Corporate Newsflash

NautaDutilh

Annual General Meeting of Shareholders of an Unlisted Belgian Limited Company: Recap of the Formalities and Deadlines

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This newsletter is sent by NautaDutilh

This article discusses the main formalities that apply with respect to the annual general meeting of shareholders of an unlisted Belgian limited company and the most important deadlines that must be respected in order to approve the annual accounts.

Introduction

This is the right time to recall the main formalities that must be fulfilled by unlisted limited companies[1] insofar as their annual general meeting ("**AGM**") of shareholders is concerned.

Indeed, the financial year of most companies closed on 31 December 2011, and the annual financial statements must be approved by the AGM within six months from the close of the financial year, that is by 30 June 2012 at the latest. This means that the accounts must be finalised well before this date as various deadlines must be met and formalities completed prior to approval of the accounts by the company's shareholders.

The AGM is the preferred occasion for dialogue between shareholders and directors, and we would like to emphasize the importance of this event in the life of a company, regardless of its size. On this occasion, not only are the company's results for the preceding year discussed but also its prospects for future growth and potential developments.

Calling of the AGM

Each year, the shareholders must hold an AGM. The AGM must be held at the place and time and on the date indicated in the company's articles (Art. 552 Company Code). The articles cannot provide for a date that is more than six months from the close of the financial year, since the accounts must be approved within this six-month period (Art. 92 Company Code).

The board of directors must call the AGM for the date and time mentioned in the articles, even if the annual accounts will not be finalised by that date. If this is the case, the AGM must find that it is not yet able to approve the accounts and proceed to take decisions on the other items on the agenda, such as renewal of the directors' or auditor's term of office, which comes to an end on the date of the AGM. The board will then call a second general meeting of shareholders (a special general meeting) to approve the annual accounts.

The annual accounts must be approved by the AGM based on the information provided by the company's directors and auditor, if the company has an auditor.[2] The annual accounts are thus prepared in advance by the board of directors, which is moreover obliged to call the AGM each year, in accordance with the company's articles (time and date), and prepare a management report.

Publication of the notice

The shareholders must receive a notice of the meeting or at least be informed of the fact that a general meeting will be held. For this reason, the notice must be made public.

When the AGM is held at the place and time and on the date mentioned in the articles and the agenda of the meeting is limited to an examination of the annual accounts, management report and auditor's report and discharge of the directors and auditor, publication of the notice in the *Belgian State Gazette* fifteen days before the meeting is sufficient.

If any other items appear on the agenda of the AGM, such as renewal of the term of office of the directors or auditor, the notice of the meeting must be published in the *Belgian State Gazette* and in one national newspaper fifteen days before the AGM.

When all the company's securities are in registered form, the notice can be sent by registered mail in lieu of publication. Moreover, the notice can be sent to the shareholders and the holders of other registered securities[3] by other means, such as email or fax, but only if each intended recipient has expressly agreed in writing to receive the notice by such means. When a company has many registered shareholders, it may be useful to include with the notice a standard consent form which the shareholders can return to the company.

If all shareholders are present at the AGM, it is not necessary to prove fulfilment of the convocation formalities.

Provision of the notice
The company's registered shareholders, as well as its directors and auditor, must receive the notice at least fifteen days before the meeting (unless all securities are in registered form and the notice is sent in accordance with the provisions of the preceding paragraph) (Art. 535 Company Code).

The notice is usually sent by regular mail, unless the recipients have individually, expressly and in writing agreed to receive the notice by other means. Unlike the other convocation formalities, however, it is not necessary to prove fulfilment of this formality.

Making available of certain documents to the shareholders
At least fifteen days before the AGM, the shareholders are entitled to review, at the company's registered office, the annual accounts, and, if applicable, the consolidated accounts, the list of shareholders who have not fully paid up their shares, with an indication of the address and number of shares held by each, the list of public funds, shares, bonds and other corporate securities that make up the company's portfolio, the management report and the auditor's report (Art. 553 Company Code).

Moreover, a copy of each document that must be made available to the registered shareholders, the directors and the auditor must be sent to these individuals, along with the notice of the meeting, as well as to all persons that have fulfilled, no later than seven days before the AGM, the formalities required to attend the meeting. Every shareholder also has the right to obtain a copy of these documents free of charge at the company's registered office (Art. 535 Company Code).

The management report
As mentioned above, the annual accounts must be approved by the AGM, on the basis of information provided by the company's directors.

If a company meets any of the following three criteria, its board of directors must prepare a management report, unless the company employed on average more than 100 people for the year (Art. 15 Company Code):

- an annual average workforce of 50;
- annual turnover, excluding VAT, of more than €7,300,000;
- balance sheet total of more than €3,650,000.

In addition to the information mentioned in Article 96 of the Company Code, the management report must contain, amongst other items, (i) information on capital increases or the issuance of convertible bonds or subscription rights within the limits of the authorised capital and carried out without application of the shareholders' pre-emptive right (Art. 608 Company Code), (ii) indications of potential buybacks or redemptions of shares or certificates (depositary receipts) (Art. 624 Company Code), and (iii) information concerning conflicts of interest that arose during the financial year (Art. 624 Company Code).

One important item in the management report, which is mentioned in Article 96 of the Company Code, is the obligation to include in the report information about significant events that arose after the close of the financial year. In this regard, the word "none" is often automatically inserted in the management report, even though the report is sometimes prepared close to six months after the close of the financial year, and it is obvious that during this time events of some importance to the company have occurred.

We would like to stress the importance of having the management report diligently prepared by the directors themselves, if need be with the assistance of their financial and legal advisors. Indeed, the shareholders will vote to release the directors from liability on the basis of the information contained in this report. Moreover, if for one reason or another it turns out that the company lacks sufficient means to pursue its activities and must be declared bankrupt, the watchful eye of the trustee in bankruptcy or the public prosecutor will be drawn to the management reports and the directors could have to defend themselves if these documents are obviously incomplete or contain misleading information. On the other hand, under happier circumstances such as perspectives for growth for which an outside investor is required, potential investors are sure to go through the company's management reports with a fine-tooth comb. They will obviously be more inclined to invest in companies whose management reports have been diligently and thoroughly prepared than those whose reports are spotty or incomplete.

The directors must provide their management report as well as the draft annual accounts to the company's auditor in order to allow the latter to prepare its own report. As mentioned above, these two reports as well as the annual accounts must be made available to shareholders at the company's registered office at least fifteen days before the date of the AGM. Shareholders are entitled to request copies of these documents free of charge.

Deadline for preparation of the annual accounts
In order to allow the auditor to perform its supervisory role, the management report and the accounts drawn up by the board of directors must be provided to the auditor at least one month before the deadline for submission of the auditor's report to the AGM (Art. 143 Company Code). The annual accounts (both stand-alone and consolidated, if applicable) must thus be drawn up and finalised by the board of directors and the management report approved at least one month before the AGM.

In practice
For small, closely held companies, if it is certain that all securities will be present or represented at the AGM, the shareholders can unanimously waive, at the AGM, their right to claim proof of fulfilment of the convocation formalities and that the relevant documents were made available prior to the AGM. In this case, the AGM can be held immediately after preparation of the annual accounts by the board of directors. Moreover, the directors and the auditor can also waive their right to receive a copy of the notice.

Agenda of the AGM
The agenda of the AGM called to deliberate on and take decisions with respect to the financial year that closed on 31 December 2011 must necessarily include the following items:

1. Examination of the board's management report and, if applicable, the auditor's report for the financial year which closed on 31 December 2011 (stand-alone and possibly consolidated annual accounts);
2. Examination and approval of the annual accounts for the financial year which closed on 31 December 2011 (stand-alone and, if applicable, consolidated accounts);
3. Decision on the allocation of profit;
4. Discharge of the directors and auditor.

The agenda of the AGM will often also include one or more of the following items:

1. *If the net asset value is negative or below the half of the capital:* Examination of the special report prepared by the board of directors pursuant to Article 633 of the Company Code and a decision on the proposed measures (this is the so-called alarm bell procedure);
2. *If the company has a works council:* Communication of the minutes of the annual information meeting of the works council held prior to the AGM;
3. Resignation/removal/appointment of the directors/renewal and confirmation of the terms of office of the directors and their remuneration;
4. Appointment of an auditor/renewal of the auditor's term of office and confirmation of the auditor's remuneration;
5. *Possibly:* Powers of attorney to accomplish publication formalities.

We have noted that a so-called "miscellaneous" item is often added to the agenda of annual general meetings. We would like to emphasize that no decisions can be taken on the basis of this item. Indeed, while the general meeting can possibly deliberate on points closely related to items on the agenda, it can never rely on the description "miscellaneous" to take decisions on items

which are not specifically mentioned on the agenda.

Procedure for the AGM
At any general meeting (annual, extraordinary, etc.), an attendance list is first prepared (Art. 539 Company Code). This formality serves to verify if the quorum required by law to hold the meeting is met. The attendance list can be included in the minutes of the meeting, which will be the case when there is a very limited number of shareholders. If the attendance list constitutes a separate document, it should be signed by all members of the presiding committee and appended to the minutes.

The meeting will elect a committee,[4] generally composed of a chairperson, a secretary and one or two returning officers. The committee's main purpose is to verify compliance with all attendance formalities (including any specific formalities provided for in the company's articles) and to settle any problems that arise during the meeting.

It is often advisable to prepare a "script" to guide the chairperson during the meeting in order to ensure that the meeting runs as smoothly as possible. The chair will first state the agenda of the meeting. The meeting will then verify if the required quorum is met and if it can validly deliberate on the items on the agenda. The meeting will then proceed to discuss and deliberate on each item on the agenda before putting them to a vote. Resolutions can only be adopted if approved by a specified majority. All that is said and decisions taken during the general meeting are set down in minutes drawn up by the secretary. It should be noted that the minutes do not constitute an official report of the meeting. Thus, a shareholder is not entitled to request the literal transcription in the minutes of his or her statements or questions. The directors must, on the other hand, answer the questions raised by shareholders unless provision of the information or facts in question could seriously harm the company. The directors' answers must be included in the minutes but, once again, not at length or literally.

It is customary to include at least the following information in the minutes of the meeting:

1. the date, time and place of the meeting;
2. the identity of the shareholders present, with an indication of the number of shares held by each (if the number of shareholders present is too significant, this list can be included in a separate document attached to the minutes);
3. the identity of the person presiding over the meeting and the qualifications of this person to serve as chair;
4. the composition of the committee, if the meeting decides to form one;
5. the agenda for the meeting;
6. proof that the meeting is validly constituted and able to deliberate on the items on the agenda;
7. the deliberations of the meeting, preferably following the order of the agenda and for each item thereon;
8. the result of the vote on each item;
9. a closing statement that the agenda is exhausted and that no one has requested to take the floor.

The minutes are signed by the members of the presiding committee. The Company Code adds: "and by those shareholders who so request" (Art. 546 Company Code). Insofar as possible, it is wise to ask the shareholders present to sign the minutes. Of course, they are not obliged to do so, but their signature can curtail the possibility of future challenges. Of course, this is only possible if the number of shareholders is relatively limited.

It is furthermore advisable to keep the minutes in a special register created for this purpose, which is not the same as the register in which the minutes of meetings of the board of directors are kept.

Postponement of the AGM
If the general meeting finds a mistake in the annual accounts (the balance sheet, income statement or comments), requests further explanations or, in general, is of the opinion that the accounts cannot be approved as such and are not in final form, the board of directors can decide to postpone the general meeting for three weeks. This possibility is only available for questions concerning approval of the annual accounts (Art. 555 Company Code). Any such postponement does not affect other decisions taken at the AGM, unless the general meeting decides otherwise. The annual accounts will then be approved at the general meeting held on second call.

Discharge of the directors
Approval of the annual accounts is a *sine qua non* condition precedent to discharge of the directors. Indeed, discharge releases the directors from their contractual liability to the company (but not from extra-contractual liability to the company or third parties) with respect to their management for the preceding financial year.

The discharge is only valid if the balance sheet does not contain any omissions or inaccurate information which could hide the company's true situation (Art. 554 Company Code). Indeed, a discharge by the general meeting is only valid if based on full knowledge of the facts.

Finally, it should be noted that acts committed by the directors in violation of the company's articles must be mentioned in the notice of the general meeting in order for the discharge to be valid for these acts. Indeed, the company's directors can be held jointly liable for damage resulting from a violation by any given director of the company's articles or of the Company Code (Art. 528 Company Code). However, if a director did not participate in the violation in question and no wrongdoing can be imputed to him or her, the director can avoid joint liability by denouncing the violation at the first general meeting or board meeting held after learning of it.

Adoption of resolutions in writing
For several years, it has been possible for shareholders to adopt resolutions unanimously in writing (Art. 536 §4 Company Code, as amended by the Act of 2 August 2002). Prior to the adoption of this provision, many companies with relatively few shareholders had in practice, although in violation of the law, circulated amongst their shareholders and management organ the minutes of a fictitious general meeting, it being understood that no such meeting was ever held.[5]

The possibility to adopt resolutions unanimously in writing is available for all decisions for which the general meeting of shareholders is competent, with the exception of those that require an officially recorded document before a notary and unless the articles of the company provide for certain restrictions (for example, with respect to approval of the annual accounts).

This possibility can only be used if the shareholders are *unanimous* in their decision, meaning a general meeting must be called in due form if any shareholder is not in agreement. This also means that all shareholders must be known and have agreed to sign the written form that takes the place of a general meeting, in order to satisfy the unanimity requirement of the Company Code.

Language of the minutes of the AGM
The use of languages in corporate instruments and documents is governed by both the consolidated Acts of 18 July 1966 on the use of languages in administrative matters (Art. 52) and by the respective decrees adopted by the French and Flemish Communities.

The consolidated acts apply, amongst other matters, to instruments and documents issued by private industrial, commercial or financial undertakings, including companies.

The instruments and documents concerned are those which are required by law or regulation. This definition undoubtedly covers all documents that must be published in the *Belgian State Gazette* or filed with the clerk of the competent commercial court as well as all instruments and documents required by the Company Code or other statutory or regulatory provisions, even if they need not be published or filed. Such documents include, for example, the annual accounts, the management report and the minutes of general meetings. As far as the minutes of meetings of the board of directors are concerned, it is generally accepted that they need only respect the provisions in effect with respect to the use of languages if the deliberations and decisions constitute the substance of instruments or documents required by law or regulation. This will be the case for a decision to increase the company's capital within the limits of the authorised capital or to call a general meeting of shareholders. On the other hand, when the board's deliberations and decisions concern purely commercial or industrial matters, such as a decision to change the distribution model or discussions regarding the company's strategic development, the minutes of the meeting can be drafted in any language, such as English for example, and need not be prepared in one of Belgium's three official languages. Companies are indeed free to draw up instruments and documents that are not required by law or regulation in the language of their choosing.

In general, language in which corporate instruments and documents are drafted will depend on where the company's operating offices are located. An operating office is defined as any establishment with a certain degree of stability where an economic activity is carried out. When a company has operating offices in only one linguistic region, the minutes of meetings and other

corporate documents must be drafted in the language of that region. For companies established in and having operating offices in the bilingual Brussels-Capital Region, minutes and other corporate documents can be drawn up in French, Dutch or both languages. For companies with operating offices in several linguistic regions, both federal and community statutory provisions apply, and the company could be obliged to draw up documents in multiple languages.

In practice, within most companies, documents are prepared only in the language of the region where the company's registered office is located while, in reality, they should also be drafted in another language if the company has an operating office(s) in another linguistic region.

The company must replace any instrument or document that is not drawn up in the language indicated by Article 52 of the consolidated acts, either at its own initiative or further to an order of the competent public service, authority or court. A new act or document in the correct language must be adopted; a mere translation will not suffice.[6]

Publication formalities
All decisions regarding the appointment of directors or the auditor or the end of their term of office taken at the AGM must be published in the annexes to the *Belgian State Gazette*. Moreover, the company's registration with the Crossroads Enterprise Database must be updated insofar as the directors are concerned.

In this regard, it should be noted that the shareholders appoint the directors for a maximum (renewable) term of 6 years and that it is up to the shareholders to determine the number of directors and their remuneration.

Thus, directors do not appoint other directors. The only circumstance under which directors can appoint another director is further to the co-optation procedure (Art. 519 Company Code), i.e. in the event of a vacancy on the board (e.g. a directorship previously filled by the general meeting becomes vacant due to the resignation or death of a director), unless the articles provide otherwise, the directors can appoint another director to temporarily fill the vacancy until the first general meeting held following the provisional appointment, at which time a permanent replacement will be selected.

The shareholders do not appoint the managing director. Rather the board of directors is authorised to delegate daily management either to one of its members, who will then be known as the managing director, or to a third party, known as the general manager.

Filing of the annual accounts with the National Bank of Belgium
The directors must file the annual accounts, as well as the management report and the auditor's report, with the National Bank of Belgium ("NBB") within thirty days after their approval by the general meeting. These documents must, in any case, be filed with the NBB no later than seven months after the closing date of the financial year (Art. 98 Company Code). If the financial year closed on 31 December 2011, the annual accounts must thus be filed no later than 31 July 2012.

Various sanctions can be imposed if a company fails to file its annual accounts on time and companies are thus strongly advised to timely approve and file their annual accounts.

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[1] We describe here only the formalities applicable to unlisted limited companies. Similar rules apply to private limited-liability companies and to other types of companies, while listed companies are subject to different rules.

[2] The general rule is that every company is obliged to appoint an auditor to review its accounts. However, Article 141 of the Company Code provides for a number of exceptions, including for small unlisted companies within the meaning of Article 15 of the code.

[3] Registered securities other than shares can include bonds, subscription rights and depositary receipts (i.e. certificates issued in cooperation with the company).

[4] The Company Code does not require the general meeting to form a presiding committee. The establishment of such a committee is a custom based on the general rules for deliberative meetings contained in Article 63 of the Company Code, which provides that "[i]n the absence of provisions in the company's articles, the general rules on deliberative meetings shall apply to panels and meetings provided for by the present Code, unless provided otherwise". The Company Code indeed does not contain any other rules on the holding of meetings, aside from this general reference.

[5] This practice constitutes forgery and the use of a forged document.

[6] Both the Flemish and Walloon linguistic decrees provide that all documents adopted in violation of their provisions shall be deemed null and void. Invalidity can be claimed by any directly or indirectly interested person or entity. This invalidity is absolute and cannot be remedied. The invalid document thus cannot be ratified and must be replaced. Criminal sanctions and administrative fines can moreover be imposed for violation of the Flemish decree.

Contact

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