New Rules for Mergers and De-mergers in Belgium

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The law of 8 January 2012 (the “Law”) implementing European Directive 2009/109/EC\(^1\) regarding the reporting and information requirements for mergers and de-mergers and amending the Belgian Company Code (BCC) has been published in the Belgian Official Gazette of 18 January 2012. It applies to mergers or de-mergers in relation to which the proposal is filed at the clerk’s office of the commercial court after its entry into force on 28 January 2012\(^2\).

1. Reporting requirements

1.1 (DE-)MERGER PROPOSAL

The (de-)merger proposal, to be drawn up by the board of all companies participating in the transaction, remains required. It is, however, no longer sufficient to file this proposal with the commercial court with a simple communication relating thereto in the Annexes to the Belgian Official Gazette, unless such communication contains a hyperlink to the respective companies’ websites where the entire proposal can be consulted. Otherwise, the proposal must now be published by excerpt in the Annexes to the Belgian Official Gazette\(^3\).

This amendment is no simplification for companies not having a website. For all other companies, a publication of the proposal by way of communication containing such a hyperlink will only become possible provided that the systems used by the relevant administrations are modernized, allowing the use of such technology. This is currently, however, not (yet) the case.

1.2 MANAGEMENT REPORT

In line with the procedure relating to de-mergers\(^4\), the detailed report of the board required in the framework of a merger is now no longer necessary if agreed to by all shareholders and holders of other voting securities of all companies involved in the merger\(^5\). In respect of a de-merger by incorporation of new companies, the Law moreover introduces an exemption for the preparation of this report in the event that the shares issued by the newly incorporated companies are issued to the shareholders of the de-merged company pro rata to their rights in the de-merged company\(^6\).

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\(^2\) Article 33 of the Law – Absent any special provision in the Law, it enters into force 10 days after its publication in the Belgian Official Gazette.

\(^3\) Amendments to articles 693, 706, 719, 728, 743 and 772/7 BCC.

\(^4\) Articles 734 and 749 BCC.

\(^5\) Amendments to articles 694 and 707 BCC – Such a report already not being required in case of a so-called simplified merger.

\(^6\) Amendment to article 745 BCC.
1.3 AUDIT REPORT

Following the previous most recent amendments to the rules relating to mergers and de-mergers\(^7\), all shareholders and holders of other voting securities of all companies involved in the merger could already agree that the **auditor’s report** relating to the merger proposal was not required\(^8\). For de-mergers, this was previously already possible\(^9\).

The new Law, however, clarifies\(^10\) that the (auditor’s) reporting requirements in relation to a contribution in kind\(^11\) are only disappplied at the level of the acquiring company if an auditor’s report is prepared in the framework of the (de-)merger transaction, implying that absent such auditor’s report, the reporting requirements for a contribution in kind need to be complied with. It is to be noted that the new provisions do not merely refer to the auditor’s report required in the framework of such a contribution in kind, but to the entire applicable article, also requiring a special management report. Arguably, reference to the entire article also implies that all provisions of said article apply. If that would be the case, the new Law not only reintroduces the obligation to provide for an audit report\(^12\), but also maintains the obligation of a management report.

As with the management report referred to in 1.2 above, no audit report on the de-merger is to be prepared in case of a de-merger by incorporation of new companies in the event that the shares issued by the newly incorporated companies are issued to the shareholders of the de-merging company pro rata to their rights in the de-merging company\(^13\).

2. Information requirements

2.1 INTERIM INFORMATION

The board is no longer obliged to provide **interim information** on significant changes in the financial position of the companies involved in the merger, if all shareholders and holders of other voting securities of all companies participating to the merger have decided so\(^14\). This possibility is not provided for in case of de-mergers. For a de-merger by incorporation of new companies, this obligation is, however, again no longer required (exemption) in the event that the shares issued

\(^7\) Law of 30 December 2009.
\(^8\) Articles 695 and 708 BCC – Such a report already not being required in case of a so-called simplified merger.
\(^9\) Articles 734 and 749 BCC.
\(^10\) Amendments to Articles 695, 705/708, 731 and 742/746 BCC.
\(^11\) Articles 313, 423 or 602 BCC (capital increase) or Articles 219, 399 or 444 BCC (incorporation).
\(^12\) Which obligation disappeared according to various authors as a result of the Law of 30 December 2009.
\(^13\) Amendment to Article 746 BCC.
\(^14\) Amendments to Articles 696 and 709 BCC. This was not required for so-called simplified mergers, where such a report was already not required. This possibility has not been provided in case of de-mergers (Articles 732 and 747 BCC), where such obligation hence remains unless the new exemption applies (cfr. footnote 15).
by the newly incorporated companies are issued to the shareholders of the de-
merging company pro rata to their rights in the de-merging company.\textsuperscript{15}

2.2 FINANCIAL INFORMATION

If the latest approved annual accounts have been established as per a period
ending more than six months prior to date of the (de-)merger proposal, \textit{interim
financial information} no longer needs to be made available if the company makes
semi-annual figures available or if all shareholders and holders of other voting
securities of all companies involved in the (de-)merger agree so.\textsuperscript{16}

2.3 COMMUNICATION

Any shareholder can, individually, expressly and in writing, agree that all
information and documentation in relation to the transaction may be sent to it by
email.

The companies involved in the transaction also no longer have to keep all such
information and documentation at the disposal of the shareholders at their
respective registered offices, if these are made available for consultation on their
websites for a continuous period of one month prior to the shareholders’ meetings
that are to resolve on the transaction. Moreover, if these documents can be
downloaded and printed, the company shall be exempted from the obligation to
provide copies thereof to shareholders’ that request so. All information and
documentation is to remain available on the website until one month after the
shareholders of the companies have resolved upon the transaction.\textsuperscript{17}

3. Shareholders’ approval

3.1 MERGERS

In case of a \textbf{merger by absorption}, the shareholders’ meeting of the absorbing
company no longer needs to approve the merger provided that (i) it is a company
limited by shares (\textit{naamloze vennootschap / société anonyme}) absorbing another
company limited by shares (\textit{naamloze vennootschap / société anonyme}), (ii)
holding at least 90 per cent (but not all) of the shares and other voting securities in
the absorbed company and (iii) that the following conditions are met:

- the absorbing company has published the merger proposal at least six weeks
  prior to the date of the shareholders’ meeting of the absorbed company
  resolving on the merger; and

\textsuperscript{15} Amendment to Article 747 BCC.
\textsuperscript{16} Amendments to Articles 697, 710, 720, 733 and 748 BCC.
\textsuperscript{17} Amendments to articles 697, 710, 720, 733 and 748 BCC.
• all information and documentation relating to the merger (cfr. art. 697 BCC) must be made available to the shareholders at the registered office of the absorbing company.

Notwithstanding the foregoing, shareholders of the absorbing company representing 5 per cent of the share capital can still request the board to convocate a general shareholders’ meeting\(^\text{18}\). It is unclear how this will work in practice as a merger by absorption per definition involves a capital increase and the issuance of new shares at the level of the absorbing company, which always require shareholders’ approval. Hence, although the new rules do provide for the possibility not to have the shareholders of the absorbing company approve the “merger operation”, not much will change in practice because the shareholders could still need to convene (before a notary public) to approve the other aspects and consequences of the merger, which will moreover be described in the merger proposal.

A similar rule applies in case of a so-called simplified merger (where the absorbing company holds 100 per cent of the absorbed company). Although the introductory language of this new provision\(^\text{19}\) is not clear, the text suggests that this exemption indeed also only applies to the shareholders’ meeting of the absorbing company (and not to “the companies involved in the transaction”, which would have been rather problematic as one cannot simply dissolve an (absorbed) company without shareholders’ approval). It goes without saying that also in case of a simplified merger, a shareholders’ meeting at the level of the absorbing company will nevertheless still be required if changes to its bylaws are to be approved as a result of the merger (e.g. amendments to the corporate purpose cfr. art. 724 BCC).

### 3.2 DE-MERGERS

In case of a de-merger by acquisition\(^\text{20}\) the shareholders’ meeting of the de-merged (divided) company does not need to approve the de-merger if the acquiring companies own all (100 per cent) of the shares and the voting securities of the de-merged company and provided that (i) all companies involved in the de-merger have published the de-merger proposal at least six weeks prior to the de-merger becoming effective, (ii) all information and documentation relating to the de-merger (cfr. art. 733 BCC) was be made available to the shareholders at the registered office of the absorbing company and (iii) the information referred to in article 732 BCC encompasses all changes to the assets and liabilities after the date of the de-merger proposal.

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\(^{18}\) Article 699 BCC.

\(^{19}\) Article 722, §6 BCC.

\(^{20}\) Amendments to article 736 BCC.
4. Squeeze-out

Finally, the Law lowers the threshold for company limited by shares (naamloze vennootschap / société anonyme) to proceed with a squeeze-out\textsuperscript{21} in view of a merger by absorption of another company limited by shares (naamloze vennootschap / société anonyme) as it now requires 90 per cent (instead of 95 per cent) ownership of all shares and other voting securities of the to-be-absorbed company.

\textsuperscript{21} Article 513 BCC