

## LEGALINK

### INVESTMENT AND BUSINESS START UP IN BELGIUM

#### (A) Legal system

1. What is the legal system (i.e. common law system, civil law system or both) in your country?

The Belgian legal system<sup>1</sup> is based on civil law and originates from the Napoleonic code. There is no system of precedents: with the exception of rulings of the Constitutional Court, a ruling is binding only on the parties to the case.

2. What are the major law courts in your country?

The Council of State (Conseil d'Etat / Raad van State)<sup>2</sup>: the Council of State offers recourse to all natural and legal persons wronged by irregular administrative acts. As a result, the most important competence of the Council of State is related to its power to suspend and to annul administrative acts (individual and statutory) that are contrary to the legal rules in force. Furthermore, the Council is an advisory body in legislative and statutory matters. Finally, the Council of State is also the Administrative Supreme Court. As a cassation court it reviews the external and internal legality of the decisions of lower administrative jurisdictions. The Council of State cannot take into consideration the merits of the case.

The Constitutional Court (Cour Constitutionnelle / Grondwettelijk Hof)<sup>3</sup>: the Constitutional Court is a court of law composed of twelve judges who watch over the observance of the Constitution by the legislative authorities of Belgium. It has the power to annul, to declare unconstitutional and to suspend laws, decrees and ordinances infringing on Title II of the Constitution (Articles 8 to 32 on the rights and freedoms of the Belgians), on Articles 170 and 172 (legality and equality of taxes) and article 191 (protection of foreign nationals) and on the power-defining rules between those authorities, provided for in the Constitution and in laws on institutional reform.

Court of Cassation (Cour de Cassation / Hof van Cassatie)<sup>4</sup>: a case can only be brought before the Court of Cassation when all normal appeal procedures have been exhausted and only on grounds of violation of the law or of a failure to comply with formal procedural requirements. The Court of Cassation cannot examine the merits of the case. If a ruling is annulled, the case is referred to a court of the same level as the one that rendered the annulled ruling. The decision of the Court of Cassation is not binding for the second court.

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<sup>1</sup> Source and further information: The European Judicial Network, [http://ec.europa.eu/civiljustice/legal\\_order/legal\\_order\\_bel\\_en.htm](http://ec.europa.eu/civiljustice/legal_order/legal_order_bel_en.htm)

<sup>2</sup> Source and further information: <http://www.raadvst-consetat.be/>

<sup>3</sup> Source and further information: <http://www.const-court.be/>

<sup>4</sup> Source and further information: [http://ec.europa.eu/civiljustice/org\\_justice/org\\_justice\\_bel\\_en.htm](http://ec.europa.eu/civiljustice/org_justice/org_justice_bel_en.htm)

Furthermore, Belgium has five major judicial areas, the five appeal court jurisdictions (each with a court of Appeal and a Labour Court of Appeal): Brussels, Liege, Mons, Ghent and Antwerp.

3. What are the sources of laws (such as constitution, statute law and common law) in your country?

The Belgian legal system<sup>5</sup> has five formal sources of law: three mandatory sources - legislation (written), customary law (unwritten) and general principles of law (expressing superior values such as the “*non bis in idem*” principle in criminal law<sup>6</sup>) - and two merely “persuasive” sources: case law and doctrine.

4. What is/are the official language(s) in your country?

French, Dutch and German.

## **(B) Foreign investment**

5. Are there any restrictions faced by a foreign individual or company when they want to invest in your country? Is an approval or permit required if a foreign individual or company wants to enter a certain industry?

Setting up incorporated entities, including non-profit corporations, as well as acquiring movable or immovable property are unrestricted for foreign investors.

The activity itself requires the same qualifications from foreign as from local investors.

6. Are there any exchange control or currency regulations in your country?

No, but attention should be drawn to the money laundering legislation.

7. What grants or incentives are available to a foreign individual or company to encourage investment in your country?

Numerous incentives are available on federal and regional level.

## **(C) Business vehicles**

8. What is the most common form of business vehicle used by foreign investors in your country?

Branches and subsidiaries, often in the form of a Public Limited Company (NV – Naamloze Vennootschap – SA – Société Anonyme) or, to a lesser degree, a Private Limited Company (BVBA – Besloten Vennootschap met Beperkte Aansprakelijkheid – SPRL - Société Privée à Responsabilité Limitée).

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<sup>5</sup> (Source and further information: *The European Judicial Network*, [http://ec.europa.eu/civiljustice/legal\\_order/legal\\_order\\_bel\\_en.htm](http://ec.europa.eu/civiljustice/legal_order/legal_order_bel_en.htm)

<sup>6</sup> Similar to the common law doctrine of double jeopardy, this civil law doctrine means that no one shall be tried twice for the same offense.

Please provide details on:

i. Registration formalities;

A required minimum capital must be invested. After that, a deed of incorporation must be filed and notarized. It is this deed that should be handed over to the Register of Legal Entities, which is part of the Crossroads Bank for Enterprises. The company will be given a single identification number, the so-called enterprise number.

ii. Minimum (and maximum) share capital;

Given that most Belgian companies consist of a limited liability structure, the Belgian Code of Companies requires a minimal amount of capital. The amount of this minimum share capital depends on the type of business structure.

In the case of a Public Limited Company, the form of business vehicle that is most commonly used by foreign companies in Belgium, the minimum share capital amounts to 61.500 euros, fully paid up. All complementary shares must be paid up for at least 25%.

When starting a Private Limited Company, the minimum share capital is 18.550 euros, of which at least 6.200 should be paid up. Complementary shares should be paid up for at least 20%.

iii. Whether shares can be issued for non-cash consideration, such as assets or services (and any formalities);

Shares can be issued for non-cash consideration if they are valued by the founding shareholders and audited by a member of the Belgian Institute of Certified Auditors.

iv. Any restrictions on foreign shareholders;

There are none.

v. Management structure and any restrictions on foreign managers;

The company is managed by a board of directors, that sets out the strategic guidelines of the company. The directors respond to the general meeting of shareholders. The board of directors can appoint managers to direct the day-to-day affairs of the company, and they can delegate certain authorities to them. There are no restrictions on foreign managers.

vi. Directors' liability;

An individual director can be held liable vis-à-vis the company itself on the basis of general civil law, when he commits a mistake in the execution of his decision making powers.

With regard to third parties he can be held liable on two grounds. First of all there's the general liability law (article 1382 Civil code), in case of the breach

of the general principle of care. However, there also exists a specific liability in case of a breach of corporate law or of the company's articles of association.

vii. Parent company liability; and

A parent company is only liable for the debts of its subsidiary if it has given a contractual guarantee or, exceptionally, if the corporate veil is lifted.

viii. Reporting requirements (including filing of accounts).

Double-entry bookkeeping is mandatory for Public and Private Limited Companies and the accounts must be published and filed annually with the Belgian National Bank. Changes to a company's structure must be registered with the local commercial court and published in the Belgian Official Gazette.

## **(D) Employment**

### 9. What are the main laws regulating employment relationships in your country?

Laws on individual relationships:

- The Law of 4 Augustus 1996 on the well-being of the employees on the job
- The Law of 3 July 1978 on employment agreements
- The Labour Law of 1971
- The law of 12 April 1965 on the protection of the salary of employees

Laws on collective relationships:

- The Law of 4 August 1996 on the well-being of the employees on the job
- The Law of 5 December 1968 on Collective Bargaining Agreements and Joint Committees
- The Law of 20 September 1948 on Workplace Labour Relations

Collective Bargaining Agreements

- Collective Bargaining Agreement nr. 5 of 24 May 1971 on the statute of trade union delegations
- Collective Bargaining Agreement nr. 9 of 9 March 1972 ordering national agreements and collective bargaining agreements on works councils
- Collective Bargaining Agreement nr. 32bis of 7 June 1985 on the preservation of employee rights in case of transfer of enterprises

### 10. Is a written contract of employment required in your country, and if so, must it contain any particular language? Are any agreements and/or implied terms likely to govern the employment relationship?

A written contract of employment is not required for full-time employment of unlimited duration, but certain obligations must be included in a written contract to be enforceable by the employer (e.g. trial period). Other contracts (part-time, limited duration, student employment) must be in writing.

Employment contracts are governed by mandatory provisions and supplementary provisions of the Law of 3 July 1978 on employment agreements.

11. Do foreign employees require work permits and/or residency permits if they work in your country? If so, how long does it take to obtain them and how much do they cost?

Foreign employees will need a work permit to work in Belgium, allowing them to apply for a visa. Certain employees are exempt from this obligation such as subjects of the EU and the European Economic Area.

Work permits must be applied for with the regional employment services (VDAB in Flanders, FOREM/Arbeitsamt in Wallonia, or the Ministry of Employment for the Brussels Region), by the employer or the employee, depending on the type. The application may take from 3 weeks up to 6 months, depending on whether an accelerated procedure may apply. Minor administrative fees will be charged.

The application for a visa must be filed with the diplomatic or consular post in the home country of the applicant.

12. Are employees entitled to management representation and/or to be consulted in relation to corporate transactions (such as redundancies and disposals) in your country?

Yes. Trade unions and/or works councils (enterprise level) must be consulted and in some cases they have the right to formulate alternative proposals.

13. Are there any employment protection laws (such as minimum wage law and/or maximum working hours law) in your country?

Yes, chiefly in the Labour Law of 1971.

14. Is there any pension system in your country? Is it on a mandatory or voluntary basis? If so, please give details.

There is a mandatory pension system, usually supplemented by private insurance offered as an extra-legal advantage by the employer.

15. How is the termination of individual employment contracts regulated in your country? Under what circumstances is the dismissal of an employee unlawful?

Termination of individual employment contracts is regulated by the Law of 3 July 1978 on employment agreements.

Notice or compensation in lieu of notice must be given by the terminating party, unless a serious fault was committed by the other party, in which case termination without notice or compensation is possible.

Certain employees, such as pregnant women and trade union representatives, are protected against dismissal and can only be dismissed in case of a serious fault. In case of unlawful termination of a protected employee sanctions include high compensations and sometimes forced reintegration.

16. Are redundancies and mass layoffs regulated in your country? If so, please give details.

Yes. Strict procedures apply and legal obligations include the prior information and consultation of the personnel, the creation of a so called “employment cell” aiming at reemploying the redundant personnel and the payment of several compensations. Several administrations such as the regional employment services and the federal ministry of employment must be involved in the procedure and they must give their prior approval.

**(E) Tax**

17. In relation to employees, what is the basis of taxation (i.e. whether territorial source principle, tax residency principle or other principle is adopted) in your country?

Pre-tax on salary, based on territorial source principle, with special rules for expatriates for a period of 5 years.

18. Under what circumstances are employees subject to taxation in your country?

In order to determine the Belgian income tax liability of the posting or transfer of an employee to Belgium, it is essential to establish whether the employee will be treated as either a tax resident of Belgium (i) or as a tax non-resident of Belgium (ii).

(i) The Belgian Income Tax Code (CIR/WIB) defines Belgian tax residence. According to Belgian Tax Law, an individual qualifies as a Belgian tax resident if he/she has established his/her domicile or the seat of his/her wealth in Belgium (CIR/WIB, article 2 §1 (1°)(a)).

The term domicile is defined as the place where the taxpayer effectively and enduringly resides, where his family lives and where personal contacts are maintained.

The seat of wealth is the place where the taxpayer manages his/her assets or where the centre of his/her business activities is located (not necessarily the place where his/her property/assets are situated).

Belgian Tax Law lays down a refutable legal presumption that an individual has his/hers domicile or the seat of his/her wealth in Belgium when he/she is registered in the Belgian population register of the municipality where he/she resides. The tax residence of a married couple is irrefutably deemed to be situated in Belgium if the family residence is located there. 1

(ii) A Belgian non-resident, i.e. a person who has not established his/her domicile or the seat of his/her wealth in Belgium, is only taxable on that part of his/her income that is received from Belgian sources.

Employees who work in Belgium without establishing tax residence will in principle only be taxable in Belgium if the salary cost is paid/borne by a Belgian tax resident or if they spend more than 183 days in Belgium during the calendar year/a period of 12 consecutive months. Profits from self-employment activity will in principle only be

taxable in Belgium if derived by means of a Belgian establishment or result from activities performed in Belgium.

Foreign executives who are temporarily assigned to work in Belgium within an international group of companies can enjoy beneficial tax arrangements under certain conditions<sup>7</sup>.

19. What income tax or social security contributions must be paid by:

i. Employees?

The social security contributions vary between 13 and 15 %, workers have a separate social security system, but the legislator prepares a joint status for both employees and workers. The personal status of the employee, such as his marital status or the number of children, will determine pre-tax withheld by the employer and taxation.

ii. Employers, in relation to their employees?

The social security average is 35% of the gross salary (38,44% for blue-collar workers and 32,44% for employees).

20. In relation to corporations, what is the basis of taxation (i.e. whether territorial source principle, tax residency principle or other principle is adopted) in your country?

Territorial source principle: resident corporations are taxed in Belgium<sup>8</sup>. Residency is determined taking into account e.g. the official location of the Board of Directors or the location where the General Assembly is held.

21. Under what circumstances are incorporations subject to taxation in your country?

The Corporation must have a legal personality, an exploitation or lucrative operations, and its tax domicile in Belgium.

Foreign corporations will be taxed on the net income generated in Belgium by a Belgian stable subsidiary.

22. What are the main taxes that are potentially applicable to a corporation and what are their tax rates?

There are two types of taxation: the basic rate of 33,99% or the reduced rate, which is a progressive rate by level, varying between 24,98 and 35,54%

23. Please explain how each of the following is taxed in your country :

i. Dividends paid to foreign corporate shareholders?

Dividends paid to foreign corporate shareholders have a tax rate of 25%.

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<sup>7</sup> Source and further information: <http://www.investinflanders.be>.

<sup>8</sup> Art. 179 ITC 1992.

When parent companies and subsidiaries are located in different European Member States, the European Parent Subsidiary Directive applies, reducing the tax rate to 0% if certain conditions are met (e.g. a minimum holding of 10% of the Belgian company's financial capital for a full year prior to the date of the distribution of the dividends).

Furthermore, international conventions often reduce the tax rate to 15%.

ii. Dividends received from foreign companies?

In order to avoid a double taxation of the dividends, 95% of the amount of dividends is deducted from the taxable income of the Belgian parent company. This system is called the Regime of definitely taxed income.

iii. Interest paid to foreign corporate shareholders?

These interests are taxed within 15 days after their attribution or payment at a rate of 15%, by means of a withholding tax.

iv. Intellectual property (IP) royalties paid to foreign corporate shareholders?

A European Council Directive on a common taxation system for associated companies from different Member States was adopted on 3 June 2003. It is applicable to interest and royalty payments between those associated companies<sup>9</sup>.

24. Are there any thin capitalization rules (i.e. restrictions on loans from foreign affiliates) in your country? If so, please give details.

Belgian tax law currently does not have a general thin capitalization rule, however, a specific thin capitalization rule<sup>10</sup> exists for interest payments or attributions to beneficiaries taxed according to a low rate<sup>11</sup>. Interest payments or attributions above a 5/1 debt-equity ratio are not tax deductible, debt being defined as all loans (all intra-group loans as defined by art. 7 ITC) under which the beneficial owner is not subject to income taxation or is subject to a tax regime that is substantially more advantageous than the Belgian tax regime, and equity being defined as the sum of the taxed reserves at the beginning of the taxable period and the capital increase at the end of the taxable period.

An anti-abuse measure provides that loans guaranteed or funded by a tainted third party will be deemed granted by this third party.

25. Are there any controlled foreign company rules (i.e. the profits of a foreign subsidiary must be imputed to a local parent company) in your country? If so, please give details.

The Belgian ITC contains various dispositions to avoid any transactions between two companies that are not conform to the rules of the market.

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<sup>9</sup> Directive 2003/49/CE.

<sup>10</sup> Art. 198, al. 1, 11° ITC.

<sup>11</sup> The specific thin capitalization rule does not apply to Companies operating within a special range of activities relating to leasing, factoring and real-estate leasing.

The article 185 § 2 is essential because it allows Belgium to adapt in the positive or in the negative the incomes of a group of companies. When two companies, part of a multinational group of companies, both agree to different conditions than those that would normally be concluded between two independent companies, and subsequently earn a profit that, without the mentioned conditions, would normally have been made by only one of them, that profit can be included within the profit of both companies.

This article applies, even in the presence of a Convention on the elimination of double taxation in cases of profit corrections of associated companies.

26. Are there any transfer pricing rules (i.e. restrictions on the pricing of transaction between a local entity and a foreign entity) in your country? If so, please give details.

The tax authority responsible for transfer pricing in Belgium is the Belgian administration of direct taxes. There is no specific transfer pricing legislation in Belgium.

*The arm's length principle* was formally introduced into Belgian tax law by Article 185 § 2 ITC<sup>12</sup>. The application of this article is similar to that of article 9 § 1 and § 2 of the OECD Model Tax Convention.

In addition, the ITC contains various provisions which directly or indirectly relate to transfer pricing: articles 26, 49, 54, 55, 79, 207, 344 and 345 of the Belgian ITC.

The general rule concerning the deductibility of expenses is contained in article 49 of the ITC: a tax deduction is allowed only if an expense is incurred for the benefit of the taxpayer and when it is connected with taxpayer's business activity.

Article 53 concerns the excessive expenses, article 55 provides that interest paid is a tax-deductible business expense, article 344 contains anti-abuse rules, and article 207 states that a Belgian company, receiving abnormal or gratuitous benefits from a company on which it is directly or indirectly dependent, may not use any current year losses or losses carried forward, nor may it apply the participation exemption, investment deduction or national interest deduction against the taxable income arising from the benefit.

Since 2009, companies must fulfil a reporting requirement<sup>13</sup> (the model form n°275F). This requirement applies to payments of over 100.000 € per taxable period made by resident or non-resident entities to persons established *in tax havens*<sup>14</sup>.

27. How are imports and exports taxed in your country?

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<sup>12</sup> L. 21 June 2004, M.B. 9 July 2004.

<sup>13</sup> Art. 307 § 1<sup>er</sup> ITC 1992.

<sup>14</sup> Tax havens are defined with reference to the black list, it currently contains 30 jurisdictions that either do not levy corporate income tax or have a nominal corporate income tax rate that is lower than 10%.

International transactions are dominated by the principle that the tax must be collected in the land where the goods and services are consumed.

In Europe, the matter was settled by the Sixth VAT Directive, establishing the principle of taxes on import from foreign states and no taxes on export. In general, no customs duties are due on exported goods. Imported goods originating from a European Member States are free of duty too. Those goods are allowed to circulate freely in the European Union.

Goods imported into Belgium from outside the European Union, however, will be subject to import duties and VAT. The import duties and taxes payable are calculated on the value of the imported good plus the cost of importation of the good itself. The standard VAT rate for importing goods into Belgium is 21%.

The duty rates applied to imports into Belgium typically vary between 0% and 17%.

28. Is there a wide network of double tax treaties in your country? If so, please give details.

In Belgium, the FFTC system (Fixed Foreign Tax Credit – QFIE - Quotité Forfaitaire d'Impôt Etranger) elaborated a mechanism that aims at reducing the double economic taxation: first taxes on foreign sources income, and second, the taxes supported in Belgium.

The FFTC limits the overall tax rate on foreign source income to the highest rate, that of the foreign country or that of Belgium.

No additional tax on foreign income will be imposed in Belgium when the foreign tax rate is higher than the Belgium rate. Conversely, if the tax rate on the foreign source income is lower than the Belgium rate, the FFTC applies on foreign surpluses in order to equalize the Belgian tax rate.

**(F) Competition**

29. Is there any competition law in your country? If so, please give details.

Belgium is subject to European and Belgian sources of competition law. Usually their rules are identical or complementary, but some minor differences may arise. The principle of Belgian and European competition law is freedom; enterprises are, in general, unrestricted economical actors in an open market. However, an unregulated market naturally leads to restrictions of effective competition. Stopping this phenomenon is the leading objective of the applicable competition law in Belgium.

Competition law is applicable to enterprises, a concept that varies from European to Belgium law. European competition law encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. Belgian competition law however restricts the definition to a legal or physical person pursuing in a sustained manner an economical goal.

The rules of competition law focus primarily on:

- Restrictive agreements and practices;

- Abuse of dominant positions;
- Market concentration;

The Commission is the European competition law authority. It acts on its own motion or on complaints. It can bring the anti-competitive practices to an end with the faculty of punctual penalty payments, order enterprises to pay fines and take provisional measures. It possesses important investigational powers in order to properly perform its missions.

The Belgian authority in competition law is the Competition Council (“Conseil de la concurrence”). It holds similar yet inferior powers than the Commission.

To ascertain which authority is competent, it must be determined which one is best suited to act with regards to the origin, the processing and the effect of the anti-competition practice on the territory as to the legal and practical ability to terminate the infringement. The Commission deems itself, in rule, best suited to act when the practice affects the trade in more than three member-states or if the case is of a specific European interest.

Belgian courts and tribunals have jurisdiction to apply both European and Belgian competition law. Only they can award damages to parties prejudiced by the anti-competitive practices.

Belgian anti-competition rules are not allowed to prohibit practices that would not be prohibited by European competition law. Nevertheless, their consequences may differ.

Part of the Belgian and European rules concerning unfair commercial practices also have the effect of prohibiting certain types of disloyal competition between enterprises and it is not uncommon that anti-competition practices are branded by courts as unfair commercial practices.

In conclusion, Anti-competitive practices are prohibited, in Belgium, by European competition law and an almost identical Belgian competition law. It is enforced by the Belgian or European competition authority best suited to act.

30. Are restrictive agreements and practices regulated by competition law in your country?

Article 101 of the Treaty on the Functioning of the European Union governs the European prohibition of certain restrictive agreements or practices. “All agreements between enterprises, decisions by associations of enterprises and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market” are null and void by right .

The legal status of the practices is indifferent, as long as the anti-competition behaviour is not unilateral. Practices can be both horizontal, between competing

enterprises, or vertical, between enterprises situated at a different level of commercialization.

Practices need only to have the potential or the goal to restraint trade on a substantial part of the internal market. The relevant market can geographically be defined as the territory in which all the concerned traders are exposed to objective conditions of competitions which are similar or sufficiently homogenous and materially to goods and services sufficiently substitutable. Therefore a practice affecting the territory of a sole state (Belgium) could be considered as impacting a substantial part of the internal market and be subject to European competition law.

Agreements of minor importance are not considered appreciable restrictions of competition. The European Union Commission deems practices between enterprises which hold aggregate market shares below 10% for horizontal agreements and 15% for vertical agreements of minor importance. Exceeding the thresholds does not constitute, in itself, a violation of competition rules.

Practices satisfying the conditions can, at very strict prerequisites, be exempted. They must:

- 1) Contribute to improving the production or distribution of goods or to promoting technical or economic progress;
- 2) While allowing consumers a fair share of the resulting benefit;
- 3) Refrain from impose on the enterprises concerned restrictions which are not indispensable for the attainment of these objectives;
- 4) Nor afford such enterprises the possibility of eliminating competition in respect of a substantial part of the products in question.

The Commission additionally holds the power to exempt certain categories of agreements for certain categories of enterprises.

Furthermore, enterprises holding jointly a dominant position, are prohibited from abusing this position following the rules elaborated as below.

### 31. Is unilateral (or single-firm) conduct regulated by competition law in your country?

Unilateral practices are not regulated by European competition law with the exception of abuse of dominant positions by enterprises which potentially affect the trade of a substantial part of the internal market.

An enterprise is in a dominant position if it can substantially act in a given market, irrespective of its competitors, their customers and consumers. Important market shares are the main indicator of a dominant position though not a necessary condition. Holding a dominant position is not prohibited, only its abuse is. Nevertheless an enterprise in a dominant position must act with particular caution in order to respect competition law.

Abuse occurs if the enterprise uses practices that have the effect of restricting the degree of competition which it faces, or is exploiting its market position unjustifiably, namely by practices made possible only by its dominant position .

32. Are mergers and acquisitions subject to merger control in your country?

European competition law declares incompatible with the common market concentrations which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.

A concentration can be the result of:

- The merger of two or more previously independent enterprises or parts of enterprises or the acquisition, by one or more persons already controlling at least one enterprise, or by one or more enterprises, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other enterprises;
- The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity;
- Control of another enterprise by means of the acquisition of their assets or rights giving significant influence on the governance of this enterprise.

Only concentrations of community dimension are ruled by the European competition law. These concentrations must be notified to the Commission, prior to their implementation. Concentrations deemed incompatible with European competition law by the Commission may be ordered to dissolve the concentration so as to be restored to their situation prevailing the implementation of the concentration and be forced to accessory measures required by the dissolution.

Concentrations that are not of community dimension but exceeding minimum turnover thresholds on the Belgian market (irrespective of the place of establishment of the parties, in Belgium or abroad) must be notified to the Belgian Competition Authority. The thresholds are:

- EUR 40 million by at least two of the enterprises concerned;
- EUR 100 million in aggregate.

**(G) Intellectual property**

33. Please outline the main intellectual property rights that are capable of protection in your country. In each case, please state:

Copyrights

- i. What is the nature of the right?

Copyright protection is extended to expressions of original ideas, but not the ideas themselves. To be original, an intellectual creation needs to be an author's own personal creation or stamped by an author's personal touch.

Every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, is subject to copyright law. Some examples would be: music, software, instruction books, PowerPoint presentations, sermons.

ii. How is it protected?

The holder of the copyright is exclusively entitled to reproduce and adapt his creation and to make it public. No formalities are required to obtain protection.

iii. How long is it protected?

The term of protection granted by copyrights lasts the life of the author and stands for seventy years after his death..

iv. How is it enforced?

In actions for an injunction, the judge already rules on the merits of the infringement.

The prejudiced copyright holder is entitled to the full compensation of the damage suffered from the transgression of his copyright. The judge can order the release of the counterfeited goods and, if appropriate, the materials and tools used primarily to produce and create the counterfeit if still in possession of the wrong-doer. In the case of infringement in bad faith, claims can be made to transfer the profits resulting from the infringement that are directly related to the counterfeited activities. The court may decide to publicize its judgment for a given time.

The infringement of copyrights can result in criminal charges.

## Patents

i. What is the nature of the right?

Inventions can be protected by patents if they are new, demand an inventive step, and are susceptible of industrial application.

Processes are in general patentable as long as they represent a technical instruction. The following in particular shall not be regarded as inventions: discoveries, scientific theories and mathematical methods, aesthetic creations, schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers, presentations of information.

In addition, patents shall not be granted to a series of inventions excluded by national statutes or those that are contrary to the public policy and accepted principles of morality.

Patents delivered by the Belgian office of intellectual rights can only protect the invention in Belgium. European patents are likewise exclusively applicable in contracting states that recognize the validity of the patent and they have the same effect as a national patent.

Belgium has furthermore ratified the patent cooperation treaty. Therefore a unified procedure for filing patent applications to protect inventions in each of its contracting states is available.

The patentability of an invention is examined by the European patent office before the delivery of a Belgian patent.

ii. How is it protected?

The patent gives the right to prohibit third parties from:

- 1) Using a patented process; producing, offering, injecting into the market, using and importing or detaining for aforementioned goals, the product obtained directly from the patented process;
- 2) Producing, offering, injecting into the market, using and importing or detaining for aforementioned goals, the patented invention;
- 3) Delivering or offering to deliver in Belgium to third parties, means to accomplish infringement acts in Belgium, if the deliverer knows or must know the sought infringement ends

iii. How long is it protected?

20 years from the date of the deposition of the request for a Belgian patent, subject to an annual fee, from the third year of the patent. A supplementary protection certificate for a maximum of five years may be granted in certain sectors.

iv. How is it enforced?

In actions for an injunction, the judge already rules on the merits of the infringement.

The prejudiced patent holder is entitled to the full compensation of the damage. The judge can order the release of the counterfeited goods and, if appropriate, the materials and tools used to produce and create the counterfeit, the publication of the ruling and the revelation of any information concerning the origin and the distribution channels of the counterfeit goods.

The infringement of patents can result in criminal charges.

## Trade marks

### i. What is the nature of the right?

Names, designs, stamps, seals, letters, figures, shapes of products or packaging and all other signs able to be represented graphically and used to distinguish the goods or services of one enterprise from other enterprises may constitute a trademark. However, signs solely comprising a shape which is imposed by the very nature of a product, which gives the product substantial value, or which is necessary for obtaining a technical result, may not be regarded as trademarks.

Signs must have a distinctive character, may not be contrary to public policy or to accepted principles of morality and must be available.

### ii. How is it protected?

Belgium is part of the Benelux convention on intellectual property. The Benelux trademark shall be acquired by registration in Belgium or with the International Bureau.

A Community trademark having equal effect throughout the community is also available. A Community trade mark shall be obtained by registration at the Office for Harmonisation in the Internal Market.

Finally, the Madrid agreement provides a mechanism whereby a trademark owner who has an existing trademark application in a member jurisdiction may obtain an 'international registration' for his trademark from the WIPO.

The proprietor of the trademark shall be entitled to prevent all third parties not having his consent from using in the course of trade:

- 1) using in business a sign that is identical to the trademark for goods or services that are identical to those for which the trademark is registered;
- 2) using in business a sign in respect of which, because it is identical or similar to the trademark and because the goods or services covered by the trademark and the sign are identical or similar, there is a risk of confusion in the mind of the public which includes the risk of association between the sign and the trademark;
- 3) using in business a sign which is identical or similar to the trademark for goods or services which are not similar to those for which the trademark is registered, where the trademark enjoys a reputation in the protected territory and where use of the sign without due cause would take unfair advantage of or be detrimental to the distinctive character or the repute of the trademark;
- 4) using a sign for purposes other than those of distinguishing the goods or services, where use of the sign without due cause would take unfair advantage of or be detrimental to the distinctive character or the repute of the trademark.

iii. How long is it protected?

Protection lasts for ten years, renewable for additional ten-year periods against the payment of a renewal fee, from the date of filing the application for registration of the trademark.

iv. How is it enforced?

In actions for an injunction, the judge already rules on the merits of the infringement.

The prejudiced copyright holder is entitled to the full compensation of the damage. The judge can order the release of the counterfeited goods and, if appropriate, the materials and tools used to produce and create the counterfeit, the publication of the ruling and the revelation of any information concerning the origin and the distribution channels of the counterfeit goods.

Part of the Belgian and European rules concerning unfair commercial practices also have the effect of prohibiting certain types of trademark infringements.

The infringement of trademarks can result in criminal charges.

## Designs

i. What is the nature of the right?

The appearance of a product or a part of a product is protected only insofar as the design is new and has individual character. Product means any industrial or handicraft item, including inter alia parts intended to be assembled into a complex product, packaging, get-up, graphic symbols and typographic typefaces, but excluding computer programs.

Characteristics of the appearance of a product imposed by its technical function are excluded from design protection.

ii. How is it protected?

Designs within Benelux must be filed with national authorities or with the Benelux office.

The Hague agreement provides mechanism for registering a design in countries and/ or intergovernmental organizations member of the Hague Agreement.

The community design has equal effect throughout the community. Designs do not require registration to benefit from protection in the internal market. However, registering grants a longer period of protection and extends the holder's power to contest similar designs whether they were copied or created independently.

The design shall allow its holder to challenge the use of a product in which the design is incorporated or to which the design is applied, which has an identical appearance to the design as filed, or which does not produce a different overall impression on an informed user, having regard to the creator's degree of freedom in preparing the design.

iii. How long is it protected?

Protection for registered designs lasts for five years and can be renewed for additional five-year periods up to a maximum of 25 years against the payment of a renewal fee. Unregistered designs are protected for a 3 year period as from the date they are made available to the public.

iv. How is it enforced?

In actions for an injunction, the judge already rules on the merits of the infringement.

The prejudiced copyright holder is entitled to the full compensation of the damage. The judge can order the release of the counterfeited goods and, if appropriate, the materials and tools used to produce and create the counterfeit.

The infringement of trademarks can result in criminal charges.

**(H) Marketing agreements**

34. Are marketing agreements regulated in your country? If so, please give brief details in respect of the following arrangements:

i. Agency;

Agency agreements are regulated by the European directive 86/653/CEE brought into force with certain tweaks by the Belgian law of 13 April 1995. It mainly addresses the rules of termination of the Agency agreement.

Both parties are required to act dutifully and in good faith towards each other. The remuneration of the commercial agent can be fixed, variable with the number or value of the business transactions (commissions) or mixed.

The agent, whose remuneration consists fully or partly of commissions is entitled to these for:

A) Transactions concluded during the Agency agreement:

- 1) As a result of his action;
- 2) With a third party whom the agent had previously acquired as a customer for similar transactions;

- 3) In a determined sector or with a determined group of persons where the agent would act of his own motion;
- B) Transactions concluded after the termination of the Agency agreement:
- 1) That are primarily attributable to the efforts of the agent during the agency agreement and in the 6 months following the termination of the agency agreement;
  - 2) That result from an order of a third party whom the agent had previously acquired as a customer for similar transactions received by the principal or agent before the termination of the Agency agreement.

Agency agreements can be concluded for a fixed or an indefinite period. The agreement not evidenced in writing is deemed concluded for an indefinite period. An Agency contract for a fixed period which continues to be performed after that period has expired is deemed to have always been concluded for an indefinite period. Case law tends to qualify sequences of agency agreements for a fixed period as agreements for an indefinite period.

Parties may terminate by notice Agency agreements concluded for an indefinite or for a fixed period with a right to anticipated denunciation. The period of notice is one month plus a month for each passed year for a maximum of 6 months save express agreement. Parties may not agree on shorter periods of notice and agreements that give the agent a shorter period of notice than the principal are prohibited.

Each party may terminate, without prejudice of compensation, the agreement without notice if a serious default of the other party justifies immediate termination of the Agency agreement by permanently rendering any professional collaboration between the parties impossible. Parties have of a period of 7 days to terminate the agreement in such a manner after being informed of the default.

The party that terminates the agreement without respecting the period of notice or without invoking such a serious default is obligated to pay compensation equal to the remuneration for that period or what is left of it.

The agreement is automatically terminated if the principal unilaterally modifies the level of remuneration of the commissions.

After lawful termination of the agreement, the agent is entitled to an indemnity if he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business of such customers.

The agency agreement may contain a written non-competition clause for a maximum period of 6 months. This clause presumes the substantial benefits needed for the indemnity of termination.

Without prejudice of international rules, activities of a Belgian commercial agent whose main establishment lies in Belgium are subject to Belgian law and to the jurisdiction of Belgian courts.

ii. Distribution;

Belgian law expressly regulates the termination of distribution agreements concluded for an indefinite period. Other aspects of the distribution agreement are subject to ordinary Belgian contract law.

Such distribution agreements may be terminated with a reasonable advance notice of termination or compensation in lieu of notice to be determined by the parties at the time of denunciation. If the parties cannot reach an agreement, the judge will resolve the dispute in equity and, if appropriate, by taking into account the customs.

Each party may terminate, without prejudice of compensation, the agreement without notice if a serious default of the other party justifies immediate termination of the agency agreement by permanently rendering any professional collaboration between the parties impossible. Parties have of a period of 3 days to notify the termination of the agreement for serious default after being informed of the default and 3 days to notify the motives of the termination after the first notification.

The fair indemnity to which the distributor is entitled if the agreement is terminated by serious default of the grantor or by the grantor, without respecting the period of notice, is evaluated, as appropriate, by taking into account the following elements:

- 1) The substantial increase in value of the business with customers, attributable to the actions of the distributor, which continues to profit the grantor after the termination of the distribution agreement;
- 2) The fees engaged by the distributor related to the distribution operations that profit the grantor after the termination of the distribution agreement;
- 3) The severance fees the distributor is indebted to his personnel, if laid off because of the termination of the distribution agreement.

When a distribution agreement is concluded for a fixed period, the parties are deemed to have renewed the agreement, for an indefinite period or for a period determined by a tacit renewal clause, if they did not notify the termination of the agreement between 3 months and 6 months before the scheduled expiration.

The distributor active fully or partially in Belgium, prejudiced by the termination of his agreement, may always bring proceedings against his grantor before Belgium courts. The judge of the distributor's domicile or of the

grantor's domicile or establishment is the appropriate jurisdiction. Belgian courts will only apply Belgian law in Belgian distribution related disputes.

iii. Franchising

Belgian law does not regulate franchising agreements. They are fully subject to ordinary contract law. However, franchising agreements could be considered distribution agreements if their object is the distribution the franchisor's products.

**(I) E-commerce**

35. Are there any laws regulating e-commerce (such as electronic signatures and distance selling) in your country? If so, please give brief details.

- Distance selling is regulated by the Market Practices and Consumer Protection Act of 6 April 2010, in compliance with European legislation.

Under the Act, the seller must provide extensive information, such as information about the seller, the product or good, the terms of delivery and consumer rights. Consumers are entitled to a cooling-off period of at least 14 days after the conclusion of the contract, or even longer if the required information is not provided by the seller. Certain exceptions apply (perishable goods, airline tickets, certain financial services...) In case of B2B sales, the same rules concerning information exchange apply, but the parties may deviate from them. However, there is no cooling-off period.

- Electronic signatures may serve as legal proof of any contract when it is ruled "qualified", i.e. when a number of technical standards are met (and if no further specific formalities are required for this contract). The Act of 9 July 2001 on electronic signatures and certification services provides the legal framework.

Under the Act, Belgium-based, qualified certificate providers must report their activities to the Federal Public Service Economy.

**(J) Data protection**

36. Are there any data protection laws in your country? If so, please give brief details.

Data protection is regulated by the Act of 8 December 1992 on the protection of privacy in relation to the processing of personal data (the so-called "Privacy Act") and its implementing decrees. It has since been modified substantially in order to transpose the European Directive and to keep abreast of computer evolution.

Under the Privacy Act, the person responsible for compliance (the so called "controller") must notify the intention of processing data to the Belgian Commission for the protection of Privacy prior to its collection. Controllers must also indicate the purpose of the data collection and fully inform the data subjects with respect to their rights (e.g. correction) and the use of the data (e.g. for direct marketing).

Personal data may only be collected if they are necessary to achieve the (legitimate and specific) purpose indicated and if they are relevant.

Data can never be collected without the subject's free and informed consent. All collected data should be treated with confidentiality and they must be protected from unauthorized processing operations and processors.

Sensitive data (with respect to religion, race, political opinion or health matter) may only be collected under very strict conditions (e.g. written consent, scientific research, data made public by the data subject, compulsory under employment law).

**(K) Product liability**

37. Are there any laws regulating product liability and product safety in your country? If so, please give brief details.

Product Liability is regulated by the Product Liability Act of 25 February 1991 implementing the EC Directive 85/374.

Any producer of physical goods can be held liable for defects of the good. When the producer cannot be identified, the seller will be liable. This liability cannot be limited or excluded contractually, and will continue for ten years after the sale. The liability extends to all bodily and moral damages, and to a certain degree to all damages to goods.

A product is considered defective when it does not provide the safety which one can reasonably expect in the given circumstances, considering its presentation, normal use and the time of production. The buyer of the good does not have to prove a fault of the producer, it suffices to show that there is a defect that caused bodily or moral damage to an individual, or material damage to private property.

According to general civil law, the producer or seller who was unaware of the defect only has to reimburse the price of the good and the costs associated with the sale. However, when he was aware of the defect, he will be liable for all damages and interests. When he is a professional producer or seller, this knowledge will be presumed.

**November 2013**