

Newsflash

10 January 2008

Financial Law

New law on public takeover bids

The law of 1 April 2007¹ and the complementary Royal Decree of 27 April 2007 implement the European Directive relating to public takeover bids² (hereafter the "Takeover Directive"). As from 1 September 2007, the new Belgian law on takeover bids is in effect.

1. Public takeover bid

Contrary to the previous law, the new law defines the term "public takeover bid" as "a bid addressed to the shareholders of the offeree company in order to acquire all or some of their securities, regardless of whether the bid is voluntary or mandatory" (Article 3§1.1°).

1.1. Mandatory bids

As from 1 September 2007, a person or a company that, either alone or in conjunction with third parties, directly or indirectly, acquires more than 30% of the voting securities issued by an offeree company admitted to a regulated market must make a bid for all securities giving access to a right to vote. An indirect acquisition of control can also give rise to a mandatory takeover bid.

1.2. Exceptions to the mandatory bid principle

There are exceptions to the obligatory takeover bid:

- In the context of a voluntary takeover bid;
- In case of a transfer between affiliates;
- In case there is another larger shareholder, or if a third party has control of the company;
- In case of a capital increase of a company in difficulty (Article 633, Companies Code);
- In the context of a capital increase with preferential rights, decided by the shareholders meeting;
- In case of a merger decided by a majority that does not include the entity holding more than 30% of the securities;

¹ M.B./B.S. 23 May 2007.

² Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.



- If the limit is exceeded by no more than 2%, on condition that the securities above the threshold are transferred within 12 months and that the voting rights linked to the securities above the thresholds are not exercised;
- In case of a gift or transfer of securities as a consequence of inheritance law or matrimonial property law;
- If the acquisition is made at no cost by a public foundation that falls under the Law of 27 June 1921;
- In the context of a fixed takeover of shares or a sale of a bond to the extent that the securities above the threshold will be transferred within 12 months, and that the voting rights linked to the securities above the thresholds will not be exercised;
- In case the offerer intends to carry out a *certification* ("certification/certificering"), to the extent that this occurs with the cooperation of the offeree company and that the certificates can, under all circumstances and without restriction, be traded for a period of three years after the acquisition.

(Article 52 of the Royal Decree)

2. Information concerning bids

2.1. Information requirements

All shareholders of the offeree company must be sufficiently well informed and have sufficient time to consider the bid.

2.2. Put up or shut up rule

This principle introduces the possibility for the Banking, Finance and Insurance Commission (CBFA) to ask any party intending to launch a public takeover bid to make its intentions public. If it appears from these declared intentions that the party is not planning to make a bid, then it may not do so for a following period of 6 months, unless this change can be justified by extraordinary circumstances. These circumstances will be evaluated by the CBFA.

2.3. Prospectus obligation

The offerer must draw up in advance a prospectus in either Dutch or French and submit it for approval to the CBFA. The prospectus must state the conditions of the bid and all useful information needed by the shareholders. The prospectus will only be published after approval by the CBFA.

2.4. Company response

In line with the French example, in the context of a public takeover bid, the board of directors of the offeree company should draw up a response after receiving the bid expressing its comments and standpoints. This company response must be published in the same way as the prospectus and must be supplemented if any



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important new developments occur. These regulations represent a considerable increase in the duties of the board of directors of the offeree company.

3. Passivity rule

The principle of “passivity” stated in the Takeover Directive implies that the board of the offeree company is required not to take any defensive measures upon being notified of the takeover bid. Belgium has however exercised its opt-out option not to apply the mandatory provisions of board passivity provided by the Takeover Directive. The existing protective measures therefore remain valid, unless the company itself decides to integrate the rules of the Directive in its articles of association.

4. Role of the CBFA

The CBFA is exclusively responsible for monitoring the application of this new law and its implementing decrees. The powers given to the CBFA are also far-reaching: It can impose fines, non-compliance penalties and even prison sentences when it establishes that there have been infringements of the new law and its implementing decrees. To monitor compliance, the CBFA can also demand that it is given all information, documents or papers that it considers necessary to carry out its supervisory task.

5. Transitional measures

The previous Law remained in force until 1 September 2007 and will continue to remain in force for public bids that were initiated prior to 1 September 2007 and that will remain valid after 1 September.

Shareholders who on 1 September 2007 own more than 30 % of the voting securities, alone or in conjunction with third parties, may notify the CBFA by 21 February 2008 at the latest, of this situation so that in case they or certain family circle members or closely linked companies acquire further shares or others join their concerted group (providing the initial shareholders group as notified maintains at least 30 % of the voting securities), they will not have to make a mandatory bid.

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