JONES DAY

COMMENTARY

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Greater Flexibility Slated for Equity Financing in Belgium

IN SHORT

The Situation: A draft law designed to reform the Belgian Companies Code ("New Company Code") received a green light from Parliament's Justice Commission on 23 October 2018. Pending final approval, the New Company Code is expected to enter into force as of 1 May 2019.

The Result: The New Company Code will make it easier for listed companies to proceed with capital increases in cash reserved to investors specified in advance.

Looking Ahead: The law reform will benefit Belgian companies by enhancing flexibility and simplification in relation to equity financing and other key areas.

The Belgian government's proposal for a New Company Code is highly anticipated in the legal and business sectors, given its focus on enabling greater adaptability and competitiveness for companies.

Among the most scrutinized changes: The modification of Article 598 of the current Belgian Company Code on the limitation of preferential subscription rights.

Capital Increase in Cash with Suppression of Preferential Rights – a Small Revolution in Belgium

In the context of a capital increase in cash, certain conditions must be fulfilled when the preferential subscription right is cancelled in favor of one or more specific persons.

The current Belgian Company Code requires the following three conditions for listed companies: (i) The identity of the beneficiary(ies) of the suppression of the preferential subscription right must be disclosed; (ii) The issue price must not be lower than the average market price over the 30 calendar days preceding the day of issuance; and (iii) The company's board of directors and auditor must produce comprehensive reports on both the proposed transaction's impact on the current shareholders' situation and the issue price of the shares, as well as its justification.

The New Company Code would introduce several changes to these three conditions. The first condition would be maintained, the second would be eliminated, and the third would be strengthened. Furthermore, an additional requirement would prohibit any significant shareholder (≥ 10 percent) beneficiary of the capital increase from voting on such a decision at the shareholders' meeting or through its representatives at the board of directors.

This shift in the treatment of preferential subscription rights is a key innovation in the New Company Code, which will provide greater transparency and maneuverability when such rights are suppressed in relation to a capital increase in cash.

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Elimination of Minimum Issue Price – Resolving an Interpretative Dilemma

To ensure equality between existing and new shareholders, the current Belgian Company Code imposes a minimum issue price when a capital increase is reserved to investors specified in advance. For listed companies, this minimum price is the average of the stock market price during the 30 calendar days preceding the first day of the issue. For non-listed companies, the issue price must be at least equal to the intrinsic value of the share, unless unanimous consent of the shareholders is obtained.

This condition was intended to prevent one or more investors, as selected by the board of directors, from receiving the opportunity to enter into the company's capital on more advantageous financial terms and below market conditions, which would result in economic dilution for existing shareholders.

Such constraints led to several interpretative difficulties, including the calculation of the 30-day rule, which refers to the time window preceding the first day of the "issue." However, does the term "issue" refer to the placement of securities with investors or to the legal process of issuing these securities?

This requirement also constitutes an unnecessary obstacle to legitimate transactions, in particular for companies in the technology and biotech sector, as well as startups. In particular, a volatile share price does not necessarily reflect a company's real value. Also, this requirement excluded the issuance of securities at a lower price, even when indispensable (for example, an urgent capital increase necessary to a company in distress).

Therefore, removing such restrictions would put an end to this legal uncertainty, as well as facilitate the ability of companies to act in their best interests.

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For further information on the New Company Code, see also our June 2018 *Commentary* "Loyalty Shares for Belgian Listed Companies: Fundamental Change on the Way."

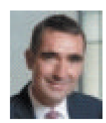
In addition, see our September 2018 *Commentary* "Greater Flexibility for Belgian Companies Issuing Bonds."

THREE KEY TAKEAWAYS

1. The New Company Code's more flexible provisions would notably simplify capital increases in cash reserved to investors specified in advance.

2. Abolishing the minimum issue price requirement would resolve ambiguities under the current Belgian Company Code and would enable the issuing of securities at below market price or below the intrinsic value of the share. This would particularly benefit, among others, startups and companies in innovative (and more volatile) sectors, such as technology and biotech.

3. To maintain equilibrium between existing and new shareholders, however, if a beneficiary of the limitation of the preferential right holds more than 10 percent of voting rights, he would be unable to vote in the shareholders' meeting or the board meeting deciding on the capital increase.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