Strelia Corporate and M&A Newsflash

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New Law on The Transfer of Significant Assets in Listed Companies

With the Act of 27 March 2024 (the **Act**), the Belgian legislator introduces, among others, a shareholder approval requirement for transfers of significant assets in listed companies[1]. The new rule entered into force on 8 April 2024.

Background and rationale

Prior to the adoption of the Act, the transfer of (significant) assets was vested with the powers of the board of directors. The Belgian Code of Companies and Associations (**BCCA**) only sought the approval of the shareholders' meeting in a limited number of situations likely to affect the assets of the company, i.e. (i) corporate reorganization procedures such as merger, demerger or contribution of universality and (ii) public takeover bid. No shareholder approval or prior consultation was required in cases where the transfer of assets took the form of an asset deal.

The new Act introduces an important shift in terms of governance for listed companies: **any transfer of assets representing at least 75% of the total assets of a listed company must be approved by the shareholders' meeting.**

The rule aims at protecting the shareholders from being excluded from decisions likely to have a material impact on the company and its activities and being left with an empty shell.

This principle is now enshrined in a new article 7:151/1 of the BCCA.

In-scope companies and transactions

The new rule only applies to **listed companies**, i.e. Belgian companies whose shares are listed on a regulated market within the meaning of article 3, 7° of the act of 21 November 2017. It applies to transfers operated by the listed company itself, but also to transfers by (non-listed) subsidiaries of the listed company.

Only **disposal of assets** falls within the scope of the rule. On the contrary, the acquisition of significant assets is not captured by the new regulation.

The obligation to seek the shareholders' meeting approval only applies to **transfer of significant assets**. For the purpose of defining what qualifies as "significant", the Belgian legislator has opted for a quantitative test instead of a qualitative assessment. Consequently, the obligation will only be triggered to the extent that it concerns **75% or more of the assets of a listed company**. Unlike other jurisdictions where such a requisite has already been implemented, the Belgian legislator has thus opted for a relatively high threshold considering that a lower threshold would have a disproportionate impact on the in-scope companies' activities.

The 75% threshold must be assessed on the basis of the last published stand-alone annual accounts or, if the company publishes consolidated accounts, on the basis of the last published consolidated accounts.

In order to avoid circumventing the rule by artificially splitting up the disposal of assets into several transactions, the Belgian legislator has introduced a **12-month look-back period** obligation. Any transfer of assets made by the listed company or its (non-listed) subsidiaries over the last 12 months must be aggregated to calculate the 75% threshold,

[1] The Act also introduces changes with respect to the number of independent directors as well as rules regarding candidate-directors in listed companies. These changes are not addressed in this newsletter.

unless such transactions have already been approved by the shareholders' meeting. It is worth noting that any and all transfers that took place during the 12 look-back period must be aggregated. There is no de *minimis* and no exemption for ordinary course of business transactions.

For the rest, the criteria to be applied to calculate the 75% threshold may be laid down in a royal decree, after consultation with the Financial Services and Markets Authority (FSMA). Pending the adoption of such royal decree, the calculation of the 75% threshold remains unclear and may lead to difficulties in practice.

Exemption for intra-group transactions

The shareholders' approval is not a requisite when the assets are transferred by a listed company to one of its subsidiaries, unless the natural person or legal entity directly or indirectly controlling the listed company, holds directly or indirectly at least 25% of the share capital of the subsidiary concerned or a shareholding granting at least 25% in the distribution of profits.

Procedure

The board of directors must draw up a detailed special report explaining and justifying the contemplated disposal of significant assets and the consequences of the transaction for the company. A copy of this report must be made available to the holders of shares, profit shares, convertible obligations, subscription rights and certificates.

If the absence of such report, the decision of the shareholders will automatically be null and void.

An extraordinary shareholders' meeting must then be convened to resolve on the contemplated transfer. There is no specific quorum nor specific majority required. The decision can therefore be adopted by a simple majority of the vote cast.

Entry into force

The new regime entered into force on 8 April 2024. The Act does not provide any specific provision regarding a transitional regime. In the context of the preparatory works, the Minister of Justice has confirmed that the new regime shall apply to transfers signed as from the date of entry into force (i.e. 8 April 2024). The signing of the transaction is indeed the reference date to conduct the threshold test. In addition, transfers within the 12 months period preceding the date of entry into force shall be taken into account to assess the 75% threshold.

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