

COMPARISON OF ISSUES UNDER BELGIAN CORPORATE LAW

Question (Y/N)	Netherlands	France	UK	Germany
<p>1. Validity of options on shares: In Belgium, there is continued legal uncertainty on the validity of call and put options on shares. This is based on an old rule of the <i>Code Napoléon</i> (currently reflected in article 32 of the Belgian Company Code or BCC), stating that a shareholders cannot be excluded from participating in the losses or profits of a company (the so-called "lion clause").</p>				
Do you have a similar rule (and legal uncertainty) in your jurisdiction ?	NO	NO	NO	NO
<p>2. Convertible bonds: In Belgium, it is doubtful whether <u>automatically</u> convertible bonds can be issued.</p>				
Do you have the same uncertainty in your jurisdiction ?	NO	NO	NO	NO
<p>3. Exercise of warrants: Under Belgian law any provision that makes the exercise of warrants mandatory is null and void.</p>				
Do you have a similar rule in your jurisdiction ?	NO	NO	NO	NO
<p>4. Voting agreements among bondholders: The BCC provides that agreements between bondholders should be limited in time as well as in the interest of the issuer. In addition, such agreements are null and void if they provide that the bondholder shall follow voting instructions from the issuer.</p>				
Do you have a similar rule in your jurisdiction ?	NO	NO	NO	NO
<p>5. Minimum term of rights issues: According to the BCC, a rights issue must be announced 8 days before launch and then be open for at least 15 days (total of 23 days market exposure).</p>				
Do you have to comply with minimum periods for rights issues ?	NO	YES	YES	YES
If so, are the periods referred to above shorter or longer than in Belgium ?	N/A	SHORTER	SHORTER	SHORTER
<p>6. Minimum price in private placements of listed companies: If a Belgian listed company wants to issue shares to specific persons with cancellation of the preferential subscription rights of the existing shareholders (i.e. issue reserved for a specific group of QIBs), it can only do so at a price that is at least equal to the average share price of the 30 days preceding the private placement.</p>				
Do you have a similar rule in your jurisdiction ?	NO	NO	YES	YES
If so, are discounts possible	N/A	N/A	YES	YES

Question (Y/N)	Netherlands	France	UK	Germany
?				
7. Conversion of convertible bonds and exercise of warrants: In Belgium, convertible bonds and warrants are always convertible/exercisable (at the option of the holder) in case of a subsequent capital increase in cash by the issuer (even if the conditions of the convertible bonds or warrants provide otherwise) to which the existing shareholders have the right to subscribe.				
Do you have a similar rule in your jurisdiction ?	NO	NO	NO	NO
8. Non-voting shares: In Belgium, non-voting shares can represent maximum 1/3 of the issued share capital.				
Do you have a similar rule in your jurisdiction ?	NO	YES	NO	YES
If so, is the maximum % higher or lower ?	N/A	SEE BELOW	N/A	HIGHER
9. Non-voting shares: In Belgium, non-voting shares must be entitled to a preferred dividend right.				
Do you have a similar rule in your jurisdiction ?	NOT POSSIBLE	NO	NO	YES

Comments
<p>Question 1</p> <p>FR French Case Law used to impose the same restriction on put options at fixed/minimum price.</p> <p>Call and put options on shares are valid under French law but specific performance may not be granted by French Courts if for example, an acquiring third party purchased the shares in good faith without being aware of an existing option or if the option agreement did not explicitly provide for specific performance.</p> <p>DE There is no uncertainty under German law as to the validity of put or call options under German law. Put/call options are usually structured as an offer to sell or purchase shares by the option-counterparty. Such counterparty is not deemed to be excluded from profits or losses of the company if the party holding the option accepts such offer in exercising the option.</p>
<p>Question 2</p> <p>FR Under French law, there is a distinction between convertible bonds (obligations convertibles en actions - OCA) which may be convertible into shares (i.e. bonds may be repaid in cash or shares) and redeemable bonds (obligations remboursables en actions – ORA) which are automatically convertible/repaid in shares.</p>

NL

We note that there may be uncertainty in respect of the conversion in case of bankruptcy.

DE

According to the prevailing doctrine and market practice convertible bonds which are fulfilled by the delivery of shares in the issuer after a pre-defined interval, irrespectively of an exercise by the bondholder, are legally permissible, even if some scholars question the validity of such instruments.

Question 3

DE

There is no such general rule applying to all subscription rights for shares in an issuer. The exercise of the shareholders' statutory preferential subscription rights for new shares in the context of capital increases must not be mandatory. The exercise of subscription rights linked with convertible bonds may be made mandatory (see question 2 above). Subscription rights not linked with a convertible bond ("naked warrants") are considered impermissible by many scholars and courts and hardly ever used in practise.

Question 4

FR

Voting arrangements must be limited in time and in scope.

UK

Geoff Fuller's most recent book (see pages 590 - 593) explains that bondholders must act bona fide in the interests of bondholders as a class - this does not mean that a vote of a majority bondholder would be invalid merely because it is prejudicial to minority bondholders - but the vote of a majority bondholder may be invalid if there is an improper or unfair notice on the part of the majority bondholder - such as fraud, bad faith, an intention to oppress the minority or to deprive it of its rights or the majority being motivated by a "collateral benefit" that it not available to the minority. One of the most obvious situations where a resolution can be invalidated on these grounds would be when an undisclosed consideration is given to members of the majority for voting in favour. There would also be a risk of a successful challenge where members of the majority also had other relationships with the issuer (e.g. as a bank creditor or as a shareholder).

DE

Pursuant to recently enacted legislation (*Schuldverschreibungsgesetz*) the bond terms may provide for the installation of a creditors' meeting in which the bondholders may adopt resolutions by majority votes. The issuer and any bondholders affiliated with the issuer have no vote in the creditors' meeting; this prohibition must not be circumvented by voting agreements between such issuer or his affiliates and other bondholders. Apart from that, this legislation does not contain any provisions restricting voting agreements among bondholders in such way as the BCC.

Question 5

FR

Rights issues must be open for subscription for at least 5 trading days and the rights issue must be announced no later than 14 days before the end of the subscription period.

UK

A listed company must ensure that the offer relating to a rights issue remains open for acceptance for at least 10 business days (LR 9.5.6).

NL

The law in respect of rights issues is not mandatory and the statutory regulation is therefore usually excluded. We note that there may be requirements in respect of timing based on the regulations of the stock exchange, which we have not included in this response.

DE

Pursuant to the German Stock Corporation Act (*Aktiengesetz*), a rights issue must extend at least over two weeks. Such period may begin on the day of the public announcement of the rights issue. If the subscription rights shall be publicly traded on the Frankfurt Securities Exchange the rights issue must be announced one business day prior to the commencement of the two-week period.

Question 6

UK

The Listing Rules (LR 9.5.10) provide that if a listed company makes an open offer, placing, vendor consideration placing, offer for subscription of equity shares or an issue out of treasury of a class already listed, the price must not be at a discount of more than 10% to the middle market price of those shares at the time of announcing the terms of the offer or at the time of agreeing the placing (as the case may be).

This rule does not apply to an offer or placing at a discount of more than 10% if (a) the terms of the offer or placing at that discount have been specifically approved by the issuer's shareholders; or (b) it is an issue of shares for cash or the sale of treasury shares for cash under a pre-existing general authority to disapply existing shareholders' rights of pre-emption.

In addition, the IPC guidelines provide that no shares should be issued under a specific disapplication of pre-emption rights at a discount of more than 5%. This is stricter than the Listing Rules provision.

The ABI also has guidelines related to vendor placings which provide that shareholder consent should be obtained where a vendor placing involves a discount greater than 5% on the company's share price (unless a clawback is offered to shareholders).

DE

There is no fixed statutory minimum price in the German Stock Corporation Act, but the price for the newly issued shares must not be "unduly low". The issue price must reflect the "true value" of the company. The price for which publicly listed shares are trading is a crucial benchmark in determining such "true value". However, other factors can be taken into account which may justify discounts, *e.g.* the interest of the company in retaining new shareholders, assets or in realizing synergies.

Question 7

FR

French law provides for dilution protection for holders of securities giving access to the share capital in the future (e.g. adjustment of conversion formula) but does not provide for automatic conversion/exercise.

DE

There is no such rule under German law. The German Stock Corporation Act, does not contain any explicit statutory rules protecting holders of convertible bonds in the event of subsequent cash capital increases against the dilution of their option rights. However, pursuant to a doctrine supported by some scholars, holders of convertible bonds are entitled to protection in such an event by way of an amendment of the option terms, *e.g.* through a discount on the option price or a cash payment to the option holders. By common market practice the terms of convertible bond contain such amendment mechanisms.

Question 8

FR

Maximum number of non voting shares is $\frac{1}{2}$ in private companies and $\frac{1}{4}$ in listed companies. Shares with permanent non voting rights are not valid in a Société Anonyme - SA (in an SA, shareholders cannot be permanently deprived from voting rights but voting rights may be limited, suspended, cancelled for a certain period of time, etc.). As a matter of principle, non voting shares shall benefit from a preference (which may be other than preferential dividend rights). More flexibility is available with voting rights in a Société par Actions Simplifiée – SAS.

UK

A company must have voting shares - there is no limit to the number of non-voting shares that are issued.

NL

Dutch companies cannot issue non-voting shares. In the Netherlands, the same effect can be effected through the use of depository receipts (issued by a foundation that holds the shares in the company). Currently, legislation is pending whereby a Dutch limited liability company (the BV) can issue non-voting shares. There is no maximum percentage applicable to the number of non-voting shares (other than one share that can vote).

DE

Pursuant to the German Stock Corporation Act, non-voting shares may not represent more than 50% of the issued share capital.

Question 9

NL

As mentioned under Question 8, legislation is currently pending. This legislation does not have a similar requirement.

DE

The German Stock Corporation Act contains a similar rule.

