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Client Alert

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Proposed New Belgian Companies Code: so what for Lenders?

The government's proposal for a new Belgian Companies Code is a hot topic in the Belgian legal and business world. Among the most publicized changes are a cap on directors' liability for all company types and the abolition of the share capital for the private limited liability company (now BVBA/SPRL but to be renamed BV/SRL). No doubt good news for directors and shareholders but what does this mean for lenders?

Cap on directors' liability

The New Companies Code introduces a cap on the liability of all directors and daily managers for a fixed amount. The cap varies from EUR 250,000 to EUR 12,000,000 depending mostly on turnover and balance sheet total. It is an aggregate cap that applies for all directors together and that is to be shared between all creditors. The cap applies in case of proven negligence or even gross negligence, but it will not apply in case of fraudulent intent or intent to cause harm. Although parties cannot exclude the cap by contract, it applies only to directors' liability and not to contractual guarantees or other credit support provided by directors.

It remains to be seen whether the proposed cap will have an effect on the risk appetite of directors, especially if these directors benefit from D&O liability insurance up to the amount of the cap.

Abolition of share capital in BVBA/SPRL

The abolition of the share capital in the BVBA/SPRL may seem harmless at first. The minimum share capital requirement of 18,550 euro is insufficient to constitute a real protection of creditors. And, although the share capital is protected by a restriction on distribution, lenders often obtain more far-reaching contractual restrictions on distributions (*eg* in acquisition, leveraged, real estate or project financings).

The situation may however be different for more standardized types of corporate lending. Most of the times, lenders on such financings will benefit at most from a contractual restriction on capital reductions. But what happens with such contractual restriction following the outright abolition of the share capital by the proposed New Companies Code? Will such contractual restriction then be interpreted as catching the distribution of the equity that will replace the share capital? Or will it be without any further effect?

Fortunately, the New Companies Code introduces a new restriction on distributions by the BV/SRL, in the form of a liquidity based distribution test. This test requires the board of directors to justify in a report that, in accordance with reasonably expected developments, the company will continue to be in a position to satisfy its debts as they fall due within a period of at least twelve months from the distribution. If there is an auditor, he or she will need to review the accounting and financial aspects of such report.

For certain borrowers (especially those with a low share capital), this new legal restriction on distribution will certainly be very helpful and may in fact improve lenders' situation compared to the current Companies Code.

New criterion for applicability of Belgian company law

Another highly publicized change relates to the applicability of Belgian company law. Under the current law, Belgian company law applies if a company has its principal establishment in Belgium. Under the New Companies Code, Belgian company law will apply if a company has its registered office in Belgium. In other words, a factual and ambiguous criterion is replaced with an objective and easily verifiable one. This is good news for lenders. They will no longer be at risk of finding out after the fact that their counterparty's principal establishment was located in a different jurisdiction and hence governed by a different company law (resulting potentially in the invalidity of the financing).

In addition, the New Companies Code introduces a specific formal procedure for the transfer of registered office from Belgium to another jurisdiction (emigration) or the other way around (immigration). In case of emigration, creditors will have the right to request additional security within two months from the publication of the proposed emigration in the Belgian State Gazette. Again, good news for lenders in light of the additional legal certainty and protection of creditors.

A possible disadvantage of the new rules is that a discrepancy may arise between the applicable company law and the applicable insolvency law. Indeed, in accordance with the Recast Insolvency Regulation, the applicability of a national insolvency law will turn on the presence of a company's "centre of main interests". The registered office is no more than a rebuttable presumption.

Also, it remains to be seen whether the new rules will encourage companies to increase the use of foreign legal forms. Foreign legal advice would in such case be recommended to ensure that the necessary corporate approvals and signing authorities are in place before a loan agreement is entered into.

Further legislative process and timing for entry into effect

At the moment the new Belgian Companies Code is no more than a proposal of the Belgian government, submitted to Parliament on 4 June 2018. As such, it must still go through the legislative process. The expectation is nevertheless that the proposal will be approved by the Parliament and published by autumn of this year. If so, the new rules described above will apply to new companies as from 1 January 2019. They will apply to existing companies as at the earliest of (i) the date on which they opt in voluntarily by amending their articles of association, and (ii) 1 January 2020.

Importantly, the application of the new rules will be immediate even if the company is party to an existing loan agreement entered into long before. This immediate application could alter the existing contractual equilibrium, without any possibility for a lender to seek effective redress. As such, we would recommend lenders to assess the impact of the new rules in terms of contractual documentation as soon as possible, and ideally before 1 January 2019.

Kind Regards,

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