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Client briefing
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Corporate Update – Belgium

Welcome to the January 2009 edition of our Corporate Update in which we summarise the developments in Belgian company law in 2008

Over the last year, several amendments were introduced into Belgian company law. Most of these changes result from the implementation of EU directives into Belgian law. They relate to:

- the obligation for listed companies and regulated financial institutions to set up an audit committee. The members of the audit committee must be non-executive. One of them must be an independent director.
- independent directors of a listed company, who are in charge of reviewing certain intra-group transactions and who sit in the audit committee, must now satisfy more severe tests for independence.
- the relaxation of the rules for share buy-back: the percentage of its own shares which a company is entitled to hold has been increased from 10% to 20%.
- financial assistance can now be granted by a company to its parent within the limits of the distributable reserves, provided that the company will maintain a non-distributable reserve for the amount of the loan or security granted, and that certain other conditions and formalities are complied with.
- the suppression of the obligation to request an auditor to issue a report on the contribution in kind for certain assets (eg, listed securities).
- a new regime for cross-border mergers involving Belgian companies, and the consequences on employees' participation. The tax aspects of cross-border mergers are dealt with in the Law of 11 December 2008.
- changes to the obligation to disclose acquisitions or disposals of participations in listed companies when they cross upward or downward a holding threshold of 5% or any multiple of 5%. Companies may impose in their statutes additional thresholds at 1%, 2%, 3%, 4% and 7.5%. Convertible bonds and warrants are no longer taken into account to calculate whether a threshold is crossed.
- the suppression of the list of companies making or having made a public call on savings.

Key Issues

Compulsory appointment of an audit committee for listed companies

More severe tests apply to independent directors

Increase of percentage of its own shares that a company can hold and extension of the duration of the authorisation

Possibility for listed companies to acquire their own shares in OTC-transactions

Financial assistance is allowed within the limits of distributable reserves

New rules on cross-border mergers

New disclosure obligations for transactions on securities of listed companies

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Audit Committees in listed companies and independent directors

The Law of 17 December 2008 provides for the mandatory appointment of an audit committee in listed companies, banks, and insurance companies (the "Law"). The Law also amends the criteria for qualifying as an independent director in listed companies for reviewing certain intra-group transactions as described in Article 524 of the Companies Code. The same criteria apply to an independent director who sits in the audit committee of a listed company. The Law completes the implementation of Directive 2006/43/EC of the European Parliament and of the Council.

The new regime entered into force on 8 January 2009. However, the provisions regarding the functions and responsibilities of the audit committee will be applicable for the first time for the financial year starting after 29 December 2008. Independent directors appointed before 8 January 2009, who satisfy the criteria of independence applicable under the previous legislation, may remain appointed as independent directors within the board of directors as well as within the audit committee until 1 July 2011. Directors, newly-appointed or re-appointed after 8 January 2009, must comply with the new criteria provided by the new Law.

This section sets out the key elements of the new regime with regards to listed companies, as well as the most important changes to the current rules.

Audit committees

Listed companies are now required to appoint an audit committee within their board of directors. Until the Law was passed, the appointment of an audit committee in listed companies was provided for in the Corporate Governance Code as a guideline for good governance, but now appointment is compulsory and regulated by the Companies Code.

The audit committee can only be composed of non-executive members of the board of directors. Further, at least one member of the audit committee must be an independent director, within the meaning of Article 526*ter* of the Companies Code (see below). The Corporate Governance Code provides that at least a majority of the members of the audit committee should be independent.

Without prejudice to the legal functions of the members of the board of directors, the audit committee shall *inter alia*:

- monitor the financial reporting process;
- monitor the effectiveness of the company's internal control and risk management systems;
- where applicable, monitor the internal audit and its effectiveness;
- monitor the statutory audit of the annual and consolidated accounts, including the monitoring of the questions and recommendations stemming from the auditor; and
- review and monitor the independence of the auditor, in particular the additional services to be provided to the audited entity.

The competences of the audit committee as described in the Corporate Governance Code remain as good governance guidelines.

The audit committee will regularly report to the board of directors on the execution of its functions and, at least once when the board prepares the annual accounts, consolidated accounts and interim financial statements.

Exemptions exist for small and medium size companies fulfilling at least two of the following criteria:

- average number of workers lower than 250 over the entire financial year;
- total of the balance sheet inferior or equal to EUR 43,000,000;
- net annual turnover inferior or equal to EUR 50,000,000.

The board of directors of small and medium size companies will exercise the role of the audit committee, provided that at least one of its members is independent. Should the chairman of the board be an executive member, he will not be allowed to chair when the board is acting as the audit committee.

Independent Directors

Independent directors appointed to the board of directors for conflict of interest purposes in intra group transactions and/or appointed as members of the audit committee must fulfil the following criteria, to be written in the shareholders' resolution appointing the director (new Article 526*ter* of the Companies Code):

- for the previous five years (rather than two years under the previous legislation), not to have been an executive director, a person in charge of daily management or a member of the management committee of the company or an affiliate;

- not to have been a non-executive director for more than three successive mandates, with a maximum period of 12 years (new requirement);
- for the previous three years not to have been a senior employee of the company or an affiliate (new requirement);
- not to receive, or have received, remuneration or another significant material advantage from the company or an affiliate, apart from fees received as non-executive member of the board of directors or of the management committee (new requirement);
- with respect to his being a shareholder in the listed company:

  (1) not to hold any social rights representing one-tenth or more of the share capital, the social fund or a share category of the company;

  (2) if he holds social rights which represent less than 10%:

  (a) by adding the social rights with those held in the same company by companies controlled by the independent director, these social rights may not amount to one tenth of the capital or a share category of the company; or

  (b) the acts of disposal related to these shares or the exercise of rights attached to them may not be subject to conventional provisions or unilateral undertakings which the independent director has accepted to comply with;

  (3) not to represent in any way a shareholder corresponding to the above-mentioned criteria (new requirement);

- not to have, or have had within the last financial year, a significant business relationship with the company or an affiliate, either directly or as a partner, shareholder, director or senior employee of a company or body having such a relationship (new requirement);
- not to have been, within the last three years, a partner or employee of the present or former external auditor of the company or an affiliate (new requirement);
- not to be an executive of another company in which an executive director of the company is a non executive member of the board of directors or management committee, nor to have other significant links with executive directors of the company through involvement in other companies or bodies (new requirement); and
- not to have within the company or an affiliate, a spouse, legal cohabitant, family member or relative (up to the second degree) exercising a mandate as a director or member of the management committee, person in charge of daily management or other member of senior management, or who are in the situations referred to above.

Given that the independence tests are more severe, the "catch-all" provision (*i.e.* not to be in any relationship with a company that could otherwise compromise the director's independence) has been abolished.

Independence, appointment and dismissal of statutory auditors
The new regime strengthens the independence of statutory auditors by requiring that they:

- confirm in writing to the audit committee their independence from the audited company on a yearly basis;
- disclose to the audit committee any additional services provided to the audited company on a yearly basis; and
- discuss with the audit committee any threats to their independence and the safeguards applied to mitigate those threats.

Furthermore, in companies with an audit committee, the proposal of the board of directors to appoint a new auditor or to renew an existing mandate is made by the audit committee. This proposal must be mentioned in the agenda of the shareholders' meeting. The Companies Code now explicitly clarifies that a disagreement between a company and its auditor on the accounting rules or audit procedures is not in itself a valid ground for dismissal of the auditor.

Share buy back, financial assistance and contributions in kind

A Royal Decree of 8 October 2008 (the "Royal Decree") amends the rules applicable to the acquisition of a company's own shares, financial assistance by Belgian companies with limited liability, and contributions in kind for certain types of assets. The Royal Decree implements Directive 2006/68/EC amending the second Directive 77/91/EEC (the "Second Directive"). The new regime entered into force on 1 January 2009.

This section sets out the key elements of the new regime and the most important changes to the current rules.

Acquisition of a company's own shares

The Royal Decree contains a number of significant changes, primarily aimed at a further relaxation of the share buy back rules.

New conditions

The most important change is the amendment of the condition that the acquisition of its own shares by a company is only allowed up to a maximum of 10% of its issued share capital. Under the new rules, the purchase of its own shares is permitted up to a maximum of 20% of the company's issued share capital. To determine whether the 20% threshold is reached, one must take into consideration the shares held by the company, those held by the company's subsidiaries which are directly controlled, as well as those that are held by a third party acting in its own name but for the account of such a subsidiary or of the company. The 10% voting rights limit applicable to shares owned by subsidiaries remains unaffected ("cross-participation").

The current requirement that the company must have sufficient distributable reserves available on its balance sheet will continue to apply to all companies.

The General Meeting must grant an authorisation (at a 80% majority) before the board of directors of an SA/NV purchase the company's own shares. Further to the implementation of the Royal Decree, the maximum period for such an authorisation has been extended from 18 months to 5 years. The authorisation by the General Meeting (or the articles of association) must specify: (i) the maximum number of shares that may be acquired and (ii) the limits within which the price must be set.

The Royal Decree does not amend the provisions relating to the possibility for a board of directors to acquire shares without the authorisation of the shareholders' meeting, if such acquisition is necessary for the company to avoid a serious and imminent danger. This right of the board of directors must be set out in the company's articles of association and is only valid for a maximum period of three years.

Possibility to purchase its own shares outside the market

The Royal Decree also provides for other amendments, which will enter into force on an unspecified date. In the current regime, listed companies can purchase shares on the regulated or non-regulated market on which they are listed without any obligation to launch a public takeover bid. The new regime brings the following changes: (i) the key new provision of the Royal Decree is that listed companies are no longer compelled to execute purchases of their own shares on markets, but can do so either on the regulated market on which they are listed, MTFs on which their shares are listed (whether or not these function based on daily negotiations and with a central order book), or with a financial intermediary who is a systematic internaliser; (ii) they can also purchase shares outside markets via an OTC-transaction. The condition set out in the law relates to the price of the purchase of a company's own share: such price cannot be higher than the price at which the other shareholders of the company can sell at the same time their shares on a regulated market or on a MTF, and (iii) further to the entry into force of the MiFID, it was necessary to replace the references to non-regulated markets by references to MTFs.

Financial assistance

Until recently, the Companies Code prohibited an SA/NV from granting advances, making loans or giving guarantees or security with a view to the acquisition of their shares by a third party (the so-called "financial assistance" prohibition).

The Royal Decree relaxes rules for financial assistance by allowing an SA/NV to grant advances, make loans or give guarantees or security with a view to the acquisition of its shares by a third party, subject to the following conditions being met:

- the company can only enter into such transactions within the limits of the distributable reserves available to it and provided that the company will maintain a non-distributable reserve for the amount of the financial assistance;
- the transactions take place under the responsibility of the board of directors at fair market conditions, especially with regard to interest received by the company and with regard to security provided to the company. The credit standing of the third party must have been duly investigated;
- shareholders must allow the transaction, at a majority of at least 75%;

- the board of directors must present a written report to the shareholders' meeting, indicating the reasons for the transaction, the interest of the company in entering into such a transaction, the conditions on which the transaction is entered into, the risks involved in the transaction for the liquidity and solvency of the company and the price at which the third party is to acquire the shares. If a director of the parent company or the parent company is itself the beneficiary of the financial assistance, the report of the board must specifically justify the decision having due regard to the capacity of the beneficiary and the financial consequences of the decision for the company; and
- the acquisition or subscription must be made at a fair price.

As lawful financial assistance can only take place within the limits of the distributable reserves of the company, the Royal Decree does not significantly increase the financial assistance possibilities available to a company. What can now be achieved through a loan could previously be achieved by distributing dividends or by a capital reduction. Another significant change in the new regime allows for a company to grant a security for the purchase of its shares (within the limits of its distributable reserves).

The Royal Decree leaves unaffected the financial assistance that is currently allowed, *i.e.* that granted to employees of the company, acting individually, for the acquisition of shares of the company, but extends this exemption to the employees of the affiliates of the relevant company. This exemption is also subject to the limits of the distributable reserves available to the company.

Contribution in kind
An auditor's special report is no longer required when a contribution in kind (at incorporation or through a capital increase) consists of (i) listed securities valued at their weighted price over the three months preceding the date of realisation of the contribution or (ii) other assets already valued by an auditor within six months before the contribution was made or (iii) in certain circumstances, certain other assets that are contributed at their book value.

Cross border mergers

In 2008, the Companies Code was amended in order to implement the Directive 2005/56 of 26 October 2005 on cross-border mergers of limited liability companies. While cross-border mergers were already possible under the previous regime, the new provisions provide a specific legal framework and facilitate cross-border mergers.

The key differences from the regime applicable to domestic mergers are (i) the prohibition to merge a company which is in liquidation and certain forms of UCIs; (ii) the allowance of a cash payment in excess of 10% of the equity value; (iii) the absence of nullity of cross-border mergers once they are in force; and (iv) the involvement of employees' representatives. The provisions extend to cross-border mergers with non-EU companies.

The procedure for a cross-border legal merger is broadly similar to that of a Belgian legal merger. The key differences are (i) the obligation to include additional information in the merger proposal (*e.g.* the (likely) consequences of the merger for employment opportunities, the valuation of the assets and liabilities transferred and the articles of association of the surviving entity), (ii) the publication of other information (*e.g.* on the rights of creditors and minority shareholders) in addition to the merger proposal, (iii) the fact that the board and auditor reports must not only be made available to the shareholders, but also to the employees (the opinion of the work's council should also be appended to the board report, if rendered in time) and (iv) the certification by the Belgian notary that the company has complied with all Belgian legal requirements. If the surviving entity is located in Belgium, the Belgian notary must also verify the certificates of all (other) merging entities. After verification, completion of the merger is recorded in a separate notarial deed and published.

The new rules have been supplemented by the Collective Labour Agreement N° 94 of 29 April 2008 on employee participation in the company resulting from the cross-border merger, which (indirectly) introduces the previously non-existent concept of employee participation in Belgian law. In certain circumstances (*e.g.* if the surviving entity is located in Belgium and one of the disappearing entities has a system of employee participation), the management of the merging companies and the employee representatives (in a so-called special negotiating body) should agree upon the employee participation regime. If no negotiations are opened or are not completed within the prescribed period under relevant national law, certain standard rules for employee participation will apply.

Finally, the tax provisions to allow for tax-exempt cross-border mergers in Belgium have been implemented by the Law of 11 December 2008.

Disclosure of major holdings

Since September 2008, a new regime for the disclosure of major holdings in listed companies has been in force. As a result, many significant shareholders in listed companies have had to update their disclosure notification.

Acquisitions or disposals of participations in listed companies must be disclosed when they cross upward or downward a holding threshold of 5% or any multiple of 5%. Companies may impose in their statutes additional thresholds at 1%, 2%, 3%, 4% and 7.5%. The Belgian disclosure regime applies to holdings in listed Belgian companies - whether listed in Belgium or abroad - and in certain non-EEA companies listed in Belgium.

The percentage calculations are made on a non-diluted basis, i.e. they ignore the possible impact of convertible bonds and subscription warrants. This is a major difference from the former regime, which required calculations on a fully diluted basis.

Indirect holdings must also be reported; the entire chain of control above the entity that holds a direct participation in the listed entity must be disclosed. This was not always the case under the former regime. Holdings owned by affiliates, or by parties acting in concert, must be aggregated when calculating the thresholds.

So-called "passive" crossings of a threshold must now also be disclosed. This situation arises when the holding percentage of an investor changes because the total number of existing shares is increased or reduced, rather than because of an acquisition or disposal of shares by the investor.

The former regime exempted from disclosure the situations where the crossing of a threshold was unwound within two business days. This exemption has disappeared, but the Banking, Finance and Insurance Commission (the "CBFA") still accepts that mere intraday threshold crossings need not be disclosed.

The disclosure must be made both to the CBFA and to the listed company concerned. The company must then publicise the disclosure on its website; under the former regime, the publication was made - often with considerable delay - by Euronext. The disclosure is due within four business days of the date on which the investor became aware of the trade, and in any event within six business days of the trade date; the publication by the issuer must then follow within three business days. Passive crossings must be disclosed within four business days of the date when the issuer releases information about the changed total number of existing shares.

Breaches of a disclosure obligation can give rise to heavy sanctions, including fines by the CBFA and criminal penalties. The CBFA has extensive investigation powers. Also, the courts may impose a suspension of the voting rights for up to a year, disposal of the shares, or the postponement of a shareholders meeting.

List of public companies

On 11 October 2008, the obligation for certain companies to be mentioned in the CBFA's list of companies making or having made a public call on savings was suppressed. Companies making or having made a public call on savings are (i) companies that in Belgium or abroad, have made a public issue of securities (including bonds) or (ii) companies, in Belgium or abroad, whose securities have been admitted to listing on a regulated market. The tests set out in the Prospectus Law of 16 June 2006 determine whether an issue of securities is public, as well as the exceptions set out in the Law of 16 June 2006 (issues reserved to qualified investors, offers to less than 100 non-qualified investors, offers requiring a minimum contribution of at least EUR 50,000 per investor, etc). In addition, a call on savings, in Belgium or abroad, will no longer be deemed public if the call is limited to current or previous directors of the company or of affiliates.

Although the list no longer exists, such companies still qualify as companies making or having made a public call on savings and must make a specific mention in their articles of association. In addition, specific company law provisions applicable to "public" companies continue to apply (eg, the prohibition for a conflicted director to take part in a board meeting, public squeeze-out rules,…). The "public" company whose securities are held by less than 100 persons other than qualified investors (compared to 50 under the previous regulation) is entitled to no longer comply with the rules specifically applicable to "public" companies.

Cancellation of bearer securities

As of 1 January 2008, companies may no longer issue bearer securities and bearer securities issued by a foreign entity may no longer be physically delivered on Belgian territory. By 31 December 2013, all bearer securities must have been dematerialised or converted into registered securities, if this had not been automatically done on 1 January 2008 (as was the case for, *inter alia*, securities issued by a listed company which were booked on a securities account).

Accounts and disclosure of information

Several new rules, which relate to accounts and disclosure of information, were introduced in 2008. They concern, *inter alia*:

- the publication by the European Commission of a consolidated version of all the IAS and IFRS rules applicable in the European Union on 15 October 2008 (Regulation (EC) n°1126/2008 of 3 November 2008). This Regulation is also available in French and Dutch;
- new standard formats for annual accounts to be filed with the National Bank of Belgium, for financial years closing after 30 November 2008. The changes also reflect the simplification of the contents of the social report (*bilan social/sociale balans*);
- the independence and expertise of the independent member(s) of the audit committee must be justified in the annual and consolidated annual reports, in accordance with the Law of 17 December 2008 on the audit committee;

- the entry into force, on 1 January 2008, of the Royal Decree of 14 November 2007 on the obligations of issuers of financial instruments admitted to trading on a regulated market. This Royal Decree replaces the Royal Decree of 31 March 2003 on the obligations of issuers of financial instruments admitted to trading on a Belgian regulated market;
- the publication by the CBFA of recommendations concerning the advertisement made in the frame of the public issue of securities (Recommendations of 14 May 2008).