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ALERT MEMORANDUM

Emergency Equity Raises – Practical Guide for Belgian Companies

April 8, 2020

For many companies, 2020 will turn out to be drastically different than expected. The impact of the COVID-19 pandemic is still hard to predict, but there is no doubt that a number of companies will face liquidity constraints, and possibly pressure on financial covenants and/or their rating, as a result of lower revenue, and a tightening of the credit market. Relief, after cancelling dividends and reallocating cash within the group, may require raising new equity or hybrid instruments, possibly on an accelerated basis. This memorandum explores paths to fast-track equity raises and provides a practical guide for boards and senior management of Belgian companies.[1]

We plot a few legal and strategic parameters based on three scenarios: a "rescuer" set-up; an ABB offering; and a rights issue with a short offer period. The choice for either scenario will be essentially driven by the question of who is willing to fund: one or a few specific investors; a limited group of qualified investors; or a wider investor base including existing shareholders. Time to money will be different in each scenario.

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1. The "rescuer" set-up. Think of one or a few identified "rescuers" who are ready to put in money in return for fresh equity, in spite of circumstances. This could possibly be a reference shareholder, a new investor (such as a private equity fund looking to deploy its "dry powder" at attractive valuations) or, in certain sectors, the Belgian State.[2] "Rescuer" scenarios can largely be made to measure and provide quick relief. This set-up will, however, require the cancellation of the preemptive rights of existing shareholders to the benefit of pre-identified

[1] For an overview of the measures adopted in Belgium so far to mitigate the effects of COVID-19, *see* our alert memorandum Belgium's Response to Mitigate the Effects of COVID-19.

[2] The press reported that the Belgian State is considering the possibility to provide capital or convertible bonds through its federal investment vehicle, SFPI/FPIM (or a separate vehicle administered by SFPI/FPIM), for businesses in strategic sectors such as logistics, petrochemicals, infrastructure, food and transport. On State aid implications, *see* the Communication from the Commission, "Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak", OJ March 20, 2020, as amended, OJ April 4, 2020 and our alert memoranda State Aid Temporary Framework to Support the Economy in the Context of the COVID-19 Outbreak and Amendment to the State Aid Temporary Framework to Support the Economy in the Context of the COVID-19 Outbreak.

persons (*i.e.*, the rescuers), which triggers a couple of additional requirements from a Belgian corporate law perspective.

- **Size**. "Rescuer" equity raises are not limited in size *per se*. For listed companies, however, the requisite speed and confidentiality of the transaction will indirectly limit the amount of capital they can raise. To avoid having to call a shareholders' meeting, the board will need to be able to issue the equity out of the authorized capital, which may in the meantime have been (partly) used up. [3] For a fast-track "rescuer" equity raise without shareholders' meeting, the provision of the articles of association ("AoA") on authorized capital needs to expressly authorize override of preemptive rights of existing shareholders. In addition, for listed companies, the newly issued shares, which are to be admitted to trading, need to be limited to 20% of the outstanding shares in order to benefit from a prospectus exemption (*see* "Disclosure" below).
- **Type of securities**. Acting under the authorized capital, the board can only resolve to issue shares of an existing class (usually ordinary shares) or convertible bonds ("CBs"). Accordingly, should a "rescuer" investor negotiate for preference shares or other securities (*e.g.*, profit sharing certificates), a shareholders' meeting would need to be called.
- **Disclosure**. This scenario is "disclosure-light". No offering prospectus is necessary since there is no broader marketing. Furthermore, no listing prospectus is needed as long as the new shares do not amount to more than 20% of the outstanding shares of the same class (calculated on a rolling 12-month period) already admitted to trading.[4] Preference shares or CBs would typically not be admitted to trading in this scenario. However, in case of CBs, upon their conversion the underlying ordinary shares can be admitted to trading without a prospectus if they represent less than 20% of the outstanding shares of the same class (calculated on a rolling 12-month period) already admitted to trading.
- **Formalities**
    - ***Reports***. Any capital increase requires a board report and an auditor's report[5], but the exact content will depend on the structure of the capital increase. Although, technically, the auditor's report is issued based on the final and approved board report, in practice both are drafted in parallel and adjusted to one another.

      The board report should address, among other matters, (i) the issue price and the impact of the transaction on the shareholders' rights and (ii) the reasons for the cancellation of the preemptive rights of existing shareholders in favor of pre-identified persons (including a justification as to why the transaction and the issue price are in the company's best interest, taking into account its financial situation, the identity of the beneficiaries and the nature and size of the cash injection).

      The auditor should in turn consider whether the financial and accounting information included in the board report is true and fair in all material respects and sufficiently informative, and provide a "detailed assessment" of the board's justification of the issue price.[6]

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3 For listed companies specifically, the authorized capital cannot be higher than 100% of the issued share capital.

4 Another possibility is for the new shares in excess of 20% not to be admitted to trading immediately, and for a listing prospectus to be drawn up for admission to trading within 90 days. *See* Euronext, Book I, Rule 61002/1 which provides that when there is no public offering, application for admission to trading of the new shares (of the same class as those outstanding) shall be made no later than 90 days after their issuance.

5 This is a mandatory provision of the Belgian Code on Companies and Associations ("BCCA"), which applies even if the AoA have not yet been aligned to the BCCA, unless waived by unanimous consent of all shareholders. Under the old Belgian Company Code ("BCC"), special report requirements were limited to certain types of capital increases.

6 The latter content requirement seems to be a step up from the old BCC, which required that the auditor's report included an opinion "*on the elements on the basis of which the issue price has been calculated, as well as on the justification*

- ***Issue price***. As described above, the board and auditor's reports will need to devote significant attention to the issue price. However, the minimum issue price rule of Article 598 of the old BCC (*i.e.*, a floor equal to the trailing 30 day average share price) no longer applies, even if the AoA have not been aligned to the BCCA. Boards (and auditors) of listed companies may perhaps be tempted, when having to justify the transaction and issue price in light of the corporate interest pursuant to the new requirements, to refer to the old minimum price rule as a benchmark. We would counsel against that: in the current equity market turmoil the recent trading performance will often not be a relevant metric, but there is also no legal basis for it and doing so would amount to reintroducing the abolished rule through market practice.

- ***Board meeting***. The logistics of an expedited board meeting to resolve on the equity raise (or to convene the shareholders' meeting) should prove relatively straightforward: the AoA usually allow board meetings to be convened within a short timeline in case of urgency (and formalities can be waived if all board members attend), and to take place via telephone or video conference. The BCCA also allows board decision making by unanimous written consent for any type of decision.[7] Several considerations may nevertheless support the organization of a board meeting rather than decision-making through written resolutions. First and foremost, written resolutions would prevent a true discussion and debate around the potentially delicate considerations related to corporate benefit in the context of a dilutive selective issuance, and it may perhaps be more difficult to raise the business judgment defense if there is no record of deliberation and real exchanges on all the issues. Also, a royal decree aimed at facilitating the practical organization of board and shareholders' meetings is expected to introduce additional flexibility.

  Be aware that in the "rescuer" scenario, conflict of interest rules apply at the level of the board of directors: any director *de facto* representing a shareholder who is subscribing for a selective capital increase must abstain from voting at the board meeting.[8]

- ***Notarial deed***. Corporate resolutions to increase the share capital require a notarial deed. The notary must record the board resolutions to issue capital in the presence of at least one director; other directors may dial-in remotely. In case it is the shareholders' meeting that resolves on the capital issuance, at least one person representing the shareholders will need to be present. The investors subscribing for the capital increase also need to be appear. In the current climate, physical presence should be minimized as much as possible through appropriate proxies (with power of substitution for maximum flexibility).

  Belgian notaries have restricted the scope of their activities since the COVID-19 outbreak, and will only pass deeds in "*extremely urgent*" matters, including to avoid significant financial consequences. Emergency equity raises should ordinarily fall in that category.

Electronic signatures. Electronic signatures are recognized as a matter of Belgian civil law, and can be used for most of the documents required in the context of an equity raise (board resolutions, board and auditor's reports[9], proxies for the shareholders' meeting, *etc*). The notary, however, will usually require

thereof". It will thus be important for the board of directors to timely engage with the auditor to ensure that the auditor feels sufficiently comfortable with the (potentially deeply discounted) issue price.

7 As opposed to the BCC which required urgency and due justification in the corporate interest. Even if the AoA still restate the old BCC, an emergency equity raise would seem to meet these conditions.

8 A similar rule applies at the level of the shareholders' meeting: if the "rescuer" is a shareholder holding more than 10% of the voting rights (alone or in concert/with affiliates), it must abstain from voting at the shareholders' meeting resolving on the capital increase.

9 This has been explicitly confirmed by the Institute of Auditors in a communication of March 20, 2020 on the possible impact of COVID-19 on audit work.

"wet" signatures for investors, *i.e.*, the persons effectively subscribing for the capital increase. In practice, the deed can often be passed based on a scanned copy, with the original being provided later.

- **Timing**. Expect a timeline of a few days to a couple of weeks, if the issuance is decided by the board. Due diligence would typically be limited to key documents, such as board materials, and calls with management. Contractual documentation involves only NDAs and a bilateral agreement with the investors. Such a bilateral agreement would, for a sizeable investment, take the form of a robust investment agreement, which could potentially include governance provisions (*e.g.*, board representation) and for non-listed companies information rights that the investors will enjoy going forward. The key drivers for timing will be agreeing on the terms of the investment with the fund providers and the drafting of the board and auditor's reports.[10]

Focus - Rules on authorized capital

As a matter of Belgian corporate law, the decision to increase the share capital is, in principle, to be taken by the shareholders' meeting. However, the articles of association may authorize the board to increase the share capital up to a certain maximum amount (for Belgian listed companies, up to 100% of the share capital). Such authorization can be granted for a period up to five years and is renewable.

- ***A specific authorization as part of the authorized capital is needed*** for (i) issuances of shares or CBs with cancellation or limitation of the existing shareholders' preemptive rights (*i.e.*, "rescuer" set-up, ABB and rights issue with short offer period) and (ii) issuances to the benefit of pre-identified persons (*i.e.*, "rescuer" set-up).
- ***The authorized capital cannot be used*** for the issuance of (i) a new class of shares;[11] (ii) for non-listed companies, shares with multiple voting rights or CBs convertible into shares with multiple voting rights; (iii) profit sharing certificates and (iv) shares below the fractional value unless the authorized capital has been renewed under the BCCA regime.[12]

Practical tips

Check how much authorized capital is still available. Calculate the outstanding amount taking into account what may have already been used up by the board, and figure out the effective "fire power" based on the estimated issue price vs. the fractional value (statutory share capital divided by number of outstanding shares) of the shares.

Consider renewing or increasing the amount at this year's EGM. Many Belgian companies will have an extraordinary shareholders' meeting ("EGM") this spring, coinciding with their annual general meeting, to align their AoA to the BCCA. This would be a good opportunity to request a renewal or increase of the authorized capital. If it has been traditionally difficult to obtain the approval from the shareholders on authorized capital, *e.g.,* because of a lack of reference shareholder and proxy advisors' pushback, consider engaging with the latter to argue about the increased flexibility needed in the months to come (possibly limiting the authorization to a shorter period than five years or tying the authorization to specific requirements).[13]

[10] Companies issuing CBs for the benefit of pre-identified persons must communicate the board and auditor's reports to the FSMA 15 days before convening the board or the shareholders' meeting (depending on who resolves on the issuance). This could raise issues in case of urgency, unless the FSMA is able to respond swiftly.

[11] This prohibition is new (under the old BCC, it was possible) and is of mandatory nature, which means that it applies to all Belgian companies since January 1, 2020, regardless of whether they have aligned their AoA to the BCCA.

[12] The BCCA has introduced the possibility to issue shares below fractional value under authorized capital. This was not possible under the old BCC, and companies which have not yet renewed their provisions on authorized capital will continue to be faced with this limitation until they have.

[13] Also in other jurisdictions, certain stakeholder groups have argued for a more relaxed approach granting companies enhanced flexibility to raise equity in today's challenging circumstances (*see*, *e.g.*, statement of April 1, 2020 by Pre-Emption Group in the United Kingdom, which recommends that investors, on a case-by-case basis, consider supporting issuances by companies of up to 20% of their issued share capital on a temporary basis, rather than the 5% for general

If an ad hoc EGM is needed, keep an eye on the royal decree which is expected to be adopted shortly to relax the convening and meeting requirements for shareholders' meeting during the lockdown period (allowing companies, regardless of their AoA, to organize their shareholders' meeting "behind closed doors" through remote voting and the designation of a sole proxyholder).

2. Accelerated bookbuilt offering ("ABB"). The "rescuer" scenario may not work for a particular company. There may, *e.g.*, not be an investor willing to play a rescuer role or not for a sufficient amount, or the company may want to diversify its shareholder base. An alternative for listed companies would then be an equity raise done by way of an ABB, *i.e.*, an accelerated placement of newly-issued securities with qualified investors, organized by banks acting as bookrunners. Banks' sales desks reach out to a shortlist of qualified investors, who make indicative bids specifying price and volume points per share (or CB). The bank teams then collect all indications, build an "order book" and make a price and volume recommendation to the company, taking into account supply, demand and investor profile (*e.g.*, long term vs. hedge fund).

The banks' role in an ABB is formalized in a placement agreement (typically modelled on an industry standard such as the AFME form, and hence agreed fairly quickly) pursuant to which the banks undertake, on a best efforts basis, to place the securities with investors. As regards the representations and warranties, seasoned issuers often manage to resist requests for extensive "business reps" on their assets, liabilities and financial condition and give a "no inside information" confirmation instead, but in the current environment banks may well ask for more. Also, the banks will likely focus on the definition of the conditions precedent to closing (in particular the material adverse effect provision). In addition, the banks will want to get sufficient comfort on the impact the pandemic has had/will have on the company's business and prospects as they will need to convince the potential investors to put an order in the book.

As is the case in the "rescuer" scenario, the existing shareholders' preemptive rights would be cancelled, albeit this would not be deemed to the benefit of pre-identified persons, as per widely accepted market practice, including by the FSMA, as long as (i) there is no prior commitment from the company to any investor and (ii) the placement and allocation are made on the basis of predetermined, objective and transparent criteria, in accordance with a "solicitation and allocation protocol" agreed among the company and the underwriters.

Reference shareholders can participate in the ABB, without triggering the additional constraints applicable to issuances to pre-identified persons, subject to the conditions mentioned above, *i.e.*, provided that such shareholders are treated as any other investor participating in the ABB.[14]

- **Size**. There is no particular limitation[15] but the same considerations as for the "rescuer" scenario apply: (i) this scenario is best prepared confidentially and executed quickly, hence through a board decision, and is thus subject to availability of authorized capital (with authorization to cancel preemptive rights of existing shareholders), and (ii) exemption from prospectus requirements (for admission to trading) is only available up to 20% of the outstanding shares.
- **Type of securities**. Companies would typically issue ordinary shares or CBs in an ABB.

corporate purposes with an additional 5% for specified acquisitions or investments, as set out in the Statement of Principles).

14 In practice, when a reference shareholder participates in an ABB, the FSMA will ask to see the book and justifications for final allocations. If shareholders have been allocated just the number of shares necessary to avoid dilution, it will raise suspicions from the FSMA as to possible pre-commitments or not entirely objective allocations.

15 Except for Belgian REITs: until last year, they could only issue equity for cash through a rights issue; they are now allowed to do it through an ABB but only up to 10% of their share capital.

- **Disclosure**. The ABB is an undocumented placement, *i.e.*, without publication of any offering documentation and with admission to trading up to 20% under prospectus exemptions (*see* "Disclosure" under section 1 above). Qualified investors are asked to sign letters confirming that they made their own assessment without relying on specific disclosure or representations from the company. In the current circumstances, the absence of prior disclosure by the issuer on the expected impact of COVID-19 on their business, financial situation and prospects could raise concerns and questions from investors, and reduce the marketability of the ABB. Issuers who have already made specific COVID-19 disclosure should make sure that the information is up to date at the time of launch (*e.g.*, by including the most recent information in the launch press release), and will be able to refer investors to that information.

- **Formalities**

  - ***Reports***. An ABB requires (i) a board report justifying the issue price and describing the impact of the transaction on the shareholders' rights and the reasons for the cancellation of the preemptive rights of existing shareholders, and (ii) an auditor's report assessing whether the financial and accounting information included in the board report is true and fair in all material respects and sufficiently informative.

  - ***Board meeting***. Prior to launching the ABB, the board decides to resolve on the capital increase up to a certain amount or number of shares, at a minimum price (determined in absolute terms or by reference to a discount to a spot or average trading price before launch[16]), conditional upon the effective placement with qualified investors. A delegation of powers is then granted to one or a few executives to determine, once the book has been built, the final price and allocations[17] and record the effective capital increase.

    Conflicts of interest rules for issuances to pre-identified persons will not apply to the decision making by the board in case of an ABB, subject to the considerations mentioned above (*see* box on "Reference shareholders" above).

  - ***Notarial deeds***. There will be two notarial deeds. The first is the board decision adopted before launch, and the second is the recording of the effective capital increase and issuance of shares (or CBs) following the placement. *See* "Notarial deed" under section 1 above for practical considerations around a notarial deed under the current constraints.

- **Timing**. This type of transaction is usually completed in a few days or couple of weeks from kick-off to closing, with the work streams centering around the drafting of the board and auditor's reports and the placement agreement. The due diligence exercise conducted by the underwriters is, in most cases, limited to calls with management and the review of board materials for the period not covered by the periodic financial disclosure. Of course in the current environment, a heightened focus on the expected impact of the global pandemic on the issuer's business, financial situation and prospects is to be expected.

  Markets are likely to be unpredictable in the weeks and months to come, and this is not ideal to conduct any capital market transaction. But from the various available routes to raise new equity from investors, the ABB is perhaps less risky: confidential market soundings[18] to gauge the interest of investors in terms

[16] In times of extreme volatility, the reference point should of course be carefully considered.

[17] The board would factor in well-defined parameters in its mandate to frame the final decision on price and allocations. Conceivably that decision could be adopted by the board itself, although that would require a high degree of flexibility in terms of timing, since the placement is usually conducted outside of market hours, the duration is unknown and the pricing and allocation decision is often made somewhere through the night.

[18] Market soundings are subject to strict rules and detailed procedures under the Market Abuse Regulation ("MAR"), which banks would follow rigorously.

of volume and price will typically be conducted before the board gives the go-ahead. If the feedback doesn't meet the company's expectations, it will wait for the next window.

The placement itself lasts a few hours or a day (with trading suspension if conducted during trading hours); allocations are then communicated to investors ("T") and the closing takes place shortly thereafter (in T+2). The exposure to market unpredictability is thus very short.

Focus – Choosing the most appropriate securities

Which type of securities?[19]

— **Ordinary shares**. Shares of the same class and bearing the same voting and distribution rights as those outstanding, listed or not.

— **Preference shares**. Shares with preferential rights to dividends and/or liquidation proceeds (new class of shares).

— **Multiple voting shares**. For non-listed companies only[20], shares with multiple voting rights (new class of shares).

— **Convertible bonds**. Bonds convertible into (typically ordinary) shares. They bring in cash but offer a certain degree of flexibility, depending on the Ts&Cs: convertible at the option of their holders or at the option of the issuer (or a combination of both), or automatically convertible at a specified date or upon satisfaction of specified conditions (so-called mandatory CBs).[21]

— **Profit sharing certificates**. Securities not representing capital; could bring in much-needed cash without destabilizing existing equilibriums and offer flexibility (voting/non-voting) but can only be issued by the shareholders' meeting.

Relevant factors include:

- Accounting treatment. The qualification under applicable accounting rules (IFRS and/or Belgian GAAP) should be examined. CBs or preference shares, for instance, may or may not qualify as equity based on the Ts&Cs (interest payments, optionality of conversion or not, pre-determined number of underlying shares, *etc.*).
- Existing financing. If the objective of the equity raise is to avoid a breach of financial ratios, the specific terms of the relevant financing arrangements should be examined, and potentially discussed with the lenders (in case of banking facility), who will not necessarily agree to rely solely on the accounting treatment.
- Rating agencies. If the company's debt is rated, the impact of the transaction on the rating should be considered early on.
- Specific regulations. In some cases, other considerations will also be relevant, *e.g.*, financial institutions will take into account capital ratio requirements and the relevant qualification of the instruments while funding by the State or State-owned entity will take into account State aid rules.[22]

[19] Some of these instruments will not be available for a fast track equity raise pursuant to the authorized capital (*see* "Focus – Rules on authorized capital" above).

[20] For listed companies, multiple voting rights are limited to double voting rights, and only kick in if the shares have been held in registered form for at least two years (thus not possible upon issuance). Shares without voting rights could also be issued (for listed and unlisted companies).

[21] The old debate/controversy in doctrine as to whether mandatory CBs technically qualify as CBs under Belgian corporate law, with all related protections as a consequence, is no longer relevant since the BCCA clarifies that they do.

[22] Consider also Foreign Direct Investment (FDI) restrictions. On March 25, 2020, the European Commission called upon Member States to set up a full-fledged screening mechanism where the acquisition or control of a particular business, infrastructure or technology would create a risk to security or public order in the EU, including a risk to critical health infrastructures and supply of critical inputs (*see* our alert memorandum Evolving European Foreign Direct Investment Review During the COVID-19 Pandemic). This may accelerate the adoption of legislative initiatives in Belgium and create hurdles for companies in strategic sectors to raise equity from non-EU investors.

3. Rights issue with a short offer period. A rights issue, *i.e.*, an issuance of shares with observance of preemptive rights for existing shareholders, may be an option, and there may be specific reasons why this would be the preferred route. A rights issue is typically done if either (i) the equity raise is too big to be covered by an ABB only or (ii) the issue price is likely to be on the lower end such that the company will want to allow its shareholders to limit financial dilution (caused by a low issue price) either by taking up their *pro rata* share of the new issue, or by selling their rights. Rights issues are indeed structured in such a way that the shareholders are able to separately trade their preemptive rights, thus allowing them to monetize if the trading price is above the issue price and if a secondary market for the traded rights develops. Rights not exercised at the end of the offer period (*aka*, the rump) can be placed with qualified investors (through a "mini ABB"), potentially with a backstop undertaking by a reference shareholder or other investor.[23] Prior to proceeding with a rights issue, the company will, however, want to have sufficient comfort that the shareholders have appetite.

Investment banks will assist the company during a rights issue, and will carry out their tasks pursuant to the terms of an underwriting agreement, which will include reps and warranties by the company (the fundamental ones being on the disclosure made in the prospectus), and cover the banks' liability pursuant to standardized clauses. Banks may or may not be willing to backstop the issue by giving a hard underwriting commitment, although given current market uncertainty they will likely want to avoid the risk of a "stick" and underwrite on a best efforts basis.

Rights issues give rise to two particular hurdles in an emergency situation. First, the company would have to tackle the delicate disclosure exercise implied by the prospectus requirement[24] (*see* "Disclosure" below), and the prospectus drafting and approval process would involve longer delays; second, the law requires the rights to be tradeable for 15 calendar days, thus exposing the transaction to market risk (if the share price falls below the issue price) for an extended period of time (*see* "Timing" below).

- **Size**. There is no particular limitation. Since this scenario would imply a prospectus, there is no particular reason to restrict the offer to 20% of the outstanding shares (which companies would otherwise do to avoid triggering the listing prospectus requirement).
- **Type of securities**. The company would typically issue ordinary shares in a rights issue.
- **Disclosure**. Drafting a prospectus will raise certain questions and issues. The prospectus needs to contain the necessary information which is material to an investor for making an informed assessment of, among other things, the financial position and the prospects of the issuer. In principle, for listed companies, all relevant information should have been disclosed pursuant to MAR and the Transparency Directive, but the perspective is slightly different when going out to the market with a prospectus and the potential liability attached to it. In a crisis situation, the exercise will not be easy, particularly when the impact of the pandemic for the issuer is still hard to predict. In addition, under the new Prospectus Regulation, risk factors are, among other things, required to be (i) specific (*i.e.*, there must be a clear and direct link between the risk factor and the issuer or the securities, thus no general COVID-19 disclaimer), and (ii) material, indicating where possible, quantitative information, in order to illustrate the potential negative impact of the risk factor.[25]
- **Formalities**
    - ***Reports***. A rights issue requires (i) a board report justifying the issue price and describing the impact of the transaction on the shareholders' rights, and (ii) an auditor's report assessing whether the

[23] Requirements for issuances to pre-identified persons will not apply in that context.

[24] Although it is technically possible to avoid the prospectus requirement in case the offer is made to less than 150 retail shareholders and the issuance does not involve more than 20% of the shares admitted to trading, reliance on these exemptions seems, due to the nature and likely size of the offering, neither practical nor conclusive.

[25] *See* ESMA, Guidelines on Risk Factors under the Prospectus Regulation, October 1, 2019.

financial and accounting information included in the board report is true and fair in all material respects and sufficiently informative. Assuming an offer period shorter than 15 days, preemptive rights would, as a technical matter, have to be cancelled (*see* "Timing" below), and the reports will need to formally address that.

- ***Corporate approvals***. The capital increase will be decided by the board if there is sufficient available authorized capital, or by the shareholders' meeting otherwise, in each case resolving on a maximum number of shares to be issued, conditional upon the successful placement and to the extent of effective subscriptions. The initial decision by the board or the shareholders' meeting will include a delegation of powers to one or a few executives to determine the final number of shares and record the effective capital increase.
- ***Notarial deeds***. Again, there are two notarial deeds, *i.e.*, the board or shareholders' decision to increase the share capital, as well as the effective capital increase following the offer period. *See* "Notarial deed" under section 1 above for practical considerations around a notarial deed under the current constraints.

- **Timing**. Under Belgian company law, capital increases with preemptive rights of existing shareholders are subject to a statutory 15-day offer period. This creates an execution risk for listed companies: the offer is launched at a fixed price (reflecting a discount to market price), allowing the preferential subscription rights to be traded separately. If during the subscription period, the offer price falls below the trading price, the transaction will be unsuccessful. The execution risk is thus directly correlated to the duration of the offer period, particularly in times of uncertainties and high price volatility.

  If the preemptive rights are cancelled as a technical matter and reintroduced on a voluntary basis, allowing existing shareholders to subscribe *pro rata*, the offer period can be reduced to at least three business days. This is the so-called "synthetic rights issue", which has become largely used in practice.

  The main driver for the overall timing will of course be the prospectus. Prospectus requirements imply significantly longer delays in terms of overall execution, because of due diligence and drafting sessions. Existing disclosure of listing companies will help but will have to be adapted to factor in more recent events (*see* "Disclosure" above).[26] Informal drafts of the prospectus are typically exchanged with the FSMA before the draft prospectus is formally filed, and the FSMA approval process itself usually takes between four and six weeks.

Focus - MAR considerations

In general

- Issuances are not permitted during prohibited periods (strict prohibition) and closed periods (prudent approach).
- The market soundings regime will apply in case of an ABB and rights issue.
- The decision to proceed with an equity issuance will, at some point in time prior to announcement, constitute inside information, and would therefore need to be disclosed as soon as possible. Alternatively, the company can decide to defer the disclosure of the inside information but this should be carefully considered in light of the applicable conditions, and documented.

[26] Since the entry into force of the Prospectus Regulation, the URD is a possibility, *i.e.*, a shelf registration document for EU issuers listed on a regulated market or MTF, but still subject to FSMA approval in the context of an offering and to be completed with a securities note and a summary in order to constitute a "tri-partite" prospectus.

- Inform the FSMA of planned equity raise and discuss possible trading suspension.[27]

In COVID-19 circumstances

If no prospectus is published (*i.e.*, "rescuer" set-up and ABB), companies may be raising funds without being able to give their investors an accurate view on the forecast for the next (few) year(s) as long as COVID-19 is still wreaking havoc.

- Around this time of the year, many issuers are publishing their **annual report**, which would typically give a good view on the fundamentals of, and risks related to, the business from an investor's perspective. Against the current crisis background, things will not be that simple. ESMA has encouraged issuers to provide transparency on the actual and potential impacts of COVID-19 to the extent possible, based on both a qualitative and quantitative assessment on their business activities, financial situation and economic performance in the annual financial report for FY2019 (if these have not yet been finalized).[28] At the same time, however, it is acknowledged that publication of the annual financial report for FY2019 (in principle, deadline April 30, 2020) may be postponed because of possible delays incurred in the audit performed by the auditors. The FSMA has already confirmed that it will not issue warnings in relation to the late publication of annual reports.
- At the same time, the issuer's obligations in relation to *ad hoc* disclosure of COVID-19-related **inside information** continue to apply. Both ESMA and the FSMA have recently reminded issuers of their obligation to promptly disclose any relevant significant information concerning the impact of COVID-19 on their fundamentals, prospects or financial situation in accordance with their transparency obligations under MAR. Nonetheless many issuers will be unable to update their internal models and meaningfully comment on prospects as long as the situation is continuing.[29] This has caused many issuers to simply withdraw their earlier projections, without yet presenting new ones.

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[27] The FSMA is generally in favor of trading suspension, with an average of 40 to 50 trading suspensions each year, which is more than other EU authorities (and much more in relative terms than in the U.S.).

[28] *See* ESMA recommendation of March 11, 2020, "ESMA recommends action by financial market participants for COVID-19 impact".

[29] *See* FSMA guidance: the absence of precise information on the financial impact does not exonerate an issuer from publishing information of which it is aware. The FSMA is taking the view that, in that case, the issuer should indicate in its press release that it is unable at this stage to quantify the financial impact of the inside information but that it undertakes to communicate about the impact as soon as the latter can be calculated.