

TREATMENT OF FOREIGN SECURITIES IN BELGIAN COMMERCIAL AND COMPANY LAW

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1. Introduction

The Belgian legislature has always been very liberal with respect to the settlement of strangers in Belgium, on the condition they observe Belgian law. The same philosophy has been applied in the treatment of foreign securities in Belgium.

The chief characteristic of Belgium's treatment of foreign securities which are publicly issued, or on which a public bid is made, is the lack of special legal regulations. Most of the laws and rules which apply to Belgian securities are also applicable to those of foreign countries. Belgium really does not have any discriminating rules relating to foreign securities, such as those in some neighboring countries where a number of administrative roadblocks or exchange control rules prevent the entry or free circulation of foreign securities.

Another important characteristic of Belgium's securities regulation is the power given by the legislature to executive bodies. Often the law simply sketches a principle or draws a borderline, giving the two bodies charged with the administration of the securities laws, the Banking Commission and the Stock Exchange Listing Committee, considerable leeway in adapting the general rules to any given foreign security situation. Both the Banking Commission and the Stock Exchange Listing Committee have acquired a significant controlling power which they use to define, refine, and implement the principles governing the treatment of foreign securities in their respective fields.

Because so much legislative and judicial power has been given to the two executive bodies mentioned above, it is interesting to look closely at their background. To those not familiar with the Belgian scene, the existence of this two-headed dragon can seem very strange and unnecessarily complicated. Indeed, it is a system unique to Belgium. The existence of these two bodies must be seen in historic perspective. While the Banking Commission and

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Listing Committee are both children of the 1935 financial and economic reforms, they have different functions and very different basic structures.

Compared to the Banking Commission, the Listing Committee is at a disadvantage because of its structure. Long-term approaches to the problems presented are unlikely to be adopted by the Listing Committee, members of which are appointed only for six-year terms and cannot be reappointed until after at least a three-year waiting period. In addition to this system's adverse effect on the Committee's continuity, a new President has been elected every two or three years since 1935. In contrast, the President of the Banking Commission is a member of the permanent staff which advises the Commission on matters of its concern. The Banking Commission also has a reporting system which provides a growing body of up-to-date case law instrumental in deciding similar cases.

The jurisdiction of the Banking Commission and the Listing Committee also differ. The range of activities of the omnipresent Banking Commission is much broader than that of the Listing Committee. The latter deals only with companies that have or seek to have their securities listed on the stock exchange, while the former supervises all public and some non-public handling of securities, including the stock exchange listing.

The decisions of both these bodies must be seen in light of that background.

The authority of the Banking Commission as a controlling body in the interpretation of Belgium's existing financial legislation and company law has grown over the years. On the one hand, this development promotes legal certainty and makes possible an interpretation of sketchy legal provisions in a manner responsive to changing situations without requiring amendments to the law. On the other hand, this situation creates the danger of abuse of power, and the risk of a one-sided approach to securities issues, concentrating on their financial aspects and thereby neglecting a number of other aspects.

With respect to the public issuance of foreign securities in Belgium, it should be mentioned that the activities of the Banking Commission are not limited to the period of actual issuance of securities or to the examination of the files relating to their stock exchange introduction, but extend over the entire period during which these foreign securities are present on the Belgian market. Therefore, the Banking Commission intervenes in a wide variety of fields, such as overseeing the content of information provided to shareholders and ensuring the equal treatment of Belgian shareholders by foreign issuers. Requirements for information to be provided to shareholders, for example, apply to the information released at the time of the public issue or stock exchange listing and contained in the prospectus, but also require that certain records be kept up to date as long as the securities are publicly available in Belgium.

The Banking Commission and the Stock Exchange Listing Committee often intervene in order to reconcile the general legal texts with problems arising

from the disruptive nature of foreign securities and the fundamental Belgian rules and policy. The purpose of this article is not to give exhaustive information about the general procedural rules governing the issuance or listing of foreign securities in Belgium. Rather, it will explore the special treatment accorded to foreign securities by both legislative and controlling bodies in the field of public selling and stock listing.

2. Legislative provisions

As mentioned in the introductory remarks, the number of legal provisions relating to foreign securities as such is extremely limited.

Among the laws with a general scope, there is first Article 108 of the Commercial Code [1], which states:

The public issue, the sale by public offering, and the listing on a national stock exchange of securities other than Belgian public funds, are subject to authorization by the Minister of Finance.

The same authorization is also required for any public offer to exchange or purchase Belgian public funds effected by or for the account of: natural persons who are not nationals of a Member State of the European Economic Community; legal entities, public or private, which are incorporated pursuant to the law of one of these [non-EEC] States; legal entities, public or private, which are incorporated pursuant to the law of one of these States but which do not have their registered office, head office or principal establishment within the Community.

Finally, the Minister of Finance may, by a notification published in the Belgian Official Gazette, make it known that no authorization has been granted for an above-listed operation. From the time of this publication, it is prohibited for anyone at all, and particularly for bankers, stockbrokers, and stockbrokers' correspondents, to cooperate in any way and in any capacity whatever in the execution of the operation in question.

This is followed by reference to penal provisions.

Furthermore, there is Article 199 of the Coordinated Laws on Commercial Corporations [2], which states that:

The public issue, public display, offer and sale of securities of foreign companies, or the inclusion of these securities in the official quotation list of a stock exchange must be preceded by filing with the clerk of the Commercial Court of the articles of incorporation of these companies, as well as the publication in at least two newspapers, including one in the area where the company's principal place of business is located, of a notice indicating the date and place of filing; and all these operations are subject to the conditions required for the public issue, display, offer, sale and inclusion in the official quotation list of the securities of Belgian companies.

Any foreign company, the securities of which are included in the official quotation list of a stock exchange, is required to file its annual accounts with the clerk of the Commercial Court and to publish without delay a notice indicating the date and place of filing in at least two newspapers, including one in the area where the company's principal place of business is located. The securities of companies which do not comply with these requirements may not be maintained on the stock exchange quotation list.

This, too, is followed by a number of penal provisions.

Whereas the first text has a definite character of defense against foreign

shares which do not merit authorization, the second is trying only to extend Belgian regulations on public issue, etc. to foreign shares.

3. Jurisprudence from administrative case law and from operating regulations

The laws quoted above both relate to the public issue of securities or the consequences thereof. The problems dealt with below concern foreign companies which solicit the public, either by issues, stock exchange listings, or takeover bids.

In these cases, Belgian legislation provides for the intervention of one or more supervisory authorities. The Banking Commission always intervenes, and in relation to a stock exchange listing, the Stock Exchange Listing Committee does as well. After these bodies have given their opinion, the Minister of Finance makes the final authorization decision [3].

3.1. The role of the Banking Commission

As should be clear from the introduction, the Banking Commission, by reason of the supervisory powers conferred upon it by the decree of July 9, 1935, has acquired a power of judgment of which it has made increasing use in the years since its creation. While its decisions have exhibited both continuity and flexibility, the growing weight of its authority may pose a risk of a one-sided, purely financially oriented approach to regulation of foreign securities.

The activities of the Banking Commission are not limited to the actual issue of securities or the examination of the files relating to their introduction. They extend over the entire period during which these foreign securities are present on the Belgian market. The commission intervenes in a wide variety of fields, such as: (1) ensuring that adequate information is provided to shareholders; (2) ensuring equality of treatment of shareholders; (3) examining the influence of foreign rules of law on the status of Belgian shareholders; and (4) protecting the rights attaching to bearer certificates. These cases will be dealt with briefly below.

3.2. Providing information to the shareholders

The information disseminated to the public on the occasion of a stock exchange listing must be contained exclusively in the prospectus, which is the basic document enabling the public to form an opinion about the shares offered. Consequently, the dissemination of documents consisting of data from the prospectus in summarized or extract form is not advisable because, according to the Banking Commission, this could distort the significance of the

basic document. It may therefore be stated that the Banking Commission does not subscribe to the EEC principle of the desirability of an abridged prospectus, because it considers that such summaries create the risk that the public would obtain only a partial or incomplete picture of the matter. In one of its annual reports, the Banking Commission pointed out that, at the time of listing its security on the Brussels stock exchange, the management of one foreign company made statements which diverged greatly from the objective figures presented in the prospectus. These statements were reproduced in the press and the Banking Commission, feeling that they were misleading to the public, requested the company to publish a communiqué asking the public to be guided solely by the prospectus.

It is important to bear in mind that, in any case, the prospectus is *the* document for conveying information to the public. Posters, press reports, and circulars should therefore be confined to describing the technical features of the offering; in particular, they should refer to the prospectus and state where it can be obtained. For the content of this issue prospectus, the Banking Commission has been guided in recent years by the principles contained in the draft directive concerning the European issue prospectus. Yet the Commission has pointed out that, while the application of this directive involves no difficulties in principle, there will be no automatic and direct application of it. Even if the directive were to come into force, there always remains a possibility of adjustment to special cases and of departure from the rule in special circumstances. In view of the fact that Belgium requires a prospectus for both stock exchange listing and new issues, this country is already complying with the principles laid down in the EEC directive.

Equality as to information received is one aspect of the equal treatment of shareholders. The Banking Commission states that once shares of foreign companies are listed on the Stock exchange in Belgium, the Belgian market must be treated in the same way as the foreign markets and, *inter alia*, must have equal access to information. In other words, this requirement goes beyond the publications required by Belgian law in Article 199 of the Co-ordinated Laws on Commercial Corporations, since it relates to *all* data published by the company. The Banking Commission therefore recommends that information disseminated in the country of origin be disseminated at the same time, or shortly thereafter, in Belgium as well. Obviously, this applies to information that may have an effect on the appreciation of securities listed on the Belgian stock exchange.

Equality among the different markets requires that shareholders have the opportunity to actually exercise the rights attaching to their shares. This means that when it is decided to issue new securities to which current shareholders have pre-emptive rights, the Belgian public must be informed and must be given an opportunity to exercise their rights. As in the case of any public issue, the exercise of such rights is preceded by the submission of a file to the

Banking Commission via the Belgian bank which provides financial service for the shares in Belgium. Moreover, this bank plays an important role in dealing with the foreign securities, as it has to ensure that application or bonus rights are exercised in an effective way in Belgium.

In addition, it may also be the responsibility of the issuer of bearer certificates and the bank which guarantees the commitments involved to take all necessary action to proceed with the public offering in Belgium when one is made in the country of origin. In this respect, the Banking Commission has pointed out on several occasions that, in the case of increases of capital involving pre-emptive rights carried out by a foreign company, the rights could not be fully exercised in Belgium either because the company delayed providing the information necessary to comply with the legal formalities in due time, or because it entirely neglected to transmit this information to the controlling authority and to the Belgian banks responsible for the financial operations [4].

3.3. Equality of shareholders

One of the rules of the Banking Commission pertaining to the examination of a domestic file for public issue or stock exchange listing relates to the pre-emptive rights of shareholders. The Banking Commission has maintained this rule with respect to foreign securities, so that candidates for listing are asked to observe in all cases the principles laid down by the Banking Commission regarding such rights.

The policy of the Banking Commission is that Belgian holders of shares of a certain class must have the same rights as the shareholders of the country of origin who own shares of the same class. However, these Belgian shareholders can claim no rights to which, pursuant to the legislation of the country of origin, holders of the same class of shares are not entitled in the country of origin.

This means that if a company with shares listed in Belgium decides to proceed with a stock split, a capital issue, or a bonus allotment, the Belgian shareholders must have the same rights with regard to that split, issue, or allotment as the shareholders of the country of origin owning shares of the same class. Any additional public issue of shares of a class listed in Belgium must be extended to the Belgian market. By the same measure, however, if a company were to proceed with a private issue of the class of shares listed in Belgium, or if it were to issue shares of a class listed in Belgium in order to acquire a company, Belgian shareholders of this class could not claim any right to such shares.

Issues for cash with preferred rights for the shareholders are normally divided into two categories: (1) issues of shares, and (2) issues of bonds, whether or not convertible into shares.

3.4. *Shares*

Normally, a prospectus is published abroad in connection with the issue of new shares of a category listed in Belgium. As the preferred rights to new shares of a category belong to all shareholders of this category, including Belgian residents, application for the new shares of this category must be allowed to occur through paying agents in Belgium. A file has to be submitted beforehand to the Banking Commission for approval, including, among other things, the issue prospectus, which must be made available to the Belgian shareholders at the time of the public offering of these new shares in Belgium.

3.5. *Bonds*

For the public issue of bonds, whether or not convertible into shares, with pre-emptive rights for existing holders of a category of shares listed in Belgium, the same attitude is adopted. The subscription lists must likewise be opened to the Belgian paying agents. Consequently, the approval of the Banking Commission has to be sought here. In the case of a convertible bond issue, a file will also have to be deposited within a certain period, prior to the time when conversion is possible. This file consists of the original prospectus as well as the annual and half-yearly reports which have appeared since the date of the original prospectus, supplemented by other new developments, *e.g.* amendments to articles of incorporation or changes in capital.

Disclosure requirements vary with the type of securities activity. If the issuer chooses to file a non-compulsory application for listing of its bonds with the Brussels stock exchange, a file containing a current prospectus must be submitted. The original issue prospectus may be used if the application for listing occurs within a reasonable period after the issue. In the case of issue and listing of stock dividends, of shares charged to the share premium account, and payment in shares via an optional dividend, a prospectus must in theory be published, although exemption from this requirement may be granted after examination.

For the purpose of issuing and listing new securities in Brussels, both in the case of issue of shares and in the case of a bond issue, whether or not convertible (a convertible bond is regarded by the Banking Commission as a deferred share issue), the same procedure must be followed as that discussed above for issues for cash with rights of first preference to the shareholders.

4. **The influence of foreign legislation on the status of the Belgian shareholder**

When the provisions of a foreign securities regulation system differ from Belgian law, the Commission confronts the problem of ensuring equal treat-

ment of shareholders while trying, when possible, to fit the foreign legislation into the framework of Belgian principles of law. The final judgment of the foreign law is based upon an examination of local situations, with no rigorous application of Belgian legal principles. According to the Banking Commission, this was the case with the double voting rights granted to registered shares owned by French nationals. In all such cases, the Banking Commission, after thorough examination of the problem, determined that the legal status and conditions of operation of the foreign companies were acceptable within the framework of the foreign legislation. Therefore, it did not have to oppose the stock exchange listing of these securities. However, the conditions were always set forth that the Belgian public should be clearly informed about the restrictions on their rights and that these clauses should not lead to the exclusion of shareholders from any right to participate effectively in the general meeting, e.g. with respect to appointment of directors, compilation and justification of the accounts, and amendments of the articles of incorporation.

The situation was different, however, with regard to oligarchic structures such as those in the Netherlands. As the Banking Commission pointed out in one of its annual reports, the shares are almost entirely deprived of all normal corporate rights and, in fact, carry solely the right to collect a dividend. The holders of these securities are therefore reduced to the rank of mere "sleeping partners", financially interested in the life and risks of a firm but deprived of any legal means of individually or collectively intervening or wielding any influence over the policies of the company.

Furthermore, the Banking Commission found that the nationalistic basis of many of these clauses could lead to a situation in which the rights of foreigners (in this case Belgian shareholders) could be totally disregarded, without recourse. A conflict went on for many years as to whether or not these shares could find a place on the Belgian stock exchanges within the Belgian legal system. Finally, the Commission decided that the risk of prejudice to shareholders is greatly diminished by adequate disclosure rules. It developed a rule that permitted approval of applications for Belgian listing relating to securities of first-class companies whose securities were already listed on the principal EEC, United Kingdom, or United States stock exchanges. After consulting with the Minister of Finance, the Banking Commission decided not to prevent the inclusion of those securities which met these conditions. However, the Belgian banks which sponsored the listing of these shares were asked to follow up carefully the policies of such companies regarding the legal rights of their shareholders, to inform the Banking Commission of any action that might be in conflict with the basic standards of financial ethics, and to contact the management of the company in order to give them any necessary explanations.

To sum up, the Banking Commission ultimately decided that the mere existence of potential discrimination does not impede the official listing, provided it does not cause prejudice to the Belgian savings sector or distort the

operation of the market. In this connection, the Banking Commission requires that an accurate description of these rights or lack thereof should be provided in the listing prospectus.

5. The rights attaching to bearer certificates

As in the Netherlands, foreign shares are often issued and subsequently listed in the form of certificates representing these foreign shares. This system is a relic of the former regulations of the Listing Committee of the Brussels stock exchange whereby only bearer shares could be listed. As most shares issued in the English-speaking world are registered shares, a system was devised by which these shares could nevertheless be traded in the Belgian stock market by means of a bearer certificate representing them. Canadian Pacific, one of the first securities to be listed in this way, appeared on the Brussels stock exchange as far back as 1890 via certificates issued by Westminster Bank. The big rush, however, came only after World War II. In the 1950s, a number of companies (some Belgian and some established abroad on Belgian initiative) were incorporated in very quick succession for the exclusive purpose of issuing certificates representative of foreign shares which could be traded in the Belgian market.

What, then, is the actual status of this type of certificate? The Banking Commission requires that the companies issuing these certificates declare in the issue documents that the owner of the certificate effectively enjoys all the rights which the original shareholder can exercise. It is therefore not permissible for these companies to exercise *ex officio* the voting rights on behalf of the certificate holders. The trust company must give the holders of the representative certificates the opportunity to exercise their voting rights, if any. The same applies with regard to dividend payments or application rights. In fact, it could be said that in this case the trust company is no more than a "letterbox" or a transparent organization, through which the certificate holder exercises all rights and receives all privileges to which he would be entitled if he were the holder of the original security, although the intermediary certificate company's name rather than his own appears on the issuing company's registers.

In the view of the Banking Commission, the certificates issued in bearer form by these Belgian companies must always be regarded as foreign shares. As a foreign securities issuer, the "administration" company must obtain authorization from the Minister of Finance, as required by Article 108 of the Commercial Code, prior to the public issue or listing of their bearer certificates. The publication requirements mentioned in Article 199 of the Coordinated Laws on Commercial Corporations must also be met.

The Banking Commission pointed out in one of its reports that this certificating system is appropriately regarded as involving foreign securities,

since the holders have the possibility of exchanging the certificates at any time for registered shares (at which time they may also give the administration company instructions for the exercise of voting rights in the foreign company). The foreign character of these certificates also emerges in the fiscal law. The tax authorities have rules that income from these certificates is regarded as foreign income. Thus, the income collected abroad from a certificate issued by a Belgian trust company is not subject to Belgian withholding tax.

As an alternative to the classic form of certificates, experiments have been made over the past eight years with a system whereby foreign securities are traded and delivered in the form of an entry with a security center called the "Caisse Interprofessionnelle de Dépôts et de Virements de Titres" (hereinafter CIK), which is an interprofessional fund. The trust company makes out a special overall certificate, the equivalent of its foreign securities, which is handed over to the CIK. Thus, in theory a choice is possible between the classic mechanism of the bearer certificate and the transfer of the original shares through the CIK mechanism.

It was originally planned that future listing would occur in only one of the two forms, while steps would gradually be taken to ensure that certificates issued in the course of previous years would also be dealt with through the interprofessional fund. In practice, however, these so-called CIK nominees have not met with much success in the stock market, despite the fact that, unlike trust certificates, these CIK certificates involve no issue costs. Since the end of 1980, the CIK certificates have been gradually withdrawn from the Brussels stock exchange forward market because of the absence of an adequate market for them.

6. The public issue of foreign investment funds in Belgium

The legislation on mutual funds is almost exclusively directed toward Belgian mutual funds. Article 6 of the Law of March 27, 1957 [5], provides that, without prejudice to the application of Article 108 of the Commercial Code, any public call in any form whatsoever which involves participation in a non-Belgian mutual fund requires prior authorization of the Banking Commission. The Article goes on to state that the Banking Commission may limit the amount and duration of the call on the public and that it may likewise determine the conditions which have to be fulfilled in order for its authorization to be granted and maintained. Moreover, the Banking Commission may withdraw its authorization if the conditions imposed are not met.

Apart from this single provision, the body of law and regulations concerning mutual funds contains no text whatever which is exclusively applicable to foreign funds. In fact, the departmental order ratifying the Banking Commission's regulation on mutual funds speaks of the regulation as one concerning

Belgian mutual funds. Given this lack of specific direction, the Banking Commission has acted pragmatically with regard to foreign funds. Through its efforts, foreign investment funds have been able to operate within the Belgian system without causing any discrepancy in treatment of investors, and without engaging in improper competition with Belgian investment funds.

Here again is a situation in which the Banking Commission applies the general principles governing Belgian investment funds to similar foreign funds, taking into account the different nature of the latter. The Banking Commission has specifically stated that the regulation of April 3, 1958 [6], is not applicable to foreign jointly-owned assets. However, this does not prevent it from ascertaining whether the management regulations contain provisions that would be likely to endanger the assets of the Belgian investors. The Banking Commission requires the foreign issuers to give detailed information to the Belgian subscribers about the nature of the investments and about the evolution of the fund. This information must be provided in conformity with the rules applicable to Belgian funds insofar as this is possible, given the foreign companies' record-keeping systems. The Banking Commission asks these foreign companies to provide monthly information reflecting the development of the fund.

It is the responsibility of the Belgian financial service of the foreign mutual fund to provide the Banking Commission with statistical information relating to the number of foreign securities actually issued and withdrawn in Belgium. Adequate steps must be taken to obtain any information which the Commission requires.

In accordance with its rules, the Banking Commission has made some decisions over the course of years which have had far-reaching effects on the foreign mutual funds. This is the case, for example, with the apportionment of appreciations. By the terms of the Belgian Departmental Order dated January 12, 1966, a mutual fund may proceed to the distribution of profits only insofar as the fund has an overall profit. Furthermore, these may be distributed only to a maximum of 4% of the value of the fund, and must be in the form of shares. When judging a foreign investment fund, the Banking Commission considers the rights of the holders of shares in such funds. The Banking Commission permits neither public solicitation for shares of foreign funds which do not meet the major requirements imposed for Belgian investment funds, nor discriminatory use of its authorization to the disadvantage of foreign funds. Several foreign investment funds, not wishing to adjust to Belgian profit distribution rules, have been denied permission to make a public offering in Belgium.

In one case, the Banking Commission withdrew the authorization it had granted to a foreign mutual fund when the fund decided to distribute the cash equivalent of the appreciations realized, although the inventory value of its portfolio showed an overall reduction in value in proportion to the amount of the participants' capital contributions.

The amount and method of calculation of issue and management commissions is another common stumbling block for foreign funds when they apply to make a public offering in Belgium. Again, the Banking Commission requires that foreign funds comply with the rules on the amount and method of calculation of these commissions applicable to Belgian funds in Belgium.

The Banking Commission has reacted favorably to an application for an increase of the issue commission of a foreign mutual fund, but only after it obtained the issuer's assurance that this increase would relate solely to the certificates placed outside Belgium. Thus, neither the assets nor the income of the fund would be charged for it. The Banking Commission refused to accept an increase in the management commission, which would have been charged to the fund.

Another type of problem has been presented by the Banking Commission's decision to give certain Belgian participants the same opportunities as those granted to foreign participants pursuant to legislation in the country of origin. For example, Belgium has no legal provision which allows the possibility of going back on a decision to purchase, free of charge and for a period of some days, if the participant himself did not take the initiative to subscribe. Moreover, the canvassing and hawking of securities are prohibited in Belgium. Nevertheless, the Banking Commission decided that in such a case the public in Belgium should be given the same opportunity as the public of the country of origin and that this opportunity should be specially mentioned in the prospectus.

Although Belgian legislation relates exclusively to regulation-type mutual funds and is not directly applicable to statutory funds (those incorporated in the form of a company), the Banking Commission infers from the legislative history that the intention of the legislature was to include statutory funds. The Banking Commission, therefore, follows closely the actions and omissions of the investment institutions of the statutory type engaging in public issues in Belgium and takes care to ensure that the principles it adopts with respect to regulation funds are applied to these statutory funds as well.

7. Takeover bids involving foreign securities in Belgium

In a takeover bid for foreign securities in Belgium, the party making the bid has to observe the same Banking Commission rules as apply to Belgian securities. It must also observe the special rules for foreign securities included in Article 108 of the Commercial Code, which have already been pointed out.

The Banking Commission may also play a role in takeover bids abroad, for foreign securities. In the case of one such takeover bid by a Belgian company, the Commission noted that it could not suspend its execution because of jeopardy to the equilibrium of the capital market or because of the misleading

nature of the bid, as it could if securities in Belgium were involved. The Commission need not play a purely passive role, however, as it may give opinions and recommendations regarding the takeover attempt abroad.

In another takeover bid abroad relating to securities circulating in Belgium, in order to prevent Belgian shareholders from suffering prejudice as a result of the takeover attempt the Commission required that bids made abroad for securities in circulation in Belgium also be made in Belgium. While the Commission insisted that the Belgian rule concerning takeover bids be followed, the information document used abroad was accepted for use in Belgium, as well.

The Banking Commission has also made it clear that it wishes companies to consult with it, as well as to comply with the Belgian equal treatment requirements. In one recent case, two foreign companies were requested to cease all publicity in their bidding contest following their placement of unapproved announcements of their bid and counterbid in the Belgian press.

8. The task of the Listing Committee

Whereas the Banking Commission is mainly guided in its policymaking by considerations of disclosure and equality of shareholders, the Listing Committee is chiefly interested in the extent to which a security to be listed is a worthy investment and the practical opportunities for purchasing the securities in Belgium. Both institutions are well aware that they are dealing with securities which do not necessarily meet the criteria required for Belgian securities and both institutions are anxious, despite these differences, to aim for equal treatment of Belgian and foreign securities.

The Listing Committee's approach to a problem is, of course, different from that of the Banking Commission. Whereas the Listing Committee is composed exclusively of specialists (*i.e.* seven stockbrokers and five bankers), the Banking Commission is a purely administrative body. Although the problems with regard to the listing of foreign securities often run parallel for these two bodies, the way in which they are tackled and the emphasis on a given solution may differ significantly. The two institutions do consult each other on questions of policy, so that there is practically no danger of truly contradictory decisions.

The Listing Committee, which derives its powers from Article 101 of the commercial Code [7], examines the merits of a stock exchange listing. The law does not define the task of the Listing Committee any more than it defines the task of the Banking Commission, but confines itself to mentioning (in addition to a number of rules of procedure which are of less importance here) that the Committee decides about inclusion and deletion from the stock exchange list, both for the forward and spot markets [8]. To that end, it examines all factors which are relevant in judging whether inclusion on the stock exchange list or

deletion therefrom is advisable. With only that as a guideline, the Listing Committee has a far-reaching valuation task.

The desire to create a market that would function as smoothly as possible is the rationale underlying the decisions of the Listing Committee. As evidenced by cases in which there is a manifest distinction between current Belgian practice and the system used in the country of origin of a foreign security, the Listing Committee's policy is to reconcile the Belgian and foreign practices so that the investor's interests are not jeopardized. In the words of a former chairman of the Committee, admission to stock exchange listing gives the shareholder an assurance that the security represents a reliable company and that the shareholder's rights are respected in the framework of national legislation and usage. The intervention of the Listing Committee is thus a guarantee and a protection.

The regulations of the Listing Committee include some provisions relating to their application to foreign securities. In fact, these provisions are merely a transposition of the conditions applicable to the treatment of a file for Belgian securities [9]. As to the physical presentation of the securities, reference is made to Articles 28 and 31 of the Commercial Code, which relate to exceptions that can be granted to the Listing Committee from its own regulations.

In recent years, the Listing Committee has dealt, *inter alia*, with the problem of the listing of foreign securities in certificate form. It has asked questions about the costs attaching to these certificates, and about the denominations in which these certificates were offered to the public in order to facilitate their negotiability and to make international arbitrage possible. The Listing Committee has also ruled that such certificates representing foreign shares may be offered by only one trust company so as to avoid confusion. In addition, the listing of a foreign security can occur only if it is done with the knowledge of the foreign issuer.

The Listing Committee acts on the principle that the legal nature of securities and the legal rights of shareholders under the law of the country of origin must be accepted as such. It is certainly not within the powers of the Belgian stock exchange authorities to impose conditions on a foreign institution, as long as differing legal concepts can be reconciled with Belgian legislation.

An important problem that has been of concern to the Listing Committee for some years is *ex officio* listing. *Ex officio* listings were made possible under the terms of the Royal Decree of November 10, 1967 [10]. The question arose whether the Listing Committee could list foreign securities within the framework of this decree. In the end, the Committee refrained from doing so because the practical application of this principle raised a number of problems concerning foreign shares. These problems related to the remuneration of the Banking Commission and the Listing Committee, the formalities that had to be fulfilled, legal memoranda, information given to shareholders, and the financial services

that, in principle, must be free of charge for foreign shares.

The Commission requires issuers of listed foreign securities to at least publish annual and other financial reports, to ensure the availability of adequate information to the shareholders.

9. Intervention by the Minister of Finance

After a file has been examined by the Banking Commission and/or the Listing Committee, it is submitted to the Minister of Finance, who acts according to the powers vested in him by Article 108 of the Commercial Code.

The Minister will generally make a positive or negative decision in line with the proposals of the Banking Commission and the Stock Exchange Listing Committee. There have been occasions, however, when the Minister has refused recommended authorization due either to monetary policy considerations or the fear that a public issue would cause a distortion of the Belgian domestic capital market or promote an outflow of foreign exchange. Thus, in the early 1960s there was an embargo on the listing of new foreign shares on the Belgian stock exchanges and, even at present, it is very difficult to obtain the Minister's authorization for the public issue of foreign securities if he is of the opinion that this would encourage a flight of capital. These are, however, merely the traditional exceptions which confirm the rule.

10. Conclusion

On the one hand, the Belgian system provides a minimum of special legal rules regarding the treatment of foreign securities. On the other hand, the case law of the Banking Commission and of the Stock Exchange Listing Committee adopts and cross applies the general Belgian law. The system has proven to be flexible and adaptable to new situations over the past years, and because of the sense of responsibility of those two bodies, the law regarding foreign securities in Belgium has developed with remarkable uniformity.

In this connection, the positive role of the banks, which generally advocate public issue or stock exchange listing of foreign securities in Belgium, should be emphasized. They have contributed to finding a solution for many difficult problems on several occasions.

Notes

[1] Code de commerce [hereinafter cited as C. Com.], Article 108, Tome I, Les Codes Larcier Livre I, Titre V (1980).

[2] C. Com., Article 199, Tome I, Les Codes Larcier Livre I, Titre IX (1980).

[3] C. Com., Article 108.

[4] C. Com., Article 199.

[5] Law of March 27, 1957, Article 6, 1980 Droit Economique et Fiscal 181, 182, Tome IV, Les Codes Larcier (1980).

[6] *Id.* at 181, approved by Judgment of January 12, 1966, Arrêté Ministeriel, Brussels. 1966 Pasinomie 34.

[7] C. Com., Article 101, Tome I, Les Codes Larcier Livre I, Titre V (1980).

[8] *Id.*

[9] *Cf.* C. Com. Articles 18, 24, 25, 27, 28, 29, 31, Tome I, Les Codes Larcier Livre I, Titre V (1980).

[10] Royal Decree of November 10, 1967, Arrêté Royal, Brussels. 1967 Pasinomie 1310.

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