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**INTERNATIONAL CORPORATE
UPDATE**

Amendments to Belgian Company Law Provide Flexibility for Corporate Transactions

By Royal Decree dated October 8, 2008, the Belgian Company Code implemented EU Directive 2006/68/EC (regarding “the formation of public limited liability companies and the maintenance and alteration of their capital”). The amendments, which went into effect on January 1, 2009, intend to provide more flexibility for corporate transactions and relate to the following matters:

- Contributions in kind
- The buy-back of shares
- Financial assistance

CONTRIBUTIONS IN KIND

Upon the incorporation of a company or the increase of a company’s capital, any contributions in kind must be valued by an auditor in order to prevent the dilution of the capital and to ensure the underlying economic reality. The auditor’s report must be filed with the clerk’s office of the relevant commercial court, and must be included in the deed of incorporation or capital increase and published in the Belgian Official Gazette.

The involvement of an auditor is mandatory and is often seen as burdensome and expensive without bringing much additional value. The newly adopted amendments to the Company Code no longer require the valuation by an auditor and a correlating auditor’s report in the following circumstances:

- The contribution of securities or money-market instruments that are traded on one or more regulated markets;
- The contribution of assets (other than securities or money-market instruments) that have already been the subject of a fair value opinion by an auditor; or
- The contribution of assets (other than securities or money-market instruments) whose fair value is derived from the statutory accounts of the previous financial year.

In these situations there is a clear point of reference for the valuation of the contribution. However, it is still possible to apply the more burdensome procedure and request an auditor’s report. Also, any minority shareholder holding at least 5 percent may demand a valuation by an auditor.



BUY-BACK OF SHARES

The buy-back by a company of its own shares is, for different reasons, a very popular and common transaction. The newly adopted changes to the legal framework on such transactions provide for greater flexibility.

Following are the requirements with regard to the buy-back of shares:

- Prior authorization by the shareholders, which must determine the framework of the acquisition, the minimum and maximum consideration for the shares and the maximum number of shares to be acquired. The maximum duration of the authorization for the buy-back has been increased to five years (up from 18 months);
- The value of the acquired shares cannot exceed 20 percent of the subscribed capital (up from 10 percent);
- Only fully paid-up shares can be acquired;
- An equal offer must be made to all shareholders; and
- A non-distributable reserve, equal to the acquisition price, must be on the company's balance sheet.

FINANCIAL ASSISTANCE

The prohibition on financial assistance means that a company may not advance funds, nor make loans or provide security, with a view to the acquisition of its shares by a third party. In the past that prohibition was absolute and formed a stumbling block to many transactions.

The new company law relaxes the outright prohibition of financial assistance, which is now permitted under certain conditions:

- The transaction takes place at fair market conditions, especially with regard to interest received and the security provided;
- The credit standing of each party must be duly investigated;
- Prior approval from the shareholders, acting in accordance with the rules for quorum and majority applicable to amending the company's articles of association;
- The board of directors must present a written report, indicating the reasons for the transaction, the corporate interest, the conditions under which the transaction is entered into, the risks involved in the transaction for the liquidity and solvency of the company and the price at which the third party is to acquire the shares;
- A financial assistance report must be filed with the clerk's office of the relevant commercial court and must be published in the Belgian Official Gazette;



- The financial assistance may at no time exceed the amount that the company can distribute as dividend and a non-distributable reserve, equal to the amount of the financial assistance, must be on the company's balance sheet; and
- When a company buys back some of its own shares (see above) and wishes to sell these shares again, and the company grants financial assistance for a third party to acquire the shares, such third-party acquisition must be made at a fair price.

The existing exceptions on financial assistance for credit institutions and management buy-outs remain unchanged.

FOR MORE INFORMATION

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