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PROPOSED REFORMS FOR BELGIAN LISTED COMPANIES REGARDING THE SHAREHOLDERS' RIGHT TO OPPOSE THE TRANSFER OF THEIR COMPANY'S KEY ASSETS AND GOVERNANCE

In a significant development that promises to reshape the corporate governance landscape in Belgium, the government has unveiled a draft bill introducing three pivotal proposals. These proposals, emanating from recommendations by the Financial Services and Markets Authority (FSMA), aim to fortify governance practices within listed companies. The draft bill has been submitted to the Belgian Chamber of Representatives on 11 December 2023.

PRIOR SHAREHOLDER APPROVAL FOR TRANSFER OF SIGNIFICANT ASSETS

The first proposal introduces a restriction on the transfer or sale of significant assets of listed companies. In this proposal, the crucial step would be to get approval from the shareholders' meeting before moving forward with these transactions.

This proposal follows current practices in countries such as the Netherlands, France and the United Kingdom, and aims to protect the interests of (minority) shareholders. Currently, it is the board of the company who decides freely on this matter without any shareholder involvement required.

When is shareholder approval required?

Shareholder approval is required when a substantial 75% or more of the company's assets are concerned. This threshold would be assessed based on the most recent annual accounts published by the listed company. If the listed company published consolidated accounts, the threshold must be calculated based on these consolidated accounts.

Additionally, a 12-month look-back period applies. All transfers of the 12 months prior to the contemplated transfer which were not approved by the shareholders' meeting must be taken into account as well.

How is the approval of such a transfer granted during the shareholders' meeting?

In a first phase, the board of directors must draft a comprehensive report explaining and justifying the contemplated transaction. This report must not only outline the consequences of the transaction but also delve into the implications for the company's future. This report must be made available to the shareholders prior to their decision.

The board report shall be made available to the shareholders. The shareholders' meeting, convened for this specific purpose, must then approve the transaction by simple majority of 50%. The approval of the transaction does not require any intervention of the FSMA.

REQUIREMENT OF THREE INDEPENDENT DIRECTORS

From soft law to hard law

Building upon the existing Belgian Corporate Governance Code of 2020, which recommends listed companies to maintain a minimum of three independent directors, the second proposal seeks to elevate this recommendation to a robust legal requirement.

Should this proposal find its place in legislation, listed companies will be obligated to ensure the presence of at least three independent directors. Non-compliance with this requirement will trigger the suspension of any financial or other advantages granted to the board, a measure that persists until compliance is reinstated.

Additionally, when a director's independence is compromised, he or she must notify the board there of as soon as reasonably possible.

Stricter conditions and screening requirements

In addition to this structural shift, the proposal imposes more stringent conditions for determining director independence. The board of directors proposing the appointment of an independent director must expressly confirm that there are no indications to doubt his or her independence. Should there be any doubt, the board must motivate how these elements of doubt do not endanger his or her independence.

Criteria to help assess independence outlined in the Corporate Governance Code of 2020 cease to be mere indicators. Instead, they become obligatory considerations. Furthermore, depending on these criteria on alone does not suffice.

The intention of this proposal is clear. The board must assess the candidate director seriously in terms of his or her independence and deliver a formal declaration to the shareholders' meeting in that regard.

APPOINTMENT OF DIRECTORS: NO ELIGIBILITY IN CASE OF SERIOUS OFFENCES

The third and final proposal concerns the eligibility criteria for directors, specifically those with convictions for serious offences. This proposal aims to increase stakeholder confidence in the board and, in general, strengthen the reputation and integrity of listed companies.

Scope of application

The ban applies to serious offences such as money laundering, insider trading, bribery, etc. The professional ban would be effective for 10 or 20 years depending on nature and length of the conviction.

A new screening mechanism, facilitated by a comprehensive database, would monitor directors and ensure that people convicted of the listed serious offences are not able to sit on the board of listed companies.

CONCLUSION

The proposed changes would significantly shift in the governance dynamics of listed companies in Belgium. As this proposed legislation progresses through the legislative journey after its submission to the Belgian Chamber on December 11th, it is crucial for stakeholders to stay informed about its developments.

In the event of the bill's approval, the implementation will unfold in two distinct phases:

1. The law would enter into force on the tenth day following its publication in the Belgian Official Gazette.
2. The mandatory appointment of a minimum of three independent directors would enter into force at a later stage, on the first day of the second financial year following the publication in the Belgian Official Gazette.

Stay well-informed and compliant as you navigate the dynamic corporate governance landscape with legal precision. We will keep you updated on any developments.

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