

Newsflash

7 November 2008

Corporate Law, M&A, Financial Law

Contribution in kind: has the auditor been set aside?

The Royal Decree of 8 October 2008 amending the Belgian Companies Code¹ has partly amended the rules on the contribution in kind. They will enter into force on 1 January 2009.² The new rules are part of a broader set of measures, mainly taken in order to contribute to the promotion of business efficiency and competitiveness of companies without reducing the protection offered to shareholders and creditors. The main innovation is that the companies will be able to issue shares for a contribution in kind without requiring them to obtain an auditor's valuation when there is a clear point of reference for the valuation of such contribution.

The Royal Decree implements the European Directive 2006/68/EG amending the Second Company Law "Capital Directive"³. Although the scope of the Directive was limited to rules regarding the public limited liability companies (NV/SA), the Belgian legislator chose to extend the application of the new capital rules to the private limited liability companies (BVBA/SPRL) and the cooperative companies with limited liability (CVBA/SCRL).

These new rules amend the Companies Code on the contribution in kind and apply *mutatis mutandis* to the contribution in kind at the occasion of the incorporation of the company, the quasi-contribution and the capital increase by means of contribution in kind.

As before, different formalities and requirements should be complied with to make a contribution in kind and these rules have not changed. The requirement of the auditor's report on valuation remains the basic principle. However, according to the new rules there are circumstances where no auditor's valuation will be required for a contribution in kind; namely if the contribution in kind relates to:

- (i) transferable securities or money-market instruments⁴ that are valued at the weighted average price at which they have been traded on one or more

¹ Royal Decree of 8 October 2008 amending the Companies Code in accordance with Directive 2006/68/EC of the European Parliament and of the Council of 6 September 2006 amending Council Directive 77/91/EEC as regards the formation of public limited liability companies and the maintenance and alteration of their capital, published in the Official Belgian Journal on 30 October 2008.

² And are subject to ratification by a law to be enacted before 31 July 2009. It is assumed that such law will be enacted prior to this date.

³ Council Directive 77/91/EEC regarding the formation of public limited liability companies and the maintenance and alteration of their capital.

⁴ As defined in article 2, 31° and 32° of the law of 2 August 2002.



regulated market(s)⁵ during the three months preceding the effective date of such contribution.

- (ii) assets other than the transferable securities and money-market instruments referred to in (i) which have already been subject to a valuation by an auditor, if the following conditions are fulfilled:
 - a. the fair value (*waarde in het economisch verkeer / la juste valeur*) has been determined at a date no more than six months before the effective date of the contribution in kind; and
 - b. the valuation has been performed in accordance with generally accepted valuation standards (e.g. international valuation standards, international private equity and venture capital guidelines).
- (iii) assets other than the transferable securities and money-market instruments referred to in (i), whose fair value of each individual instrument is derived from the audited annual accounts of the previous financial year and the audit report did not contain any reservations.

However, an auditor's valuation will be required for the instruments referred to under (i), if the price has been affected by exceptional circumstances that change the value of the transferable security or money-market instrument at the effective date of its contribution, including situations where the market for such instruments has become illiquid.

Furthermore an auditor's valuation will also be required for the assets referred to under (ii) and (iii), if (a) there are new qualifying circumstances that would significantly change the fair value of the financial instruments at the effective date of its contribution or if (b) one or more shareholders, holding an aggregate percentage of at least 5% of the company's share capital on the day that the quasi-contribution or the capital increase is effected, request the valuation of an auditor.

Finally, within one month after the effective date of the contribution in kind the company must file a declaration with the Register of Legal Entities, containing certain information on the contribution in kind.

David Roelens, Avocat Associé/Advocaat Vennoot, Tel. : + 32 2 800 71 32, E-mail : droelens@laga.be

Dries Deforche, Advocaat/Avocat, Tel.: + 32 2 800 70 75, E-mail: ddeforche@laga.be



⁵ As defined in article 2, 3°, 5°, 6° of the law of 2 August 2002.