- Disadvantage of a legal entity:
 - Administrative more burdensome
 - Yearly reporting requirements
 - Bookkeeping

Which type of company to choose?

- Decisions to take:
 - Limited or unlimited liability
 - One manager or a board of directors
 - Minimum capital
 - Number of shareholders
 - Special agreements between shareholders or with managers
 - Shares freely transferable

Administrative formalities

- One or more persons business
 - Open an account in the name of the business
 - Request a number to the trade register (Crossroad Bank of Enterprises)
 - Request the activation of the VAT number
 - Join a social fund for self-employed persons (sociale kas voor zelfstandigen)
 - Join a Health Care Service (ziekenfonds)

- Company: minimum formalities:
 - Open an account in the name of the company (also a special blocked account to incorporate the company)
 - Request a registration number to the trade register (Crossroad Bank of Enterprises)
 - Request the activation of the VAT number
 - Join a social fund for self-employed persons
 - Join a health care service

- Incorporation of a BVBA of NV
 - Draft financial plan
 - Draft articles of association
 - Wire amount of minimum capital to a blocked account -> bank certificate
 - Bank certificate, financial plan, identification of the incorporators and the directors to be sent to the notary
 - Notary draws up notary deed
 - Go to notary to enact the notary deed or give a POA
 - Notary registers the notary deed, files a copy at the clerk's office of the commercial courts and takes care of the publication in the Annexes to the Belgian State Gazette
 - Notary provides the registration number in the Crossroad Bank of Enterprises (not VATnumber)

Capital

- Strict rules for limited liability companies (as the creditors have no other assets to rely upon)
- Distinction between subscribed and paid up capital
 - Subscribed capital = amount mentioned in the Articles of Association for which there is a payment undertaking of the shareholders
 - Paid-up capital = amount of the subscribed capital effectively paid to the company

- Capital is to be paid by the shareholders:
 - In cash wired to a blocked account -> bank certificate -> notary deed -> release of the blocked funds
 - In kind
 - Special procedure (valuation to be made by the accountant/statutory auditor and the incorporators/directors)
 - Can only be increased or decreased if a special procedure is complied with
 - Actual capital increase or decrease
 - Formal capital increase or decrease

- Working capital is composed of :
 - The company's capital (net equity):
 - By the shareholders - incorporators
 - By investors who become a shareholder
 - External funds (e.g. bonds, loans):
 - By shareholders
 - By investors who do not become a shareholder
 - By banks

Good to know

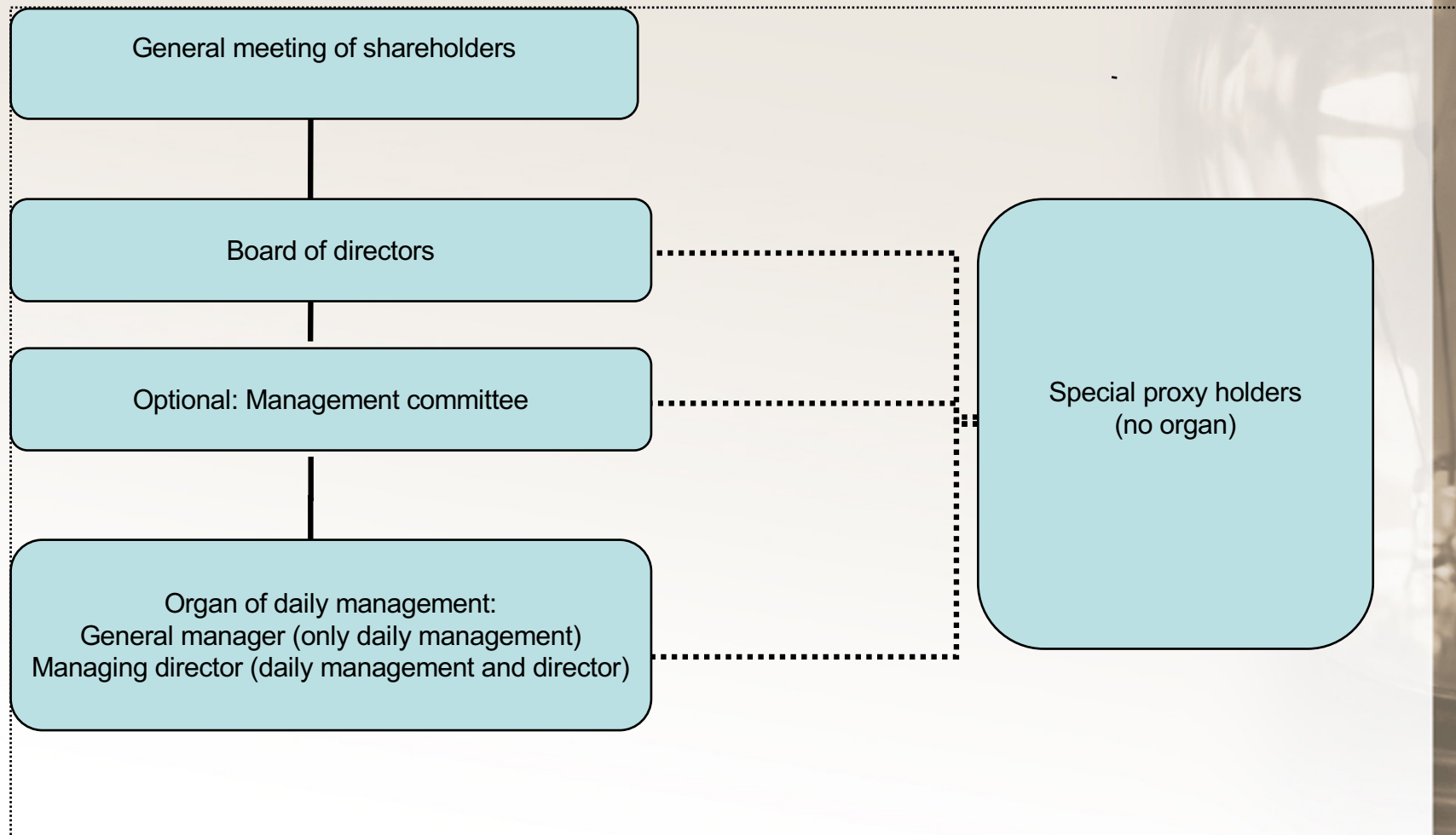
- Our Company Law will be amended in the coming two years
- Only the NV, BVBA, CV and the VZW, stichting and maatschap will remain
- Life should become easier ...

II. How does a company work

Articles of Association of the BVBA or NV

- Minimal content mainly:
 - Clearly define the corporate objective (you can only do what is listed in the corporate objective !)
 - Amount of capital and shares
 - Board and representation
 - Shareholders' meeting
 - Annual accounts and distribution of profits

Organs of the NV



Organs of the BVBA

General meeting of shareholders

One or more managers/
Board of managers

Special proxy holders
(no organ)

Powers

- Shareholders' meeting: only those powers expressly reserved for the shareholders meeting in the Company Code or Articles of Association – reserved powers
- Board of directors or (board of) managers: all powers not reserved for other organs – residual power

Shareholders' meeting (NV & BVBA)

- 3 types
 - Annual shareholders' meeting
 - Yearly at the date mentioned in the Articles of Association
 - Approval of the annual accounts, discharge of the directors/managers
 - Extraordinary shareholders' meeting
 - A shareholders' meeting in front of the notary (e.g. amendment of articles of association, capital increase/decrease, merger, split)
 - Special shareholders' meeting
 - Rest category (e.g. appointment and dismissal of directors, auditor if not at the annual shareholders' meeting)

Board of directors (NV)

- 3 directors (save if there are only 2 shareholders and there is a specific clause in the Articles of Association)
- Physical persons and legal entities :
 - Permanent representative is mandatory for legal entities (exclusively 1 physical person)
- Appointment, dismissal and fee must be decided by the shareholders' meeting

- Powers:
 - Act jointly
 - Residual powers
 - All decisions and acts usefull for the achievement of the corporate purpose
 - Determines the strategy and policy
 - Distinction between decision power and power to represent the company!

Management committee (NV)

- Optional organ
- Composition, appointment, dismissal and powers are determined in the Articles of Association or by the board of directors
- Relatively rare (mandatory for credit institutions)

Organ of daily management (NV)

- One or more persons
- Mostly only 1 person:
 - General manager (only in charge of daily management)
 - Managing director (in charge of daily management and a director)
- Physical person or legal entity

- Appointment, dismissal and fee are to be determined by the management committee or board of directors
- Daily management:
 - No statutory definition
 - Supreme court (Hof van Cassatie):
 - All acts that form part of the daily life of the company
 - All acts that are of minor importance and require a quick response

Manager (BVBA)

- One or more managers – board or not (depends on the wording of the Articles of Association)
- No separate organ of daily management
- Appointment, dismissal and fee fixed by the shareholders

Decision power vs the power to represent the company

- A company should also act via its organs (but can only act via its organs)
- Acts are imputed to the company (as if the organ does not exist)
- The person that is competent to take the decision is not necessarily the person who can represent the company for the execution of a decision
- Decision power: see previous slides
- Power to represent the company: determined by the articles of association, if not by the majority of the members of the board of directors/managers

Liability

- Shareholders: in principle not
- Directors/managers: legal grounds
 - Bad management: only internal
 - Non compliance with the company code or the Articles of Association: internal and external
 - Additional liability in the event of bankruptcy, alarmbell procedure, non filing of the annual accounts, ...
- Members of the management committee : idem as directors
- Organ of daily management: legal grounds

Yearly administrative formalities

- Bookkeeping (double-entry)
- Closing of the financial year -> draft annual accounts
- Drawn up by the board of directors/managers (together with the annual report)
- Check by the statutory auditor, if any
- Shareholders' meeting should be convened within 6 months following closing of the financial year (in principle at the date provided in the Articles of Association) to approve the annual accounts
- Filing of the annual accounts with the National Bank (within 30 days following approval by the shareholders' meeting)

- Board of directors/managers should meet at least 1x per year (draft annual accounts)
- Shareholders' meeting should meet at least 1x year (approval annual accounts)
- Of the meetings of the board of directors and shareholders' meetings minutes should be kept

End of the company

- Fixed duration in the Articles of Association or achievement of the corporate purpose
- Merger or split
- Voluntary liquidation
- Judicial liquidation
- Bankruptcy

III. How to attract employees and managers

Employees

- Enter into an employment agreement with the company:
 - Work under the supervision of the employer (subordinated relationship; they receive orders and the way they spend their time at work is organised by the employer)
 - Against payment of a wage
 - cash + benefits in kind
 - Strict rules

Service providers (self employed)

- Consultancy agreement or management agreement
 - No subordination
 - Contractual freedom
 - Risk of recharacterisation
 - Fee + VAT (invoice)

Agreement with the daily manager

- Employee or self employed
- If employee: more difficult to terminate, limited liability, higher cost
- If self-employed: less control (because no subordination), higher liability, lower cost
- Clear definition of the tasks of the daily manager/managing director (minutes board and text of the agreement)
- Conflict of interest procedure if managing director has to participate in taking a decision on board level on his management agreement

IV. How to attract investors

Different steps of an investment

- Informal contacts
- Information memorandum/confidentiality undertaking
- Negotiation of a term sheet/LOI/MOU
- Due diligence process
- Negotiation of the agreements
- Signing/closing

Distinction between a term sheet – LOI - MOU

- A term sheet
 - = bullet point agreement outlining the material terms and conditions of a transaction
 - binding or non binding
 - proposal, not an agreed document

- Letter of Intent (LOI):
 - = a letter outlining the intent from one party to another
 - binding or non binding
- Memorandum of Understanding (MOU)
 - = a document describing a bilateral or multilateral agreement between parties
 - signed by parties
 - binding or non binding

- Is not a “defined” contract under the Belgian civil code (so there are no legal requirements and the court will look for the intention of the parties to determine whether it is binding or not)
- Also called discussion sheet, heads of agreement, ...

Binding vs non binding

- In principle, an agreement will exist as soon as a clear offer is made and acceptance of the offer occurred !
- Make sure that you clearly define that there is no agreement on the essential elements of the agreement, that the term sheet is not binding and that the agreement is subject to a number of enumerated conditions

- Some clauses must be binding (e.g. exclusivity, confidentiality, applicable law/competent court, expenses,...)
- Avoid clauses that solely depend on your own decision (they are null and void under Belgian law; e.g. satisfactory due diligence)

Different types of participation

- Preferred shares
- Common shares
- Warrants
- Options
- Convertible bonds
- Bridge loans

Different agreements

- Subscription agreement
- Shareholders' agreement
- Specific clauses in the articles of association (preemption rights, drag along, tag along)
- Management agreement
- Stock option plans
- Share purchase agreement

Additional info

www.kreskado.be

- The [Kreskado platform](http://www.kreskado.be) is a starting point for growth companies. Kreskado is the Esperanto word for growth which perfectly encapsulates the platform's aim: to provide assistance and advice to young, innovative companies and accompany them as they grow. The platform is a means of providing growth companies with information about legal and other aspects. At present, NautaDutilh is cooperating with an IT service provider and accountancy firm; in the near future, however, the idea is to extend the scope of cooperation to other professional service providers active in marketing, sales, financing, etc.
- Users of the platform can access questions and answers about the services offered. For legal aspects, we have created, with the help of selected clients (CEOs of growth companies, investors and business consultants), an extensive Q&A in which we provide answers to more than 30 frequently asked questions. In addition, a number of legal documents can be downloaded for free (<http://www.kreskado.be/standard-documents>).

Additional information – see
separate documents