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The Legal 500 Country Comparative Guides

Belgium

ACQUISITION FINANCE

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This country-specific Q&A provides an overview of acquisition finance laws and regulations applicable in Belgium.

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BELGIUM
ACQUISITION FINANCE

1. What are the trends impacting acquisition finance in your jurisdiction and what have been the effects of those trends? Please consider the impact of recent economic cycles, Covid-19, developments relating to sanctions, and any environmental, social, and governance ("ESG") issues.

During the first half of 2022, the easing of COVID-19 restrictions allowed for further expansion of the economic growth in Belgium. However, high inflation and the decrease in consumer confidence in the second part of the year have curbed this expansion, having its influence on the availability and cost of debt. Weakening economic output, international political tensions and rising interest have created a challenging environment for corporations and private equity investors. Debt has become more and more expensive in Belgium, as well on a global scale.

Nonetheless, debt still remains the most popular type of acquisition financing in the Belgian market.

Above that, and although debt remains king, an average M&A transaction was financed in 2022 by one-third trough (semi-)equity or more, depending on the size of the deal. The contributions of equity have therefore more or less reached the same level again as before the pandemic in 2019, as is the case for deferred payments, which still has as its most popular subtype vendor loans.

Sustainability and ESG in general are still becoming increasingly important in the context of corporate finance.

2. Please advise of any recent legal, tax, regulatory or other developments (including any reforms) that will impact foreign or domestic lenders (both bank and non-bank lenders) in the acquisition finance market in your jurisdiction.

Book 5 of the new Civil Code will enter into force on January 1st 2023, and will have an impact on financing arrangements. Book 5 reflects the legislator's aim to increase legal certainty by codifying important principles of Belgian contract law developed over the years by case law and legal doctrine. This includes (i) information requirements during the negotiation phase and the pre-contractual liability, (ii) abuse of circumstances when negotiating terms and exercising rights, (iii) unfair clauses, (iv) hardship during the performance of the financing arrangement, (v) assignments of receivables and debt, (vi) assignments of contract and (vii) compounding interest.

3. Please highlight any specific high level issues or concerns in your jurisdiction that should be considered in respect of structuring or documenting a typical acquisition financing.

When structuring an acquisition financing, one should always take into account the corporate interest of the obligors involved. Other typical issues concern the application of financial assistance rules (see below).

4. What are the legal and regulatory requirements for banks and non-banks to be authorised to provide financing to, and to benefit from security provided by, entities established in your jurisdiction?

Providing (secured) loans is, as such, not a regulated activity in Belgium. In order to provide financing to companies, an lender must not obtain a licence if it does not qualify as a credit institution (i.e. no receipt of deposits). However, a licence is always required when providing loans to consumers or residential mortgage loans.

Credit institutions established in the EEA can apply for a

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passport with their competent authority allowing them to operate in Belgium, either through a branch or on a cross-border basis. They do not need a separate Belgian banking licence.

Third country (non-EEA) credit institutions can only operate in Belgium through a branch and must apply for a Belgian banking licence for the branch.

5. Are there any laws or regulations which govern the advance of loan proceeds into, or the repayment of principal, interest or fees from, your jurisdiction in a foreign currency?

In Belgium there are no regulations which govern or restrict the advance of loan proceeds in a foreign currency. Loans in USD or GBP are common.

6. Are there any laws or regulations which limit the ability of foreign entities to acquire assets in your jurisdiction or for lenders to finance the acquisition of assets in your jurisdiction? Please include any restrictions on the use of proceeds.

Since Belgian has traditionally an open economy, there are no regulations which limit the ability of foreign lenders to acquire assets in Belgium or to finance the acquisition of assets.

The EU framework for foreign direct investment screening is set out in Regulation 2019/452. This regulation sets out minimum requirements for member states' FDI screening mechanism and creates a framework for the European Commission and national authorities to share information and views.

On 1 June 2022, Belgium's federal and various regional governments entered into a draft cooperation agreement to introduce a Belgian mechanism for screening foreign direct investments. The screening of investments falling within the scope of the system will be performed by an Interfederal Screening Committee ("ISC"), which will be composed of representatives from both the Federal government and the governments of the different Regions and Communities. The mechanism should enter into force in 2023.

7. What does the security package typically consist of in acquisition financing transactions in your jurisdiction and are there any additional security assets available to lenders?

Belgium is familiar with different types and forms of security packages, depending on a various number of factors, such as the available budget or costs. However, most packages include:

Pledges

Share pledges

Share pledges are granted by the shareholders of a company, entered into by a private agreement. Due to the lack of public formalities (such as a notary), the share pledge is one of the most common and popular types of securities in Belgium. It becomes enforceable against third parties as soon as they are entered into the share register.

Receivables pledge

A pledge on receivables and bank accounts is often present in a security package, among other things due to the lack of registration formalities.

Pledge on movable assets or the entire business

A pledge on movable assets or the entire business is vested by private agreement. In order to be enforceable, the pledge must be registered in the national pledge register.

Mortgage (real property)

Due to the essential element that a mortgage is granted over real estate, the intervention of a notary is required. Such formalities increase the cost (e.g. a duty of 1.3% of the secured amount), making it less flexible type of security.

Above the security interests mentioned, Belgian security packages also entail other types of pledges and security interests, such as intellectual property rights pledges or guarantees.

8. Does the law of your jurisdiction permit (i) floating charges or any other universal security interest and (ii) security over future assets or for future obligations?

i. Yes, it is possible to grant a pledge on the entire business of a company. In order to be enforceable, the pledge must be registered in the national pledge register. A pledge over a

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business will cover the assets of the business on a floating basis so that future assets of the business are included.

ii. *Future movable assets*A security over future movable assets is possible, provided that the assets are determined or determinable at the entry into force of the security agreement.*Future immovable assets*The parties to a mortgage will in most cases agree that the future constructions on a mortgaged land and fitting to the mortgaged real estate will also be covered by the mortgage.

Future receivables

Provided that the receivables are determinable when the pledge is granted, a pledge over future receivables is also possible. Pledge agreements will commonly oblige the pledgor to periodically provide lists of the receivables.

Future debts

Belgian law permits security for future obligations.

9. Do security documents have to (by law) include a cap on liabilities? If so, how is this usually calculated/agreed?

This depends on the type of security.

E.g. mortgages and pledges on movable assets or the entire business must mention the maximum secured amount of the security, as the registration duties or retributions are calculated on the basis of the amounts secured by the security interest.

Other security agreement (e.g. share pledges) do not have to include a maximum secured amount. Upstream guarantees by group companies are typically limited in view of the net assets of the guarantor. This is not a strict legal requirement, but it is typically applied in view of the corporate interest test.

10. What are the formalities for taking and perfecting security in your jurisdiction and the associated costs and timing? If these requirements are different for different asset classes, please outline the main points to note for each of these briefly.

See Q7.

Additional assets may include more specifically:

Real property (land), plant and machinery

Security over real property is vested by a mortgage which is executed by way of a notarial deed and registered with the mortgage register. Plant, machinery, equipment and inventory can be pledged by means of a non-possessory pledge that is registered with the Belgian national pledge register in order to be effective against third parties.

Receivables

A pledge over receivables can be created by a pledge agreement, which is perfected and enforceable against third parties (other than the debtor and creditors with competing claims) upon its execution. In addition, the pledge must be notified to or acknowledged by the debtor in order to become enforceable against the debtor and creditors with competing claims.

Shares in Belgian companies

Shares in Belgian companies can be pledged (without a notarial deed), unless this is prohibited by the company's articles of association, and such pledge shall be perfected upon recordation in the company's share register (in case of registered shares), or it is registered in a special financial account (in case of dematerialised securities).

11. Are there any limitations, restrictions or prohibitions on downstream, upstream and cross-stream guarantees in your jurisdiction? Please also provide a brief description of any potential mitigants or solutions to these limitations, restrictions or prohibitions.

A company can guarantee the obligations of another group company, provided that such guarantee (i) falls within the guarantor's corporate purpose and (ii) is not contrary to its corporate benefit.

The guarantee must in the first place serve the guarantor's corporate purpose, as set out in its articles of association. If this corporate purpose test is not met, the guarantee can only be held void towards a third party if that party knew or should have known that the transaction was ultra vires. Professional lenders are deemed to verify a borrower's or guarantor's articles of association prior to granting a loan.

Secondly, the guarantee must also be in the corporate

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benefit of the guarantor. Hereto, the guarantor's board of directors must assess the corporate benefit of the guarantor, typically by taking into account: (i) any direct and/or indirect benefits the guarantor derives from the loan; (ii) the balance between the risk relating to the guarantee and the benefit for the guarantor; and (iii) the guarantor's financial capacity.

Belgian subsidiaries that grant cross-stream or up-stream guarantee will often include limitation language in credit agreements, guarantees and security documents which reduces the risk of violating Belgian corporate benefit rules. Such limitation wording is not imposed by law, but is based on market practice.

12. Are there any other notable costs, consents or restrictions associated with providing security for, or guaranteeing, acquisition financing in your jurisdiction?

The vesting of a mortgage by notarial deed and the registration thereof will entail the payment of registration duties (1.3% of the secured amount), notary fees and possible additional costs. In order to avoid the costs of a mortgage, often a mortgage mandate is used instead, which is an irrevocable proxy to vest a mortgage. It does not create any security and will only become perfected and take rank as of the moment of its conversion.

The registration of a pledge on movable assets in the national pledge register costs up to €518 per registration. The costs will typically be borne by the borrower.

13. Is it possible for a company to give financial assistance (by entering into a guarantee, providing security in respect of acquisition debt or providing any other form of financial assistance) to another company within the group for the purpose of acquiring shares in (i) itself, (ii) a sister company and/or (iii) a parent company? If there are restrictions on granting financial assistance, please specify the extent to which such restrictions will affect the amount that can be guaranteed and/or secured.

Under Belgian company law, a company is allowed to grant financial assistance to support the acquisition of its own shares, provided that such financial assistance does not disregard the rights of minority shareholders and does not jeopardise the continuity of the company. Financial assistance may further only be granted using funds that are eligible for distribution. In order to avoid that available funds are distributed several times, the company must create an unavailable reserve for the value of the financial assistance. Finally, the transaction will have to be authorised by the shareholders' meeting and will then be carried out under the responsibility of the management body, which is also required to draw up a special report for this purpose.

These rules do, however, not apply to a situation whereby a Belgian company guarantees or secures borrowings to acquire shares in a parent or sister company.

14. If there are any financial assistance issues in your jurisdiction, is there a procedure available that will have the effect of making the proposed financial assistance possible (and if so, please briefly describe the procedure and how long it will take)?

See Q13.

15. If there are financial assistance issues in your jurisdiction, is it possible to give guarantees and/or security for debt that is not pure acquisition debt (e.g. refinancing debt) and if so it is necessary or strongly desirable that the different types of debt be clearly identifiable and/or segregated (e.g. by tranching)?

Yes, this is possible and common practice (including debt pushdown techniques). The acquisition debt and the debt for the refinancing of the target will be distinguished from each other through *tranching*. The debt used for the refinancing will be made available to the target company. The target company can grant a security or guarantee with regard to the refinancing debt.

It is strongly desirable that the different types of debt (e.g. acquisition debt versus refinancing debt) are clearly identifiable and/or segregated.

16. Does your jurisdiction recognise the concept of a security trustee or security

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agent for the purposes of holding security, enforcing the rights of the lenders and applying the proceeds of enforcement? If not, is there any other way in which the lenders can claim and share security without each lender individually enforcing its rights (e.g. the concept of parallel debt)?

N/A

17. Does your jurisdiction have significant restrictions on the role of a security agent (e.g. if the security agent in respect of local security or assets is a foreign entity)?

Belgian law recognises the concept of a security agent with respect to pledges on movable assets and pledges on financial instruments (bank accounts, securities and shares). However, for mortgages this concept does not exist yet and a parallel debt structure may be required.

18. Describe the loan transfer mechanisms that exist in your jurisdiction and how the benefit of the associated security package can be transferred.

A loan subject to Belgian law can be transferred in accordance with Article 1690 of the (old) Belgian Civil Code. In principle, collateral granted under a loan agreement will be transferred automatically. However, in case of a transfer of a pledge on movable assets or mortgages, formalities may be applicable. The transfer of a mortgage must be mentioned in the mortgage register. The transfer of a pledge must be recorded in the pledge register.

The Law of 3 August 2012 on various measures to facilitate the mobilization of receivables in the financial sector has provided a more flexible regime for the transfer of claims to or by financial institutions, mobilization institutions and credit institutions.

19. What are the rules governing the priority of competing security interests in your jurisdiction? What methods of subordination are used in your jurisdiction and can the priority be contractually varied? Will contractual subordination provisions survive the insolvency of a borrower incorporated in your jurisdiction?

Typically, the timing of registration of a security interest will determine its priority.

Further, subordination or intercreditor agreements are common under Belgian law and will survive the insolvency of the borrower, although explicit legislation is absent in our jurisdiction.

20. Is there a concept of “equitable subordination” in your jurisdiction whereby loans provided by a shareholder (as a creditor) to a company incorporated in your jurisdiction are subordinated by law upon insolvency of that company in your jurisdiction?

Belgium does not know the concept of equitable subordination.

21. Does your jurisdiction generally (i) recognise and enforce clauses regarding choice of a foreign law as the governing law of the contract, the submission to a foreign jurisdiction and a waiver of immunity and (ii) enforce foreign judgments?

i. Yes, a Belgian court will recognise the foreign law chosen by the parties to govern the agreement, except for any mandatory provisions of other jurisdictions, applicable EU law, overriding mandatory provisions of the jurisdiction in which the obligations out of the contract are performed, Belgian overriding mandatory provisions or Belgian public policy provisions that might override the foreign governing law and apply direct to the contract.
ii. In principle, a Belgian court will recognise and enforce a judgment of a foreign court without re-examining the merits of the case, save for some exceptions (*g.* if the judgment is manifestly contrary to Belgian public policy or if it violated the rights of defence).

Belgium is a member of the New York Arbitration Convention. An arbitral award will be recognised and enforced without re-examination of the merits, subject to the provisions of the New York Arbitration Convention and the Belgian Judicial Code. The latter includes certain reasons based on which the recognition of an arbitral

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award can be refused (*e.g.* if the arbitral award infringes Belgian public policy or if it has been insufficiently motivated).

22. What are the requirements, procedures, methods and restrictions relating to the enforcement of collateral by secured lenders in your jurisdiction?

Belgian law is becoming more and more lender friendly in this respect. Pledges on movable assets, the entire business, bank accounts, shares and receivables can be enforced without prior curt approval. Only the enforcement of a mortgage requires an enforceable title (e.g. judgement).

23. What are the insolvency or other rescue/reorganisation procedures in your jurisdiction?

A company's state of bankruptcy (understood as the situation wherein the company has ceased to pay its debts persistently as they become due and that is no longer in a position to obtain credit) will be determined by the court in a bankruptcy judgment which suspends the enforcement rights of individual creditors. Creditors will then file their claims with the trustee in bankruptcy, who will verify the claims. The trustee in bankruptcy will try to gain proceeds from the company's assets that are sold and from the debts to the company recovered. These proceeds will be distributed amongst the creditors holding security interests, privilege rights and unsecured creditors, based on their rank which is established by a complex set of rules.

Belgian law also knows judicial reorganisation procedures which allow companies in financial distress to reorganise their activities and debts.

24. Does entry into any insolvency or other process in your jurisdiction prevent or delay secured lenders from accelerating their loans or enforcing their security in your jurisdiction?

A bankruptcy judgment suspends the enforcement rights of individual creditors. However, the suspension for creditors holding a security interest on specific movable assets and mortgages will usually be limited up to the closing of the first minutes of the verification of the claims, unless this period is extended up to one year from the bankruptcy judgment at the request of the trustee in bankruptcy.

Notwithstanding, pledges and security assignments of bank accounts, shares and certain financial instruments, as well as close-out netting agreements, remain enforceable immediately despite the opening of bankruptcy.

25. In what order are creditors paid on an insolvency in your jurisdiction and are there any creditors that will take priority to secured creditors?

First of all, the creditors of the bankrupt estate are covered, meaning that all debts in relation to the management of the bankrupt estate are repaid. These debts therefore have absolute priority.

Following repayment of this first category, creditors are divided in three further categories (in order of priority): (a) secured or privileged creditors in relation to a specific asset who are privileged on the proceeds of the asset, (b) privileged creditors on all movable and/or immovable goods (for example tax authorities) and (c) non-privileged creditors.

26. Are there any hardening periods or transactions voidable upon insolvency in your jurisdiction?

Under Belgian law, transactions that are concluded or performed within maximum six months before the date of the bankruptcy judgment (the so-called hardening period) may be declared ineffective against third parties.

Such transactions include *i.a.*: (i) payments for debts which are not due; (ii) payments other than in cash for debts due; (ii) gratuitous transactions entered into at an undervalue or an extremely beneficial terms for the counterparty; and (iv) security provided for pre-existing debts.

If the counterparty was aware of the debtor's cessation of payments and the court determines that such declaration would benefit the debtor's estate, the court may, at the request of the trustee in bankruptcy and in its discretion, declare other transactions entered into or performed during the hardening period ineffective against third parties.

In addition, fraudulent transactions that are abnormal and were entered into with the knowledge that the transaction would prejudice the company's creditors, are also ineffective if the company goes bankrupt, even if the transactions dates back from before the hardening period mentioned above.

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27. Are there any other notable risks or concerns for secured lenders in enforcing their rights under a loan or collateral agreement (whether in an insolvency or restructuring context or otherwise)?

Abuse of rights claims may occur if the enforcement of a security is sought without reasonable and sufficient interest that causes damage or the damage that is caused due to the enforcement is disproportionate to the achieved advantage. Any limitation of liability by the pledgee is null and void.

A translation by the Belgian courts of the evidence used may be required.

International private law may assign other rules in a cross-border enforcement procedure.

28. Please detail any taxes, duties, charges or related considerations which are relevant for lenders making loans to (or taking security and guarantees from) entities in your jurisdiction in the context of acquisition finance, including if any withholding tax is applicable on payments (interest and fees) to lenders and at what rate.

A 30% withholding tax rate applies to interest payments to domestic and foreign lenders, unless exceptions or reductions from withholding taxes apply based on Belgian law provisions or double-tax treaties. US and EEA credit institutions are, in principle, exempt.

In principle, no withholding tax arises on the proceeds of enforcing security or claiming under a guarantee.

29. Are there any other tax issues that foreign lenders should be aware of when lending into your jurisdiction?

Generally, there are no other important tax considerations than those set out above. In principle, no income will become taxable in Belgium solely because a loan, guarantee and/or security was granted from a company in Belgium.

30. What is the regulatory framework by which an acquisition of a public company in your jurisdiction is effected?

The Belgian legislator has implemented the EU Directive 2004/25 of 21 April 2004 in Belgian law by the Statute of 1 April 2007, which has been further elaborated in the Royal Decree of 27 April 2007 regarding Public Takeover Bids.

31. What are the key milestones in the timetable (e.g. announcement, posting of documentation, meetings, court hearings, effective dates, provision of consideration, withdrawal conditions)?

The bidder is not allowed to disclose the bid intention before (complete) bid notification with the Belgian Financial Services and Market Authority (FSMA). The FSMA will publicly announce the bid intention one day after the submission of the notification. An early announcement is possible when this is necessary to guarantee the normal functioning of the market. Formal contracts with the target company may trigger public disclosure obligations for the target as the information may be qualified as inside information. The target may apply the procedure to postpone the announcement of inside information at his own risk.

Typically, non-disclosure agreements, including standstill provisions, will be concluded between the bidder and the target. A due diligence on the target company will usually take place. The start of the due diligence requires a formal decision by the board of the target company. The bidder cannot force the target to allow the due diligence. The FSMA may require the disclosure of certain due diligence findings in the prospectus (e.g. if the finding have an impact on the bid price). Prior arrangements with a reference shareholder (voluntary bid) of arrangements with the target board (support letter) are possible.

The bidder shall have to prepare a draft prospectus in line with statutory content requirements. It should include, among other information, the conditions of the bid, information about the target company, details concerning the determination of the bid price, the post-bid strategy etc. The board of the target company can publicly respond to the bid as set out in de draft prospectus through a memorandum in reply. This memorandum will be published with the prospectus after approval by the FSMA. The prospectus shall be posted on the website of the bidder and his paying agent.

The acceptance period of the bid will start at least 5 days after the approval of the prospectus by the FSMA. The initial bid period may be prolonged of there may be

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a mandatory reopening of the bid.

32. What is the technical minimum acceptance condition required by the regulatory framework? Is there a squeeze out procedure for minority hold outs?

The regulatory framework does not impose a technical minimum acceptance condition.

Belgian law knows the following squeeze-out procedures:

Stand-alone squeeze-out right for majority securities holders. Other than as a result of a takeover bid, a security holder can, under certain conditions, acquire all the voting securities in a Belgian listed company if it holds, directly or indirectly, alone or in concert with another security holder, 95% of the securities conferring voting rights in the company other than as a result of a takeover bid.

Squeeze-out procedure following a (successful) voluntary or mandatory takeover bid. If, following a takeover bid, the bidder holds at least 95% of the share capital conferring voting rights and 95% of the voting securities in the target (and, in case of a voluntary takeover bid, provided that the bidder acquired 90% of the share capital conferring voting rights of the target in the course of the bid), the bidder can reopen the bid for at least 15 business days and squeeze out the remaining security holders under the same conditions as the initial bid.

33. At what level of acceptance can the bidder (i) pass special resolutions, (ii) de-list the target, (iii) effect any squeeze out, and (iv) cause target to grant upstream guarantees and security in respect of the acquisition financing?

When the bidder has acquired shares representing 75% of the voting rights, he will be able to make any kind of decision in the target company, including changes to the articles of association.

The FSMA may oppose a delisting of a Belgian company that is listed on Euronext Brussels in the interest of protecting investors. The FSMA will traditionally not permit a delisting of a Belgian company unless a squeeze-out has been carried-out. Exceptionally however, the Belgian Act of 21 November 2017 allows for a simplified delisting procedure for listed companies with a very limited free float, if certain conditions are met.
With respect to squeeze out and upstream guarantees: see above Q 30 and Q11, subject to financial assistance restrictions (see Q 13).

34. Is there a requirement for a cash confirmation and how is this provided, by who, and when?

A public takeover bid cannot be subject to financing. The bidder needs to have an unconditional credit facility or funds available at a financial institution having a Belgian licence at the time of the bid.

The funding of the bid must be secured. In case of a cash offer, this should be done by using an escrow or unconditional bank guarantee.

35. What conditions to completion are permitted?

A bid may be conditional, but only in case of a voluntary bid. A mandatory bid cannot be subject to any conditions (except for competition approval, if the FSMA allows this).

The conditions of a voluntary bid must be realistic, meaning that they must not make it impossible to achieve the intended result. Customary conditions include a minimum acceptance level, material adverse change clause (MAC) and competition approval.

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