



2007

# Important Legal Developments in Belgium for the Financial Services Industry

An Overview

31 December 2006



## Letter from the Chairman

Dear Friends,

NautaDutilh is proud to present you with its second annual overview of important expected developments in the financial sector, which this year covers the whole of the Benelux.

2007 promises to be another interesting year for your industry. In each of the Benelux countries, new national legislation in the field of financial services will come into effect, most of it implementing EU directives. The implementation of MiFID – to give just one example – is expected to have a major impact on many financial institutions. Moreover, developments on the corporate side will make the expected continued M&A boom quite exciting, while the much anticipated new tax rules will also play an important role in the region's economy.

NautaDutilh is in a prime position to ensure you have a top legal advisor on your side. Under the umbrella of our Financial Institutions Industry Group, we offer you a team of experts thinking alongside you, digesting and analysing the many changes and trends in terms of how they affect your business and the opportunities they present. In other words: in NautaDutilh you will find a business ally.

We have worked – and will continue to work – together with our good-friend law firms across the globe to perfect and promote our strategy of independence and the benefits of the “Horses for Courses: One Team” philosophy, under which we handle international transactions with a team of true specialists from our own firm and from other law firms in the relevant jurisdictions. With 10 new partners, and a good year behind us in which we represented our clients in land-mark transactions and high-profile litigation, we at NautaDutilh look forward to the challenges and excitement that 2007 is sure to bring.

We welcome the opportunity to continue working with you and carrying out our commitment to excellence and pragmatism.

Best wishes,

Marc Blom

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# Glossary

|   |  |
|---|--|
| Alternext Decree                        | Royal Decree of 14 December 2006 on Alternext and amending the Market Abuse Decree   |
| Bankruptcy Act                          | Act of 8 August 1997 on bankruptcy   |
| Capital Maintenance Directive           | Directive 2006/68/EC of 6 September 2006 amending Directive 77/91/EEC as regards the formation of public limited-liability companies and the maintenance and alteration of their capital |
| CBFA                                    | Banking, Finance and Insurance Commission/<br><i>Commission Bancaire, Financière et des Assurances/<br/>Commissie voor het bank, financie en<br/>assurantiewezen</i>                     |
| Clearing and Settlement Code of Conduct | The European Code of Conduct for clearing and settlement dated 7 November 2006   |
| Collective Investment Act               | Act of 20 July 2004 on certain types of collective management of investment portfolios   |
| Dematerialisation Act                   | Act of 14 December 2005 on the abolition of bearer securities  |
| Distance Marketing Directive            | Directive 2002/65/EC concerning the distance marketing of consumer financial services  |
| Fair Trade Practices Act                | Act of 14 July 1991 on commercial practices and the information and protection of consumers  |
| Financial Intermediary Act              | Act of 22 March 2006 on the intermediation for banking and investment services and the distribution of financial instruments   |
| Issuers Obligations Decree              | Royal Decree of 31 March 2003 on the obligations of issuers of financial instruments admitted to trading on a Belgian regulated market   |
| Institutional SIC/VBS                   | Investment company in institutional receivables  |
| IP Enforcement Directive                | Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights   |
| Judicial Composition Act                | Act of 17 July 1997 on judicial composition procedures   |
| Market Abuse Decree                     | Royal Decree of 5 March 2006 on market abuse   |
| Market Abuse Decree II                  | Royal Decree of 5 March 2006 on the correct presentation of investment recommendations and the disclosure of conflicts of interests  |
| Merger Directive                        | Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited-liability companies   |

|                                       |   |
|---------------------------------------|---|
| MiFID                                 | Markets in Financial Instruments Directive 2004/39/EC of 21 April 2004 amending Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC and repealing Directive 93/22/EEC   |
| Parent-Subsidiary Directive           | Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of companies and subsidiaries of different Member States, amended by Directive 2003/123/EC of 22 December 2003                           |
| Pension Arrangements Act              | Act of 27 October 2006 on the supervision of institutions providing corporate pension arrangements  |
| Private International Law Code        | Act of 16 July 2004 adopting a private international law code   |
| Prospectus Act                        | Act of 16 June 2006 on the public offers of financial instruments and the admission of financial instruments to negotiation on regulated markets  |
| Prospectus Directive                  | Directive 2003/71/EC of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC  |
| SE Employee Directive                 | Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European Company with regard to the involvement of the employees   |
| Takeover Directive                    | Directive 2004/25/EC of 21 April 2004 on takeover bids  |
| Tax Merger Directive                  | Directive 2005/19/EC amending Directive 90/434/EEC on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States                     |
| Transparency Directive                | Directive 2004/109/EC of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC |
| UCITS Directive                       | Directive 85/611/EC of 20 December 1985 as amended by Directive 2001/107/EC of 21 January 2002 and Directive 2001/108/EC of 21 January 2002   |
| Unfair Commercial Practices Directive | Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and amending Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC and Regulation (EC) No 2006/2004               |

2006

## 1. Implementation of the Prospectus Directive

The Prospectus Directive, establishing a harmonised format for prospectuses in the European Union, has been implemented in Belgium by the Prospectus Act, effective 1 July 2006. The Prospectus Act partially replaced the Act of 22 April 2003 and introduced new rules on the public offering of securities in Belgium and the admission of securities to trading on a Belgian regulated market. The Act of 22 April 2003 remains partially in force insofar as public takeover bids are concerned. This will change when the Takeover Directive is implemented in Belgium.

Key elements of the Prospectus Act include:

- public offerings of securities (having a total value of at least EUR 2,500,000) and the admission to trading of securities to one or more regulated markets require the publication of a prospectus;
- the prospectus must be approved by the CBFA prior to publication;
- the prospectus can be drafted in either French, Dutch or English; if the offering takes place totally or partially in Belgium, a French or Dutch summary of the prospectus must be prepared;
- the CBFA has ten days to approve a draft prospectus; approval remains valid for twelve months after publication, provided the prospectus is duly updated; the CBFA must re-approve any offering made after this twelve-month period;
- once approved by the CBFA, a prospectus can be used for offerings to the public and for the admission of securities to trading on a regulated market in all other Member States following simple notification to the supervisory authority of the Member State(s) in question, i.e. the so-called "European passport".

## 2. Alternext Brussels

Alternext was created by Euronext in Paris on 17 May 2005. Brussels followed suit on 15 June 2006 with the admission of Evadix, while Alternext Amsterdam was launched on 24 November 2006. Alternext now counts more than 70 companies for these three jurisdictions.

Key elements for a listing on Alternext Brussels include:

- any company may request a listing, provided it has published financial statements for at least two years, intends to raise at least EUR 2.5 million, and has a listing sponsor;
- a listing sponsor is a financial specialist recognised by Euronext who acts as a coordinator between the issuer and the exchange at all times; it also plays a key role in ensuring that the issuer fulfils its transparency requirements; in Brussels, the currently recognised listing sponsors are Bank Degroof, ING Belgium, KBC Securities, Leleux Associated Brokers, Nextcap and Petercam SA;
- companies are required to communicate key information to the market, i.e. any price-sensitive information, unaudited semi-annual reports, audited annual accounts, substantial shareholdings (25/50/75/95%), and statements of management transactions;
- the rules on insider trading and market manipulation, as well as on takeover bids and squeeze-out, apply.

On 4 September 2006, Alternext launched its All-Share Index, which tracks the combined performance of all shares on the Alternext market.

As of 1 January 2007, stricter rules on market abuse apply to companies listed on Alternext Brussels. The Alternext Decree has extended to Alternext Brussels some of the information obligations imposed on companies listed on a regulated market.

The key provisions of the Alternext Decree include:

- the obligation to declare majority shareholdings (25, 30, 50, 75 and 90%);
- the obligation to make immediately public any inside information;
- the obligation for issuers to prepare a list of persons working for them with access to inside information;
- the obligation for persons performing managerial tasks to inform the CBFA of any transaction carried out with respect to certain of the issuer's securities.

### 3. Insider Trading: Strict New Rules on Market Abuse as of 10 May 2006

On 5 March 2006, the King adopted the Market Abuse Decree, which, together with the Market Abuse Decree II, completes the transposition into Belgian law of the Market Abuse Directive, started by the Royal Decree of 24 August 2005.

Key elements of the new rules include:

- the Decree specifies certain warning signals that can indicate the existence of market manipulation;
- no transactions or orders can be carried out if they give false or misleading signals regarding the offer, demand or quotation of one or more financial instruments, or if they secure the price of a financial instrument at an abnormal or artificial level; the CBFA can however allow such transactions if it considers them to be “usual market practice” within the meaning of the Market Abuse Decree;
- issuers whose financial instruments are admitted to trading on a Belgian regulated market must draw up a list of all persons working for them (whether under an employment contract or otherwise) who have access, on a regular or incidental basis, to inside information that directly or indirectly concerns the issuer; the Market Abuse Decree specifies the content of the list and when it must be updated promptly; the list must be kept for five years once drafted or updated; the issuer must ensure that all persons on the list are aware of their statutory and regulatory obligations and the possible sanctions for misuse or improper disclosure of information;
- persons entrusted with managerial authority within an issuer and those closely connected with them must notify the CBFA of any transaction involving the issuer’s shares and any related derivatives executed for their account having a value of more than EUR 5,000 (whether by one or more transactions); these notifications are posted on the CBFA’s website;
- financial intermediaries must inform the CBFA of transactions if they have reasonable grounds to believe that a transaction could constitute market abuse and must provide the CBFA with any relevant information.

The Market Abuse Decree II introduced new rules on investment recommendations made by advisors or analysts based in Belgium that constitute a possible basis for an investment decision. These rules include:

- reasonable measures must be taken to ensure that the information provided gives a correct view of the issuer’s financial situation or financial instruments issued by it;
- investment advisors and analysts must disclose any conflicts of interest.

## 4. Financial Intermediary Act

On 22 March 2006, the Financial Intermediary Act was enacted. This Act, which entered into force on 1 July 2006, regulates intermediation activities in banking and investment services and the distribution of financial instruments.

Key elements of the Financial Intermediary Act include:

- the Act applies to intermediaries that provide certain banking and investment services or that intend to carry out such activities in Belgium;
- intermediation in banking and investment services is defined as bringing together investors and regulated entities, such as credit institutions and investment firms;
- banking and investment intermediaries providing services in Belgium must be registered with the CBFA;
- intermediaries must meet certain requirements in order to register in Belgium, including those related to theoretical knowledge of the sector and practical experience; in particular, the Act requires that the applicant provide evidence of its professional capabilities; the loss of such professional skills will entail cancellation of the entity's registration with the CBFA;
- investment firms carrying out activities in Belgium through an unregistered intermediary may be held liable (and incur criminal sanctions) for all acts performed by the intermediary;
- it is currently unclear if and how the Financial Intermediary Act should be applied if cross-border elements are involved;
- article 13 of the Act provides that the employees of any regulated company that offers financial services to the public must have sufficient professional expertise in their sector; it is unclear whether this Article applies only to intermediaries or to any regulated company; neither the CBFA nor Parliament has addressed this issue to date.

It is worth noting that the CBFA has created a special section on its website ([www.CBFA.be](http://www.CBFA.be)) to answer questions about the interpretation and application of the Financial Intermediary Act.

## 5. New Securitisation Rules

The Act of 16 June 2006 amended and clarified certain provisions of the Collective Investment Act. The clarifications relate to securities issued by an Institutional stitutional SIC/VBS. Funding for these securities must be provided at all times by specific types of institutional or professional investors, and they can only be assigned to qualifying institutional or professional investors.

The Act of 16 June 2006 confirms that an Institutional SIC/VBS shall not lose its institutional status:

- in the event of an admission of securities issued by an Institutional SIC/VBS to a regulated market; or
- when securities issued by an Institutional SIC/VBS are held, through third parties, by investors other than institutional or professional investors,
- provided the SIC/VBS can demonstrate that it has taken all appropriate measures to ensure that the holders of the securities are institutional or professional investors. Such measures are described in a Royal Decree of 15 September 2006.

These new provisions will promote the use of Institutional SIC/VBS for securitisation transactions involving the placement of securities on regulated markets.

## 6. Extension of Directors' Liability

The umbrella Act of 20 July 2006 created new rules on directors' liability for certain tax and social security obligations. The Act entered into effect on 1 August 2006.

The new rules include:

- in the event of non-payment of income tax withheld by a company, the directors responsible for daily management (i.e., for this purpose, anyone who de iure or de facto has authority to manage the company) can be held jointly and severally liable if they have committed a wrongdoing within the meaning of Article 1382 of the Belgian Civil Code; this liability can be extended to other directors (not in charge of daily management); under certain circumstances, the Act creates a presumption of wrongdoing;
- directors or de facto managers can, in the event of bankruptcy, be held liable for the payment of social security contributions (including penalties, default interest and increases) owed by the bankrupt company if (i) they acted in a clearly and grossly negligent manner leading to the bankruptcy of the company or (ii) during the five years immediately preceding the bankruptcy, they were involved in two or more other bankruptcies, liquidations or similar events in which social security contributions remained unpaid; in the latter case, negligence shall be presumed;
- the social security administration can request information from the company about unpaid receivables if the company has not paid its social security contributions for two quarters over a one-year period and has not agreed on a reimbursement plan with the administration which it follows scrupulously; if the company fails to reply or provides incorrect information, the directors in charge of daily management can be held personally and jointly liable for all or any part of the unpaid amounts; other directors (not responsible for daily management) can also be held liable if it is established that they committed a wrongdoing that contributed to the non-payment.

## 7. Important Tax Developments

Key tax developments in 2006 include:

- notional interest deduction: the possibility for Belgian and foreign companies with a tax base in Belgium to deduct a percentage of their aggregate adjusted equity from their tax base;
- abolishment of the 0.5% capital contribution tax;
- Abbey National case (VAT exemption for management of special investment funds): the European Court of Justice ruled on 6 May 2006 that (i) the concept of “management” must be interpreted in all Member States in accordance with the interpretation of that term under Community law; (ii) the functions of a depositary of undertakings for collective investment (as mentioned in the UCITS Directive) do not fall within this concept; and (iii) third-party suppliers to whom administrative tasks are delegated benefit from the exemption, provided the delegation concerns specific essential managerial elements and not merely material or technical supplies (such as the making available of a system of information technology);
- shareholder liability for the sale of a “cash company”: any shareholder that directly or indirectly holds more than 33 percent of a Belgian company and transfers at least 75 percent of its shareholding less than one year after having acquired it can be held jointly and severally liable with the company for any unsettled tax claims. The foregoing applies only if at least 75% of the company’s assets comprise receivables, fixed financial assets, investments and cash. Such liability does not apply to a transfer of shares in a listed company or to companies subject to oversight by the CBFA;
- introduction of a 1.1% tax on all life insurance premiums paid by individuals residing in Belgium;
- further to a judgment of the European Court of Justice of 22 June 2006 and an amendment to Belgian law which will enter into effect in 2007, all coordination centres authorised before 17 February 2003 (the date of the European Commission’s decision that such centres violate EU law) may apply for an extension valid until 31 December 2010;
- the Act of 25 April 2006 on the taxation of movable income amended the non-resident income tax and withholding tax obligations for foreign movable income paid in Belgium; the most important change with respect to withholding tax is that a Belgian bank, stock exchange or clearing house that pays income indirectly to a non-resident recipient through an intermediary need not withhold tax; this obligation is transferred to the intermediary.

## 8. Sector-Level Collective Bargaining Agreements

Various important amendments were made in 2006 to sector-level collective bargaining agreements:

- in the banking sector, the collective bargaining agreement of 15 June 2006 for groups at risk (i.e., employees who require additional training in order to maintain a competitive position within the company) provides that all banks should have agreed on a collective bargaining agreement defining the term “groups at risk” before 31 December 2006;
- with respect to brokerage, the collective bargaining agreement of 4 May 2006 on job security provides for a specific procedure to be followed in the event of multiple dismissals further to a merger or acquisition; if this procedure is not followed, the employee is entitled to receive EUR 1,800.

## 9. Non-compete Clause Concluded after Termination of an Employment Contract

On 29 May 2006, the Minister of Finance and Social Affairs answered a Parliamentary question on the tax and social security consequences of a non-compete clause concluded after termination of an employment contract. The Minister’s position is that even if non-compete compensation is paid after termination of the employment contract, by virtue of a separate agreement, this compensation should still be subject to tax. As regards social security contributions, the Minister adopted a different stance stating that “compensation paid pursuant to an agreement concluded after termination of an employment contract shall not be considered remuneration, provided it is not disguised severance pay and is not granted by virtue of the employment contract”. Therefore, social security contributions will not usually be due.

Even though answers to Parliamentary questions do not have force of law, they could influence future litigation on this topic.

## 10. Competition/Banksys

On 31 August 2006, the Belgian Competition Council closed the long-standing Banksys case.

Proceedings were opened against Banksys, which operates payment systems in Belgium, for alleged abuse of dominance: excessive and discriminatory merchant acquisition fees and terminal rental fees, unduly restrictive exit terms for terminal rental agreements, and cross-subsidisation between Banksys’s terminal activities (which are subject to competition) and merchant acquisition activities (where Banksys has a de facto monopoly).

In an interim decision of 29 June 2004, the Competition Council held that Banksys was dominant on a number of markets related to its payment-card system. However, before ruling on the question of abuse, the Council ordered a more detailed investigation into Banksys's pricing.

An expert's report was submitted, but Banksys offered up a number of commitments in order to assuage the authorities' concerns, including:

- an undertaking to offer distinct contracts for acquiring services and terminals;
- an undertaking to maintain a number of price reductions introduced in 2004;
- a relaxation of exit terms for terminal rental agreements.

The Competition Council accepted these commitments in its decision of 31 August 2006 and closed the case without ruling on whether Banksys's conduct was in fact abusive.



# 2007 Regulatory

## 11. Transparency Directive

The Transparency Directive establishes requirements in relation to the disclosure of periodic and ongoing information (including the disclosure of major shareholdings) about issuers whose securities are admitted to trading on a regulated market in the European Union. The Transparency Directive must be implemented in Belgium by 20 January 2007. With the exception of the rules on publication of periodical information described below, Belgium has yet to implement the Directive.

The Directive sets minimum harmonisation standards, thus allowing the Member States to impose additional or more stringent requirements. Host Member States, however, are not allowed to impose stricter requirements on issuers regulated by another Member State.

The Directive does not provide for the harmonisation of liability rules. In cross-border situations, conflict of law questions will therefore continue to arise. In order to determine the applicable liability rules, these questions must be resolved first.

### Disclosure of Periodic and Ongoing Information by Issuers

Pursuant to the Transparency Directive, a company whose securities are listed on a regulated market in the European Union must, as from 2007, publish annual and half-year financial reports. If the relevant listed company does not publish quarterly financial reports, it must also publish interim management statements during the first and second six-month periods of its financial year.

The interim management statements, which are a new phenomenon, must contain information on such listed company's financial position and on any material events and transactions that have taken place during the period between the beginning of the relevant six-month period and the date of publication of the statement. In principle, the interim management statements need not include numeric information.

Each Member State's national law will determine who is responsible for the preparation and publication of the relevant information. The Transparency Directive does not provide for harmonisation of the Member State's liability regimes.

The rules on the disclosure of periodic information have been implemented into Belgian law by a Royal Decree of 4 October 2006, amending the Issuers Obligations Decree on periodic information to be published by listed companies.

The key new rules, which will enter into force on 1 January 2007, include:

- listed companies will be able to meet the disclosure of periodic information requirement by posting this information on their website, provided the website meets at least the following criteria (the CBFA may impose additional technical requirements):
  - a separate up-to-date section must be reserved for financial and mandatory information, available free of charge to everyone;
  - a calendar of the company's periodic publications should be posted and any delay in publication should be indicated;
  - anyone should be able to subscribe free of charge to receive relevant information by e-mail simultaneously with the release of periodic and occasional information;
  - the website must contain all information that the company has published in the past three years under the applicable legislation;
  - warnings and information published by the CBFA regarding the company must be posted.
- in certain circumstances, a listed company can choose to publish its information in one or more newspapers rather than via its website, e.g. information required to exercise shareholders' rights, as well as semi-annual, annual and quarterly reports and information related to inside information; in the latter case, the information can also be posted on the stock exchange's website;
- regular and consolidated annual accounts and any related reports, any special reports required under the Company Code, and any draft amendments to the articles of association need not be published in full (i.e. annual information) provided that the company indicates on its website or in a newspaper advertisement where such information can be consulted or obtained free of charge; these rules are however merely a confirmation of existing practice;
- all information that must be published must also be submitted to the CBFA and to the stock exchange (which, up till now, only received information in specific cases) no later than the time at which it is made available to the public.

The CBFA has updated its circular on the obligations of issuers of financial instruments admitted to trading on a Belgian regulated market, a practitioner's guide to the obligations of listed companies to make information public, to reflect the above changes. The updated circular is available on the CBFA's website ([www.CBFA.com](http://www.CBFA.com)).

## Disclosure of Major Shareholdings

The Transparency Directive sets out new rules on the disclosure of major holdings of shares of an issuer admitted to trading on a regulated market in the European Union and to which voting rights attach.

Although no bill has been prepared so far, the implementation into Belgian law of the Directive is expected to bring about, amongst other things, the following changes to the existing legislation:

- only outstanding issued securities with voting rights attached will be taken into account in determining whether a threshold has been met;
- the applicable thresholds will remain 5% and multiples of 5%, but the King could be empowered to add an initial 3% threshold; in the meantime, the possibility for issuers to stipulate an initial 3% threshold will be maintained;
- disclosure will be required not only for the acquisition or disposal of shares (as is currently the case) but also when the shareholder reaches, exceeds or falls below a threshold as a result of corporate events that result in changes to the breakdown of voting rights provided that the information is disclosed by the issuer;
- the shareholder must notify the issuer as soon as possible and, in any case, no later than four trading days thereafter; the issuer in turn must disclose the information upon receipt and, in any case, no later than three trading days thereafter;
- a transitional provision will most likely be adopted, pursuant to which a new (and in accordance with the new rules) “basis notification” will be required from all existing major shareholders.

## 12. Markets in Financial Instruments Directive (MiFID)

MiFID, which is to replace the existing Investment Services Directive (ISD), will introduce significant changes to the regulation of investment firms and financial markets. In September 2006, the European Commission published an implementing Directive and an implementing Regulation, which add technical detail to the framework provided by MiFID.

MiFID contains rules with respect to:

- the manner in which investment firms must be organised and managed;
- the conduct of business by investment firms (e.g. classification of clients, content of marketing communications, “know your customer” and best execution);
- regulated markets and multilateral trading facilities;
- trade transparency;
- cross-border business, branches and passporting.

Noteworthy features include:

- the introduction of commodity derivatives as a financial instrument;
- the expansion of investment services to include investment advice – as a result, firms whose sole business is to provide investment advice will need to obtain a licence as an investment firm;
- the abolition of the concentration rule, which means that Member States can no longer require investment firms to route orders only to stock exchanges;
- the introduction of new rules relating to cross-border business – only the home state's rules will apply to the provision of services by an investment firm in another Member State, unless the business is conducted through a branch of the firm within the host state's territory. In the latter event, the host state's rules will apply;
- the introduction of a new and very detailed system of client classification incorporating, among other things, the possibility to opt-up or opt-down;
- the requirement to compile a client profile will no longer apply to execution-only transactions with respect to certain non-complex products if the service is provided at the client's initiative;
- the introduction of rules regarding pre-trade transparency.

Member States are supposed to implement MiFID in their national legislation by 31 January 2007. Investment firms must comply with the implementing legislation from 1 November 2007. The purpose of this nine-month transitional period is to allow firms sufficient time to prepare.

Belgium has yet to implement these provisions. Implementation will be accomplished by a Royal Decree, adopted pursuant to a delegation of authority from Parliament. This delegation will be included in the Act implementing the Takeover Directive. Since no bill for implementation of the Takeover Directive has been introduced in Parliament on 31 December 2006, it is very likely that the 31 January 2007 deadline will not be met.

## 13. Clearing and Settlement Code of Conduct

In July 2006, the European Commission announced it would favour an industry-led approach to a more efficient and integrated post-trading market in the European Union, as opposed to issuing a Directive.

In response to the Commission's announcement, the three main industry associations, FESE, EACH and ECSDA, prepared a code of conduct, to which their members subscribed on 7 November 2006.

The Clearing and Settlement Code of Conduct addresses three main issues and establishes deadlines for the following implementation measures:

- transparency of prices and services should have been implemented by the end of 2006;
- access and interoperability conditions must be established by 30 June 2007; and
- services must be unbundled and accounting separation implemented by 1 January 2008.

A strict monitoring system will be set up to ensure compliance with the provisions of the code.

Initially, the code will apply exclusively to cash equities. However, the European Commission is encouraging signatories to apply all or some of its provisions to most or all financial instruments. It is indeed expected that the scope of the code will gradually be extended to cover other financial instruments.

Euroclear has stated that even though the code will initially apply only to equities, the international central securities depository and all national central securities depositories of the Euroclear group intend to apply the code from the outset to all asset classes, including fixed income.

# Corporate and Tax

## 14. Simplification of Capital Maintenance Rules

The purpose of the Capital Maintenance Directive is to simplify provisions pertaining to the capital of limited-liability companies in order to enhance corporate efficiency and increase competitiveness without undermining the protection afforded the company's shareholders and creditors.

The Directive lists a number of situations where, if the value of the contribution can be fairly determined by reference to generally accepted criteria, a valuation report by the company's auditor on contributions in kind to the capital of a limited-liability company will no longer be required. However, minority shareholders (holding jointly at least 5% of the company's subscribed capital) are protected in that they will be able to require a valuation of the contribution by an independent expert nonetheless.

When implementing the Directive, the Member States may:

- allow the general meeting of shareholders to empower the company's management body to carry out a share redemption over a period of five years (currently three years), if there is a threat of serious, imminent harm to the company;
- allow, under certain conditions, limited-liability companies to provide third parties with financial assistance;
- establish an administrative or judicial procedure to safeguard creditors' interests in the event of a capital reduction.

The deadline for implementation of the Directive into national law is 15 April 2008. No bill has been prepared so far.

## 15. Abolition of Bearer Securities and the Introduction of Dematerialised Shares

As of 1 January 2008, Belgian companies will only be allowed to issue registered or dematerialised securities (stock, profit-sharing certificates, bonds, warrants or notes). It will still be possible, however, for Belgian companies to issue bearer securities if these are subject to foreign law and are not physically delivered in Belgium. Bearer securities issued prior to 23 December 2005 must be converted into registered or dematerialised securities before 31 December 2013. Securities issued after 23 December 2005 but before 1 January 2008 must be converted before 31 December 2012.

The Dematerialisation Act foresees several measures (such as the cancellation of dividends and voting rights) and sanctions (including criminal sanctions, i.e. a fine ranging from EUR 1,000 to EUR 500,000) for those who fail to meet this requirement.

The Dematerialisation Act provides that dematerialised securities can now be booked directly with settlement institutions (Euroclear Belgium and the National Bank of Belgium) and held with licensed account holders. The activities of the latter are subject to oversight by the CBFA and to specific regulations.

## 16. The SEVIC Case

On 13 December 2005, the European Court of Justice issued an important judgment in the SEVIC case, in which it ruled that legal barriers preventing cross-border mergers can be contrary to the freedom of establishment as provided for by Articles 43 and 48 of the EC Treaty. The Court's judgment was issued following the refusal by a German court, the Amtsgericht in Neuwied, to order the registration of a merger between the German company SEVIC Systems AG and the Luxembourg company Security Concept SA in which SEVIC Systems AG was to remain as the surviving company. The reason given by the German court for its refusal was that the German Transformation of Companies Act (Umwandlungsgesetz) explicitly provided that the Act was only applicable to legal entities established in Germany.

The European Court of Justice ruled that the fact that the relevant German legislation treated companies differently according to whether the merger in question was a domestic or cross-border one constituted a restriction on the freedom of establishment. It further ruled that such a restriction can only be justified if:

- it pursues a legitimate objective compatible with the EC Treaty;
- it is justified by imperative reasons in the public interest;
- it is appropriate for the attainment of the objective pursued but does not go beyond what is necessary for that purpose.

The Court concluded that because the German legislation in all cases prevented mergers between German and non-German entities, this constituted an unjustified restriction on the freedom of establishment.

As a consequence of the SEVIC judgment, it is now the general view that cross-border mergers between legal entities from different Member States can be effected, and that such a merger may only be prohibited if there are compelling reasons for doing so in the particular case at hand.

However, Belgian law does not guarantee tax neutrality to cross-border mergers if the absorbing company is not a Belgian resident for tax purposes. Belgium will most likely regularise these aspects in the course of 2007.

## 17. Cross-border Mergers - Implementation of the Merger Directive

On 15 December 2005, the Merger Directive came into force. Member States are required to have implemented it in their national legislation by no later than 15 December 2007. No bill has been presented to Parliament so far.

The Merger Directive facilitates mergers between companies from different Member States. It is expected to reduce the cost of such transactions, while guaranteeing sufficient legal certainty and enabling as many companies as possible to benefit. The Directive allows cross-border transactions such as acquisitions to be structured in the form of a cross-border merger rather than a share purchase transaction, which may be more complicated.

A cross-border merger, by operation of law, results in:

- the transfer of all of the assets and liabilities of each of the merging companies to the surviving entity or the new entity created through the merger;
- the shareholders of the merging companies becoming shareholders of the surviving company or the new company;
- the merging companies ceasing to exist.

It is generally believed that as a consequence of the SEVIC judgment (see Section 16 above), cross-border mergers between companies from different Member States have been possible since 13 December 2005, even without the Merger Directive having been implemented in local legislation. This would apply to all forms of legal entities referred to in the SEVIC judgment, not only those to which the Directive is applicable. The principles developed by the European Court of Justice will remain important not only in the course of the national implementation of the Merger Directive, but also as a guideline for the interpretation of all cross-border issues, including those related to the Directive. However, Belgium will have to amend its national law as indicated in Section 16 above.

As far as employee participation is concerned, the Merger Directive refers on most points to the SE Employee Directive. Within this framework, employee participation is generally deemed to relate to the influence of employees' representatives on the structure of a company, in particular the composition of a company's supervisory board or, in the case of a company with a one-tier board structure, its management board/administrative board. The relevant provisions on employee participation rights are designed to prevent the circumvention of these rights by means of a cross-border merger, but to nevertheless allow for the latter to be completed without undue delay.

## 18. Tax Merger Directive

The Tax Merger Directive must be fully implemented before 1 January 2007. Thus far, only a draft bill has been prepared in Belgium, and important issues such as the exemption of capital gains and the tax consequences of the transfer of a company's registered office are still under discussion.

## 19. Implementation of the Takeover Directive

The aim of the Takeover Directive is to regulate takeover bids on the securities of companies governed by the laws of Member States and whose securities are admitted to trading on a regulated market.

Once implemented, the Directive will necessarily imply two major changes to existing Belgian law:

- the obligation to launch a mandatory takeover bid will be triggered by the acquisition of a specific percentage of the voting rights in the target company (the current proposal for Belgium is 30%) and no longer by the acquisition of control for a price above the market price; if this threshold is exceeded, the acquiror will be obliged to make a takeover bid for all existing securities of the target company, at an equitable price;
- a sell-out right (also called a reverse squeeze-out) will be introduced, pursuant to which minority shareholders will be entitled to require the majority shareholder to buy their shares at a fair price; this right may be exercised once the majority shareholder acquires through a public offer 90% or 95% of the voting rights in the target company; the final threshold will be determined by each Member State; it is likely that the Belgian threshold will be 95%, as this percentage currently triggers the squeeze-out right.

In addition, the Directive requires the Member States to implement two sets of measures aimed at reducing the possibilities to oppose a takeover bid:

- the board of directors of the target company may not take any action (other than seeking alternative bids) liable to result in frustration of the bid without the prior consent of the general meeting of shareholders;

- all specific rights of shareholders are “frozen” during the offer period (including rights normally exercised at any shareholders’ meeting called to adopt defensive measures) and during the first general meeting of shareholders after such period if the offeror holds more than 75% of the voting rights. During this time, restrictions on the transfer of securities or on voting rights and the right of shareholders concerning the appointment or removal of board members shall not be enforceable against the offeror. Moreover, any securities normally carrying multiple votes shall carry only one.

However, as the Directive is the result of political negotiations, its adoption was only possible with an opt-out possibility. Thus, each Member State can decide not to implement these measures. Belgium will most probably opt-out but Belgian law will allow companies to opt-in (or to make the opt-in subject to reciprocity, i.e. opt-in would only apply if the law applicable to the offeror contains such measures).

Finally, the Directive also contains rules regarding offer documentation. In this respect, the Directive introduces a European passport for offer documents: these shall be recognised in any other Member State without re-approval, except for translation and limited additional information which may be required by the supervisory authority in the host country.

The deadline for implementation of the Directive was 20 May 2006.

The CBFA’s proposal to implement the Takeover Directive was approved by the government on 6 October 2006 and is expected to be submitted to Parliament in early January 2007.

On 13 December 2006, the European Commission sent a “reasoned opinion” to Belgium for failure to implement the Takeover Directive by the established deadline. If the Commission does not receive a satisfactory reply to its opinion within two months, it can refer the case to the European Court of Justice.

## 20. Withholding Tax on Payments Made by Collective Investment Undertakings

Since the entry into force of the umbrella Act of 27 December 2005, withholding tax is due on payments made to resident individuals in Belgium by both European and non-European collective investment undertakings, except when the undertaking has invested less than 40% of its assets in interest-bearing securities. Until the end of 2007, this tax will only apply to the interest component of any payments made. As from 2008, it will be levied on the entire amount, including interest and any capital gain on the underlying investment.

## 21. Extension of Parent-Subsidiary Withholding Tax Exemption

The Belgian government has declared that the withholding tax exemptions currently applicable under the Parent-Subsidiary Directive will be extended as of 1 January 2007 to dividends paid to recipients in countries that have signed a treaty for the avoidance of double taxation with Belgium. In order to benefit from the exemption, the shareholding in the subsidiary must be at least 15% (10% as of 1 January 2009) and should have been held for at least one year. The new threshold is lower than that currently applicable under the treaties.

## 22. Extended Powers of Tax Collectors

The umbrella Act of 27 December 2006 extended to tax collectors investigative powers already wielded by the tax authorities.

As of 1 January 2007, tax collectors can carry out investigations and request information from banks and other financial institutions if they suspect the existence or planning of tax evasion. Financial institutions now have a duty to cooperate with the tax collectors if requested to provide information on the financial situation of their clients.

## 23. New Tax Treaty with the US

On 27 November 2006, Belgium and the United States signed a new treaty for the avoidance of double taxation. The main features of the new treaty include the abolition of withholding tax on dividends paid by a Belgian subsidiary to a US parent (if a stake of at least 10% has been held for twelve months prior to payment of the dividend) and vice versa (in this event, the threshold is 80%), subject to a limitation of benefits clause. An unconditional exemption is available for pension funds. Interest and royalties, in general, are only taxable in the country of residence, with no withholding tax. The new rules are expected to enter into force on 1 January 2008 (depending on the date of ratification of the treaty by both countries).



# Miscellaneous

## 24. Rome Convention

On 15 December 2005, the European Commission published a proposal for the conversion of the Rome Convention into an EU regulation. It is not certain when the regulation will enter into force and whether it will affect existing contracts.

Among other things, the regulation will contain the following:

- a new conflicts of law rule on the proprietary aspects of assignment and contractual subrogation: the law of the place of residence or business of the assignor will determine whether the assignment may be relied upon against third parties; in Belgium, this rule already exists in the Private International Law Code, but there is much debate on its appropriateness especially in the context of assignment (and pledging) of bank accounts and other similar claims in the financial sector;
- amended rules to determine the applicable law in the absence of a choice of law clause: a hard and fast rule is proposed instead of the presumption, subject to an exception clause, that the contract is governed by the law of the place of residence of the party that is to effect the characteristic performance. This will increase legal certainty but reduce flexibility;
- an amended conflicts of law rule for consumer contracts: the possibility of choosing the law that governs a consumer contract will disappear; the law of the habitual place of residence of the consumer will apply;
- a definition of internationally mandatory rules;
- a conflicts of law rule on statutory offsetting;
- the possibility for parties to choose, as the applicable law, principles and rules recognised internationally or in the European Union but not constituting the law of a state.

This Regulation will take priority over the conflict of law rules contained in the Private International Law Code.

## 25. Insolvency

The most important development flagged in this area is a bill which will replace in its entirety the Judicial Composition Act. The bill was approved by the Government on 3 July 2006 and subsequently submitted to the Council of State, which rendered an opinion in November. The bill was expected to be introduced to Parliament at the beginning of 2007, but it is still uncertain whether the Government will be able to have it voted into law before the next elections. The proposed legislation adopts a more economic approach to restructuring procedures.

Major changes include:

- greater flexibility (often in favour of the debtor) in all phases of composition with creditors;
- a choice from amongst various types of solutions linked to specific procedures (e.g. moratorium, preparing for a transfer of the business, etc.);
- a framework for out-of-court settlements and mediation; and
- a longer reorganization period.

Following the introduction of a new procedure to file claims in bankruptcy pursuant to the Act of 6 December 2005, no further changes are expected to the Bankruptcy Act in the near future; however, further refining of the “discharge” provisions cannot be excluded, since these continue to create uncertainty due to contradictory decisions of the lower courts and the Constitutional Court.

With regard to the legislation on personal insolvency (consumers, non-merchants, etc.), certain provisions of the Act of 13 December 2005, substantially amending the existing 1998 Act, will enter into effect in the course of 2007. In general, the 2005 Act enhances the efficiency of the procedure to the debtor’s benefit. In particular, the scope of discharge is extended in all respects.

## 26. Benelux Trademark and Design Law Transformed

The Benelux Convention on Intellectual Property of 25 February 2005 (BCIP) entered into force on 1 September 2006. As a result, the rather artificial distinction between the former Benelux Trademark Office and the Benelux Design Office has been abolished. Both entities have been replaced by the Benelux Organisation for Intellectual Property, which consists of several bodies. The most important of these is the Benelux Office for Intellectual Property, which is now the official body for the registration of trademarks and designs in Benelux.

## 27. Implementation of Intellectual Property Enforcement Directive

The deadline for implementation of the IP Enforcement Directive was 29 April 2006. Belgium failed to meet this deadline, but it should be noted that Belgian intellectual property law is already to a large extent in line with the Directive's requirements. In certain fields, Belgian law even provides greater protection for intellectual property rights.

A draft bill transposing the Directive and containing certain provisions that go beyond the Directive's requirements is currently being debated. Its main features include:

- the availability of descriptive seizure proceedings to the holders of all intellectual property rights, including trademarks, designs and models, geographic indicators of origin and topographies of semi-conductor products, even though the possibility for the holders of such rights to seek descriptive relief was already largely recognised by the courts;
- changes in jurisdiction: currently, both the attachments judges (*juges des saisies/beslagrechter*) and the courts of first instance have jurisdiction to grant descriptive relief; under the bill, only a very limited number of courts will have jurisdiction to hear such proceedings;
- confirmation of the possibility to obtain injunctive relief for infringement of an intellectual property right if the infringement also constitutes a violation of the Fair Trade Practices Act and possibility for the defendant in cease-and-desist proceedings to ask the president of the competent court to declare the intellectual property right invalid;
- possibility for the courts to award damages in the event of a bad faith infringement of any intellectual property right, taking into account the profit made by the infringing party; currently, this possibility only exists for the holders of certain intellectual property rights, such as Benelux trademarks and patents.

## 28. Implementation of the Unfair Commercial Practices Directive

On 11 May 2005, the European Parliament and the Council adopted the Unfair Commercial Practices Directive concerning unfair business-to-consumer commercial practices in the internal market. This Directive amends several other directives, including the Distance Marketing Directive.

#### The Unfair Commercial Practices Directive

- establishes a single general prohibition of unfair commercial practices distorting consumers' economic behaviour;
- sets criteria to be used in identifying such unfair commercial practices;
- introduces new concepts, such as misleading acts, misleading omissions, aggressive commercial practices or undue influence; and
- contains a black list of misleading and aggressive commercial practices that are considered unfair in all circumstances and must be prohibited in every Member State.

The Belgian Fair Trade Practices Act currently prohibits, in general terms, many of the acts covered by the Directive (for example, the Fair Trade Practices Act contains a general ban on misleading advertising). The transposition of the Directive will, however, necessitate significant amendments to the Fair Trade Practices Act, as the current Belgian prohibitions are less detailed than those required by the Directive.

The deadline for implementation of the Unfair Commercial Practices Directive is 12 June 2007. A draft bill transposing it is currently being debated. Although the exact content of the amendments is still unclear, the bill is expected to include the following features:

amended definitions of "consumer" and "product"; the Fair Trade Practices Act may contain two different definitions of these terms following implementation;

the introduction of new concepts and definitions such as "commercial practices", "to materially distort the economic behaviour of consumers", "undue influence", "misleading acts", "misleading omissions" and "aggressive commercial practices"; and

a black list of misleading and aggressive commercial practices considered unfair and prohibited throughout the European Union.

## 29. Transfer of Pensions in the Event of a Merger

In event of a transfer of undertakings or a merger, the transferee was, until recently, not obliged to take over any old age, invalidity or survivor's benefits under supplementary schemes, unless such schemes were embedded in a collective bargaining agreement. This position has since been changed. The Pension Arrangements Act provides that in the event of a transfer of undertakings or a merger, the employees can choose to transfer their pension reserves to the transferee's pension scheme if the transferee decides not to take over the transferor's scheme. The Act will enter into force on 1 January 2007.

## Contact

We hope you found this overview useful and welcome the opportunity to answer any questions or address any concerns you may have with respect to its content. For questions regarding the Brussels Capital Markets and Financial Services Group, please contact:

**Marc van der Haegen**

*Corporate & Finance Partner*

T. +32 2 566 81 72

E. marc.vanderhaegen@nautadutilh.com

**Benoît Feron**

*Corporate & Finance Partner*

T. +32 2 566 81 44

E. benoit.feron@nautadutilh.com

**Dirk Van Gerven**

*Corporate & Finance Partner*

T. +32 2 566 81 74

E. dirk.vangerven@nautadutilh.com

**Anne Fontaine**

*Corporate & Finance Partner*

T. +32 2 566 81 46

E. anne.fontaine@nautadutilh.com

For questions or comments regarding the content of this publication, please contact your regular NautaDutilh advisor or:

**Anne Fontaine**

*Corporate & Finance Partner*

T. +32 2 566 81 46

E. anne.fontaine@nautadutilh.com

**Giulia Mauri**

*Corporate & Finance Senior Associate*

T. +32 2 566 82 08

E. giulia.mauri@nautadutilh.com

[www.nautadutilh.com](http://www.nautadutilh.com)

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