

JEAN-MICHEL DETRY

CORPORATE
ACQUISITIONS
AND MERGERS
IN BELGIUM



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Corporate Acquisitions and Mergers in Belgium

Jean-Michel Detry

DLA Piper

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INTRODUCTION

[01] Since 2000, company law has undergone a large number of changes in Belgium, coupled with some very important developments.

[02] The first major change was brought in by the Act of 7 May 1999, introducing the Companies Code, and its implementing Royal Decree of 30 January 2001. The new Companies Code replaced the Commercial Companies Acts, which were consolidated on 30 November 1935. Since it came into force on 6 February 2001, the Code has already undergone a number of wide-sweeping changes. For instance, the Act of 2 August 2002 and the Act of 2 May 2007 on the publicity of major holdings of issuers whose shares are admitted to trading on a regulated market and introducing miscellaneous provisions amended the company law provisions on the management and control of private companies as well as companies having made a public call to investor.

[03] Similarly, the Act of 17 December 2008, which chiefly introduced audit committees for listed companies and financial institutions, also amended a number of Companies Code provisions to bolster the quality of financial information provided to the general public.

[04] The Act of 2 August 2002 on regulation of the financial sector and financial services sets forth a range of duties of information incumbent on issuers of financial instruments and sets down rules on insider trading. The act also contains provisions dealing with the powers of the Financial Services and Markets Authority (the FSMA), formerly the Banking, Finance and Insurance Commission (the CBFA).

[05] As far as takeover bids are concerned, the entire domain is governed by the Act of 1 April 2007, together with its implementing Royal Decree of 27 April 2007, which transposes Directive 2004/25/EC.

[06] The legal and fiscal regime for cross-border mergers has also seen a number of significant developments. On the one hand, section 77 of the Financial Arrangements (Miscellaneous Provisions) Act of 8 June 2008 transposes the terms of Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies into Belgian law. On the other hand, the Act of 11 December 2008 transposing the European Directive of 17 February 2005 has introduced new tax rules on cross-border reorganizations.

[07] Recently, the economic legislation has been thoroughly reformed and is now embodied in the Code of Economic Law (CEL) dated 29 March 2013.

THE REGULATORY FRAMEWORK

Act of 2 March 1989 on the Disclosure of Shareholdings in Listed Companies and on Take-Over Bids, Implemented by the Royal Decrees of 10 May 1989 and 8 November 1989

[08] The Act of 2 March 1989 on the disclosure of major share interests in companies listed in Belgium. The first chapter of the Act, amended by the Act of 18 July 1991

and the Act of 2 August 2002, related to the disclosure of share interests. A Royal Decree implementing the first chapter of this Act was promulgated on 10 May 1989.

[09] Before being repealed by the Royal Decree of 27 April 2007, this Act also contained the second chapter on takeover bids and changes in controlling interests in companies that make, or have made, public offers to investors. The Royal Decree of 8 November 1989 implementing the second chapter of this act was also repealed by the Royal Decree of 27 April 2007.

Act of 6 August 1993 on the Fiscal Aspects of Mergers and Divisions

[10] The fiscal aspects of mergers and acquisitions were basically regulated by the Act of 22 December 1989. This act was amended by the Act of 6 August 1993, which came into force on the same date as the Act of 29 June 1993, i.e., 1 October 1993. The fiscal aspects of acquisitions and mergers are discussed below.

Act of 6 April 1995 on the Status and Control of Investment Undertakings and on Investment Intermediaries and Advisers

[11] This act contains provisions governing investment undertakings and their control, investment intermediaries and advisers. It no longer contains provisions governing secondary markets, stock exchanges or their control.

Act of 7 May 1999 (Companies Code)

[12] The Act of 7 May 1999, named the Companies Code, constitutes a general codification of most of the statutory provisions applicable to companies, including economic interest groupings and agricultural companies. The Companies Code combines provisions of civil law, commercial law and accounting law. It came into force on 6 February 2001. The Companies Code replaces the Consolidated Commercial Companies Acts, which formerly governed commercial companies.

Act of 2 August 2002 on Supervision of the Financial Sector and Financial Services

[13] This act regulates secondary markets for financial instruments and their control. It contains provisions governing financial markets as well as transactions relating to financial instruments. In this regard, the act lays down the various duties of information incumbent on an issuer of financial instruments and sets out the new rules on insider trading.

[14] This act also contains the provisions relating to the establishment of the Belgian regulator, the Financial Services and Market Authority ('FSMA'), its status and its powers.

Act of 2 August 2002 Amending the Companies Code and the Act of 2 March 1989 on the Disclosure of Shareholdings in Listed Companies and Takeover Bids

[15] This act made important amendments to company law relating to the management and control of private companies as well as companies having made a public calls to investors. According to corporate governance principles, the main goal pursued by this act was to improve propriety in the operation of companies with regard to their management and investors.

Act of 16 June 2006 on Public Offers of Investment Securities and the Admission of Investment Securities for Trading on Regulated Markets

[16] This act was intended *inter alia* to incorporate into Belgian law the provisions of two European directives: (a) the Directive of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading; (b) the Directive of 9 March 2005 organizing new committees with regards to financial services.

Takeover Bids Act of 1 April 2007 and Its Royal Decrees of 27 April 2007 on Public Share Purchase and Takeover Bids

[17] The entire rules governing takeover bids are now set down in the Takeover Bids Act of 1 April 2007, the Royal Decree of 27 April 2007 on public share purchase offers and the Royal Decree of 27 April 2007 on takeover bids. The Act is a transposition of Directive 2004/25/EC of 21 April 2004 on takeover bids and is more generally intended to modernize the rules governing all public share purchase bids. The Takeover Bids Act and its two implementing royal decrees thus incorporate, with minor alterations, the majority of the provisions dealing with takeover procedures that were hitherto contained in Chapter II of the Act of 2 March 1989 and in the Royal Decree of 8 November 1989 on takeover bids and changes in the control of companies together with the public disclosure provisions previously contained in the Act of 22 April 2003.

The Royal Decree of 14 November 2007 on the Obligations on Issuers of Financial Instruments Admitted for Trading on a Belgian Regulated Market

[18] This Royal Decree lays down a general obligation incumbent on any financial issuer admitted to a market regulated in Belgium to communicate to the general public any information necessary for the transparency, integrity and proper functioning of the market. Certain specific obligations are also laid down in relation to periodic and occasional information requiring to be disclosed.

Act of 17 December 2008, in Particular Instituting Audit Committees in Listed Companies and Financial Undertakings

[19] This Act amends certain sections of the Companies Code to bolster the quality of financial information issued and is aimed at streamlining corporate management. In particular, the Act transposes certain provisions of Directive 2006/43/EC.

Finance (Miscellaneous Provisions) Act of 8 June 2008 (Official Gazette, 16 June 2008)

[20] Section 77 of the Act transposes into Belgian law the provisions of Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies. These rules are now contained in the new title VI bis ('*Specific rules on cross-border mergers and equivalent transactions*') of book XI ('*Corporate reorganisations*').

Act of 11 December 2008 Transposing the European Directive of 17 February 2005

[21] This Act introduced the new tax rules on cross-border reorganizations. It transposed Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States.

The 2009 Belgian Code on Corporate Governance

[22] In 2004 the Corporate Governance Committee published the Belgian Code on Corporate Governance for listed companies. This document refers to the latest version of the redrafted Code dated 12 March 2009.

The Code of Economic Law of 29 March 2013

[23] Between 2010 and 2014, the economic legislation has been thoroughly reformed. The reformed economic legislation is now embodied in the CEL dated 29 March 2013. This code replaces, amongst others, the Act on market practices and consumer protection of 2010.

SPECIFIC LEGAL PROVISIONS

Transfer of Shares and the Legal Monopoly of Banks and Registered Brokers

[24] With a few exceptions, the Act of 2 August 2002 on the supervision of the financial sector and financial services maintains the traditional principle that all transactions involving listed securities have to be effected on the stock market. In this respect, section 24 of this act lists exceptions to the obligation on investors to go through the stock market when carrying out transactions involving financial instruments listed on a stock exchange and issued by Belgian establishments and undertakings. This principle does not apply to:

- (a) occasional transactions between private individuals;
- (b) the assignment of financial instruments conferring at least 10% of the voting rights of the issuing company or entity;
- (c) assignments of financial instruments conferring voting rights between closely linked companies;
- (d) transactions between different departments of the same collective investment undertaking as referred to in Book III of the Act of 4 December 1990 on financial transactions and financial markets.

[25] Upon the recommendation of the FSMA, the King may exclude professional investors from the scope of paragraph 1, under such conditions and limits as he may determine.

Notification of Major Transfers

[26] We would point out that operations in which it is intended to dispose of one-third or more of the share capital of an undertaking whose business is located in Belgium and whose equity amounts to EUR2 500 000 or more must first be notified to the Minister for Economic Affairs, the Minister of Finance and the relevant State Secretary for Regional Economy. Notification has no longer been required in the

Walloon Region, however, since 1 January 2004 or in the Flemish Region since 1 January 2006.

Public Takeover Bids from Abroad

[27] Since 1 July 2003 and by contrast with the previous situation, any foreign company publicly offering its securities in Belgium without having a subsidiary or branch in Belgium is required to file its incorporation deed and its articles of association with the clerk of Brussels Commercial Court (section 88, Companies Code).

Foreign Exchange Legislation

[28] Currency exchange operations are regulated under sections 137 et seq. of the Act of 6 April 1995. From an institutional point of view, the exchange market is governed by the Act of 2 January 1991, on the Institut Belgo-Luxembourgeois du Change/Belgisch Luxemburgs Instituut voor de Wissel ('the Institute').

[29] Until 5 March 1990, there was a very flexible exchange control system for foreign currencies, based on a two-tier foreign exchange market controlled and administered by the Institute. The two markets were the regulated market, on which commercial transactions were effected, and the financial market, on which financial transactions were effected. In some cases, there was a choice as to the exchange market on which a transaction could be effected. However, this system was abolished in March 1990. Now, the Institute is entrusted with supervising foreign payments from and to the Belgian-Luxembourg Economic Union, and with implementing exchange controls. It also provides statistical information on the balance of payments of the Belgian-Luxembourg Economic Union.

General Provisions Relating to the Financial Services and Markets Authority ('FSMA')

[30] The CBFA, which was the product of integration of the Insurance Regulator with the Banking and Finance Commission, was the single regulatory body for the Belgian finance sector since 1 January 2004. It was replaced by the 'FSMA' on 1 April 2011, as a consequence of the adoption of the Twin Peaks legislation. The FSMA is an autonomous body endowed with legal personality and having its registered office in the administrative district of the Brussels-Capital Region.

[31] The functioning and composition of the FSMA are laid down in the Act of 2 August 2002 on regulation of the financial sector and financial services. These functions have undergone significant changes since the financial crisis. The Twin Peaks-reforms has consigned both the micro- and micro-prudential supervision of banks to the National Bank of Belgium. The FSMA, on the other hand, is responsible for the market conduct supervision.