LEXOLOGY
Getting The Deal Through

Corporate Reorganisations

in Belgium

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LEGAL AND REGULATORY FRAMEWORK

Types of transaction

What types of transactions are classified as 'corporate reorganisations' in your jurisdiction?

A corporate reorganisation can take a variety of forms. From a Belgian law perspective, a corporate reorganisation typically refers to transfers of shares, the sale of assets, the sale of part of a (or the entire) business (contribution of business branch), mergers and (partial) demergers, within the same corporate group in order to strive for more efficiency and less (structural) complexity within the corporate group.

Some of these corporate reorganisations are statutory (eg, merger, (partial) demerger, contribution of a business branch), and require a specific legal procedure to be complied with, while others (eg, transfers of shares, sale of assets) can be more tailored and are thus less stringent.

A corporate reorganisation can be implemented either on the national level (eg, merger between two Belgian group entities) or cross-border (eg, cross-border merger or relocation of head office by incorporating a new company).

Rate of reorganisations

Has the number of corporate reorganisations in your jurisdiction increased or decreased this year compared with previous years? If so, why?

Although there is little data available on the evolution of the number of reorganisations over the years, it is safe to say that 2018 was not a peak year for corporate reorganisations. Indeed, reorganisations are usually driven by changes in legalisation, such as the introduction of tax incentives or changes in labour conditions, or by other external factors such as the need for ringfencing of risks (split between real estate and operational activities) or the preparation of acquisitions or disposals. Since there were no particular new external conditions in 2017, there was no significant increase in reorganisations in 2018 compared to previous years.

Jurisdiction-specific drivers

Are there any jurisdiction-specific drivers for undertaking a corporate reorganisation?

As of 1 May 2019, a new Companies and Associations Code will enter into force in Belgium. Pursuant to this reform, several company forms will be abolished by 2024 and will consequently need to convert into one of the remaining company forms during that period. Moreover, the private limited liability company will be presented as the default company, providing its shareholders with a maximum of flexibility both at the occasion of its incorporation and afterwards. In light of the above, the number of corporate reorganisations will undoubtedly spike in the coming years, as companies will wish or need to change, for example, their company form, (too complex) company structure and articles of association.

From a tax perspective, the implementations of the Base Erosion and Profit Shifting (BEPS) rules and EU Anti-Tax Avoidance Directive (ATAD) give rise to certain internal reorganisations within international groups because of the enhanced focus on economic substance.

Structure

How are corporate reorganisations typically structured in your jurisdiction?

The structuration of a corporate reorganisation obviously depends on the desired outcome. Common reasons for group reorganisations are, however, the simplification of the corporate structure of the group (with reduced complexity, lower compliance costs and simplified reporting), and preparation in anticipation of an acquisition (or a divestment) so that the target group or business can properly fit into the purchaser's structure. Most commonly used transactions to achieve these goals are: (simplified) merger; (partial) division; transfer of assets; sale or exchange of shares; and, although less common, (simplified) liquidation.

Laws and regulations

What are the key laws and regulations to consider when undertaking a corporate reorganisation?

The key laws and regulations to consider when undertaking a corporate reorganisation will depend on which type of corporate reorganisation is concerned:

• A share deal is very flexible in Belgium and does not require any government authorisations, and the permits will, in principle, continue to be in effect.

• The sale of assets and liabilities can be achieved by either: (i) the sale of the assets and liabilities ut singuli; or (ii) the sale of the assets and liabilities under the continuity regime (a merger-like procedure).

• Merger and (partial) demerger require a specific procedure to be complied with, the details of which are set out in the Belgian Companies Code (eg, drafting and filing of the (de)merger proposal and passing, at least six weeks after the filing of the (de)merger proposal, of the authentic deed). By operation of law, the (de)merger entails the universal transfer of assets, liabilities, rights and obligations, this transfer being effective between the companies, as well as with regard to third parties, without any further formalities.

Furthermore, every corporate restructuring must take into account the tax implications in Belgium relating to income tax and indirect taxes (VAT, registration duties, etc) at a federal level, but also at the level of the regions (Brussels, Flemish and Walloon). The various tax codes contain specific rules relating to tax exemption in the event of a corporate reorganisation (mostly related to real estate taxes).

From an employment law perspective, the following laws need to be taken into account:

• National collective bargaining agreement (CBA) No. 32-bis, regarding the preservation of rights of employees affected by a transfer of business as defined in the aforementioned CBA, implementing the European TUPE directive into Belgian law.

• National CBA No. 9, setting out the terms and conditions relating to information and consultation of works councils.

• Some preliminary legal information and consultation requirements will apply if the corporate reorganisation will entail either a collective dismissal or a plant closure or both.

National authorities

What are the key national authorities to be conscious of when undertaking a corporate reorganisation?

In order to render a transfer of a business (consisting of assets and liabilities) opposable to the tax and social security authorities, a copy of the asset purchase agreement needs to be filed with said authorities, as well as (specific) tax and social security certificates confirming that the seller does not have any tax or social security debts.

Moreover, it is possible to request a ruling on the expected tax consequences of the envisaged reorganisation from the 'ruling committee' (Service for Advanced Decisions in tax matters), which is an autonomous division within the federal tax administration. This is useful, especially if the interpretation of certain tax rules or the application thereof on the envisaged transaction is not totally clear.

Finally, listed companies should inform the Financial Services and Markets Authority (FSMA) in advance of any planned reorganisation that could give rise to conflicts of interest on the part of the persons initiating the operation. Doing so enables the FSMA to convey any comments it may have on the draft documents to the listed company before the latter publishes them. If the FSMA is not consulted prior to the reorganisation, it may publish, at its sole discretion, a warning after the publication of the legally required reports if it is of the opinion that the information that the listed company has made available is inadequate or misleading, or that there could be a threat to the equal treatment of securities holders.

KEY ISSUES

Preparation

What measures should be taken to best prepare for a corporate reorganisation?

In a first step, a macro action plan should be drawn up, setting out the general principles of the reorganisation. Subsequently, such macro action plan should be validated from a legal, tax, financial, social, regulatory, accounting and operational point of view. In this phase it is important to undertake a thorough due diligence of the entities involved in the reorganisation to identify those matters that will require specific attention.

Once the due diligence has been completed and the macro action plan has been validated and finalised, a micro action plan should be prepared, detailing all specific actions that need to be taken to implement the reorganisation (including allocation of responsibility and setting of deadlines).

Belgian labour laws provide for an extensive set of regulations in terms of information and consultation, which will depend on the type of corporate reorganisation and on the impact of the reorganisation on the employees. The timing and content of the information and consultation requirements will vary depending on myriad circumstances, for example the type of reorganisation, the employee headcount of the concerned company, the presence of an employee representative body, the number of employees affected by the reorganisation, the sector of industry to which the concerned entity pertains, etc. Most legal information and consultation requirements regarding employee representatives or employees (or both) must moreover be completed before a final decision is taken concerning the reorganisation. A particular point of attention will therefore be the content of the communications on the intention to proceed to the reorganisation, both internally and externally, to avoid triggering the information and consultation requirements at too early a stage.

Employment issues

What are the main issues relating to employees and employment contracts to consider in a corporate reorganisation?

Most issues are, of course, related to reorganisations that have a significant impact on the terms of employment of (some) employees. Whether or not this will be the case from an employment law perspective mainly depends on the structure of the reorganisation, namely, whether it is a share deal or an asset deal, and whether it entails a collective dismissal or a plant closure (or both) as defined in the law.

Mostly, no material issues arise in the event of a mere share deal, since such a transaction would in principle have no impact on the terms of employment of the employees, as the identity of the employer would remain the same.

However, particular rules apply if a business or parts of a business are transferred to another entity by way of an asset deal. If such a deal entails the transfer of a 'going concern', in other words the operations of the business involved in the reorganisation would effectively be continued or resumed post-completion by the acquirer with primarily the same or similar activities, and the new employer has the possibility of continuing its operation in a sustainable way after the completion of the reorganisation, all rights and obligations resulting from the existing employment contracts at the date of completion of the reorganisation will automatically be transferred to the acquirer, with the exception of the employees' rights to benefits under complementary pension, life, death or invalidity schemes outside the statutory Belgian social security schemes. These rights will, however, still automatically transfer: (i) in the event of a transfer of all assets and liabilities of the business concerned in the reorganisation; or (ii) if the concerned complementary schemes were formalised in a collective bargaining agreement.

Changes to the key employment conditions of the concerned employees are legally restricted, and employees affected by a transfer of business in the sense of CBA No. 32-bis can only be dismissed for organisational, technical or economic reasons. Preliminary information and consultation obligations will, however, be triggered regarding employee representative bodies as soon as the local management of the concerned entity is aware of the pending reorganisation. These obligations should, moreover, be completed as soon as possible - in any event prior to any definitive decision being taken (or made public) in relation to the reorganisation.

If the corporate reorganisation will entail a collective dismissal or a plant closure (or both), a specific set of laws must be complied with, including but not limited to information and consultation obligations, which can be triggered as soon as it becomes apparent that the business concerned has an intention to proceed to a collective dismissal. Mostly, employee representatives will insist on negotiating a social plan setting out the terms of dismissal of the concerned employees, even though this is not always legally mandatory.

What are the main issues relating to pensions and other benefits to consider in a corporate reorganisation?

Corporate reorganisations typically have no material impact on pensions or other benefits from a legal perspective. Nonetheless, any such benefits should be assessed with a view to the legal nature of the particular agreement they are based on (eg, collective bargaining agreement or individual employment agreement, as well as the respective scope of application).

In the case of a transfer of business in the sense of CBA No. 32-bis, the rights and obligations resulting from the employment relationships of the employees are automatically transferred to the acquirer. This includes benefits in kind and group insurance benefits, such as complementary pensions, which are confirmed in the individual employment contracts or in collective bargaining agreements.

Otherwise, group insurance benefits will only automatically transfer to the acquirer pursuant to CBA No. 32-bis if the transfer concerns a transfer of all assets and liabilities of the transferring business.

If the group insurance benefits do not transfer by operation of law in application of CBA No. 32-bis, the acquirer will, however, still need to grant the concerned employee a benefit in kind with at least similar value to the one linked to participation in the group insurance scheme set up by the transferor prior to the transfer, but - in theory anyway - this new benefit in kind could take another form.

The possibility of a one-to-one transfer of complementary pension or other group insurance benefits is, however, not always possible, and sometimes entails the acquirer setting up a 'mirror plan', which put simply is a new group plan copying the terms and conditions of the plan to which the transferring employees were affiliated on the date of

completion of the reorganisation.

Financial assistance

Is financial assistance prohibited or restricted in your jurisdiction?

Financial aid is permitted under Belgian law under certain conditions:

- the management body is responsible for the transactions, which have to be at arm's length;
- the financial aid is subject to the prior approval of the shareholders' meeting, deciding with a three-quarters majority;
- the management body needs to draft a special report, which is published in the annexes to the Belgian State Gazette;
- the amount of the financial aid needs to be available for distribution; and
- the amount of the financial aid needs to be entered in the balance sheet as an unavailable reserve.

Under the new Belgian Companies and Associations Code, the financial aid regime will become more flexible. Indeed, the special report of the management body will no longer need to be published and infractions in this respect will no longer be criminally sanctioned.

Common problems

What are the most commonly overlooked issues or frequently asked questions in a corporate reorganisation?

An important point of attention is whether a business (to be divested or otherwise transferred for simplification purposes) qualifies as an actual 'branch of activities', as this may have important consequences for the corporate structuration of the reorganisation process. The question whether the assets characterise a branch of activities or a mere collection of assets depends mainly on whether the entity is technically and administratively independent and is capable of functioning on a stand-alone basis. For instance, if the assets are legally characterised as a branch of activities or a universality of assets, the group has the option of choosing between two different types of asset deals: transfer under the Belgian Companies Code; or transfer under general Belgian civil law concerning the transfer of assets (see question 5).

The price at which simplification transfers take place is also a common focus point, notably to avoid any transfer pricing issues, and advice is often taken as to what value should be used for each transfer.

Moreover, directors should consistently monitor their fiduciary duties towards the group but also towards each individual company involved in the process (as these interests are not always fully aligned) at all stages of the project.

Finally, due diligence investigations often show that the target companies have not accurately complied with their withholding tax obligations, and this issue needs to be addressed with proper measures in the framework of a reorganisation.

ACCOUNTING AND TAX

Accounting and valuation

How will the corporate reorganisation be treated from an accounting perspective? How are target assets and businesses valued?

If all the relevant conditions and requirements in the Belgian Companies Code are respected (in case of a merger, demerger or another form of reorganisation under the continuity regime as provided for in the Code), the principle of neutrality can apply to mergers, demergers and spin-offs for accounting purposes, meaning that all assets and liabilities will keep their book value when being transferred to the acquiring company (no step-up). The same principle applies for corporate income tax purposes if all conditions for a tax-free reorganisation are fulfilled. If the above principle of neutrality does not apply, assets must in general be valued on the basis of their fair market value. There are no valuation methods that are prescribed in the accounting or tax legislation. However, the tax authorities will accept valuations on the basis of generally accepted valuation methods in the market. These methods may differ depending on the kind of assets to be valued.

Tax issues

What tax issues need to be considered? What are the tax implications of carrying out a corporate reorganisation?

The concrete tax consequences of a reorganisation depend on the type of restructuring and on the underlying facts and circumstances. Such operation must therefore always be carefully planned.

There are specific rules providing for tax neutrality for certain types of corporate reorganisation: mergers, demergers, spin-offs, and contribution of separate business unit. In order to benefit from this tax neutrality the main purpose (or one of the main purposes) may not be tax avoidance. It is therefore important to demonstrate and to document in a proper manner that the reorganisation is mainly driven by legitimate (non-tax) business motives. It is possible to obtain a ruling decision relating thereto. Subject to certain additional conditions, this tax neutrality could also apply to cross-border corporate reorganisations.

If a reorganisation (for example a carve-out) occurs in order to facilitate a subsequent sale of shares, special attention must also be given to the general anti-abuse provision in Belgian tax law that could be invoked by the tax authorities to recharacterise this combination of transactions into a (taxable) straightforward sale of the assets ('step-by-step' doctrine).

Further, the following elements should also be considered:

• the consequences of the restructuring for the shareholders (eg, possible application of withholding tax or capital gains tax); and

• a tax-neutral reorganisation will affect the carried forward tax losses and other tax deductions that are available to the companies involved.

Special attention should be given to the indirect tax aspects (VAT, registration duties, etc) if the reorganisation includes the transfer of real estate in Belgium.

CONSENT AND APPROVALS

External consent and approvals

What external consents and approvals will be required for the corporate reorganisation?

A sale ut singuli requires compliance with the civil law transfer formalities. This implies that the transfer of the assets and liabilities and of the rights and obligations will not be automatic (contrary to what is the case for the sale under the continuity regime) but will, inter alia, require the following:

- the transfer of an agreement will require the approval of such transfer by the co-contracting party;
- the transfer of the receivables will require the notification of the transfer to the debtors;
- the transfer of the debts will require the approval of such transfer by the creditor;
- tangible assets will in principle be transferred without any additional formality;
- the transfer of intellectual property will require notification or registration, or both;
- the transfer of authorisations, permits, licences and subsidies will require approval, plus notification or registration, or both (by the public authorities); and
- in order to continue pending legal procedures, the purchaser will have to file a voluntary intervention.

In the case of a sale under the continuity regime on the other hand, the agreements, receivables, debts and tangible assets will be transferred without approval of the co-contracting party, the debtor and the creditor (unless there would be any specific contradictory contractual clauses). The sale will, in principle, be opposable towards third parties without any additional formalities being complied with.

By operation of law, the (de)merger entails the universal transfer of the assets, liabilities, rights and obligations, this transfer being effective between the companies, as well as with regard to third parties, without any further formalities. However, it is good practice to notify the transaction to any co-contracting parties of the involved (de)merged entities.

Internal consent and approvals

What internal corporate consents and approvals will be required for the corporate reorganisation?

The internal corporate consents and approvals required depend on the type of corporate reorganisation and the type of corporate entities involved. The constitutional documents or a shareholders' agreement (if any) should be reviewed to determine the specific corporate approvals that are required.

Most corporate reorganisations (involving limited liability companies) are initiated by the relevant management body and generally require the consent of the general meeting of shareholders (eg, in case of a (de)merger, contribution of business branch). The consent of the shareholders may also be required in case of existing share transfer restrictions.

Notwithstanding the information and consultation procedures in this respect, no approval for the reorganisation from the employee representatives is (in principle) required. However, in the event of a collective dismissal or a plant closure (or both), approval from the employee representatives to close off the mandatory information and consultation process is in any event strongly recommended for evidence purposes, even when there would be no explicit legal requirement in this regard.

Employees who are subject to an automatic transfer of employment as a result of a transfer of business in the sense of the CBA No. 32-bis do not need to consent to their transfer of employment.

ASSETS

Shared assets

How are shared assets and services used by the target company or business typically treated?

Before implementing a corporate reorganisation, any shared assets and services should be identified and an assessment should be made as to the impact the reorganisation may have.

Assets exclusively owned, as well as services exclusively rendered within a corporate group, typically do not result in specific challenges in light of a corporate reorganisation as internal agreements for assets or services are usually drafted in such a way as to allow flexible corporate reorganisations without significant formalities. Any such

agreements should, however, be reviewed to determine whether any amendments or updates are required because of the reorganisation, or if any formalities should be executed before implementing the reorganisation.

Where a participating entity holds contracts with third parties on behalf of the group, the terms of the underlying third-party contract must be checked to ensure that the services may continue to be provided following the implementation of the reorganisation.

Any contracts covering shared assets and services should also be reviewed from a tax and transfer pricing perspective.

Transferring assets

Are there any restrictions on transferring assets to related companies?

Intra-group transactions are in principle allowed under Belgian law. The main condition is that the intra-group transfer of assets takes place at arm's length. In the same sense, financial support by one group entity to another is in principle allowed but subject to a number of conditions developed by case law: (i) the financial support must be proportionate to the financial capacity of the supporting company; and (ii) the supporting company must enjoy a proportionate benefit by granting the financial support. Specific rules for intra-group transfers are foreseen by the Belgian Companies Code in relation to listed companies.

Can assets be transferred for less than their market value?

From a tax perspective, it is advisable to transfer assets at their fair market value. Indeed, the transfer of assets at a value that is inferior to their market value may generate adverse tax consequences for the transferor and the transferee. That said, such transfer may be defendable before the tax authorities, depending on the concrete circumstances. A case-by-case analysis is therefore always recommended. There are several valuation methods that are generally accepted by the market and by the tax authorities. These methods may differ depending on the kind of assets to be valued.

FORMALITIES

Date of reorganisation

Can a corporate reorganisation be backdated or deemed to have already taken place, for example from the start of the financial year?

Backdating legal effects is not authorised under Belgian law. However, certain corporate restructurings, such as mergers and (partial) demergers, are typically performed with a retroactive effect from an accounting perspective. This means that the restructuring will be deemed to have taken place on an anterior date in the accounts of the relevant entities. That date will generally be the date of the financial statements that are used for the restructuring.

Such retroactivity is in principle not accepted for income tax purposes. Still, in practice the tax authorities will accept the retroactivity of the restructuring provided that the retroactivity clause does not go back more than seven months and that it does not hamper the proper application of the tax provisions. There have been cases where an accounting retroactivity in excess of seven months was accepted in light of the specific circumstances of the restructuring.

Documentation

What documentation is required in a corporate reorganisation?

The documentation that is required depends on the type of corporate reorganisation.

In general, corporate reorganisations require (besides the actual agreements) the drafting of minutes of the meetings of the management boards of the involved entities regarding approval of the transaction and the agreements.

Moreover, for the sale of the assets and liabilities under the continuity regime, the necessary corporate approvals as set out in the Belgian Companies Code will also need to be obtained (eg, approval by the board of directors of the authentic or private sales proposal and approval by the shareholders' meeting of the sale).

As for (de)mergers, the necessary documentation is specified in the Belgian Companies Code, and includes, among others, special reporting of the executive bodies of the involved entities, special reporting of the statutory auditor, and intermediary statement of assets and liabilities not older than three months, if the last annual accounts predate the (de)merger proposal by more than six months.

It may be advised for some documentation of the restructuring to clearly contain the specific (business) motives of the companies for performing certain operations in order to safeguard the tax neutrality of the reorganisation.

In the event of a transfer of business in the sense of CBA No. 32-bis, the employees affected by the reorganisation must, before the completion of the transfer, receive a written transfer letter containing legally prescribed information with regards to the reorganisation. Specific written notifications and documents must be issued and signed in the event of a collective dismissal or a plant closure, or both.

Representations, warranties and indemnities

Should representations, warranties or indemnities be given by the parties in a corporate reorganisation?

Parties in corporate reorganisation are free to determine the scope of any representations, warranties or indemnities. The exact scope depends, to a large extent, on the type of corporate reorganisation and the relevant sector or industry in which the relevant parties are active.

It is, however, not common practice for the parties to an internal corporate reorganisation to include extensive representations and warranties in reorganisation documentation. Indeed, transfers are often made with very limited warranties covering, for example, capacity of the parties, internal corporate authorisations and title to shares or assets.

This may, under specific circumstances, be different in scenarios where the reorganisation measure is implemented as part of a presale structuring process.

Assets versus going concern

Does it make any difference whether assets or a business as a going concern are transferred?

Under general civil law, for each asset transferred belonging to the business, there must be verification that all asset-specific requirements are being complied with. Some of these requirements can be avoided by opting for a specific procedure in the Belgian Companies Code, which allows a branch of activities or a universality of goods to be transferred under the continuity regime (merger-like procedure).

Moreover, the transfer of assets is as a general rule subject to VAT. Such transfer will, however, not be subject to VAT if these assets constitute a going concern in the sense of the VAT Code and the following conditions are met:

- both parties to the transaction are VAT registered;
- the purchaser can autonomously continue a business with the transferred assets; and
- the purchaser would have been able to deduct the VAT charged by the seller if the transfer had been subject to VAT.

The notion of going concern may also be crucial in the event the assets encompass real estate. The transfer of real estate generally triggers a registration duty of 12.5 per cent (10 per cent in the Flanders region). That duty may not be due if the assets are transferred as a branch of activity by means of certain restructuring operations that meet certain conditions.

Types of entity

Explain any differences between public, private, government or non-profit entities to consider when undertaking a corporate reorganisation.

Corporate law does in principle not differentiate between publicly and privately held companies in a reorganisation. Publicly held companies should, however, when performing a reorganisation, take into account all laws, regulations and requirements that apply only to publicly held companies (eg, disclosure and stock exchange requirements). Additionally, the decision-making process in publicly held companies is more burdensome than that in privately held companies.

The reorganisation of non-profit organisations is much less regulated than that of companies. Since 2009, a number of company law procedures apply mutatis mutandis to non-profit organisations. The reorganisation of non-profit organisations in general requires special attention because the legal end result must in principle be achieved through a concatenation of legal acts.

With regard to governmental entities, these are regulated by additional laws that do not apply to companies, so any reorganisation project would also require an examination of such laws.

Post-reorganisation steps

Do any filings or other post-reorganisation steps need to be taken after the corporate reorganisation takes place?

From a corporate perspective, the following post-reorganisation steps could be applicable, depending on the nature of the transaction:

- update of the share register;
- issuance of share certificates;
- publication of the transaction in the annexes to the Belgian State Gazette;
- amendment of the registration with the Crossroads Bank for Enterprises;
- filing of asset purchase agreements and certificates with (in)direct tax and social security authorities; and
- filing of a notarial certificate in order to release blocked funds.

UPDATE AND TRENDS

Recent developments

Are there any emerging trends or hot topics regarding corporate reorganisations in your jurisdiction?

UNPROCESSED QUESTIONS

All questions

Updates and trends

In 2018, important tax reforms were introduced in Belgium. In addition, as of 1 May 2019, a new Belgian Companies and Associations Code will enter into force. Moreover, the current Civil Code (including general contract law) will be profoundly modified in the years to come. These reforms may trigger a new spate of internal reorganisations driven by tax optimisation, the abolition of different company forms and the changes made to characteristic elements of the remaining company forms under the new Belgian Code for Companies and Associations. Moreover, we anticipate a strong increase in (cross-border) corporate reorganisations in preparation for, and in the aftermath of, Brexit.