BELGIUM

Belgium

PART I: CONTRACTUAL – NO OFFICE IN THE TARGET COUNTRY

A. Direct sale:

A.1. *Without written agreement – general terms*

1. *What are the formalities a foreign seller must complete in your jurisdiction in order to make sure that its terms and conditions of sale are binding and enforceable towards local purchasers? Are these conditions enforceable towards non commercial parties?*

   - **There are no special formalities** a foreign seller must respect. The general terms will be binding on the local purchaser if the following two conditions are fulfilled: (1) The purchaser needs to have the chance to examine the general terms and conditions of sale. (2) The purchaser needs to accept the general terms and conditions.

     The seller who wants to call upon the general conditions **will have to give evidence that the purchaser had a reasonable chance to examine the general terms and conditions of sale before the actual contract was closed and the goods were sold.** Therefore, in principle the general conditions have to be mentioned on the order form, enabling the purchaser to examine these conditions before the closing of the agreement.

   - However, contrary to this general rule that applies only to non commercial parties, **the general terms and conditions will be binding on a purchaser-merchant even if they are only mentioned on the invoice.** According to article 25, 2° of the Belgian Code of Commerce the sales and purchase agreement can be proven by means of an invoice that has not been protested by the purchaser-merchant. **The acceptation of the invoice includes the acceptation of the conditions mentioned on this invoice.**

     The acceptance of the general terms and conditions can also be silent by a commercial party in the hypothesis of a long-term contractual relationship between the parties. In this case the seller can prove that his purchaser already examined the conditions, e.g. because he already received an invoice that he didn't protest.

- `To avoid any problems with regard to the enforceability of the general terms and conditions both towards commercial and non commercial parties, it is advisable to bear in mind the following **recommendations:**
  - It is always safest to ask for a signature of the purchaser on the general conditions.
  - The general conditions should be drafted in a language that can be understood by the purchaser. In case of Belgium: French and Dutch.
  - The general conditions should be printed in a typography that is easily readable and if they are printed on the backside, there should be a reference to these conditions on the front side. There might be no doubt about the fact that the purchaser could take notice of the general conditions
  - The general conditions printed on the invoice and on the order confirmation have to be exactly the same;
  - When the invoice or the order confirmation is printed in multiple exemplars, the general conditions have to be printed on the backside of each one of them;
  - When an order is done by phone, it is recommended to send the order in different copies to the purchaser and make him return it with the signature of an authorised person;

A.2. <u>With a written agreement:</u>

1. *What are the clauses a foreign seller should integrate in a written sales agreement (or in his general terms and conditions) and the reasons why?*

(a) *<u>Retention of title:</u> Is this provided for in your jurisdiction? What are the conditions to make it enforceable towards local purchasers and third parties?*

- **Yes, the retention of title can validly be provided within contractual conditions.**
- The conditions to make the retention of title enforceable towards local purchasers are **the same as the conditions mentioned above with regard to the general terms and conditions.**

- The enforceability of retention of title towards third parties in **matters of insolvency is provided in the Bankruptcy law** (article 101 of the Belgium Bankruptcy Law, applicable on all forms of concourse between creditors in matters of bankruptcy).
- The retention of title has to be agreed on by the parties in writing and at latest at the time of delivery. A retention of title agreed upon after the purchase and delivery of the goods is not valid as it is considered as a (prohibited) transfer of title by means of a surety.
- When the retention of titles is included in the general terms and conditions of the seller, it is recommended to have the signature of the purchaser on it, in order to have an express proof of acceptance of the clause.
- Furthermore, retention of title can only be executed as long as the goods can still be identified after its sale. This condition will not be met when the goods have become immovable after its instalment (e.g. bathroom furniture) or when they have been mixed up with other goods so that they can be no longer identified. In case it is likely that the goods will become mixed up / become immovable after its delivery, it is recommended to the seller to register his invoices at the clerk's offices of the commercial court within 15 days after the delivery. In that case, the seller will maintain his legal privilege as a non-paid seller of goods.
- If the goods have been sold to a third party in good faith, the seller can ask for payment from the third party, as long as the third party has not paid the purchaser. In this case the property title is transferred from the goods towards the claim on the third party.
- There are **no registration formalities** to be fulfilled to make the retention of title enforceable towards third parties.
- However, in order to avoid a conflict with a landlord, who has a legal privilege on all the goods that furnish the rented premises, a written notice of the retention of title to the landlord is recommended in case **the purchaser-tenant** brings the goods, subject to the retention of title, into the rented premises. If not, in matters of bankruptcy the landlord will have preferential rights on these goods for outstanding rent to be paid.

– When the purchaser is a consumer who bought the goods 'on credit', i.e. with a postponement of payment, with a loan or with any other payment arrangement, the law restricts the enforceability of a retention of title clause. Once the consumer has paid more than 40% of the price in cash, the goods can only be retained by a judicial decision or by a written agreement conducted after a letter of default has been sent by registered mail.

(b) Interest and penalty clause: Are these clauses enforceable in your jurisdiction? Can they be reduced or annulled? What are the consequences if this clause is not integrated in the agreement? What is the legal rate in your jurisdiction?

– Since parties in Belgium, like in most West-European jurisdictions, enjoy freedom of contract, parties are free to agree on payment, interest and penalty clauses in their agreements.

However, a court can temper the enforceability of **grossly unfair contract terms.**

Contractual provisions regarding payment terms and the consequences of late payments **in commercial transactions** that deviate from the provisions of the Law of 2 August 2002 on combating late payment in commercial transactions are subject to review by the Courts at request of the debtor. If these provisions are deemed grossly unfair to the debtor, the Courts may revise them. The judge disposes of a same possibility to temper contractual clauses on late payments as regards **non-commercial transactions.**

The law of 2 August 2002 was the Belgian implementation of the European Directive 2000/35/EC of 29 June 2000 on combating late payment in commercial transactions. **This law is also the default law for commercial transactions in case that the parties have not contracted on payment, interest and/or penalty clauses.** The scope of the law is limited to all payments made as remuneration for **commercial transactions. Members of liberal professions** are also covered by the Law. Consumers, however, are excluded from its scope.

- **General rule of the law:** Unless the parties have agreed otherwise ("agreed payment period"), **each payment subject to the Law is due within 30 days** as from the day following the day on which ("statutory payment period"):

(i) the debtor receives the invoice or equivalent request for payment;

(ii) the goods or services are received, if the date of receipt of the invoice or the equivalent request for payment is uncertain or if the debtor receives the invoice or the equivalent payment request before the goods or the services;

(iii) the acceptance or the verification of the goods' or services' conformity with the agreement takes place, if such procedure is provided for in the agreement or by law and the debtor receives the invoice or the equivalent request for payment before the acceptance or verification takes place.

- **Sanctions:** Creditors who are not paid within either the agreed payment period or the statutory payment period, are **automatically and without the necessity of a preliminary default letter entitled to interests** at the conventional or legal interest rate. The legal rate is published each semester in the Belgian law gazette. For the second semester of 2012, the statutory rate amounted to **8,00 %,** which is considerably higher than the Belgian legal interest rate (currently at 4,25 %).

  However, if **in international relationships the CISG (the Vienna Convention on the International Sales of goods) is found applicable** to the contract, an interest rate that does not only want to compensate the creditor, but that also wants to sanction late payment and that wants to give an incentive for timely payment, is not in accordance with the international context of the CISG. The interest rate should be determined in an international way and thus not by the lex contractus. Therefore, the interest rate of the ECB can be used.

- Unless agreed otherwise, the creditor is also entitled to claim **reasonable compensation from the debtor for all relevant recovery costs** incurred through the latter's late payment. These recovery costs must respect the principles of transparency and proportionality. If the claimed recovery costs **are disproportioned the court can moderate** the claimed recovery costs. However, such a claim for recovery of costs cannot be combined with a claim for legal defence costs. The latter is a fixed amount determined in function of the value of the claim as provided in the Judicial Code, and is awarded to the winning party.

(c) Applicable law and competent jurisdiction: Are these clauses enforceable in your jurisdiction? What are the consequences if this clause is not integrated in the agreement?

*** National transaction:**

A clause that determines the territorial competent jurisdiction is valid between parties if it has been accepted by both parties (see supra).

*** International transaction:**

– Applicable law

Regulation No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) is applicable in Belgium. This regulation provides that a contract shall be governed by the law chosen by the parties. This choice can be made expressly or can be clearly demonstrated by the contract or the circumstances of the case.

When all elements relevant to the situation at the time of the choice are located in another country than the one whose law has been chosen in the contract, the choice of the parties may not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

In case no such a choice has been made by the party, the Regulation determines the applicable law per sort of contract.

- Competent jurisdiction

As regards transactions between persons domiciled in a EU member state, the Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) applies. The **general rule** is that persons, regardless their nationality, have to be sued in the courts of the country where they have their **domicile** (article 2 Regulation n°44/2001).

Pursuant to article 23 of this Regulation the parties can agree to confer jurisdiction to the courts of a specific Member State. This agreement conferring jurisdiction shall be either (a) in writing or evidenced in writing, (b) in a form which accords with practices which the parties have established between themselves, or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

B Commercial Intermediaries

3. *What types of commercial intermediaries do exist in your jurisdiction.*

   – **Franchising:** An agreement between two parties (Franchisee and Franchisor) whereby the Franchisee has the right, in exchange for a direct or indirect financial consideration, to use the Franchisor's trade name, and/or trade mark and/or service mark, know-how, business and technical methods, procedural system, and other industrial and/or intellectual property rights, supported by continuing provision of commercial and technical assistance by the Franchisor.

   – **Distribution agreement:** (verkoopsconcessie /concessions de vente): An agreement whereby one party (the supplier) agrees with another (the distributor) to supply the latter with products or services for the purpose of resale. The distributor sells the products or services in his own name and on his own account.

   – **Commercial representative:** (handelsvertegenwoordiger / **représentant de commerce**) An agreement whereby a white-collar employee, the commercial representative (handelsvertegenwoordiger / représentant de commerce) agrees to solicit potential customers for payment with a view of negotiating and/or concluding transactions under the authority, on the account and in the name of one or more employers. The legal intermediary acts on behalf of his principal in such a manner that the legal relationship is created directly between the principal and the customer. The commercial representative is subordinate to the principal.

   – **Commercial agent:** (handelsagentuur / agence commerciale) An agreement whereby an independent intermediary has on a lasting basis the authority to negotiate, and eventually to conclude agreements in the name and on behalf of the principal. The legal intermediary acts on behalf of his principal in such a manner that the legal relationship is created directly between the principal and the customer.

4. *What legislation does apply in your jurisdiction with regard to the above mentioned types of distribution agreements?*

   – **Franchising:**

      ○ Under Belgian law, there are no specific rules governing

franchising, except for the pre-contractual phase (see here-after).

Parties are thus free, within the framework of the general principles of contract law and public policy, to enter into contracts as they wish.

- Law relative to pre-contractual information in the framework of commercial partnership agreements (19 December 2005).

  This law contains provisions of imperative law.

  Scope of the law: any agreement of commercial partnership concluded between two persons, each of them acting in their own name and on their own behalf, by which one party grants against compensation of whatever nature, direct or indirect, to the other party the right to use a commercial formula in one or more forms as listed in the law, in the sale of products or the provision of services .

  At least one month before the conclusion of the commercial partnership agreement, the person granting the rights has to provide the other with (1.) a draft agreement and (2.) a special disclosure agreement. If the person granting the rights fails to do so, the person receiving the rights may invoke the annulment of the contract within two years of conclusion of the contract.

  i. The special disclosure document has to contain two separate parts: The first part must summarize the important provisions of the commercial partnership agreement, such as the method of calculating royalties, the consequences of the franchisee's failure to comply with its obligations, the conditions of renewal, the reservation of rights of the franchisor, the non-compete restrictions, the franchisor's right of first refusal, … When the party granting the rights fails to reproduce those important provisions, the party receiving the rights may invoke the annulment of the corresponding clauses in the commercial partnership agreement.

  ii. The second part must provide the necessary details to enable to evaluate the franchise-agreement : the history and perspectives of the market, the

history and experience of the franchise system, the intellectual property rights being granted, the data about the number of units, the data about the units that were opened / terminated / not renewed over the last three years, the perspectives on expansion, …

- Law of 27 July 1961 on the unilateral termination of certain categories of distribution agreements.

  In some cases the franchising agreement might trigger as well the applicability of this law (see hereafter).

– **Distribution agreement:**

- Law of 19 December 2005 relative to pre-contractual information in the framework of commercial partnership agreements (entered into force since 1 February 2006).

  Opinions are divided on the question whether this law applies to distribution agreements or not. Because of the severe sanctions in case of violation of its provisions, it is recommendable to respect the provisions of this law. (See Law of 27 July "franchise-agreement")

- 1961 on the unilateral termination of certain categories of distribution agreements.

  This law has a limited scope, but its provisions are of imperative law.

  It only covers the following categories of distribution agreements:

  (1.) exclusive distribution agreements: this kind of agreement does not necessarily imply that an exclusive right to sell the supplier's products within a defined area has to be granted to only one distributor:

  i. the right can be granted to several distributors (shared exclusivity)

  ii. the supplier may reserve the right to distribute the products himself;

  (2.) quasi-exclusive distribution agreements: the distributor sells nearly all of the contract products in his territory. The law does not specify what must be understood by "nearly all of the products";

(3.) distribution agreements imposing onerous obligations upon the distributor: the supplier imposes important obligations upon the distributor which are closely and specifically related to the distribution agreement and the burden of which is so heavily that the distributor would suffer serious prejudice if the agreement is terminated.

The law only covers the problem of termination of these agreements in case they have been concluded for an **indefinite period.** Nevertheless, the law provides that, in cases where a distribution agreement of **fixed duration** has been concluded:

(1.) for termination to be valid, an express notice of termination has to be given by certified post between the sixth and third month before the expiry date;

(2.) in case no such termination has been given and the agreement does not indicate the duration in case of renewal, it is renewed provide for an indefinite period of time;

(3.) in case it has been renewed twice, any subsequent renewal of the agreement will automatically result in the prolongation of the agreement for an indefinite period.

The **protection** offered to the distributors (and suppliers) operating under such agreement concluded for an indefinite period is as follows:

Either party may terminate a distribution agreement of indefinite duration only by giving reasonable notice or by paying an indemnity in lieu of notice.

Article 2 of the law requires a mandatory payment of an indemnity if, in the absence of a serious fault, a distribution agreement of indefinite duration is terminated unilaterally without providing a reasonable notice period. The required length of the notice period is "the time needed by the terminated party to find a comparable source of income". The compensation will be equally to the benefits the distributor could have realized, when the principal had respected the reasonable period of notice.

Article 3 of the law provides that the distributor shall be entitled to an equitable supplementary indemnity if the termination is not attributable to him. The compensation is calculated in function of:

(1.) the surplus value associated with the clientele created by the distributor and which remains with the supplier after the termination;

(2.) the expenses incurred by the distributor in developing the distributorship from which the supplier benefits after the termination of the distributorship;

(3.) indemnities payable by the distributor to employees whose employment contract has been terminated as a result of the termination of the distributorship;

This regulation is mandatory.

– **Commercial representative:**

○ A commercial representative is generally subject to Belgian Labour Law and more specific to The Contracts of Employment Act of 3 July 1978.

The Contracts of Employment Act provides that any agreement concluded between a principal and an intermediary will be deemed to be a commercial representation agreement until it is proven to be otherwise. This rebuttable presumption is valid irrespective of any explicit contractual clause to the contrary and also applies in cases where the contract is silent on this issue.

○ The Law contains specific provisions concerning the remuneration of commercial representatives, the goodwill indemnity after the termination of commercial representation agreement and the covenant in restraint of competition

(1.) Wages

In principle, the level of a commercial representative's remuneration may be freely determined by the parties to the agreement. However, due regard should be given to local collective labour agreements (collectieve arbeidsovereenkomst / convention collective de travail) which may provide for mandatory minimum wages, indexation of fixed salaries and year-end bonuses.

According to the Law sales representatives are entitled to commission on all **accepted** orders

arranged through their efforts and agency, even if such orders take effect at a time when their contract of employment is suspended or has terminated.

An order is deemed to be accepted by the employer, unless he has made an express provision or has refused expressly an order within the term agreed in the contract or – by default of a term in the contract – within one month.

They are also entitled to commission on orders given by a customer during the suspension or after the termination of their contract, on condition that they prove that during the performance of their contract they established a direct contact with the customer which led to the acceptance of the orders in question. The orders must have been communicated within a period of three months after the termination of their employment contract.

Sales representatives whose contract of employment stipulates that they visit only one clientele or only enterprises in one industry are entitled, during the performance of their employment contract, to commission on business transactions concluded by their employer with that clientele or with enterprises in that industry without the efforts and agency of the sales representative concerned.

(2.) Termination of the contract

See hereafter "termination of employment contracts".

(3.) Goodwill Indemnity

A goodwill indemnity is a form of compensation payable by an employer to a sales representative who has recruited new customers in case the contract of employment is terminated in absence of a serious fault of the sales representative. However, if the employer is able to prove that the sales representative has suffered no prejudice as a consequence of the termination, no goodwill indemnity has to be paid.

The right to a goodwill indemnity is mandatory law and a clause wherein a sales representative renounces to a goodwill indemnity is voidable.

The indemnity is equal to three months' pay, increased by one month's pay for the start of every additional five-year period of service.

(4.) restraint of trade clause

A restraint of trade clause is only valid if the annual pay of the representative exceeds 31.467 EUR (as from January 1st 2012 on).

Moreover, the covenant is subject to three conditions:

i. The prohibited competition must regard similar activities

ii. the clause must be limited geographically to those "areas" where the employee can truly constitute competition

iii. The clause may not last for more than twelve months.

– **Commercial agent**

○ Law of 19 December 2005 relative to pre-contractual information in the framework of commercial partnership agreements (entered into force on 1 February 2006).

Opinions are divided on the question whether this law applies to commercial agency agreements or not. Because of the severe sanctions in case of violation of its provisions, it is recommendable to respect the provisions of this law. (See "franchise-agreement")

○ Law of 13 April 1995 on the commercial agency agreements.

The law has been enacted in accordance with the council directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents.

(1.) Remunerations

A commercial agent is entitled to remunerations consisting in a fixed fee or a commission or a combination of both. In the absence of any agreement, a commercial agent shall be entitled to remuneration that is customarily in the place where he carries on his activities.

In case the remuneration consist in part or wholly of commission, a commercial agent shall be entitled to commission on transactions concluded during the period covered by the agency contract:

i. If the transaction has been concluded as a result of his efforts;

ii. If the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind;

iii. If he is entrusted with a specific geographical area or group of customers and the transaction has been entered into with a customer belonging to that area or group.

During the period covered by the agency contract, commissions are due when the principal has (or had to) conclude the agreement with the third party or when the third party fulfilled his contractual obligations.

A commercial agent shall be entitled to commission on commercial transactions concluded after the agency contract has been terminated:

i. if the transaction is mainly attributable to the commercial agent's efforts during the period covered by the agency contract provided that the transaction was entered into within six months after that contract terminated; or

ii. if the order of the third party reached the principal or the commercial agent before the agency contract terminated.

(2.) Termination of the contract

If the agency contract is concluded for an indefinite period (or for a definite period with a provision that the contract can be terminated) either party may terminate it by notice.

The period of notice shall be one month for the first year of the contract, and increases with one month for

every year that is commenced with a maximum of six months. The parties cannot agree to shorter periods.

If a party fails to respect the period of notice a compensation is due.

No period of notice has to be respected in case the contract is terminated for reason that a professional collaboration between the parties is definitely no longer possible or for reason that the other party sincerely lacks to fulfil his obligations. This provision is of mandatory law.

(3.) Goodwill Indemnity.

A goodwill indemnity is due if the agent has recruited new customers or if the agent has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits. However, in some cases this indemnity is not due (eg. when the agreement has been terminated following a serious failure of the agent).

If the contract provides a restraint of trade clause, there is a rebuttable presumption that the principal continues to derive substantial benefits.

The amount may not exceed a figure equivalent to an indemnity for one year calculated on the remuneration over the preceding five years. *However, in case the real damage suffered by the agent is higher than the amount granted by way of goodwill indemnity, the agent can claim additional compensation if he is able to prove his real damage. Both the goodwill indemnity and the additional compensation are mandatory law in the benefit of the agent; parties can only draft clauses which are more beneficial for the agent.*

The agent will lose his entitlement to the indemnity when he has not notified the principal within one year following termination of the contract l that he intends pursuing his entitlement.

(4.) Restraint of trade clause

A restraint of trade clause can be agreed to if:

i. it is concluded in writing; and

ii. it is restricted to the geographical area, or the group of customers and the geographical area, entrusted to the commercial agent;

iii. it relates to the kind of goods covered by the agency contract;

iv. it does not exceed 6 months after the termination of the contract.

- The provisions are mandatory law but can, under specific circumstances, be renounced to.

PART II: BRANCH – OFFICE IN THE TARGET COUNTRY BUT NO LEGAL PERSON:

5. *What are in your jurisdiction the differences between starting up a branch and starting up a company (subsidiary)?*

   As a branch has no legal personality, obligations incurred through such branch can be enforced on the assets of the foreign company, even if they are located abroad.

   Since the subsidiary is a separate legal entity, its liability is limited to its own assets. The shareholders will therefore not be personally affected by the liabilities of the subsidiary beyond the amount of subscribed capital.

6. *What formalities must be fulfilled for opening a branch?*

   – **In the jurisdiction of the head office**.

   - **Corporate resolutions:** The board of directors of the head office must formally adopt resolutions deciding to open the branch office. Those resolutions should at least mention:
     – The address and activity and starting date of the branch;
     – The name of the branch, when it differs from the company name;
     – The nomination and the identity of the persons with the competence of managing the branch and representing the company in dealings with third parties and in legal proceedings in connection with the activities of the branch, together with their competence;
     – Also the company itself has to be duly identified in the resolutions.

Those identification requirements are more rigid in case the company is incorporated outside the European Union.

- **Legalized affidavit:** For filing purposes with the clerk's office of the Court of Commerce, the following documents must be included in, or attached to, an affidavit issued by the foreign corporation's secretary (or any other duly authorized officer), certifying that the attached documents are true copies:
  - The corporate resolutions relating to the opening of the branch and stating the extent of the powers granted to the company's legal representative for the activities of the branch; these resolutions must be certified as true resolutions of the competent corporate body of the head office (usually the board of directors);
  - A document certifying the foreign corporation's existence;
  - A copy of the foreign corporation's articles of incorporation and articles of association (if the latter are contained in a separate document) or an amended and restated version of these documents as currently in force if there have been amendments;
  - Various information about the foreign corporation and its Belgian branch (e.g. principal place of business of the company, address and activities of the branch, etc.).

  This affidavit must be legalized in the foreign corporation's jurisdiction. When the corporation is incorporated in a country that is party to The Hague Convention of 1961, the simplified "apostille" (stamp) procedure can be used for the legalization. Otherwise the legalization should be done by the Belgian embassy or the nearest Belgian consulate.

  However, for some countries, a legalization procedure is no longer necessary as a result of a (bi- or multilateral) treaty (eg. The Convention of Brussels of 25 may 1987 adopted by Belgium, Denmark, Germany, France, Ireland and Italy).

– <u>In Belgium</u>

  - **Translate documents into one of Belgium's official languages:** For filing purposes, the affidavit and all attached documents (i.e., the articles of incorporation,

the articles of association and, as the case may be, the document certifying the foreign corporation's existence) must be translated by a certified translator into one of the three official Belgian languages. The region where the branch will be located determines the language to be used. A free translation is allowed for the annual accounts and the consolidated accounts.

- **File annual accounts with Belgian National Bank**: A copy of the foreign corporation's annual accounts (and, as the case may be, its consolidated accounts) of the last fiscal year must be translated and filed with the National Bank of Belgium, the country's central reserve bank. The certificate from the National Bank of Belgium, confirming that the annual accounts (and, as the case may be, the consolidated accounts) have been duly filed, must be filed with the clerk's office of the Court of Commerce together with all other required documents. This requirement applies to privately held as well as publicly held companies.
- **File documents with local Court of Commerce**: The above-mentioned documents and corporate resolutions, as well as a translation, must be filed with the clerk's office of the Court of Commerce in the judicial district where the branch is located.
- **File for publication in Belgian Official Gazette:** An excerpt of the translation of the corporate resolutions must be published in the Annexes of the Belgian Official Gazette (Belgisch Staatsblad).
- **Obtain a trade registration number.**
- **Apply for a VAT identification number.**

7. Why would you rather advise a foreign seller to set up a branch and not a company in your country, or vice versa?

   – Advantages of a branch:

   - Mobility: a branch can easily be opened and closed down. No notary public required, no financial plan, etc...
   - Belgian corporate law, with a few exceptions, does not impose requirements such as a board of directors or shareholders' meetings.
   - No minimum capital requirements.

- A branch benefits from the reputation of the head office.
- The head office can more easily allocate expenses to a branch.

– <u>Disadvantages of a branch:</u>

- The head office is fully liable for the debts of the branch.
- A branch's annual filing will reveal financial information about the foreign entity that it may prefer to keep confidential.
- From a marketing viewpoint, a branch can be regarded, not as a Belgian or European company, but rather as a foreign entity.
- Since a branch may easily be closed down, the local market may be reluctant to enter into transactions with the branch.
- The fulfilling of a number of formalities, both when establishing a branch as well as during the existence of the branch. As already mentioned all these documents must be written or translated in one of Belgium's official languages.

8. *Is a branch authorized to act before the court, to engage people,…?*

   A legal representative must be designated for the purposes of managing the branch and representing the company in dealings with third parties and in legal proceedings in connection with the activities of the branch.

9. *What is the liability of the legal representative of the branch?*

   The legal representative of a branch has the same liability towards third parties as a director of a Belgian Company.

10. *Is there an automatic liability of the head office for the operations or acts of the branch?*

    The head office is entirely liable for all undertakings of the branch office in Belgium.

11. *Which language will the documents be in?*

    Branches are subject to Belgian regulations on the use of languages. All documents required by law must be drafted in one of Belgium's official languages (i.e., French, Dutch or German)

depending on the region where the branch has its registered office.

12. What are the accounting requirements for a branch?

    A branch has the obligation to keep accounting records in accordance with the Belgian accounting rules but is not required to publish its own annual accounts. Only the accounts of the head office need to be published. The parent company's accounts must be audited and certified according to its own national regime.

PART III: SUBSIDIARY – LEGAL PERSON (SEPARATE LEGAL LOCAL ENTITY) IN THE TARGET COUNTRY

13. What are the advantages of establishing a subsidiary compared to establishing a branch?

    – Because the subsidiary and the parent company are separate legal entities, the parent company is not exposed to any liabilities of the subsidiary. In contrast, a foreign investor remains fully liable for all the commitments of its branch. Obligations incurred through such a branch can be enforced on the assets of the foreign investor, even if they are situated abroad.

    – From a marketing viewpoint, a subsidiary will be regarded as a Belgian or European company, rather than a foreign entity.

    – A subsidiary can benefit from several tax advantages:

        • The ability to repatriate or distribute net profits with little or no dividend withholding tax;

        • Subsidiaries can benefit from the advantages given under the double tax treaties concluded by Belgium.

    – In most cases, qualification as a "parent company" under the EU Parent-Subsidiary Directive.

    – Annual filing requirements are less stringent for subsidiaries than for branches. A branch's annual filing will reveal financial information about the foreign entity that it may prefer to keep confidential.

14. *Can you present the main characteristics of the company forms existing under your jurisdiction in the following schedule:*

COMPANY FORM	**NV / SA** Naamloze vennootschap Société Anonyme Public limited liability company	**BVBA / SPRL** Besloten vennootschap met beperkte aansprakelijkheid Société Privée à Responsabilité Limitée TClosely held limited liability company	**CVBA / SCRL** Cooperatieve vennootschap met beperkte aansprakelijkheid Société Coopérative à Responsabilité Limitée Co-operative company with limited liability
Limited liability	YES	YES	YES
Free transferability of the shares	YES	NO	NO
Fixed or variable capital	Fixed	Fixed	Fixed and Variable
Minimum capital	61.500,00 EUR	18.550,00 EUR At least 6.200,00€ of the capital must be paid up on the day of the incorporation, at least 12.400,00€ if only one founder Since June 2010, a BVBA can also be established with a capital of 1 EUR ("Starter-BVBA"). However, as soon as the S-BVBA has 5 FTE's and in any case at latest after 5 year, the capital has to be brought at the minimum of 18.550,00 EUR	18.550,00 EUR At least 6.200,00€ of the capital must be paid up on the day of the incorporation, at least 12.400,00€ if only one founder
Number of founders	2	2 Exception EBVBA (only one founder)	3
Notarial deed	YES	YES	YES

COMPANY FORM	**VOF/SNC** Vennootschap onder firma Société en Nom Collectif The general partnership	**Comm VA / SCA** Commanditaire vennootschap op aandelen Société en Commandite par Actions The co-operative company with unlimited liability	**Comm.V. / SCS** De gewone Commanditaire Vennootschap Société en commandite simple The limited partnership	**CVOA / SCRI** Cooperatieve vennootschap met onbeperkte aansprakelijkheid Société Coopérative à Responsabilité Illimitée Co-operative company with unlimited liability
Limited liability	NO	YES, but only for the limited partners, not for the managing partners	YES, but only for the limited partners, not for the managing partners	NO
Free transferability of the shares	NO	YES	NO	NO
Fixed or variable capital	Variable with possibility to make a contribution of labour	Fixed	Variable	Variable
Minimum capital	0	61.500,00€	0	0
Number of founders	2	2	1	3
Notarial deed	NO	YES	NO	NO

15. *Which of the company forms is used most frequently in your jurisdiction?*

    NV , BVBA and CVBA.

16. *Which company form is used most frequently in case of small or family business?*

    BVBA and CVBA.

17. *What are the main formalities a foreign company has to comply with in order to establish a subsidiary (filial/filiale)?*

    The legal steps required when establishing a company are similar

for all types of companies and consists of the following steps:

– **Draft an incorporation deed**

  The incorporation deed will be drafted by a Belgian public notary based on the specifications of the shareholders.

  The incorporation deed must amongst others state the details (name and address) of the shareholders who incorporate the company and specify the amount of the capital contribution made by each shareholder. The incorporation deed also includes the company's articles of association ("statuten"), which determine the rules governing the company. The directors will be appointed on incorporation of the company.

– **Draft a business plan**

  New legal entities must prepare a business plan covering the first two years of operation. A Belgian accountant can help to draft the business plan.

– **Deposit of the share capital in a blocked bank account**

  In the case of a contribution in cash, a bank account must be opened in the name of the company "to be incorporated" with a bank in Belgium and each shareholder must transfer the amount to be paid up on its shares to this account, prior to the execution of the incorporation deed. The bank will issue a certificate, which must be delivered to the notary on the date of execution of the incorporation deed, confirming that the paid-up amount of the capital is in the bank account.

- **Draw up the appraisal reports**

  A shareholder can also do a contribution in kind (assets other than cash) to the company, provided that such assets have an economic value (e.g. real estate, shares in another company, a claim for the payment of an amount of money etc). In such cases, an appraisal report must be issued by an auditor. In addition, the founding shareholders must prepare a report stating the reasons why the asset contribution is in the interest of the company. Both reports must be delivered to the notary on the date of execution of the incorporation deed.

  They, together with the incorporation deed, must be filed with the Registrar Office of the Commercial Court by the notary.

– **Notarize the incorporation deed**

The incorporation deed must be recorded in a notarial deed to be executed by the founders and a Belgian public notary. The founding shareholders must be present or represented when the incorporation deed is enacted before the public notary. To be represented, a power of attorney must be provided and attached to the incorporation deed. The signature on such a power of attorney does not need to be legalized.

– **Register the incorporation deed**

  A corporation obtains a legal personality separate from that of its shareholders as of the date of filing of the incorporation deed at the Registrar Office of the Commercial Court in the judicial district where the company has its registered office. This filing is handled by the notary who executed the incorporation deed.

– **File for publication in Belgium's Official Gazette**

  An extract of the company's incorporation deed must be filed for publication with the Belgian Official Gazette.

– **Obtain a corporate registration number**

  A company may not commence business activities prior to its registration at the Crossroads Bank for Enterprises (CBE) (KruispuntBank van Ondernemingen / Banque-Carrefour des Entreprises) in the judicial district where it has its registered office.

  Apart from the fulfillment of other conditions, a company cannot be registered at the CBE unless people having management powers (typically the managing director) give proof of good management skills. Consequently, a certificate of basic knowledge of managerial skills needs to be obtained, based on either a diploma or the experience of the manager. This formality might sometimes prove to be time consuming but

  can be avoided if the company can prove that it (or its parent) does not qualify as a small or medium sized company (i.e. has more than 50 employees, a turnover above EUR 7,000,000 or a balance sheet exceeding EUR 5,000,000). In this respect, a declaration of honor ("affidavit") by the foreign corporation or its parent is sufficient.

– **Apply for a VAT identification number**

As a general rule, a subsidiary must also be registered with the local VAT Administration.

18. *What are the costs of establishing a subsidiary in your jurisdiction?*

- Contrary to a branch, the establishment of a subsidiary in Belgium does not include either translation costs or administrative legalization formalities and costs. However, a fee of approximately **1.500 EUR** must be paid to the public notary who will enact the incorporation deed.
- Other incorporation expenses include costs in relation to the publication of an abstract of the notarial deed in the Belgian Official Gazette (229,17 **EUR** - VAT included), stamp duties and registration at the Crossroads Bank for Enterprises (**77 EUR** – not subject to VAT).

19. *How long does it take to establish a subsidiary in Belgium?*

- A public limited liability corporation or a private limited liability company can be established within **a short period of time**. There are no government approvals or waiting periods. If the foreign investor has approved the articles of association, opened a bank account and prepared its business plan, the incorporation is a matter of days.
- However, attention should be given to **work permit regulations and the certificate of proof of good management skills,** which might be delaying factors.

20. *Is there specific legislation with regard to the liabilities of the founders and the directors of the most used company form?*

- Although the founders of a NV/SA constitute a separate legal person, in which the shareholders potential liability is normally limited to their subscription, **the founders can be held responsible if the NV / SA has been declared bankrupt within the first three years of its creation.** In that case the court will examine the financial plan, the budget that was edited by the founders and that provided a forecast covering the company's first two years of activity. If the court considers that the capital was manifestly insufficient to carry out the planned activities the founding shareholders may incur personal liability. The draft budget must be submitted and kept by the notary.
- The **directors of an NV/SA** can incur liabilities in the following situations.

- The Belgian Company Code provides **for a mandatory procedure in case the company has substantial losses.** The board of directors must convene an extraordinary meeting of shareholders within two months in the event that the net assets of the company have reached a level which is inferior to half of the stated capital.

  The shareholders must than decide whether to dissolve the corporation or whether to accept the measures in an attempt to restructure the company's financial situation. The decision to dissolve the company is taken in accordance with the rules that govern the modification of the by-laws (3/4 of the votes). If the losses amount to more than three-quarters of the company's stated capital, the decision to dissolve the company can be taken by 1/4 of the votes represented at the meeting.

  The penalty provided for in case the board does not convene such a meeting of shareholders in due time, consists of the liability of the board of directors towards third parties for the losses that the third parties have sustained as a result of the fact that the meeting was not held.

- In accordance with the Belgian Company Code, directors can be held liable in the following circumstances:
  - Liability for the improper execution of their tasks as directors;
  - Liability for the violation of the Belgium Company Code or of the charter of the company.
- In accordance with article 1382 Civil Code directors can be held liable for **wrongful acts.**
- A director can be held liable if he or she had a **direct or indirect personal interest** in a decision and obtained an unjustified advantage to the detriment of the company as a result of that decision.
- The Belgian company code provides that directors can be **held personally and jointly liable if it can be established that a clearly wrongful act committed by them have contributed to the bankruptcy of the company.**
- In specific situations, a director can be exposed to **criminal sanctions.**

- **The new Program Law 20th July 2006 provides for some specific liabilities:**
  - Personal and several liability of directors for unpaid VAT or advance tax in case of non-payment of three terms of due VAT or advance tax in a period of one year (when working with monthly payments) or non-payment of two terms of due VAT or advance tax within one year (when working with three-monthly payments)
  - Personal and several liability of directors for unpaid social security contributions in case of bankruptcy when:
    - directors of the bankrupt company were involved in at least two bankruptcies or liquidations with social security contribution debts in the preceding 5 years;
    - a grossly fault of a director caused the bankruptcy.
- The Belgian company code establishes the so-called **minority action.**

  This means that the minority shareholders can file an action on the account of the corporation if a director executes his task in an improper manner without having to prove that they suffered damage which is distinct from the damage suffered by the corporation.

  With regard to the NV / SA, the minority action can be instituted by shareholders who control (on the day the general meeting of shareholders is called to vote on the discharge of the director) either:
  - at least one percent of the votes;
  - shares worth at least 1.250.000,00 EUR.

  Shareholders with voting rights can only file a minority action if they have not approved the director's discharge or if their vote in this respect was invalid. Once the procedure for the minority action has started it becomes impossible to enter into a settlement agreement unless all the plaintiffs consent.

PART IV – MISCELLANEOUS

A. Real estate

A.1. Purchase of a real estate

21. *Who do you turn to in order to close a valid purchase agreement?*

    – A transfer of real estate does already occur when the parties mutually agree on price and object of the sale. This (first) agreement does not necessarily need to be enacted by Notarial Deed and may take the form of a private contract ("verkoopscompromis"/"compromis de vente").

    – Nevertheless, to be enforceable against third parties, a transfer of real estate requires a Notarial deed (or judgement). This Deed must be registered at the mortgage office and from that moment the transfer is enforceable against third parties. The Notary Public enacting the Deed will take care of this registration and will receive the registration tax from the Purchaser.

22. *What are the costs related to the purchase agreement?*

    – Transfer of real estate is subject to:

        • a transfer tax of, in the Flemish region of Belgium, 10 % of the purchase price and, in the Brussels or Walloon region of Belgium, 12,5 % of the purchase price,

        • notarial fees and

        • other small fees related to inquiries performed by the Notary.

    – In case of newly built property (meaning the sale takes place at the latest at the end of the second year, following the year of occupation), the transfer is subject to a VAT of 21% instead of the above mentioned transfer tax.

23. *Is there in your jurisdiction legislation that can slow down the purchase process (e.g. environmental legislation requiring preliminary soil examinations)*

    • ***Soil Clean-up Regulation***

    – If the real estate is located in the Flemish region of Belgium, one should take into account the Flemish Decree on Soil Clean-up of 11 October 2006.

      According to the stipulations of this Decree, the contractual transfer of land will be void when the transfer deed is not accompanied by a soil condition certificate issued by the Flemish Waste Agency (OVAM). This soil certificate, issued by OVAM must be delivered prior to the transfer (article 101 of the Decree). A fee of 36 EUR is charged per cadastral parcel for which a certificate is delivered.

Moreover, if certain potentially soil threatening activities are or were carried out on the land to be transferred, a severe procedure has to be observed. (Article 102-115 of the Decree) A preliminary soil survey must be submitted to OVAM, prior to the transfer. Upon receipt of the preliminary soil survey, OVAM has to decide within a term of 60 days whether the transfer can take place without any further measures or whether the preliminary soil survey revealed pollution that needs further investigation such as a descriptive survey (outlining the extent of the pollution and the physical profile of the contaminated spots). Once this second survey has been carried out, it has to be submitted to OVAM who decides whether the transfer can take place without any further measures or whether the condition of the soil requires a soil clean-up proposal. Once this soil clean-up proposal has been drafted and submitted to OVAM, transfer will be possible if the Seller:

- commits to OVAM to do any required soil clean-up and
- provides financial security to cover clean-up costs.

The whole procedure can easily take several months.

- The Walloon region adopted its own Soil Clean-Up Act (Décret relatif à la gestion des sols), aimed at safeguarding the quality of soil in the region, on 5 December 2008 (entered into force on 18 May 2009). The governmental institution responsible for the execution is called SPAQuE *(Société Publique d'Aide à la Qualité de l'Environnement)*.
- In the Brussels Capital region, the Ordinance of 5 Mars 2009 (entered into force on 1 January 2010) has to be respected. The responsible governmental institution is IBGE-BIM *(Institut Bruxellois pour la Gestion de l'Environnement - Brussels Instituut voor Milieubeheer)*.

• ***Energy performance of buildings Regulation***

- The European Directive 2002/91/EC of 16 December 2002 on the energy performance of buildings imposed on Member States an obligation to ensure that, when buildings are constructed, sold or rented out, an energy performance certificate is made available to the owner or by the owner to the prospective buyer or tenant, as the case might be. In Belgium, this subject is a regional competence, so that each region has enacted its own rules:

- Flanders region: Order of the Flemish government of 11 January 2008
- Walloon region: Order of the Walloon government of 3 December 2009
- Brussels Capital region: Order of the Brussels government of 17 February 2011
- The price of a certificate varies between 150 EUR and 300 EUR, depending on the size of house subject to the audit and the audit provider (liberal system of pricing).

A.2. Rent a real estate:

24. Is there imperative law in your jurisdiction with regard to the rent of offices, industrial real estate or commercial real estate? Can you give a summary of the major stipulations of these regulations?

– There is no imperative law on rent of offices.

– There is no imperative law on rent of industrial real estate.

– But there is imperative law on rent of commercial real estate. The law of 30 April 1951 on commercial lease contains mandatory provisions in case of rent for purposes of retail trade ("kleinhandel"/"commerce de detail") or crafts activities ("ambacht"/"activité d'un artisan") whenever there is a direct contact with the consumer in their premises.

This law provides for a series of binding provisions, sometimes protecting the tenant, sometimes protecting the landlord, sometimes protecting both. As a result, in case of violation of these legal provisions, it will be either the tenant, either the landlord, either both who can invoke the nullity of the incompatible provision in the agreement.

- The term of the lease has to be at least nine years. The tenant can terminate the lease every three years. The landlord can do this every three years, but only for specific reasons and only if this has been stipulated in the agreement. When there is a mutual agreement to terminate the lease prematurely, the tenant and landlord have to ratify it by appearing before the Notary Public or the judge. (Article 3 of the Law)

- In case the business – ran in the rented premises – is sold or leased by the tenant to a third party, a clause in the lease

that prohibits the transfer or sub-lease of the commercial rent will have no effect, provided that certain formalities are observed (article 10 and 11 of the Law).

- In case of transfer of the rented premises, the new landlord must respect the on-going lease of nine years if this lease was registered. If the lease was contracted for more than nine years, the new landlord has to respect the duration exceeding the current nine year period provided that the lease was enacted by Notary Public. In case of non-registered lease agreements, two hypotheses are possible. If the tenant has occupied the places for less than six months, he can be demanded to leave the premises without any notice period. If the tenant has occupied the places for more than six months, the new landlord can demand the tenant to leave when observing certain formalities and, in some circumstances, only after paying compensation. (article 12 of the Law)
- The tenant has the right to apply for renewal of the agreement thrice. The tenant has to ask the renewal by registered letter or by writ between the 18th and the 15th month before the end of the on-going lease period. He has to outline the conditions of the intended renew lease he is willing to accept. Subsequently, the landlord has three months upon receipt of the demand to answer the request. In case of refusal to renew, he has to indicate the reason of refusal. If he lacks to do so, he has to pay a compensation which equals the rent of three years. Beside it, the law also outlines some reasons that might trigger a compensation of one or two years of rent. (article 25 of the Law)

25. *Are there any formalities to fulfill in order to enforce the lease agreement towards third parties?*

– Registering a lease is a mandatory formality imposed by Belgian fiscal legislation. A tax of 0.20 % is imposed on the total amount of the rent and costs covering the entire lease period.

The registration of the lease agreement makes it enforceable against third parties (such as a new owner), but only for a period of nine years. When the lease agreement exceeds the period of nine years, it needs to be subscribed at the mortgage office which requires a Notarial Deed. When the latter kind of agreement has been registered without subscription at the mortgage office, the agreement will only be enforceable for the on-going period

of nine years. For instance, a lease agreement of 27 years for a premise which is sold after ten years, will 'lose' its power of enforceability vis-à-vis the new owner at the end of the on-going nine years period, thus after 18 years.

A.3. Environmental issues:

26. *For what types of activities is an environmental permit required?*

Since 1980, reforms in Belgium have resulted in the creation of regions (the Brussels Region, the Walloon Region and the Flemish Region) and communities (the Dutch Community, the French Community and the German Community).

Since July 1993, the regional authorities have full competence in environmental protection matters except for waste transit, protection against ionizing and uniformity of product requirements, where the federal authority retains exclusive competence. As a consequence, each region has its proper legislation on environmental issues. The procedure to obtain an environmental permit will be different depending on the location of the plant: if it is located in the Flemish Region, the Brussels Region or the Walloon Region, it will be respectively governed by the Flemish Decree, the Brussels Ordinance or the Walloon Decree.

1. The Flemish Region

The procedure in the Flemish Region is governed by the Flemish Decree of 28 June 1985 on the Environmental Permit and its implementing Decree of 6 February 1991, commonly referred to as VLAREM I.

The regional act and its implementing decree classify enterprises into three classes, depending on the nature and the importance of the impact on the environment:

I. *Class 3 operations,* which do not need to be authorized in an actual permit. The operator must only notify the municipal authorities.

This category includes activities deemed to have "limited" effects on the environment.

II. *Class 2 operations,* which must be authorized by the municipal authorities.

This category includes activities that are deemed more harmful to the environment.

III. *Class 1 operations*, which must be authorized by the provincial authorities.

This category includes truly hazardous activities, such as the production of pesticides.

When an establishment is listed into different categories, the procedure according to the highest category must be applied.

2. The Brussels Region

In the Brussels Region, the procedure is governed by the Ordinance of 5 June 1997 on the Environmental Permit.

Listed exploitations under the Ordinance are classified into five categories:

I. *Class III* exploitations: Class III covers exploitations which have only a very limited impact on the environment and which do belong to the competence of the municipalities. The operator only needs to inform the municipal authority, whom will hand out a confirmation receipt. No formal permit is delivered.

II. *Class I.C* exploitations: Class I.C covers exploitations which have, just like class III, only a very limited impact on the environment, but do belong to the competence of the IBGE-IBM (part of the Brussels Capital region), since it concerns regional competences.

III. *Class II* exploitations: Class II covers exploitations which have a moderate impact on the environment. The permission is delivered by the municipal authority.

IV. *Class I.B* exploitations: Class I.B covers exploitations which have a considerable impact on the environment. The permission is delivered by IBGE-IBM.

V. *Class I.A* exploitations: Class I.A. covers exploitations which have a very considerable impact on the environment. The permission is delivered by IBGE-IBM.

3. The Walloon Region

The procedure is governed by the Walloon Decree of 11 March 1999 on Environmental Permits.

The regional act covers three types of listed facilities, depending on the nature and the importance of the impact on the environment:

I. *Class 3 activities*, which only need to be notified to the municipal authorities.

II. *Class 2 activities*, which have to be authorized by the municipal authorities.

III. *Class 1 activities*, which have to be authorized by the municipal authorities.

27. Can you describe briefly this procedure? How much time will this procedure normally take

1. <u>The Flemish Region</u>

I. Class 2 operations

The applicant files a request for an environmental permit with the municipal authorities. The applicant receives notification when the request is admitted. This notification starts the approval procedure.

The request is published and a public investigation is conducted. The appropriate authorities give their advice.

The municipal authorities decide whether the permit is granted within 3,5 months. The absence of a decision within the required time limit equals a negative decision. An extension of one and a half months is possible.

All interested parties can file an appeal with the provincial authorities within 30 days after the decision is published.

The permit is generally granted for 20 years.

II. Class 1 operations

The applicant files a request for an environmental permit with the provincial authorities.

For certain listed categories of activities the request needs to be accompanied by an "environmental impact assessment" or a "safety report". This can take more two months.

The applicant receives notification when the request is admitted. This notification starts the approval procedure.

The request is published and a public investigation is conducted. The appropriate authorities give their advice.

The provincial authorities decide whether the permit is granted within 4,5 months. The absence of a decision within the required time limit equals a negative decision. An extension of two months is possible.

All interested parties can file an appeal with the Flemish Minister of the Environment within 30 days after the decision is published.

The permit is generally granted for 20 years.

2. The Brussels Region

The applicant submits an application form to the relevant authorities.

The permit must be delivered within the following timespan:

Class III: the confirmation receipt should be handed out at latest 20 days after submission of the completed file. If no confirmation receipt or reaction follows, the operator can start.

Class I.C: 20 days after the file has been considered complete.

Class II: 60 days after the file has been considered complete.

Class I.B: 160 days after the file has been considered complete. The application form has to be accompanied of a report of the operator outlining the effects on the environment.

Class I.A: 450 days after the file has been considered complete. The application form has to be accompanied of a study of a certified institution outlining the effects on the environment.

When the legal deadline is exceeded, the permit is considered by law to be refused, except for class III. For Class II, I.B. and I.A., a 'public investigation' during 15 days is conducted which aims to inform (eg. via a notice board on the premise of the exploitation and at the city hall) the public about the demanded permission.

If not satisfied with the decision or if the official deadline has been exceeded, the company has the right to appeal within 30 days of issuing; first before the "Environment College" and then the Brussels government.

The decision (also a negative one) has to be displayed on the premises for a term of 15 days. In case of a positive decision, neighbours have subsequently 30 days to appeal against the permission.

Permits are usually issued for 15 years, except for class III

permissions which are granted without a timespan, and can be renewed once.

3. The Walloon Region

All requests for environmental permits, except those relating to the mobile establishments, must be introduced at the municipality in which the activity is situated.

The municipality issues the permit, if the activity takes place in one municipality. If the activity takes place in different municipalities or is a mobile installation, the technical civil servant grants the environmental permit.

The time of treatment of the file is the following:

Class 3 establishments: 15 days

Class 2 establishments: from 110 to 140 days

Class 1 establishments: from 160 to 190 days

A.4. Employment:

28. Are there any specific regulations with regard to outsourcing of employees?

- Yes, in Belgium outsourcing of employees (i.e. to place an employee at someone's disposal or the *"terbeschikkingstelling van werknemers"*) is only allowed under several conditions, to be retraced in the **Law of the 24ᵗJuly 1987** on temporary labor, temporary deployment by specialized agencies and outsourcing of employees at the disposal of a third user.
- This law stipulates a **principle prohibition** to outsource employees to third users (article 31, § 1 of the law), because outsourcing results in a situation that the authority is exercised by the third user instead of the employer. Thus, whenever an employee performs tasks for a third party, one should take care that the authority is still exercised by the employer.
- However, the **following elements are not considered to be an execution of power contrary to the prohibition:**
  (i.) instructions given by the third user according to the agreement conducted between him and the employer, when those instructions relate to the performance of the task or the break and labour time;

(ii.) measures taken by the third party vis-à-vis the employee in execution of his duties under the Law of the welfare at work (cfr. Infra).

- Beside it, the law made two **exceptions** for employment by means of outsourcing to be allowed: (i.) outsourcing of employees is not prohibited when it is done by special employment agencies whose main activity consists amongst others in outsourcing employees, provided that they have obtained a license for it;
  (ii.) When an employer's main activity does not consist of outsourcing employees, he can outsource his employees engaged on a permanent basis for a limited period when the procedure set out in article 32 of the law is followed.
- **Sanctions:** In case an employee is engaged with a view to be outsourced" in contradiction of the legal prohibition, the employment contract is considered **to be null** from the beginning on. When **the third user ignores to respect the prohibition of executing authority, he will be considered to have granted an employment contract for an indefinite term.** However, the employee can terminate the agreement without notice or compensation. The law also stipulates that users and employers that outsource employees contrary to the provisions of the law are **severally and jointly liable** for the payment of social security, wages, compensations and benefits related to the employment contract. Moreover, they are subjected to several **criminal and administrative sanctions.**

29. *Applicable legislation according to the type of employment (differences between employment by local company or by head office for the local branch)*

    In principle no differences exist with regard to the applicable labour law and social security between employees employed by the head office for a local branch or by a subsidiary.

    Labor Law:

    - The applicable labor law in cases containing cross-border elements (a foreign employer, a foreign employee, a foreign law choice…) is mainly regulated by the EU Regulation n° 593/2008 of 17 June 2008 *on the law applicable to contractual obligations (Rome I).*
    - Parties can, under several conditions, **choose the applicable**

labor law (art. 8). However, this choice **cannot deprive the employee of the protection given by the law normally applicable** and can, in certain cases, not prevent the application of compulsory labor law of a certain third and involved country (art. 8).

- When no choice has been made, the law of the country where the employee **habitually carries out his work** in performance of the contract will apply, regardless the fact whether it concerns an employment by a branch (with no separate corporate personality) or by a subsidiary (with a separate corporate personality). The normally applicable law will thus be **Belgian labor law.**
- When the applicable law cannot be determined pursuant the above mentioned factors, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated. However, when it appears from the circumstances as a whole that the contract is more closely connected with another country, the law of that country shall apply.

Social security:

- The applicable social security system is in general regulated by **the national law of each country.**
- The Belgian social security law is of public order and an employee is submitted to the Belgian social security law when he is **employed in Belgium** by an employer established / settled in Belgium, or when the employer is established / settled abroad and the employee is connected with a registered office in Belgium.
- On EU-level, Regulation n° 883/2004 of 29 April 2004 on the coordination of social security systems sets out the rules to determine to which social security law of a member state an employee (or self-employed person) is subject. The general rule is that the employee is submitted to the law of the **country he works in,** even when the employee lives in a different country or when the employer or the registered office is established in another country.
- An important **exception** however is present in case of the **posting** of an employee ("detachering") who usually works in one country, to another country for a temporary period (maximum 24 months). This employee is, under several

conditions, allowed to stay submitted to the social security of the original country of labor (see also below).

30. *Legal engagement and dismissal requirements and formalities*

- **Engagement:** as from the engagement on, the employer needs to fulfill several formalities concerning the personnel/ staff:
  - he is **obliged to join several (social security) institutions,** namely:
    - The Public Service of Social Security ("*Rijksdienst voor de sociale zekerheid" [RSZ] / "Office Nationale de Sécurité Sociale" [ONNS])* (article 21 of the Law of 27 June 1969 on the Social Security of employees)
    - A family allowance fund ("*Kinderbijslagfonds" / "Caisse d'allocations nationales"*) (article 34 of the Royal Decree of the 19 December 1939): the employer needs to join within 90 days as of the employment. The fund can be freely chosen for most industries, but when an employerrefrains from connecting, he will be officially joined with the Public Service of Family Allowances of Employees ("*Rijksdienst voor Kinderbijslagen van werknemers" / "Office national d'allocations familiales pour travailleurs salaries"*).
    - A fund for annual vacation ("*Rijksdienst voor Jaarlijkse Vakantie" [RJV] / "l'Office National des Vacances Annuelles" [ONVA]),* unless the employer only employs white-collars ("*bedienden" / "employés*").
    - The employer is also obliged to close an insurance for industrial accidents ("*Verzekering tegen arbeidsongevallen" / "assurance contre les accidents du travail*") (art. 49 of the law of 10 April 1971 on industrial accidents)
    - An external service for prevention and protection ("*externe dienst voor preventie en bescherming op het werk" / "service externe de prévention et de protection*") (art. 40 of the Law of 4 August 1996 on the welfare of employees during their performance). Joining is mandatory when the internal service for prevention and protection cannot perform all of

its tasks. The internal service for prevention and protection is a mandatory department in every firm and is perceived by at least one prevention advisor. As long as the firm counts less than 20 employees, the employer might execute the function.

- other **formalities:**
  - The employer and the employee need to close an employment agreement (orally or in writing). An oral agreement is always considered to be of an indefinite duration and for full-time performances.
  - The employer needs to draw up a Code of Labour ("*Arbeidsreglement*" / "*Règlement du travail*") (art. 4 of the law of 8 April 1965 on the Code of Labour)
  - The employer needs to dispose of staff files (or a "personeelsregister" / "*register du personnel*") in which he needs to record several data of his employees (Royal Decree of 8 August 1980 on the keeping of social records). However, the system of keeping staff files (in paper) has been largely replaced by the "DIMONA-system". Every engagement or termination of employment, as well as every change or correction of working hours, needs to be registered electronically via the internet by means of a so called DIMONA-declaration (Royal Decree of 5 November 2002).
  - The employer needs to set up certain services: in case of an employment of an average of at least 50 employees, the employer needs to set up a Committee for prevention and protection at work (art. 49 of the law on Welfare of employees during the performance of their work). When he employs at least an average of 100 employees, he needs to set up a Work Council ("*Ondernemingsraad*" / "*Comité d'entreprise*").

– **Dismissal:**
  - **By the employer:**
    - The employer can end the employment agreement at any time by dismissing the employee, without any formalities. In the beginning, he disposes of a "dismissal power"

- However, a difference needs to be made between a lawful dismissal (this is a resignation / notice or a dismissal for urgent matters) and a unlawful dismissal (in which case the employer will need to pay a compensation to the employee)
- A dismissal can also be lawful, though unjustly ("onrechtmatig"), in which case a compensation will also be due
- Notice / resignation: the employer can lawfully make an end at an employment agreement for indefinite period by granting the employee a notice period. The notice has to be either by registered post or by writ of a bailiff and has to mention the duration and the beginning date of the notice period, on pain of being void (art. 37 of the Law of 3 July 1978 on the Employment Agreements). An employment agreement for definite period cannot – in principle - be terminated by notice.
- The notice period and, in the absence of this period, the compensation are determined according to the type of employee (blue collar or white collar) and in main order by taking into account the seniority of the employee. For certain categories of white collars, the wage and the age of the employee play a very important role (see art. 59 and 82 of the law concerning the Employment Agreements). In some cases (namely for white collars with a wage across a certain border), the notice period can be determined at forehand in the employment agreement. It should also be noted that the existing differences in notice periods between blue and white collar workers are gradually disappearing.
- Dismissal for urgent matters: every party to the agreement can make an immediate end at the agreement without notice period or compensation in case of an urgent matter. An urgent reason / matter is a serious shortcoming that makes every future cooperation in an immediate and definitive way impossible (art. 35 of the law concerning the Employment Agreements). The judge considers whether the invoked facts are a valid reason.

This dismissal is submitted to severe formalities which have to be fulfilled otherwise a dismissal compensation can be triggered.

- **By the employee:**
  - Also the employee can make at any time an end at the agreement for urgent matters or by granting a notice period.
  - In case of a dismissal without notice or without complying to the rules for dismissal for urgent matters, he will have to pay a compensation to the employer.

31. *Social security regulations*

- See above: The applicable social security system is in general regulated by **the national law of each country.**
- The Belgian social security law is of public order and an employee is submitted to the Belgian social security law when he is **employed in Belgium** by an employer established / settled in Belgium, or when the employer is established / settled abroad and the employee is connected with a registered office in Belgium.
- The Belgian Social Security covers amongst others the regulation concerning the pensions, the unemployment, the insurance for work accidents, the insurance for occupational diseases, the family allowances, the annual vacation and the health insurance.
- The employer needs to contribute to the financing of the social security and pays a contribution of among 32 % of the gross wage of the employer.

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This memo provides only some general comments on the topic.

It is obvious that more detailed information and legal advice or assistance might be required in each individual case.

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EUROJURIS INTERNATIONAL BUSINESS GROUP:

who we are

Eurojuris International

Eurojuris was formed in the late 1980s with the objective of providing clients with access to legal advice and representation from local lawyers throughout Europe and worldwide.

Eurojuris is now the leading network of law firms in Europe and worldwide with over 600 member firms and approximately 5000 lawyers. In addition Eurojuris can, through its correspondent firms, provide access to local firms in many other countries throughout the world. Members and correspondents are always well established medium sized independent law firms satisfying the Eurojuris criteria.

Eurojuris aims to provide more than just a reliable directory of legal firms. A permanent headquarters with full time staff to manage the organisation was created in 1993 and its responsibilities include co-ordinating numerous national activities, publishing brochures, newsletters and guides, organizing meetings and congresses, promoting specialist groups and setting up an organisation to provide cohesion among different legal systems and business cultures.

The Eurojuris commitment to quality is paramount and is maintained by ensuring that management procedures and work methods are tailored to match the client needs and are dynamic and open to constant improvement. It is also essential that all Eurojuris International members understand and implement approved work methods and that regular internal and external control procedures are reviewed on a systematic basis.

Eurojuris International Business Group

The Eurojuris International Business Group (Eurojuris IBG) is one of a number of the Eurojuris practice groups. Eurojuris IBG is a proactive, business generating group that was formed to enable a small group of Eurojuris members to focus on the needs of business clients. Members of the Eurojuris IBG are experienced in their practice areas and leaders in the international legal and business community.

Eurojuris IBG members aim to provide a Partner level service to clients and, through close co-operation with European colleagues, to provide a consistent and seamless service.

Eurojuris IBG aims to offer a uniform presentation and mutual legal education schemes with common practices and to develop common services for the clients of member firms.

As more and more businesses find that improved communication and access opens the way to more international trade, the need for legal representation throughout a number of jurisdictions becomes essential. Eurojuris IBG provides access to expert local knowledge through a lawyer in the jurisdiction of the client's head office.

The members of Eurojuris IBG maintain close levels of co-operation and knowledge of each other's firms. This is achieved not only via the usual media of email, fax and telephone, but also through regular meetings, some of which take place in the offices of the member firms to enable members to understand the way in which they can better serve their client's needs.

The members of Eurojuris IBG fulfill very strict criteria: they are business minded, they work with business clients across Europe and overseas, they all work in the English language and have some knowledge of other European languages. Importantly they are equipped with the most up to date information technology systems and maintain substantial Professional Indemnity Insurance.

How to expand your business across borders

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