

New squeeze-out possibility and simplification of the merger and demerger procedure

On 18 January 2012, a law was published that modifies the Belgian Companies Code (the "Code") and implements Directive 2009/109/EG in connection with the documentation and report obligations of mergers and demergers (the "Law").

The Law provides for a simplification of the mandatory formalities for (national) mergers and demergers, and creates a new squeeze-out possibility.

Concrete changes

Below we will give you a brief overview of the main features of the Law.

1. Squeeze-out.

The Law lowers the minimum threshold for an acquiring company to launch a squeeze-out in view of a merger by absorption, from 95 % to 90% of the shares and other securities conferring voting rights in the company that is being acquired. The minority shareholders do not have the possibility to refuse to sell off their securities, even if the company is not listed. Both companies should be limited liability companies (*sociétés anonymes/naamloze vennootschappen*).

2. Publication of the merger/demerger proposal

Companies have the option to publish proposals in the Belgian State Gazette under the form of either an abstract of the proposal or as a hyperlink to the company's website where the proposal will be available. We assume that companies choosing the latter path will have to ensure this hyperlink is active until at least one month after the merger or demerger decision of the general meeting, by analogy with the newly

inserted paragraph 4 in article 697 of the Code.

3. Simplification of the report obligations

Several report obligations can be avoided if all shareholders and other holders of securities conferring voting rights (hereafter "the shareholders") have agreed accordingly. You will find below a chart outlining inter alia all the report obligations before and after the entry into force of the Law. In any case the publication of the merger or demerger proposal will still be required.

Specifically the following reports will no longer be required if all shareholders agree:

- (a) Report of the board on the merger proposal

For demergers this was already the case. However, the Law does not provide for a similar procedure as the one applicable to demergers; i.e. the requirement to obtain an explicit and unanimous decision by the shareholders in the general meeting deciding on the demerger. It is to be seen how this will be dealt with in practice for mergers. It should be possible for the shareholders in a merger to give their consent prior to the general meeting deciding on the merger.

Key issues

- New squeeze-out possibilities in the framework of a merger by absorption.
- Publication of the proposal in the Belgian State Gazette possible through a hyperlink to the company's website.
- General possibility to waive report obligations.
- Miscellaneous other simplifications.

- (b) Report of the auditor on the merger or demerger proposal

This has been the case since 2010 and the Law now further clarifies that if a company uses this waiver, the obligation to draw up a special auditor report for the purpose of the capital increase by a contribution in kind, will be re-triggered. Hence, in principle, it will still be necessary to draw up at least one auditor report, mainly for the purpose of creditor protection. In that case the exemptions to the obligations to draw up an auditor report can still be applied (article 602, paragraph 2 of the Code).

(c) No report requirements for proportional demergers by incorporation

There is no need to seek shareholder approval for waiving the report of the board or the report of the auditor, in the context of a demerger by incorporation of a new company whereby the shareholders of the demerged company receive shares in the new company, in proportion to their participation in the demerged company ("proportional demerger by incorporation"). This was already the case for a silent merger.

4. Miscellaneous changes

(a) No shareholders approval

i. Mergers

It is no longer necessary to hold a general meeting of the shareholders of the acquiring company deciding on the merger in case the acquiring company's holding in the acquired company amounts to 90 % (a "qualified merger by absorption") and when certain conditions are met: besides the normal requirements with regards to the publication of the proposal and the possibility for the shareholders to inspect all documents, the acquiring company should still convene a shareholders meeting if at least five percent of its shareholders request this. In addition, in case of a silent merger, there is no obligation to hold a general meeting at the level of the fully-owned acquired company.

ii. Demergers

No shareholders meeting of the demerged company will be required in case of a demerger by absorption whereby the acquiring company holds all the shares in the demerged company ("silent demerger") and if, in addition to the normal requirements with regards to the publication of the proposal and the possibility for the shareholders to inspect all documents as mentioned above, all

the important changes with regards to the assets and liabilities since the date of the demerger proposal are notified by the board. The Law does not specify how this information should be communicated to the shareholders. Remarkably all types of companies can rely on this provision, whereas in the case of mergers by absorption and silent mergers, only limited liability companies (*sociétés anonymes/naamloze vennootschappen*) can be the beneficiary.

(b) Interim information

i. Mergers

It is no longer an obligation for the board to provide information on the important changes with regards to the assets and liabilities after the date of the merger proposal if all shareholders agree to waive this. Another change involves the possibility for merging companies to waive the obligation to produce interim statements. The latter obligation is triggered when the last annual accounts were closed more than 6 months prior to the proposal.

ii. Demergers

For demergers these changes regarding the obligation in connection with the important changes of the assets and liabilities and the interim statements, will solely be applicable for proportional demergers by incorporation.

iii. Mergers and demergers

There is no need for listed companies to produce interim statements as these companies are already subject to the half-yearly report obligation under the Royal Decree of 14 November 2007.

(c) Electronic mail and website

The preparations for the general meeting to decide on the merger or demerger are reduced as well, and if the shareholders consent, copies of the proposal, reports and other documents may be sent to them by electronic mail. In addition, it is no longer necessary for a company to

make all documents accessible at its registered office if it makes those documents available on its website. Furthermore, it is not required to send the documents if the shareholders can download and print the relevant documents from the company's website. In that case, however, those documents should be available at the company's registered office for consultation. The information has to be maintained on the website for at least one month after the merger or demerger decision.

5. Entry into force

The new provisions enter into force on 28 January 2012. However the new legal regime will only be applicable for the merger and demerger proposals filed at the clerk's office of the commercial court, after the entry into force of the Law.

6. Overview

The two tables in the annex compare the situation before and after the entry into force of the Law. In particular, it focuses on the obligations that are no longer mandatory in the context of Belgian mergers and demergers if all shareholders give their consent.

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Annex: Overview of changes

Before the law / After the law

	<i>Report of the board</i>	<i>Report of the auditor</i>	<i>Information on changes in assets and liabilities</i>	<i>Interim statements</i>	<i>Shareholders meeting</i>
Merger by absorption	mandatory can be waived	can be waived can be waived	mandatory can be waived	mandatory can be waived	mandatory mandatory
Merger by incorporation	mandatory can be waived	can be waived can be waived	mandatory can be waived	mandatory can be waived	mandatory mandatory
Qualified merger by absorption	mandatory can be waived	can be waived can be waived	mandatory can be waived	mandatory can be waived	mandatory NV/SA: can be waived by the acquiring company
Demerger by absorption	can be waived can be waived	can be waived can be waived	mandatory mandatory	mandatory mandatory	mandatory mandatory
Demerger by incorporation	can be waived can be waived	can be waived can be waived	mandatory mandatory	mandatory mandatory	mandatory mandatory
Proportional demerger by incorporation	can be waived N/A	can be waived N/A	mandatory N/A	mandatory N/A	mandatory mandatory
Silent merger	N/A N/A	N/A N/A	N/A N/A	mandatory can be waived	mandatory NV/SA: can be waived by both companies
Silent demerger	can be waived can be waived	can be waived can be waived	mandatory mandatory	mandatory mandatory	mandatory NV/SA: can be waived by both companies

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