Belgian Listed Companies Dashboard

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Editorial

NautaDutilh is pleased to provide Belgian listed companies with a dashboard to help them follow up on important regulatory developments at the European and Belgian levels.

This is our eighth dashboard for Belgian listed companies, covering the period from 1 January 2018 until 31 August 2018.

Two particularly important developments in the past six months which will impact listed companies are:

1. **The reform of the Company Code**
   The new Company Code is still a work in progress and is expected to apply as from 1 January 2019. For more information about the reform of the Company Code, be sure to visit our new portal here.

2. **The revision of the Corporate Governance Code**
   The revised Corporate Governance Code should, in principle, enter into force on 1 January 2020.

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1. Reform of the Belgian Company Code

As indicated in our last dashboard, the Belgian Company Code will soon be overhauled.

On 25 May 2018, the Council of Ministers approved on second reading a bill to introduce a new code of companies and associations. The vote is scheduled for later this year. In the meantime the bill will be brought before and discussed in Parliament. It is expected to be applicable as from 1 January 2019.

The new code will introduce major changes intended to make Belgian corporate law more flexible and attractive to foreign investors and align it to today's digital world.

For Belgian listed companies, some of the most important changes that will be introduced are the following:

- An NV/SA will be able to have either a one-tier management structure or a two-tier system with a supervisory board. It will be possible to remove directors at will and even appoint them in the articles of association.
- In addition, it will be possible to issue shares with double voting rights (for long-term shareholders in listed companies).
- Finally, the nationality of a company will no longer be determined by the location of its head office or effective place of management but rather by the location of its registered office, regardless of where the company conducts business.

The introduction of double-voting shares in listed companies is fast approaching

Listed companies will soon be able to introduce shares with double voting rights for long-term shareholders, by way of a decision of the general meeting of shareholders approved by a two-thirds majority and amendment of the articles of association. Companies formed before the entry into force of the new Code of Companies and Associations (expected to occur on 1 January 2019) may however introduce such double-voting shares by a simple majority vote (and amendment of the articles of association) until 30 June 2020.

A dedicated portal to guide you through the labyrinth of changes

Given the vast number of changes the reform entails, NautaDutilh has created a **secure online platform** (the "**Portal**") with all relevant information about the new code in a central place.

Our team of specialised lawyers, some of whom were closely involved in preparing the new Company Code, will keep you informed of everything you need to know about the upcoming reform through presentations, articles and biweekly newsletters. As the idea is to create an interactive community, the Portal is also a place where users can share their comments and ask questions.

2. Prospectus Regulation

2.1 Revised Prospectus Act

2.1.1 Background

The revised Prospectus Act, implementing Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market and repealing Directive 2003/71/EC (the "**Prospectus Regulation**"), was published in the *Belgian State Gazette* on 20 July 2018. It repeals and replaces the Act of 16 June 2006 on public offers of investment instruments and the admission of investment instruments to trading on regulated markets.

2.1.2 Key aspects

Scope

As was already the case, the revised Prospectus Act applies to "investment instruments" in general. The scope of application of the revised Prospectus Act is thus broader than the Prospectus Regulation which applies only to "movables securities".

Prospectus requirement

The revised Prospectus Act requires the publication of a prospectus for:

- public offers for consideration exceeding EUR 5 million, if the securities are not admitted to trading on an MTF;
- public offers for consideration exceeding EUR 8 million, if the securities are admitted to trading on an MTF; and
- admissions to trading on a regulated market, regardless of the value of the transaction.

Subject to what is mentioned below, the Belgian legislature thus used the flexibility provided for by the Prospectus Regulation to exempt offers between EUR 1 million and EUR 8 million.

Information note requirement

The revised Prospectus Act requires the publication of an information note for:

- public offers for consideration below EUR 5 million without admission to trading on an MTF; and
- public offers for consideration below EUR 8 million with admission to trading on an MTF.

For such offers, a prospectus is thus not required. The information note is a more concise document containing only key information for investors. It is not subject to *a priori* review or approval by the FSMA. The FSMA may however conduct an *a posteriori* review of the note's content and take administrative measures or impose sanctions if the information note does not comply with the requirements of the revised Prospectus Act.

De *minimis* regime

No prospectus, information note or notification to the FSMA is required for public offers for an amount below EUR 500,000, provided the subscription per investor is capped at EUR 5,000.

Abolished exemptions

Under the revised Prospectus Act, the following offers are no longer exempt from the obligation to publish a prospectus and will thus fall under the abovementioned rules:

- offers of shares in cooperative companies;
- offers of securities to employees under incentive plans; and
- crowdfunding offers.

2.1.3 Transitional rules

Most provisions of the revised Prospectus Act will enter into force on 21 July 2019.

However, the provisions regarding the new thresholds for the obligation to publish a prospectus or information note entered into force on 21 July 2018 (offers that were pending on that date are governed by the old rules).

An exception applies however for (i) offers of shares in cooperative companies and (ii) offers of securities to employees under incentive plans, which were exempt from the obligation to publish a prospectus under the old rules. If such offers were in progress on 21 July 2018, they will fall under the new rules as from 21 October 2018.

New Q&A on profit forecasts

On 28 March 2018, ESMA updated its Q&A on prospectus-related issues to include a new section on profit forecasts. In doing so, ESMA aims to clarify how to identify profit forecasts in the context of prospectuses, amongst other documents, by further explaining the definition set out in the Prospectus Regulation 809/2004 and providing examples. ESMA stresses that the Prospectus Regulation's definition of a profit forecast should be carried over to the new prospectus regime which will become applicable on 21 July 2019 (see above).

2.2 ESMA's technical advice on the Prospectus Regulation

Background

Following a public consultation in 2017 on draft regulatory technical standards (RTS) in respect of the new Prospectus Regulation, ESMA published on 3 April 2018 technical advice to the Commission (the "**Technical Advice**").

Key aspects

Format and content of the prospectus

The Technical Advice suggests maintaining, for the most part, the existing prospectus regime. A number of changes are proposed, however, in order to, on the one hand, ease requirements for issuers and reduce the cost and administrative burden of using a prospectus and, on the other hand, introduce a number of additional disclosure requirements deemed necessary for investor protection.

The content of the new Universal Registration Document (URD) for issuers of securities listed on a regulated market or MTF is further detailed. The URD serves as a shelf registration document which issuers can use to expedite offers of securities.

The Technical Advice also proposes lighter disclosure requirements for secondary offerings, given that certain information is already publicly available.

Format and content of the EU growth prospectus

The Technical Advice sets out the minimum disclosure requirements for the EU growth prospectus, the order in which information should be disclosed, and the format and content of the summary. To better take into account the specific needs of SMEs, the extent of the disclosure requirements is based on the issuer's size and the complexity of the transaction, balanced against the need to ensure investor protection.

Scrutiny and approval of the prospectus

ESMA further develops criteria for the scrutiny, approval and filing of a prospectus to ensure better convergence between national authorities.

Next steps

Once endorsed by the European Commission, the Technical Advice will form the basis of the Commission's delegated acts, which must be adopted by 21 January 2019.

2.3 ESMA's regulatory technical standards (RTS) on the implementation of certain provisions of the Prospectus Regulation

Background

Following a public consultation in 2017 on draft regulatory technical standards (RTS) in respect of the new Prospectus Regulation, ESMA published the final version of its RTS on 17 July 2018.

Key aspects

The RTS cover the five areas to which the public consultation related, namely:

- key financial information to be provided in the summary;
- data for that classification of prospectuses and practical arrangements to ensure that such data is machine readable;
- advertisements circulated to retail investors;
- requirements for supplements; and
- the publication of prospectuses.

Next steps

The RTS have been submitted to the Commission for endorsement.

Submission of an information note to the FSMA soon to be required for SOP offerings

The exemption from the obligation to publish a prospectus for SOP offerings, provided for by the Act of 16 June 2006 on public offers of public investments and the admission of investment instruments to trading on regulated markets, has been abolished.

The legislature found that this exemption had become superfluous due to the introduction of the information note requirement for offers below EUR 5 million/EUR 8 million and the *de minimis* regime.

That being said, SOP offerings should still be considered public offerings. This means for example that an SOP offering to fewer than 150 people will not be subject to the revised Prospectus Act and the

Public consultations relating to the Prospectus Regulation

On 13 July 2018, ESMA launched two public consultations relating to the new Prospectus Regulation on (i) the minimum content of a document published in the context of an offer/admission to trading of securities related to a takeover, merger or division and (ii) draft guidelines on risk factors featured in a prospectus.

The consultations close on 5 October 2018. ESMA will then provide technical advice to the Commission and publish its final reports by 31 March 2019.

3. New Belgian
Corporate Governance Code

As indicated in our previous dashboard, the Corporate Governance Committee wishes to reform the 2009 Corporate Governance Code and thus launched, amongst other initiatives, a public consultation on the subject, which ran from 19 December 2017 until 28 February 2018.

As the revision of the Corporate Governance Code (the "**2020 Code**") is closely linked to the reform of the Company Code, it will only be published after finalisation of the latter.

The Corporate Governance Committee has prepared a table comparing the 2009 Code and the 2020 Code, available here.

The 2020 Code must still be approved by royal decree and is expected to enter into force on 1 January 2020. However, listed companies may decide to apply the new principles to financial years as from 1 January 2018.

Practical guide to the disclosure of non-financial information

We reported in our previous dashboard on the introduction of new disclosure requirements in annual reports relating to non-financial and diversity information. These new reporting requirements apply to financial years starting on or after 1 January 2017.

To assist companies with these new reporting obligations, a practical guide has been prepared and is available here.

4. Increased
Cross-border mobility

The European Commission has published a first proposal for a directive amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions. It sets out simplified procedures at the EU level for companies to move from one EU Member State to another, merge or divide into two or more new entities across borders.

The Commission has also published a second proposal for a directive amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law. The proposal aims to reduce inefficiencies, unnecessary costs and delays in registering a company as a legal entity, filing documents with the business register and applying for publication in the national gazette. The objective is to allow companies to register, file and update their information completely online, without the need for physical appearance (unless fraud is suspected).

The proposals will be submitted to the Council of the European Union and the European Parliament for consideration and adoption. Once adopted, the new directive will have to be implemented by the Member States.

5. Belgian REIT reform

5.1 Background

Over the last few years, the Belgian government has demonstrated its commitment to making the Belgian real estate market more attractive by further developing the regulatory and tax framework applicable to Belgian REITs and introducing a new real estate vehicle, the GVBF/FIIS.

In this context, the Belgian legislature reformed the REIT legislation by the Act of 22 October 2017 and the Royal Decree of 23 April 2018 on regulated real estate companies.

5.2 Key aspects

Enhanced ability to create partnerships

Under the old rules, it was difficult for REITs to enter into partnerships due to protective measures that discouraged potential partners. The new rules ( ) provide for greater flexibility, as follows:

Minimum stake in other companies

✗	• A REIT had to have a minimum stake of 50% and exercise control • All subsidiaries had to have the same status (institutional REIT or ordinary company)
✓	• Minimum stake now 25% + 1 share • However, total fair market value of minority stakes cannot exceed 50% (FMV) of the REIT's total assets • Subsidiaries can be a mix of institutional REITs and ordinary companies

Deadlock

✗	In the event of deadlock with a partner, JV agreement needed to enable the REIT to buy out the partner
✓	Buy-out right is no longer mandatory

Institutional REIT

✗	• A listed REIT had to hold a minimum 50% stake • Co-shareholders in an institutional REIT had to be institutional investors • I-REIT had to have its own organisation
✓	• Stake of a listed REIT can be as low as 25% • Retail investors can now also be shareholders in an institutional REIT (minimum investment of EUR 100,000) • I-REIT can now rely on the organisation of the listed REIT

Partnership between REITs

✗	Difficult for two REITs to enter into a partnership (given the prohibition on two REITs jointly controlling the JV)
✓	Prohibition has been lifted: two REITs can now exercise joint control over a subsidiary

Exit value

✗	Sale of asset to JV partner had to be at least at fair market value
✓	Sale can be below fair market value, if the price determination mechanism is agreed upfront

New assets classes for REIT investments

A REIT can only invest in asset classes provided for by the REIT legislation. Until the 2018 reform, these asset classes were limited to real estate. The 2018 reform introduced new asset classes to encourage infrastructure investment, as further described below.

Energy infrastructure

Eligible assets: assets related to the production, storage or distribution of energy or water, water purification, and waste disposal facilities.

PPPs

- Extended possibility to take part in infrastructure/building-related PPPs.
- Examples: wind farms, tunnels, parking garages, roads, bridges, etc.
- DBM + F, DBFM, DBFMO contracts (D&F only is not possible); concessions and other types of PPPs.
- Not mandatory to have a right in rem.
- Long-term projects: services (for which REIT involvement is expected) with a term of at least 5 years.
- During the initial phase of the project (up to 2 years after the construction phase or longer, depending on PPP requirements), stake of the REIT can even be lower than 25%.
- Possible for REITs to grant loans and sureties in relation to such PPPs.

Greater leverage possibilities for new asset classes

- Leverage can exceed 65% at the SPV level; such leverage is not taken into account to determine the maximum threshold of 65% leverage on a consolidated basis.
- Conditions: investment at the SPV level, no exclusive control of the SPV, exposure of listed REIT must be limited (equity investment and debt funding commitment).
- Prohibition on the provision of mortgages/sureties with a value in excess of 75% of the relevant asset does not apply.
- Conditions: investment at the SPV level (unlisted REIT level), exposure of listed REIT must be limited (equity investment and debt funding commitment).

Social REIT: a new type of (non-profit) REIT

A new type of REIT was introduced by the reform: the so-called "social REIT". Its purpose is to stimulate (public) investment in real estate infrastructure intended for the elderly and disabled.

A social REIT benefits from the same tax status as a REIT, but with lighter regulation, and has the following main characteristics.

- It should seek a limited profit or no profit.
  - A social REIT must take the form of a cooperative company with a social purpose (à *finalité sociale/met sociaal oogmerk*).
  - Dividend: max. 6% of nominal value of shares.
  - Winding-up: liquidation proceeds must be allocated to a non-profit project (no distribution to shareholders).

- It benefits from lighter regulation.
  - Listing not mandatory.
  - Liquidity provided by variable capital (cooperative company); social REIT must set up a liquidity reserve in that respect; redemption at par value (no bonus for exiting shareholders – return only through dividends).
  - Can opt for Belgian GAAP (IFRS not required).

- It is subject to the following main restrictions.
  - Narrow definition of real estate as an asset class.
  - No subsidiaries.
  - Leverage: max. 33% (instead of 65%).
  - Retail shareholders: max. investment of EUR 20,000/investor (alternatively, investment of at least EUR 100,000)

6. Belgian entities required to disclose their UBOs by 30 November 2018

Belgian entities are required to gather information about their ultimate beneficial owners ("**UBOs**") and enter it in a central UBO register by 30 November 2018. This obligation also applies to listed companies in addition to the substantial shareholder disclosure requirements already in place.

In its fight against the use of the financial system for the purposes of money laundering or terrorist financing, the European Union has imposed far-reaching measures – including the requirement for EU member states to each establish a central UBO register – by means of the Fourth and Fifth Anti-Money Laundering Directives (Directives 2015/849 and 2018/843). In Belgium, most of the Directive's provisions have been implemented in national law through the Act of 18 September 2017 for the prevention of money laundering and terrorist financing and for the restriction of the use of cash (the "Act"). The Act provides for the establishment of a Belgian UBO register, but does not elaborate on the modalities in this regard.

The Royal Decree of 30 July 2018 on the working modalities of the UBO register (the "**Royal Decree**") has now finalised the implementation process by providing detailed rules on the operation of the UBO Register.

6.1 Who are an entity's UBOs ?

Under the Act, the UBOs of an entity consist of the following individuals (natural persons):

(i) the individual(s) who ultimately owns/own or controls/control that entity through direct or indirect ownership of a sufficient percentage of the voting rights or shares or other ownership interest in that entity;

(ii) the individual(s) with control over the entity by other means (such as a shareholders' agreement).

With regard to (i), where an individual holds more than 25% of the voting rights or a shareholding or other ownership interest of more than 25%, this will constitute an indication of direct ownership by that individual. Where the relevant voting rights or shareholding or other ownership interest are/is held by an entity that is under the control of one or more individuals, or by multiple entities that are under the control of the same individual(s), this will constitute an indication of indirect ownership by the individual(s) in question.

(iii) If, after having exhausted all possible means and provided there are no grounds for suspicion, no individual meeting the criteria of points (i) or (ii) is identified or if there is any doubt that the individual(s) identified is/are the beneficial owner(s), the individual(s) who holds/hold the position of senior managing official(s) of the entity will be deemed to be its UBO(s). Where this is the case, records of the steps taken to identify the entity's UBO(s) must be drawn up and kept.

6.2 What are the modalities and deadlines for compliance with the disclosure obligation?

The UBO register will be maintained by the Federal Public Service for Finance (the General Administration of Treasury).

The entity's directors or legal representatives must enter the requisite information in the UBO register before 30 November 2018 or, in the event of subsequent changes in the composition or details of the UBOs, within a maximum of one month following the change in question. In addition, the UBO information in the register must be confirmed annually. The medium for the disclosure, updating and confirmation of UBO information will probably be the electronic MyMinFin platform, for which a Belgian e-ID is required.

Failure to comply with the disclosure requirements in a timely manner is punishable by a court-imposed fine ranging from EUR 50 to EUR 5,000 (art. 155 of the Act). Furthermore, in some cases the Minister of Finance can impose an administrative penalty ranging from EUR 250 to EUR 50,000 (art. 132(6) of the Act), taking into consideration the circumstances of non-compliance.

6.3 Who can access the information?

Everybody will have access to the UBO register. However, the Royal Decree distinguishes three categories of parties with different access rights:

(i) the competent authorities (i.e. those entrusted with enforcement of the anti-money laundering rules, such as the Belgian tax authorities);

(ii) "obliged entities" (i.e. parties that are required to apply the anti-money laundering rules when providing professional services, e.g. banks, lawyers and auditors; these parties are listed in article 5 of the Act);

(iii) members of the general public.

A UBO will not be notified when a search of the UBO register involving his/her information is performed. However, UBOs will (most likely through the MyMinFin application) receive a copy of all information recorded about them in the register.

While the competent authorities and obliged entities will have access to all information, members of the general public will only have access to more limited information. Obliged entities and members of the general public will have to pay a fee (still to be determined) to access the UBO register.

Some of the technical modalities regarding access to the UBO Register still have to be finalised. However, it is already clear that information requests will be archived for ten years.

Recent public consultations by the European Commission

Fitness check on the EU framework for public reporting by companies
The European Commission conducted a fitness check of the EU framework for public reporting by companies to assess whether the framework is still fit for its purpose. The consultation (i) assessed the relevance, efficiency, consistency and coherence of the EU public reporting framework, (ii) reviewed specific aspects of the existing legislation as required by EU law, and (iii) assessed whether the EU reporting framework is fit for new challenges (including digitalisation and sustainability).

The consultation ran from 21 March 2018 until 21 July 2018.

Public consultation on minimum requirements related to the transmission of information for the exercise of shareholder rights
The European Commission conducted a consultation on requirements related to the transmission of information for the exercise of shareholder rights, in particular a draft implementing regulation laying down minimum requirements implementing the provisions of DIrective 2007/36/EC of the European Parliament and of the Council as regards shareholder identification, the transmission of information and the facilitation of the exercise of shareholder rights.

In order to safeguard the personal privacy and security of UBOs, two main limitations apply: firstly, it will not be possible to perform a general search to receive a list of all entities of which an individual is a UBO (i.e. searches are only possible per entity using the entity registration number); secondly, a UBO can request that all or part of the information about him/her in the register be kept confidential and not disclosed (e.g. if disclosure would expose the UBO to a disproportionate risk or a risk of being kidnapped, if the UBO is a minor, etc.).

6.4 What should entities do now?

Now that it is clear what information must be disclosed, entities are advised to ensure that all the relevant data is gathered and that a legal representative of the entity has her/his e-ID (with pin code) ready.

FAQ on certain matters relating to takeover bids and market abuse

On 15 January 2018, the FSMA published FAQ setting out its policy on certain matters related to takeover bids and market abuse. In particular, the FSMA addresses the disclosure obligations and the specific market abuse rules applicable to bidders when preparing a bid.

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