Global Private M&A Guide - Limited External Content - Belgium

Common deal structures

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# What are the key private M&A deal structures?

In Belgium, the acquisition of a business is often structured via the acquisition of shares in a company, by the acquisition of assets or the acquisition of an entire business, or a company's business division.

Auction processes are common in Belgium and are typically governed by bid process letters. Most auction processes comprise a phase for non-binding indicative bid letters and a phase for binding offer letters.

Mergers and demergers are less common methods of acquisitions in M&A deals; however, they are frequently implemented in intra-group reorganizations. The merger procedure results in the dissolution of the absorbed company, the automatic transfer to the absorbing company of all assets and liabilities of the absorbed company by operation of law (subject to a few limited exceptions), and (unless the absorbed company is a wholly-owned subsidiary of the absorbing company), the issuance of shares in the absorbing company to the shareholders of the absorbed company.

There is no specific legislation governing M&A in Belgium. The Belgian Code of Companies and Associations provides for merger and demerger procedures and optional corporate procedures for the transfer of an "entire business" or a "branch of activity" of a Belgian company. There is separate legislation governing public offers.

# Which entity is likely to be the target company (on a share sale) or the seller (on an asset sale)?

Limited liability companies in Belgium are the most commonly used form of corporate vehicle, in particular the naamloze vennootschap/société anonyme (NV/SA) and the besloten vennootschap /société à responsabilité limitée (BV/SRL).

# What are the different types of limited liability companies?

The most commonly used types of limited liability companies in Belgium are the NV/SA and the BV/SRL.

NV/SAs can be incorporated by one or more shareholders, the minimum share capital of an NV/SA is EUR 61,500 and shares can be issued with or without nominal value. Upon incorporation, the share capital must be fully underwritten and each share must be paid up for at least 25%, with an overall minimum of EUR 61,500 in aggregate. Shares in NV/SAs are, in principle, freely transferable. Contractual restrictions on the free transfer of shares in NV/SAs are possible but should be subject to time limitations and should always take into account the company's best interests. NV/SAs can be managed by either (i) a single director, (ii) a board of directors (conseil d'administration / raad van bestuur) or (iii) a management board (conseil de direction / directieraad) and a supervisory board (conseil de surveillance / raad van toezicht). The default option, however, is the board of directors ((ii)). The company's management is authorized to perform all actions not reserved for the general shareholders' meeting. Where applicable, the supervisory board will be responsible for the general policy and strategy of the company only. In contrast, the management board will be authorized to perform all actions not expressly allocated to the supervisory board or the shareholders' meeting. The company's management can adopt decisions by unanimous written consent (in lieu of a meeting).

The SRL/BV is a flexible company without capital requirements. The SRL/BV can be incorporated and can exist with only one shareholder. In addition, there is a lot of room for contractual structuring and more possibilities with respect to the type of securities (such as unlimited multiple voting rights or preference shares, profit-sharing certificates, warrants, and convertible bonds, etc.) and transferability of securities. BV/SRLs are managed by one or more directors, who need not necessarily act as a collegiate body. The management of the company is authorized to perform all actions not reserved for the general shareholders' meeting. The management of the company can adopt decisions by unanimous written consent (in lieu of a meeting).

# Is there a restriction on shareholder numbers?

There is no maximum number of shareholders in Belgian companies.

A Belgian company NV/SA or BV/SRL type company must have at least one shareholder. In the case where an NV/SA has only one shareholder, certain filing obligations in this respect apply.

# What are the key features of a share sale and purchase?

There is, in theory, no strict legal requirement that an agreement for the sale and purchase of shares must be in writing. However, agreements always tend to be in writing because all parties wish to have written evidence of their agreement. All parties should receive one copy of the fully executed original agreement. It is common, in practice, that each page of the agreement will be initialed by or on behalf of each of the parties to identify the agreed pages. That said, electronic signatures are becoming more common.

The transfer of title to registered shares must be recorded in the target company's share register to ensure the enforceability of the rights arising from the transfer against third parties and the company itself. The transfer of title to dematerialized shares is effected by moving the registration from one securities account to another.

# What are the key features of an asset sale and purchase?

Special rules may apply to the sale and transfer of specific assets, such as real estate (which requires a notary deed) or registered intellectual property rights (which require specific registration formalities). Transfers by operation of law of the "entire business" or (optionally) a "branch of activity" of a Belgian company require the advance filing of special forms with the clerk's office of the relevant Business Court, a waiting period, as well as, in certain cases, the execution of notary deeds to complete the transfer.

Unless parties opt to apply the specific procedure provided for in the Belgian Code of Companies and Associations for the transfer of a "branch of activity" of a Belgian company by operation of law (or the transfer is a transfer of the "entire business"), no specific procedure is required to transfer title of the assets of a business as a going concern. Parties merely enter into a sale and purchase agreement, which will make the sale and purchase binding between them. Depending on the assets being transferred, however, certain formalities must be complied with to perfect the transfer of the relevant assets. Unless the contract provides otherwise, the obligations under a contract are not assignable by a party to such contract to a third party without the other party's consent. Transfer of the benefits under a contract (if not prohibited under a contract) must be notified to the relevant other party or parties to the contract unless the benefits constitute a business division or a company's entire business.

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