CAPITAL MARKETS UPDATE

New Belgian rules on primary market practices

BRUSSELS
JUNE 29, 2007

A Royal Decree of May 17, 2007 relating to practices on the primary market (the "Decree") was published on June 18, 2007 in the Belgian State Gazette. It amends in certain important respects the rules applicable to public offerings of securities in Belgium.

I. BACKGROUND

- In 2000, the CBFA issued certain guidelines in relation to practices on the primary markets (Circular D2/F/2000/4 of June 19, 2000). These guidelines, although somewhat dated in certain respects, provided useful guidance and were applied by the CBFA with a fair degree of flexibility, taking into account the particular circumstances of a transaction.

- In 2006, the CBFA launched a public consultation with a view to adapting these rules and converting them into black letter law. The Decree sets forth the new rules resulting from that consultation (although it would appear that a number of questions and comments made in response to the consultation have not been taken into account).

- Whilst in certain respects the Decree confirms past CBFA practice, it goes further in certain other areas, and the formalization of those rules in actual legislation (as opposed to administrative practice) removes an appreciable degree of flexibility.

II. SCOPE OF APPLICATION

- The rules set out in the Decree apply to public offerings of securities in Belgium which are subject to a prospectus publication requirement in accordance with Belgian law. Contrary to what the term "primary market" could be read as implying, the rules actually apply both to offerings of new securities and of existing securities, and to initial and "follow-on" offerings

alike. Some of the rules could also apply to offerings of securities as consideration in an exchange offer.

- Importantly, the scope of application of the rules is *not* limited to those cases where the CBFA is the home country regulator within the meaning of the Prospectus Directive: the rules will apply in any public offering requiring a prospectus in Belgium, including a multi-country offering in respect of which a prospectus is approved by the competent authority of another Member State and subsequently passported into Belgium (but see paragraph 1(a) below as regards the scope of application of the minimum retail allocation rule).

- Conversely, a transaction that does not constitute a public offering in Belgium (such as *e.g.*, an IPO with an "institutions only" placement and a Euronext Brussels listing), would not be caught by the new rules.

III. RETAIL OFFERINGS AND PROTECTION OF RETAIL INVESTORS

(a) ***Minimum retail allocation***. In any public offering of securities (other than an offering targeted at a specific group of investors), a "tranche" of no less than 10% of the securities being offered must now be reserved for retail investors, unless a derogation (*i.e.*, an authorization to apply a lesser percentage) is granted by the CBFA. In the case of a cross-border offering, the rule only applies to the tranche of the offering that is "reserved to the Belgian market"[1].

The Decree does not specify whether this percentage is to be applied before or after exercise of any over-allotment facility or of the "extension clause" referred to in paragraph V below. One will need to see how CBFA practice develops on this point, but the sensible approach would be to apply the 10% rule to the "base deal", before any over-allotments or deal increase.

Contrary to current practice, it will no longer be possible to claw back securities out of the retail tranche into the institutional tranche in the event of significantly higher relative subscription in the latter tranche. Such claw-backs will now only be possible to the extent that subscriptions by retail investors do not reach the minimum retail allocation percentage

[1] This would seem to imply, in effect, that in order to avoid application of the minimum 10% retail allocation rule to an entire cross-border offering, one will need to provide for a separate "Belgian tranche" of that offering, and the 10% rule will only apply to that tranche.

(*i.e.*, 10%, unless otherwise agreed with the CBFA). Retail investors must, in other words, be allocated in full up to the 10% (or lesser percentage) minimum entitlement, regardless of the overall results of the transaction and the relative results of the institutional and retail tranches.

(b) ***Subscription period***. The Decree provides that the offering period for the institutional tranche may close earlier than the retail offering period. The reverse (earlier retail closing) is allowed only if (i) the issuer or offeror has reserved the possibility to do so in the prospectus, (ii) the circumstances under which there would be an early closing of the retail tranche are set forth in the prospectus, and (iii) the issuer/offeror and the underwriters have taken appropriate measures to ensure that the order book remains confidential until the end of the offer period.

Until now, the CBFA often allowed the retail subscription period to close earlier that the institutional period, because of the back-office constraints associated with collection and centralization of retail orders in large offerings. It is unclear whether those considerations would be deemed by the CBFA to provide sufficient justification for an early closing of the retail tranche.

(c) ***Offer price***. The final offer price for retail and institutional investors must be identical, although a limited discount may be granted to retail investors.

IV. STABILIZATION AND OVER-ALLOTMENTS

The Decree turns into actual mandatory provisions certain safe-harbor rules of EU Regulation 2273/2003[2] with respect to stabilizations and over-allotments. Offering participants no longer have the ability, as regards stabilization transactions effected in Belgium, to "opt out" of the safe harbor and rely on other arguments to demonstrate that, in the circumstances, a non-safe harbor compliant practice does not in fact breach the law.

[2] Commission Regulation (EC) No 2273/2003 of December 22, 2003 *implementing Directive 2003/6/EC of the European Parliament and the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments* (the "Regulation").

The main stabilization and over-allotment rules included in the Decree are:

(i) the prohibition to effect stabilization transactions above the offering price;

(ii) the obligation to effect ex post facto disclosure of stabilization transactions within five days from the end of the stabilization period (see paragraph 0 below);

(iii) a limitation of the over allotment facility and the greenshoe option to 15%, and any naked short position (*i.e.*, a short position, resulting from the exercise of an over-allotment facility, which is not covered by a greenshoe option) to 5%, of the securities effectively purchased.

The latter rule is problematic in several respects:

- First, under the Regulation, the 15% limit only applies to the greenshoe option, and not to the over-allotment facility; because the Regulation limits naked short positions to 5%, it effectively allows underwriters to over-allot a transaction by up to 20%. The Decree, by contrast, "caps" over-allotments at 15% and is thus stricter than the Regulation.

- Second, whereas the Regulation makes it clear that the 15% limit on greenshoe options and the 5% limit on naked short positions are computed on the basis of the "original offer" (the base deal), the Decree expresses the 15% limit by reference to the "*amount of the public offering effectively subscribed*" and the 5% limit by reference to "*the amount of the public offering*". It seems to us that, the ambiguity in the wording of the Decree notwithstanding, the limits should be computed on the basis of the original offer.

V. EXTENSION CLAUSES

Belgian law now contains a recognition of "extension clauses" such as those commonly applied in France: the Decree provides that the number of securities which can be offered in addition to the securities initially offered cannot exceed (i) 15% if the offer "has a dilutive effect" (*i.e.*, a primary issue), or (ii) 25% if the offer "has no dilutive effect" (*i.e.*, a secondary sale). The CBFA may agree to higher percentages. This means *a contrario* that it is possible to increase a transaction size within those limits.

VI. SELF-ALLOCATIONS

When the offer is fully subscribed (or oversubscribed), self-allocations by underwriters for their own account are prohibited, except in the case, and to the extent, of the underwriters' obligations in a bought deal commitment (prise ferme) or as a result of a hard underwriting (garantie de bonne fin).

VII. PRE-IPO ACQUISITIONS

Any person having acquired securities, other than through a public offering, at a purchase price which is lower than the offer price, within a period of one year preceding a first admission of securities to trading on a regulated market, will be subject to a mandatory one-year lock-up period. Certain relaxations of the lock-up restrictions apply for acquisitions made within a three-month period before the admission to trading at a price which is lower by maximum 20%, and for acquisitions realized within a nine-month period before said three-month period at a price which is lower by maximum 30%[3].

Those mandatory lock-ups, although they exist in certain other jurisdictions, may act as a deterrent for private equity or venture capital investment in pre-IPO financing rounds.

VIII. DISCLOSURES DURING THE OFFER PERIOD

The Decree contains rules regarding communications made about the offering during the offer period:

- any disclosure made during the offer period as to the level of demand may not be misleading, inaccurate or contain omissions, and
- any disclosures about the number of subscriptions received may only take into account subscriptions made at the offer price or, as the case may be, within or above the price range.

IX. POST-TRANSACTION DISCLOSURES

(a) ***Disclosure to the public***. The Decree requires a number of post–transaction disclosures, which can be made either by publication in

[3] In these cases, the lock-up period will either be of (i) six months in relation to all securities acquired, or (ii) nine months in relation to two-thirds of the securities acquired, or (iii) 12 months in relation to one third of these securities.

national newspapers or on the issuer's or underwriters' website: (i) within five business days of the end of the offer period, the issuer must disclose certain information about the results of the offering (total number of securities allocated, allocation between retail and institutional tranches, exercise of over-allotment facility, exercise of claw-back, percentage of the offer having received a preferential treatment, and final offer price); and (ii) within five business days of the end of the stabilization period, the issuer or the underwriters must disclose certain details of stabilization transactions having taken place (period, price range for each date and results of stabilization)[4] and, as the case may be, that the greenshoe option has been exercised.

(b) ***Disclosure to the CBFA***. Information regarding the final level of demand, the breakdown of demand between the various tranches and the portion of the offering allocated to the issuer, the offeror, the underwriters or their respective affiliates must also be communicated to the CBFA as soon as this information is known to the issuer or the offeror. Helpfully, the Decree requires that information to be disclosed to the CBFA only, rather than to the general public, whereas in past practice the CBFA sometimes required full public disclosure of the exact level of demand.

X. SANCTIONS

Non-compliance with the rules of the Decree may be sanctioned by administrative fines, ranging from EUR 2,500 up to EUR 2,500,000 (or, if the transaction effected in breach of the rules has resulted in financial gain, up to two times (or three times in the case of a repeat offence) the amount of the gain derived from the transaction) (see Article 36, §2 of the Law of August 2, 2002 on the supervision of financial sector and financial services).

* * * * *

For further information about any of the issues raised above, please call Laurent Legein or Jan Meyers in Brussels (+32 2 287 20 00).

CLEARY GOTTLIEB STEEN & HAMILTON LLP

[4] This timing is stricter than that of the Regulation, which requires this information to be made public within a week of the end of the stabilization period (Article 9, §3).

BRUSSELS
Rue de la Loi 57
1040 Brussels, Belgium
32 2 287 2000
32 2 231 1661 Fax

NEW YORK
One Liberty Plaza
New York, NY 10006-1470
1 212 225 2000
1 212 225 3999 Fax

WASHINGTON
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
1 202 974 1500
1 202 974 1999 Fax

PARIS
12, rue de Tilsitt
75008 Paris, France
33 1 40 74 6800
33 1 40 74 6888 Fax

LONDON
City Place House
55 Basinghall Street
London EC2V 5EH, England
44 20 7614 2200
44 20 7600 1698 Fax

MOSCOW
Cleary Gottlieb Steen & Hamilton LLP
CGS&H Limited Liability Company
Paveletskaya Square 2/3
Moscow, Russia 115054
7 495 660 8500
7 495 660 8505 Fax

FRANKFURT
Main Tower - Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
49 69 97103 0
49 69 97103 199 Fax

COLOGNE
Theodor-Heuss-Ring 9
50668 Cologne, Germany
49 221 80040 0
49 221 80040 199 Fax

ROME
Piazza di Spagna 15
00187 Rome, Italy
39 06 69 52 21
39 06 69 20 06 65 Fax

MILAN
Via San Paolo 7
20121 Milan, Italy
39 02 72 60 81
39 02 86 98 44 40 Fax

HONG KONG
Bank of China Tower
One Garden Road
Hong Kong
852 2521 4122
852 2845 9026 Fax

BEIJING
Twin Towers – West
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
86 10 5920 1000
86 10 58 79 3902 Fax