THE BELGIAN BILL TO AMEND THE CORPORATION LAW – NEW PERSPECTIVES FOR BELGIAN SECURITIES REGULATION

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1. Introduction

In late 1979, the Belgian Government submitted a comprehensive bill to amend the nation's company law for Parliamentary approval [1]. The proposal reflects 30 years of work which began in 1952, when the Government first appointed a commission to consider revisions. Though the bill itself proposes changes throughout the company law, this article focuses on the measures relating to creation of new types of securities, issuance of bonds, petitions for proxies, requirements regarding disclosure of information, and prevention of insider trading.

Before examining the particular areas of revision, three salient characteristics of the bill should be noted. First, the preparation of the bill was guided by studies of foreign law [2], and many of the proposals have been developed from this perspective [3]. The explanatory memorandum preceding the bill includes numerous references to French and German laws, as well as to Dutch, Italian, Swiss, English, and American laws [4]. The influence of comparative law is in large part the result of the presence of comparative law scholars on the commission that drafted the bill.

A second characteristic of the bill is that the drafters took into account developments in the European Economic Community (EEC) with respect to the harmonization of company law. The advantage of this approach is that the bill's provisions incorporate changes in the law which the drafters anticipated would be required under future EEC directives, thus reducing the likelihood that further changes will be needed. This advantage, however, may be limited. Efforts to harmonize company law within the EEC have progressed and shifted course since 1971, by which time the major provisions of the Belgian bill had already been drafted. Thus, the final directives of the EEC frequently differ greatly from the draft versions upon which the proposed Belgian provisions

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were based. The bill is therefore not entirely consistent with the Second, Third, and Fourth Directives [5].

A third notable characteristic of the bill is that recommendations of the Banking Commission, an administrative agency responsible for banking and securities regulation, influenced many of its provisions [6]. This influence may be attributed to three factors: the wide acceptance of its recommendations [7]; the presence of a Banking Commission representative both on the commission officially appointed to formulate the preliminary draft of the bill and on the later committee which prepared draft amendments; and the Commission's early and continuing activity with the Government in the field of minority shareholder protection reform.

2. New types of securities

The bill provides for the creation of three new types of securities: non-voting shares, subscription bonds, and variable capital company shares.

2.1. Non-voting shares

Under current Belgian law, all owners of capital stock are entitled to vote. While the bill acknowledges this principle, it follows the practice of other countries by permitting non-voting shares to be issued under certain conditions [8]. The explanatory memorandum indicates that the purpose of this provision is to facilitate access to capital markets by medium size businesses; the provision would permit them to receive new capital without imperiling the stability of management by modifying the structure of their voting stock.

Under the bill, the decision to issue non-voting shares must be made at a general shareholders' meeting. Due to the special nature of the transaction, the bill requires that the Board of Directors prepare a special report for the shareholders' meeting detailing the purpose of and justification for the issue of non-voting shares. In certain instances, the information in this report must also be submitted to the Banking Commission [9].

Non-voting shares may be issued subject to the following conditions.
(1) They may not represent more than one-third of the capital of the company.
(2) They must carry preferential dividend rights of 5% of their book or nominal value. The Articles of Incorporation may also provide for dividends in excess of the foregoing.
(3) In the event of a winding up, non-voting shareholders must be repaid their contributions before voting shareholders are permitted to participate in the liquidation. In addition, if the Articles of Incorporation so provide, non-voting shareholders may have the right to share in any liquidation surplus.
If the rights provided for in the bill are not granted or are subsequently revoked, the holders of non-voting stock automatically receive voting rights, notwithstanding any provision to the contrary. Moreover, the holders of non-voting shares are entitled to vote as a special class on any matter affecting their rights and such rights can be modified only upon such a vote [10].

If a subsequent issue of non-voting stock is being contemplated, the proposed law would require that senior holders of non-voting shares have the right to vote at the general shareholders’ meeting convened to consider the issue [11]. If the issue is approved, senior shareholders of non-voting stock would acquire pre-emptive subscription rights to newly authorized non-voting stock [12]. However, if the new shares are to carry voting rights, the holders of non-voting stock would acquire neither voting nor such pre-emptive subscription rights.

2.2. Subscription bonds (warrants)

Belgian law currently permits the issuance of bonds convertible into shares and bonds carrying subscription rights to purchase shares in the future at a fixed price [13]. The bill would augment existing law by providing for the issue of subscription rights as independent securities, enabling investors to secure the right to purchase shares in the future without purchasing debt instruments [14]. One of the advantages of the amendment is that it enables the company to achieve these purposes without issuing founders shares, thus avoiding the issuance of a second class of stock, which is the only presently available alternative [15].

The proposed reforms would permit a company to issue subscription bonds in registered or bearer form, if authorized to do so under its Articles of Incorporation and if it has not already issued founders shares. The duration of the subscription rights may not exceed ten years from the date of the company’s formation or from the date of the general shareholders’ meeting that approved the issue of the bonds, whichever is later. The terms under which the bonds are issued must include the date of subscription, the issue price of new shares, and the duration of the subscription rights.

As is the case with non-voting share issues, the Board of Directors must prepare a detailed report on the bond issue for the general meeting; in certain cases this report must also be submitted to the Banking Commission. In addition, because the problems of protecting subscription bondholders are the same as those connected with the issue of convertible bonds or bonds with subscription rights, certain provisions relating to the latter types of bonds apply to subscription bonds as well [16]. For example, as of the date the subscription bonds are issued, the company may not enter into any transaction that would reduce any of the bondholders’ rights unless the holders’ other rights are adjusted accordingly. When capital stock is to be increased, bond-
holders may exercise their subscription rights, notwithstanding any clause to the contrary. As stockholders, they will then be vested with the same pre-emptive rights as the other stockholders and may participate in the issue of new stock to the same extent as these other stockholders.

2.3. Stocks of variable capital companies

The bill creates a new form of commercial company: the variable capital company [17]. The organizational structure of the variable capital company is largely based upon the cooperative company or society. However, in order to prevent the recurrence of past abuses which flourished under the cooperative company form, the new variable capital company utilizes elements of the joint stock company and the private limited liability company.

The cooperative company is characterized by the fact that its capital varies automatically according to the admissions and exits of its members, by the active participation of its members in the company's business, and by the limitation placed on transfers of shares to non-members. These characteristics, however, are not formulated in the existing law. This omission led to abuses which the variable capital company, by formally incorporating these characteristics into its definition, is designed to eliminate. In the past, companies organized as cooperatives but permitted individuals not actively involved in the company's operations to purchase and withdraw shares, contrary to the principles underlying cooperative societies. Despite these historical abuses, the drafters of the bill thought it necessary to maintain the possibility of a company form in which the variability of capital would permit the entry and exit of associates. Nevertheless, because the philosophy underlying this form of enterprise is that persons involved in the undertaking share a common purpose or similar bond, the rules regulating the admission and departure of associates and limiting the transferability of shares are strict [18]. Certain other rules pertaining to variable capital companies are borrowed from those governing joint stock companies and private limited liability companies.

The limitations on the negotiability of shares of a variable capital company will normally prevent shares from being listed on stock exchanges. Public subscription of company shares, however, is not prohibited. Companies selling their shares publicly are subject to regulations that for the most part are taken from those applicable to joint stock companies.

3. Some new rules for the issue of bonds

The bill significantly modifies existing rules relating to the issue of bonds. The principal innovation is provision for the appointment of a trustee to exercise certain rights of bondholders, as in Switzerland, the Netherlands, and
the Anglo-Saxon nations [19]. Bondholders whose securities have been issued in the same offering form a group or assembly. When there are several classes of bonds, each class of bondholders will be grouped separately. Although the assemblies may meet together for the purpose of a vote, they vote by class. These groups operate to protect the interests of bondholders. They do not, however, have the status of a separate legal entity.

The resulting system is composed of a group representative, the assembly or assemblies of the bondholders, and the individual bondholders. According to the issue involved, the law divides the decision-making responsibility for questions involving bondholders' interests among the three groups, with the group representative responsible for making certain decisions, the assembly for certain others, and the individual bondholders for still others. The bill assigns the respective decision-making powers among the three groups [20].

The group representative may be appointed by the company issuing the bonds, chosen at the general meeting of the bondholders, or appointed by the Commercial Court. The representative is the authorized agent of the bondholders even though his salary is paid by the company. Although the same representative may represent several classes of bonds, he may sometimes act on behalf of one class, and at other times, on behalf of another. The organization and operation of the bondholders' assembly is modelled on those of the shareholders' meeting. Administrative costs of the assembly are borne either by the company or by the assembly itself. The purpose of this amendment is to establish a system, by means of a legal determination, which sets forth the respective powers of the representative, the assembly, and the individual bondholders as regards particular issues.

4. Petitions for proxies

Public petitions for proxies are rare in Belgium. Nevertheless, because several such requests have been made, the authors of the bill incorporated provisions to protect stockholders from whom proxies are solicited. These measures are based on the EEC's proposed Fifth Directive, which includes specific proxy rules designed to protect shareholders' interests [21]. The provisions can be divided into two categories: proxies soliciting voting rights and proxies soliciting rights other than voting rights.

The bill sets forth the following rules with respect to the public solicitation of proxies for the purpose of exercising voting rights at a general shareholders' meeting.

1. Notwithstanding any clause to the contrary, a proxy is granted for one meeting only or for a second meeting with the same agenda as the first one. A proxy is always revocable.

2. The request for a proxy must contain at least the following information:
(a) the identity and objectives of the person requesting the proxy;
(b) a list of the documents relating to the proxy solicitation that the
shareholders may request from the company or which may be inspected at
the company's registered office (e.g. minutes of the preceding general
meetings and materials addressed to shareholders at these meetings);
(c) the agenda and the text of proposals for each of the issues on the
agenda;
(d) a request for instructions on the exercise of voting rights for each of the
issues on the agenda;
(e) the manner in which the representative will exercise the voting rights in
the absence of instructions from the shareholders.
(3) All proxies must be in writing.
(4) The voting rights must be exercised in accordance with the shareholder's
instructions or, in the absence of instructions, in the manner set forth in the
proxy request.

The representative may deviate from the foregoing if circumstances arise
that were unknown at the time the proxy was requested or at the time the
instructions were mailed and if the shareholders' interests are thereby threa-
tened. In the event he so deviates, the representative must justify his actions to
the shareholders without delay.

The proxy rules are less rigorous when proxies are solicited from share-
holders in order to exercise shareholders' rights other than voting, such as
calling for a general meeting, bringing an action against the directors, or
requesting a court to appoint an auditor-investigator. The proxy must be in
writing and the individual seeking it must inform the shareholders of his
identity, his objectives, the right he wishes to exercise, and the manner in which
he intends to do so.

In addition, an individual planning to solicit any type of proxy from
associates of a joint stock company or of a variable capital company which
have offered share subscriptions to the public, appealed for funds which are
payable on demand, or issued bonds, must inform the Banking Commission of
his intentions five days before proxies are solicited, and must submit an
appropriate dossier to the Banking Commission. If the Commission has not
been advised of the petition, has not received a dossier, or deems that either
the shareholders are not sufficiently informed or that they might be misled
regarding the identity or objectives of the soliciting party, the Commission is
authorized to so inform both the company and the soliciting party. If ap-
propriate action is not taken by the concerned parties, the Commission may,
by a reasoned opinion appealable to the Council of State, suspend the petition
for up to three months and publicize its decision.
5. Information provided by companies

The bill makes several changes that give shareholders greater access to relevant information. Innovations in three areas deserve particular attention: information available at general meetings, periodic reporting requirements, and disclosure of information with regard to material changes.

5.1. Information available at general meetings

The authors of the bill found that shareholders would benefit if they were provided with special information when called to a general meeting to consider certain specific transactions. In these instances, the Board of Directors of a company will be required to prepare a report detailing the purpose of and justification for the proposed transaction [22].

The special informational requirements are triggered by transactions involving:

- the issue of non-voting shares;
- the issue of subscription bonds (warrants);
- the issue of convertible bonds or bonds with subscription rights;
- the capital increase by modification of the associates' commitments;
- the modification of the essential purpose of the company;
- the modification of the legal form of the company;
- the transfer of the registered office to a location outside of Belgium;
- a merger with a foreign company or with a company with a different legal form or a different essential purpose;
- a merger by absorption of another company or by the creation of a new company;
- a dissolution in order to transfer the company's assets to another company;
- the introduction, in the ordinary course of business, of restrictions on the free transferability of shares;
- any other fundamental changes in the company as determined by the Articles of Incorporation.

The bill also requires the company's Board of Directors to give the Banking Commission one month's notice before the date of the meeting, if the company is either a joint stock company, a variable capital company, or a cooperative company which has offered share subscriptions to the public, appealed for funds which are payable on demand, or issued bonds. This notice must be accompanied by the report prepared for the meeting and by a dossier drawn up in accordance with Banking Commission regulations [23]. If the Banking Commission is not notified, does not receive the dossier, or finds that the report either contains insufficient information or could be misleading to the shareholders, it will inform the company and each of its directors of the insufficiency. If corrective action is not taken, the Commission may, by stating
the grounds for its action, suspend the projected transaction for a maximum of
three months. The Commission may also make its decision public [24].

5.2. Periodic reporting requirements

The Royal Decree of October 8, 1976 [25], sets forth regulations governing
the preparation of the company's annual financial statement which is pre-
sented to the shareholders at the company's regularly scheduled yearly meet-
ing. At present, however, the law does not contain any periodic reporting
requirements. The bill would change this situation by giving the King, because
of his right to regulate annual information, the right to require the manage-
ments of the types of companies listed in section 5.1 supra, to make periodic
reports to their shareholders. In exercising this right, the King will also be
responsible for determining reporting dates and methods of distributing the
required information. The King also has the power to issue exemptions and to
authorize variations from these procedures.

5.3. Disclosure of information with regard to material changes

In anticipation of the EEC directive regulating admission to stock ex-
changes, the bill directs the Boards of Directors of listed companies to
publicize, without delay, any fact or decision which could materially influence
the company's stock price. This obligation, however, does not apply if publiciz-
ing such information could prejudice the company. In addition, if the Banking
Commission learns of an undisclosed material fact or decision, it may require
the company to make such information public according to the terms set forth
by the Banking Commission. If in such a case the company does not comply
with the Banking Commission's order, the Commission may publicize the
information itself [26].

6. Insider trading

The authors of the bill were concerned that the obligation to disclose
material information as it developed would not be sufficient to prevent insider
trading. Therefore, the bill specifically prohibits persons working for a com-
pany or having contacts within a company from engaging in transactions on
the basis of such still-privileged information [27].

The first constraint prohibits holders of privileged information from acquir-
ing or transferring securities on the basis of that information. In an action
against an inside trader, the Public Prosecutor must prove that the defendant
had privileged information and that he used it; conviction under this section
does not require the Prosecutor to prove speculative intent or an attempt to
realize a profit or avoid a loss.
Second, insiders may not pass privileged information to a third party. This prohibition assumes that the intent in passing privileged information is to benefit the third party before the information becomes public.

Third, insiders may not, on the basis of privileged information, recommend the purchase or sale of securities to a third party. Although this prohibition relates to the second in that both address situations in which a third party benefits from privileged information, it differs in that only the recommendation and not the privileged information itself is transmitted to the third party [28].

There is an important exception to the prohibitions against insider trading. Although the bill makes no distinction between transfers or acquisitions on or off the stock exchange [29], current Belgian securities law does make such a distinction. Under Belgian stock exchange regulations, transactions in listed securities must be executed in the stock exchange. There are, however, two exceptions to that rule under Belgian securities law: transactions in which the value of the securities transferred is at least ten million Belgian francs and transactions involving only parties not habitually engaged in off-the-market transfers [30].

In order to make the bill consistent with current Belgian securities law, the bill's prohibitions against insider trading are inapplicable to transactions outside the exchange where one party holds privileged information, so long as that information is conveyed to the other party before the transaction is completed [31].

The authors of the bill have attempted to stress the gravity of illegal insider trading, particularly as it affects the credibility of the stock market. They have provided for heavy penalties in an effort to create an effective deterrent [32]. The bill subjects the offender to the same penalties set forth in the Penal Code for breach of confidence. These penalties include imprisonment from one month to five years and fines ranging from twenty-six to five hundred Belgian francs, multiplied by a number, currently sixty, which offsets devaluation of the Belgian franc.

The explanatory memorandum adds that by assimilating insider trading with the crime of breach of confidence, professional sanctions [33], and the application of international conventions on the cooperation of judicial authorities [34] will also be available for use against the offender.

To ensure that the risks of violating the law are not outweighed by potential profits from insider trading, the bill makes the insider liable for a sum corresponding to the profit directly or indirectly acquired from the offense. The other party may also petition for the recision of the transaction.

The explanatory memorandum points out that prohibitions against insider trading would be more effective if factors such as the internationalization of business life were taken into account. In fashioning remedies, the bill's authors were particularly concerned about problems of enforcement that might arise
when orders are received from abroad. For example, in the case of an order transmitted to a Belgian stockbroker through an intermediary residing abroad, Belgian judicial authorities would be unable to pursue the intermediary under current law. The bill removes this obstacle by providing that the judicial authorities may require the person residing abroad to divulge the name and address of the person who gave him the order. This information will in turn permit the courts to pursue the offender, who would have otherwise remained unknown to them [35]. The bill's authors have accomplished this objective by devising a procedure which reconciles the needs for efficiency, speed, and justice for the accused [36].

If sufficient prima facie evidence exists that an offense has been committed and if one or more buy or sell orders have been transmitted to Belgium through an intermediary residing abroad, the court having jurisdiction over the stock exchange in which the order was executed may order the intermediary to divulge, within a fixed amount of time, the name(s) and address(es) of the person(s) who gave him the order(s). If such information is not forthcoming, and upon request of the Public Prosecutor, the court may prohibit the execution in Belgium of all orders transmitted through the intermediary for a period of one to ten years. The judgment pronouncing the prohibition shall be published by extract at the expense of the intermediary in the Moniteur Belge and in at least two daily newspapers. The text of the bill specifies the references that must be contained in the extract. Upon such publication, it becomes unlawful for any persons to collaborate in any way in the execution of orders transmitted by the censured individual.

7. Conclusion

In preparing their recommendations revising the Belgian securities laws as regards bond issues, the creation of new types of proxies, information disclosure, and insider trading, the authors of the bill have attempted to deal with current objectives and past abuses in a way which meets a dual objective: satisfaction of immediate domestic needs and incorporation, insofar as is possible, of projected needs expected to arise when the harmonization of EEC law is complete. Recent comparative law studies and Banking Commission recommendations have also had a significant impact in shaping the bill.
Notes


[5] Separate bills for implementing the Second and Fourth Directives are presently pending in Parliament (Doc. Ch. 1981–1982 no. 210 and S. 1980–1981 no. 250). It should be noted that not all deviations have been unintentional. The bill's authors have deliberately deviated from the provisions contemplated in the draft of the Fifth Directive: although the bill adopts the Fifth Directive's model of a dualistic system whereby management of the company is divided between a managing director or directors and a supervisory board, it does not incorporate the Fifth Directive's provision for employee participation in management.

[6] For information on the Banking Commission, see A. Bruyneel, The Belgian Commission Bancaire: Functions and Methods, 1 J. Comp. Corp. L. & Sec. Reg. 187 (1978). Several examples of Banking Commission recommendations included in the bill merit discussion. First, under the current law, pre-emptive rights for senior shareholders are not compulsory. Suggestions to grant these rights were disregarded when the company law was amended in 1913. The Banking Commission, however, has for a long time recommended that senior shareholders be granted pre-emptive rights automatically, notwithstanding the absence of any such statutory requirements. See the Commission's Reports for 1946–1947, at 77 et seq. and 1947–1948, at 58 et seq. The bill adopts the Commission's position, see Article 127, providing for shareholders' pre-emptive rights and stipulating that the right may be set aside only by a vote of the general shareholders' meeting, see the Commission's Report for 1960, at 104 et seq. The Commission also recommends that even if pre-emptive rights are set aside, the principle of shareholder equality should be respected, see the Commission's Reports for 1947–1948, at 59 et seq.; 1960, at 105; and 1967, at 167 et seq. The subscription price of the new shares should correspond to their real value, see the Commission's Reports for 1960, at 105; 1961, at 121; and 1967, at 167. Although the latter recommendations have not been included in the bill, their application would not be precluded if the bill is approved. When a provision of the bill reproduces a Banking Commission recommendation in principle, the recommendation remains valid as to the details or as to further questions which have not been explicitly dealt with in the bill. If the bill does not treat an issue which the Commission has reached with a recommendation, the Banking Commission's position remains valid as a recommendation.

In addition to granting pre-emptive rights to stockholders, the bill makes a company's acquisition of its own shares, a practice that has long been opposed by the Banking Commission, see, e.g., the Commission's Reports for 1947–1948, at 63 et seq. and 1966, at 131 et seq., virtually impossible. It accomplishes this by requiring complete unanimity: the acquisition and the conditions under which it is effected must be unanimously approved by a general shareholders' meeting at which all shareholders are present or represented. Article 87, §1.

The Banking Commission's concern with the potential abuses resulting from reciprocal shareholdings between two companies, see the Commission's Reports for 1950–1951, at 67 et seq., is also reflected in the bill. Reciprocal shareholdings between parent and subsidiary companies are prohibited, and reciprocal shareholdings between two independent companies are only permitted if each company owns less than ten percent of the other's capital. Articles 37 and 87, §7.

Finally, the bill authorizes the issue of new shares at a price below the par value of old shares; it responds, however, to the Commission's disapproval of the practice, see the Commission's Report for 1947–1948, at 68 et seq., by subjecting the practice to certain special information disclosure requirements, Article 129.
Most of the Banking Commission’s recommendations have been adopted into the writings of legal scholars and Belgian companies comply with them voluntarily. Sometimes, however, even when a Banking Commission recommendation is not accepted by a legal writer, companies nonetheless voluntarily comply. For example, legal writers have criticized the Banking Commission’s recommendations on the private sale of controlling interests. Companies, however, have largely followed the recommendations in the belief that even though the recommendations are subject to legal arguments, they represent an ethical standard which should be met. It should also be noted that these practices, with regard to Banking Commission recommendations, apply to all its recommendations and are not limited to those related to the bill under discussion.

Article 71.
Article 296.
Article 279.
Id.
Article 127.
Article 73.

Founders shares are shares that do not represent assets contributed in cash or in kind and that do not represent capital stock. They are issued to persons who have made contributions which are not eligible to be represented by capital stock.

Subscription bonds are independent rights to purchase securities; there is no underlying debt instrument. Convertible bonds are bonds which can be transformed into securities. Bonds with subscription rights are bonds which, although they themselves are not convertible into securities, enable the holder to purchase securities separately according to the terms of the bond.

The authors of the bill expect that the variable capital company will be used primarily by persons who wish to buy or sell goods in common, or to engage in research projects together or by family members desiring to put a family undertaking into corporate form.

Information to be included in the dossier is designed to enable the Banking Commission to gauge the sufficiency of the information included in the report. As such, the dossier may contain information which the Commission will not require to be included in the report because it feels it is not material from a shareholder’s point of view.

The system is strongly inspired by Title II of Royal Decree no. 185 of July 9, 1935, which governs the public issue of securities and the admission of securities to the stock exchange.

We have indicated that the bill grants the Banking Commission certain powers with respect to the disclosure of material information. In contrast, the Banking Commission has no authority in the area of insider trading. Nevertheless, the explanatory memorandum suggests that, given the relationship between the provisions on insider trading and disclosure of material
information, the judicial authorities should seek the advice of the Banking Commission with respect to legal actions involving insider trading. Doc. cit., at 164.

[29] These transactions may involve any security which is admitted to the official listing or traded on the public sales market without regard to the legal status of the issuer under public, private, Belgian or foreign law.

[31] Article 402, §2, al. 5.
[32] Id. at §2, al. 1, 2, and 4.
[33] See royal decree no. 22 of October 24, 1934.
[34] Doc. cit., at 164.
[36] Article 402, §3.

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