



d e m i n o r

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Brussels, 15 October 2018

Dear Madam,  
Dear Sirs,

At the initiative of Deminor, the Belgian consultancy firm specialised in corporate governance and shareholder protection, we send this letter to express our concern about the potential introduction of loyalty shares for Belgian listed companies. A draft form of this letter was previously sent to and discussed with our clients, institutional investors, and with leading investor organizations.

Our position is in line with the opinion of ICGN, an authority on global standards of corporate governance and investor stewardship. ICGN has made its position known in similar debates in France<sup>1</sup> and Italy.<sup>2</sup> The Italian government, responding to these concerns, ultimately decided against the introduction of double voting rights without supermajority approval. Like ICGN, we believe in the importance of the “one share one vote” principle. This principle “ensures the equal treatment of all shareholders in the company by aligning control via voting rights with economic interests”<sup>3</sup>, thereby limiting the potential for conflicts of interest. The “one share one vote” principle can help prevent management entrenchment, which insulates controlling shareholders from market forces,<sup>4</sup> and results in an even allocation of risks between shareholders. Effectively,

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<sup>1</sup> ICGN Support letter to the French asset management association (Association Française de la Gestion financière – AFG), available at: <https://www.icgn.org/sites/default/files/AFG%20-%2029.01.2015.pdf>

<sup>2</sup> Joint Statement on the Introduction of Multiple Voting Rights at Italian Listed Companies, available at <https://www.eumedion.nl/en/public/knowledgenetwork/letters/2015-02---statement-on-italian-multiple-voting-rights.pdf>, Nota Tecnica sul voto maggiorato in Italia e all'estero, available at: <http://www.assogestioni.it/index.cfm/1,147,10681,49,html/voto-maggiorato-e-votoplurimo-un-vulnus-al-principio-di-one-share-one-vote>, ICGN Comment on the Growth Decree re multiple voting rights, 28 January 2015, available at [https://www.icgn.org/sites/default/files/Italian%20Government%20-%2028.01.2015\\_1.pdf](https://www.icgn.org/sites/default/files/Italian%20Government%20-%2028.01.2015_1.pdf).

<sup>3</sup> ICGN Viewpoint, Differential share ownership structures: mitigating private benefits of control at the expense of minority shareholders, February 2017, available at: [https://www.icgn.org/sites/default/files/2.%20ICGN%20Viewpoint%20differential%20share%20ownership\\_1.pdf](https://www.icgn.org/sites/default/files/2.%20ICGN%20Viewpoint%20differential%20share%20ownership_1.pdf).

<sup>4</sup> Bebchuk, Lucian A. and Kastiel, Kobi, The Untenable Case for Perpetual Dual-Class Stock (April 18, 2017). Virginia Law Review, Volume 103, pp. 585-631, June 2017; Harvard Law School John M. Olin Center Discussion Paper No. 905; Harvard Law School Program on Corporate Governance Discussion Paper 2017-6, available at: <https://ssrn.com/abstract=2954630>.

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introducing differential share ownership rights will mean that “*controllers with low equity holdings bear only a small fraction of the negative effects of their actions on the company value while capturing the full private benefits.*”<sup>5</sup>

By contrast, attaching multiple voting rights to a single share can be harmful to corporations in two major ways. First, as ICGN found in their research, which is based on numerous empirical studies, companies that have shares with multiple voting rights often underperform in terms of governance quality.<sup>6</sup> A separate study further demonstrates that “*firm value is positively associated with insiders’ cash-flow rights and negatively associated with insiders’ voting rights, and negatively associated with the wedge between the two*”, concluding that “*a majority owner of a private company can rationally choose to sacrifice some firm value in order to maintain private benefits of control.*”<sup>7</sup> Second, artificially inflating a shareholder’s voting power – without matching this to the shareholder’s actual economic exposure – weakens the accountability of managers and controlling shareholders towards minority shareholders and insulates companies from market forces. All of this can lead to unintended consequences, which are particularly damaging towards minority shareholders and institutional investors.

The Belgian government’s justification for introducing multiple votes shares is that this measure can encourage the long-term engagement of investors and facilitate the anchorage of Belgian companies. Deminor does not contest the added value of reference shareholders who monitor and help define the long-term strategy of a company and supervise its management. There are several studies showing how companies with stable, long-term and involved owners perform better than companies with dispersed short-term investors. But Deminor strongly believes that the anchoring of a company is perfectly possible without introducing double voting rights, as there are plenty of examples of corporations where reference shareholders have less than 50% of the voting rights combined.

In addition to keeping “one vote one share” principle, we also believe the proposed majority requirement to adopt the loyalty rule is inconsistent with the protection of minority shareholder interests.

Under Belgian company law, a supermajority of 75% is required to amend the articles of association. The goal of this supermajority is to protect minority shareholders against the risk of the majority unilaterally modifying their rights as shareholders. However, the majority vote that is required to introduce loyalty shares is only 66%, which makes it much tougher for minority shareholders to block the adoption of the loyalty rule. We do not see why the required majority for the introduction of loyalty shares is lower than the majority required for any other amendment of the articles of association. Such a threat to minority rights should in fact be strictly framed.

The temporary provision allowing companies to amend their articles of association with a simple majority vote until 30 June 2020 is alarming. During this period, it will practically be impossible for minority shareholders to block the amendment. This will allow the majority to change the rules and violate minority shareholders’ rights with complete impunity and without checks and balances. Third, the introduction of loyalty shares will have a clear disparate impact among shareholders: it will automatically benefit the controlling shareholders, because controlling shareholders do not usually trade their shares on the stock

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<sup>5</sup> Ibid.

<sup>6</sup> ICGN ([https://www.icgn.org/sites/default/files/2.%20ICGN%20Viewpoint%20differential%20share%20ownership\\_1.pdf](https://www.icgn.org/sites/default/files/2.%20ICGN%20Viewpoint%20differential%20share%20ownership_1.pdf)) quoting Paul A. Gompers, Joy Ishii, Andrew Metrick; Extreme Governance: An Analysis of Dual-Class Firms in the United States, *The Review of Financial Studies*, Volume 23, Issue 3, 1 March 2010, Pages 1051–1088, available at: <https://academic.oup.com/rfs/article-abstract/23/3/1051/1593830>.

<sup>7</sup> Gompers, Paul A. and Ishii, Joy L. and Metrick, Andrew, *Extreme Governance: An Analysis of Dual-Class Companies in the United States* (May 1, 2008). AFA 2005 Philadelphia Meetings; Rodney L. White Center for Financial Research Working Paper No. 12-04; Rock Center for Corporate Governance Working Paper No. 39, available at: <https://ssrn.com/abstract=562511>.

market. However, it will adversely affect minority, retail and institutional shareholder rights, who are less likely to register their shares.

The proposed measure is not only harmful to corporations and to minority shareholders. It is also harmful to the market. Indeed, shareholders benefit from a loyalty vote only if the shares in question are registered and have not been traded for two consecutive years. As a result of this requirement, the market liquidity of these shares will decrease, which will impact the proper operation of the Belgian market itself, making it less attractive to institutional investors.

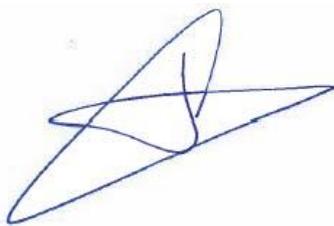
It should be noted that the position expressed in this letter is consistent with the opinion of the Council of State, issued on 13 September 2018. The Council of State is highly critical of the proposed majority requirements, both temporary and permanent, stating that (i) the controlling shareholder should not be permitted to unilaterally amend the articles of association, especially in the case where the amendment seeks to undermine minority shareholder rights and (ii) the majority requirements create an unjustified discrimination between shareholders in listed companies and shareholders in non-listed companies.<sup>8</sup>

This letter's purpose is not to be exhaustive, but to encourage a reflection and dialogue with the investor community. There are other practical and legal issues in the draft bill that are not discussed here, which include the issue of how double voting rights must be taken into account when verifying the 30% threshold set by the EU Takeover Directive.

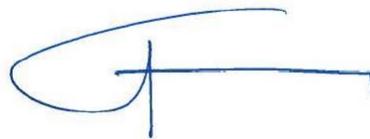
For all the above-mentioned reasons, we believe that the adoption of the draft statute in its current version may have harmful consequences for companies, minority shareholders, institutional investors, and may ultimately also adversely affect the effectiveness and attractiveness of the Belgian market as a whole.

Therefore, we strongly encourage Parliament to reconsider the introduction of loyalty shares in Belgian law and to reaffirm the "one share one vote" principle in the revised Companies Code. Otherwise, the majority requirements should at least be changed to match the requirements for any other amendment of the articles of association.

Yours faithfully,



Bernard Thuysbaert  
Managing Partner,  
Deminor



Erik Bomans  
Chairman of the Board of Directors,  
Deminor

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<sup>8</sup> According to the draft bill, non-listed companies will also be allowed to introduce multiple voting rights shares in their articles of association but this decision will require a standard supermajority of 75%.