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Belgium: Cross Border Joint Venture and Strategic Alliance Guide

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Structures

What are the standard forms of joint ventures / strategic alliances and common features of each?

There is no standard form for joint ventures, although the following varying degrees of cooperation can be distinguished:

1. De facto cooperation
2. Unwritten joint venture agreement
3. Written agreement for a contractual joint venture that is not a company
4. Written agreement for a joint venture that qualifies as a company but without legal personality
5. Written agreement for a joint venture that qualifies as a company with separate legal personality (i.e., with assets, rights, and obligations separate from its shareholders)

For discussion purposes, this guide will focus primarily on joint ventures and strategic alliances that operate through "contractual relationships" (i.e., 3 and 4 above, hereinafter referred to as contractual relationships) and "entity-based structures" (i.e., 5 above, hereinafter referred to as entity-based structures). Indeed, technically speaking, companies without legal personality are merely agreements.

Although joint ventures operating through de facto cooperation or unwritten agreements (1 and 2 above) are widespread in practice, especially for smaller ventures, they tend to be less frequently used for larger, more established joint ventures and will almost always result in difficulties due to the burden of proof in the event of litigation.

Typically, every joint venture, be it a contractual relationship or an entity-based structure, will have the following characteristics:

- Contractual relationship
- Sharing of resources and risk
- Right of the independent parties to take part in management, albeit to a limited extent
- Limitations on the purpose of the joint venture and/or the term of the agreement

Some Basics of Belgian Contract Law

In general, the special partnership, public limited liability company, and private limited liability company are the most common corporate forms for joint ventures. However, before going into more detail on the civil and corporate law aspects of joint ventures, it is important to highlight a number of basic principles of Belgian law applicable to agreements and legal entities.

Under Belgian law, an agreement is a meeting of the minds or *consensus ad idem* (*wilsovereenstemming/consentement*) between two or more parties, pursuant to which they enter into one or more legally enforceable commitments.

In order for an agreement to be valid, the following cumulative conditions must be met:

- *Consensus ad idem* (*wilsovereenstemming/consentement*) (i.e., a meeting of the minds or mutual consent). Such consent must not be vitiated (*wilsgebreken/vices de consentement*) (i.e., invalidated), due to error (*dwaling/erreur*), duress (*geweld/violence*), fraud (*bedrog/fraude*), or disadvantage (*benadeling/lésion*).

- The parties must have legal capacity (*handelingsbekwaamheid/capacité légale*). Legal entities in principle benefit from the same rights as natural persons, insofar as compatible with their nature and type, and unless provided otherwise by law. Legal entities must be represented by a natural person in order to be able to act vis-à-vis third parties and enter into agreements (i.e., through their corporate organs (i.e., corporate bodies established pursuant to the law) or pursuant to their articles of association or a valid power of attorney).

- The object (*voorwerp/objet*) of the agreement (i.e., the legal consequence(s) intended by the parties) must be valid. The parties can freely determine the intended outcome or goal of their agreements subject, however, to the following limitations:

  (1) The object or goal must exist or it must be possible for the object or goal to exist in the future.

  (2) The object or goal must be tradable (i.e., it cannot be excluded from trade).

  (3) The object or goal must be determined or determinable.

  (4) The object or goal must be lawful (*geoorloofd/licite*), meaning it cannot be contrary to public policy (*openbare orde/ordre public*) or in violation of mandatory provisions of law (*dwingend recht/droit impératif*).

- The agreement must have a permissible cause (*oorzaak/cause*), which need not be expressly stated in the agreement. There is substantial discussion in the case law and literature with respect to the existence and concept of a permissible cause. With respect to reciprocal agreements, it could be argued that the permissible cause of a party is performance of the object of the agreement by the other party.

Consequently, two or more parties with an intention to join forces in order to achieve a common objective can enter into an agreement stipulating the terms and conditions for their collaboration. By nature, such objectives or goals can be very diverse, such as a joint project or investment, the joint management of a company or project, the joint manufacturing and/or distribution of a product, joint research and development, etc. As the object or goal of the cooperation is the key component of any joint venture, the content of each agreement will vary.

Choosing a Joint Venture Structure

Parties that wish to establish a joint venture in the form of a company must first decide which company form is best suited for their purposes. The following factors can be taken into account when choosing a company form:

- Separate legal personality
- Limitation of liability
- Cost and administrative burden upon incorporation and during existence
- Transferability of the shares
- Structure and functioning of the board
- Types of securities that may be issued
- Minimum capital requirements
- Tax transparency

Companies can be distinguished based on a number of characteristics: legal personality, limited or unlimited liability, civil or commercial purpose, etc. For purposes of this contribution, we focus solely on companies with a commercial purpose.

Non-Entity-Based Structures (Formed through Agreements)

Companies without legal personality are formed through agreements between the partners and are not separate legal entities. The Belgian Company Code (*Wetboek van vennootschappen/Code des sociétés*) provides for the following types of companies **without** legal personality:

- An **ordinary law partnership** (*maatschap/société de droit commun*) is a partnership with a civil or commercial purpose and without legal personality. The parties can structure and tailor the partnership to meet their joint venture needs and goals. When the purpose of the joint venture is fulfilled (or if it becomes clear that it will not be fulfilled), the partnership can be easily wound up and liquidated.

- A **special partnership** (*tijdelijke handelsvennootschap/société momentanée*) is a partnership without legal personality or a common name, formed for the purpose of performing one or more specific commercial transactions. This type of partnership ends when the specific project is finished.

- A **silent partnership** (*stille handelsvennootschap/société interne*) is a partnership without legal personality in which one or more persons take an interest in the operations of one or more other persons who act in their own name.

Additional attributes of the above described partnerships are as follows:

Table 1

	Formation and maintenance formalities and regulations	**Notarial instrument**	**Minimum capital requirements**	**Liability to third parties**
Ordinary Law Partnership	Minimal.	None.	None.	Joint and several liability of the partners, unless expressly agreed otherwise in writing with third parties.
Special Partnership	Minimal.	None.	None.	Joint and several liability of the partners and partners can be sued directly and personally.
Silent Partnership	Minimal.	None.	None.	Joint and several for partners. Third parties cannot assert claims against the limited or silent partners who merely contribute to the partnership (and do not act in any other capacity).

Entity-Based Structures with Legal Personality

The following companies with legal personality are worth mentioning:

- A **general partnership** (*vennootschap onder firma/société en nom collectif*) is a partnership entered into between jointly and severally liable partners. Its purpose is to carry out a civil or commercial activity.

- A **limited partnership** (*gewone commonditaire vennootschap/société en commandite simple*) is a partnership entered into between one or more jointly and severally liable partners, called general partners, and one or more mere investors, called limited or silent partners.

- A **private limited liability company** (*besloten vennootschap met beperkte aansprakelijkheid/société privée à responsabilité limitée*) is a company incorporated by two or more shareholders that can only be held liable up to the value of their contributions. A private limited-liability company can be incorporated by only one person (*eenpersoons-BVBA/société privée à responsabilité limitée unipersonnelle*). The transfer of shares is subject to strict rules. The shares can only be transferred *inter vivos* or upon death, with the consent of at least half the shareholders representing at least three quarters of the capital excluding the shares to be transferred. Consent is not required for transfers to another shareholder, a spouse, a direct linear ascendant or descendant, or any other (category of) persons mentioned in the articles of association.

- A **public limited liability company** (*naamloze vennootschap/société anonyme*) is a company incorporated by two or more shareholders that can only be held liable up to the value of their contributions. While a private limited liability company (see above) is a corporate form focused more on the persons of the shareholders (often family members and/or shareholders that play an active role in the company), a public limited liability company is focused more on the capital contributions of the shareholders. Consequently, share transfer restrictions are less important; therefore, the shares are in principle freely transferable unless the articles of association (or a shareholders' agreement) provide otherwise.

- A **cooperative company** (*coöperatieve vennootschap/société coopérative*) is a company composed of a variable number of shareholders that make varying contributions. However, there must be at least three shareholders. The share capital of a cooperative company consists of a fixed portion and a variable portion, making it easy for a shareholder to exit the company or to be expelled, without having to transfer shares or decrease the fixed capital. A cooperative company is a very flexible corporate form, which allows shareholders to structure the management and functioning of the company to suit their needs. Shares can in principle be freely transferred to other shareholders in accordance with the conditions stipulated in the articles of association (if applicable). Third parties can be accepted as shareholders if they are mentioned in the articles of association or if they belong to a category of persons mentioned in the articles and meet the conditions set out in the articles and provided by law. A cooperative company is a very flexible corporate form, which allows shareholders to structure the management and functioning of the company to suit their needs.

- A **partnership limited by shares** (*commonditaire vennootschap op aandelen/société en commandite par actions*) is a partnership between one or more jointly and severally liable partners, called general partners, and one or more limited or silent partners. Unless the Belgian Company Code provides otherwise, the provisions applicable to public limited liability companies also apply to partnerships limited by shares (see above).

- An **economic interest grouping** (*economisch samenwerkingsverband/groupement d'intérêt* économique) is a company incorporated for a limited or unlimited duration by natural or legal persons for the sole purpose of facilitating or developing the economic activity of its members or improving or increasing the results of their activity, in which case the activity of the economic interest grouping must be related and subordinated to such activity. An economic interest grouping is not allowed to:

  (1) Except when pursuing its own purpose, intervene directly or indirectly in the activities of its members

  (2) Hold directly or indirectly shares or a stake in a commercial company or a company with a commercial form

  (3) Pursue profit for itself

  (4) Be a member of another (European or other) economic interest grouping –or–

  (5) Borrow through the issuance of bonds

  The instrument of incorporation can provide that all or some members are required to contribute cash or goods or services.

For the purposes of this Guide, the European public limited liability company and the European cooperative company are not discussed, as they are not commonly used for joint ventures.

A brief summary of other features of each such entity is provided below:

Table 2

	Liability to third parties	**Notarial instrument**	**Minimum share capital requirements**	**Profit shares (*winstbewijzen/ parts bénéficiaires*) & warrants**	**Nonvoting shares (*aandelen zonder stemrecht/ actions sans droit de vote*) & bonds (*obligaties/ obligations*)**	**Form of securities**
General Partnership	Joint and several liability of the partners. The partners cannot be held personally liable for the partnership's liabilities as long as the partnership itself has not been found liable.	No.	None.	Cannot be issued.	Cannot be issued.	

Limited Partnership	General partners are jointly and severally liable. Limited or silent partners are mere investors and are not jointly and severally liable. General partners cannot be held personally liable for the partnership's liabilities as long as the partnership itself has not been found liable. Silent partners are not allowed to carry out managerial acts. A silent partner that violates this rule will be considered jointly and severally liable for all acts in breach thereof. In addition, a silent partner will be held jointly liable if it customarily performs acts of the partnership or if its name forms part of the partnership's name.	No.	None.	Cannot be issued.	Cannot be issued.	
Private Limited liability Company	Shareholders liable up to amount of their contribution.	Yes.	Minimum of €18,550 of which at least €6,200 must be paid up (at least €12,400 must be paid up if only one shareholder).	Cannot be issued.	Nonvoting shares and bonds may be issued.	Registered form.
Public Limited liability Company	Shareholders liable up to amount of their contribution.	Yes.	Minimum of €61,500, which must be paid up in full.	Profit shares and warrants can be issued.	Nonvoting shares and bonds may be issued.	Registered or dematerialized form.

Cooperative Company	The articles of association must expressly indicate whether the liability of the shareholders is limited or unlimited. If the shareholders opt for a cooperative company with unlimited liability, they are personally and jointly and severally liable for the company's liabilities. If the shareholders opt for a cooperative company with limited liability, they are only liable for the company's liabilities up to the value of their contributions.	No, if cooperative company with unlimited liability. Yes, if cooperative company with limited liability.	None, if cooperative company with unlimited liability. If cooperative company with limited liability, there is a minimum share capital requirement. The articles of association shall determine the minimum fixed share capital, which cannot be less than €18,550, of which at least €6,200 must be paid up.	Not provided for by the Belgian Company Code.	Nonvoting shares and bonds may be issued.	Registered form.
Partnership Limited by Shares	General partners are jointly and severally liable. Limited or silent partners are mere investors and are not jointly and severally liable. General partners cannot be held personally liable for the partnership's liabilities as long as the partnership itself has not been found liable. A silent partner that signs for the partnership in a capacity other than proxyholder or whose name forms part of the partnership's name will be considered jointly and severally liable to third parties for the obligations of the partnership.	Yes.	Minimum of €61,500, which must be paid up in full.	Profit shares and warrants can be issued.	Nonvoting shares and bonds may be issued.	Registered or dematerialized form.

Economic Interest Grouping	Members are jointly and severally liable for the grouping's liabilities. A new member is jointly and severally liable for the liabilities of the economic interest grouping, but can be released from liability for liabilities that arose before it became a member if expressly provided in the instrument of incorporation or accession. Such a release will only be enforceable against third parties following its publication in the annexes to the *Belgian State Gazette*. A former member is not liable for liabilities arising after publication in the annexes to the *Belgian State Gazette* of an event resulting in that person ceasing to be a member of the economic interest grouping.	No.	None.	Cannot be issued.	Cannot be issued.	N/A

What are some of the key corporate governance, tax, regulatory, and timing considerations that could impact the choice of structure?

Corporate Governance

Eligibility to Serve as a Director

In principle, both natural and legal persons can be appointed directors and—except for age and capacity requirements—there are no statutory conditions. However, there are disqualifying factors (e.g., professional ban, conviction, bankruptcy), incompatibilities (e.g., competing activities, independence of certain professions), and competence requirements (e.g., financial institutions, members of the liberal professions, etc.). Furthermore, when a legal person is appointed director of a company, it must appoint a natural person from amongst its shareholders, directors, members of its management committee, or employees to act as its permanent representative. In a limited partnership and a partnership limited by shares, the directors must be general partners.

Number of Directors

- **Public limited liability company.** Governed by a board of directors with at least three directors (*bestuurders/administrateurs*).
- **Other corporate forms.** There must be at least one director (e.g., one or more *zaakvoerders/gérants* manage a private limited liability company).

Term of Office

- **Public limited liability companies.** The maximum term is six years.
- **Other corporate forms.** There is no statutory limitation on the term of a directorship.

Committees

Most corporate forms allow for some freedom to establish committees in addition to the corporate bodies required by law (e.g., strategy committee, technical committee, steering committee, etc.).

Such committees can play a mere advisory role but can also, to a certain extent, be granted powers of attorney by the board of directors. For public limited liability companies, the Belgian Company Code provides for the possibility to establish a management committee (*directiecomité/comité de direction*) and to entrust daily management to one or more persons. The board of directors may delegate some of its powers to the management committee. However, a management committee can be established only if this is provided for by the articles of association. The management committee can exercise broad managerial powers, but the board of directors cannot be stripped of all its powers. The formulation of general corporate policy and strategy, as well as supervision, are powers reserved to the board of directors. For other powers reserved to the board of directors, please see answer to question: *What documentation/agreements are required to form a joint venture or strategic alliance?*

The board of directors can also entrust daily management to one or more persons. Such persons can exercise daily managerial powers and will in most cases also be granted the power to represent the company within the scope of daily management. This is without prejudice to the board's right to exercise daily managerial powers itself.

Cooperative companies have broad freedom to organize management in their articles of association.

Finally, the applicable rules on legal representation of the company and directors' liability are also important and vary to a certain extent from one corporate form to another.

Tax

Capital contributions to a Belgian legal entity are not subject to a capital contributions tax.

Using a company that has legal personality, such as a private limited liability company or a public limited liability company, means (in brief) that all profits generated by the business, whether in Belgium or abroad, will be taxable in Belgium under the corporate income tax rules (without prejudice to the application of tax treaties to avoid double taxation). Operating via a branch means that only Belgian-source income will be taxable in Belgium.

Sometimes it is advisable to use a company without legal personality, such as an ordinary law partnership, or a company with legal personality from a corporate perspective but which is tax transparent, such as an economic interest grouping. The result is that the profits of the business are taxed in the hands of the shareholders or partners. Tax-transparent entities may be particularly interesting to attract foreign investors.

Depending on the option selected, the formalities and reporting obligations will differ. As far as income tax is concerned, tax residents of Belgium must file an annual income tax return. The type of return to be filed will depend on the circumstances and may be a corporate tax return, a personal income tax return, or a tax return for legal entities. Operating in Belgium via a branch, a representative office, or even salespersons may still (but not necessarily) require the filing of a tax return for non-resident tax purposes.

Throughout the Belgian Income Tax Code (ITC), the concept of legal personality serves as the main factor to classify an entity as a taxpayer. Thus, the ITC requires that an entity have legal personality in order to fall within the scope of application of corporate tax. Likewise, Article 18 ITC qualifies income derived by partners from the entity in which they participate as dividends, but only if the distributing entity is a corporation, thus again (indirectly) referencing the prerequisite of legal personality. Conversely, the ITC classifies a number of Belgian corporate forms as tax transparent by stating that they are deemed associations without legal personality (for income tax purposes). Article 29 § 1 directly attributes (and taxes) income derived via a tax-transparent entity to its partners or members, regardless of whether the income is actually distributed to them.

Only entities with separate legal personality can be subject to Belgian corporate tax. Belgian tax law does not define the concept of legal personality and thus reference should be made to the definition of this concept in corporate law. Unless the tax legislation expressly provides otherwise, it is not possible in a domestic context for a corporate vehicle to be re-characterized for tax purposes as a nontaxable entity or vice versa.

Regardless of whether an entity is treated as transparent for Belgian income tax purposes, issues could arise in an international context. For instance, a Belgian private limited liability company is eligible for U.S. check-the-box treatment, allowing it to be considered transparent for U.S. tax purposes (whereas a public limited liability company does not qualify for such treatment). This has led to a large number of multinationals changing their corporate form from that of a public limited liability to a private limited liability company.

Regulatory

Certain corporate forms are more suited for certain types of activities. Moreover, some activities cannot be conducted by certain corporate forms. For instance, a private limited liability company is not allowed to make a public offering and therefore cannot offer securities to the public or be listed on a stock exchange. In general, however, regulatory provisions tend to focus more on the activities of a joint venture or strategic alliance than on its corporate form.

Timetable

As mentioned throughout this Guide, certain corporate forms are easier to incorporate and run than others. However, in general, timing issues are insignificant when it comes to choosing a structure for a joint venture.

Can a joint venture or strategic alliance be formed for any purpose?

In general, businesses have substantial freedom to conduct any activity permitted by law. However, depending on, among other factors, the activities conducted and the sector in which the activities are conducted, there may be certain European, federal, regional, or local rules and regulations applicable to a joint venture that could adversely affect its ability to do business. Furthermore, certain activities will require permits, licenses, etc.

A number of general limitations are discussed below.

Contractual Relationships

Please see answer to question: *What are the standard forms of joint ventures / strategic alliances and common features of each?*

Entity-Based Structures

Statutory Purpose

A company must act in accordance with the statutory purpose applicable to its corporate form. In other words, a legal entity can only engage in activities to the extent these are consistent with the purpose the legislature has reserved for that type of legal entity. Indeed, the most important statutory limitation on companies is linked to the nature of a company, namely that it is incorporated in order to pursue a profit (with the exception of the economic interest grouping). This principle is considered to be of public policy; therefore, acts contrary to the statutory purpose are void. However, acts that fall outside the statutory purpose are valid and enforceable against the company if a third party, due to extraordinary circumstances, could legally assume the company was acting within the scope of its statutory purpose.

Corporate Purpose

A company must act in accordance with its corporate purpose. The corporate purpose of a company is set out in its articles of association and describes the activities the company can conduct. It is important that the corporate purpose of the company be carefully worded. Vague or too broad formulations are in principle not allowed. However, it is common to include in the corporate purpose boilerplate language in order to allow the company to engage in a broad range of activities. Acts in violation of the corporate purpose can be declared void.

Corporate Interest

All acts and decisions of a company must be in its corporate interest. Case law and literature are divided on the definition of corporate interest; however, an accepted approach is that corporate interest is the interest of all current and future shareholders of the company. Decisions and actions contrary to corporate interest can be declared void, without prejudice to the rights of third parties acting in good faith. A third party does not have a duty to investigate but will not be considered to be acting in good faith if he or she knew or should have known that a corporate body acted to the detriment of the company. Belgian law does not provide for a so-called *Konzernrecht* and, consequently, the interest of the group to which the company belongs cannot be taken into account when assessing the corporate interest. However, it is allowed to take into account (in part) the interest of the group when assessing whether a decision or action is in the interest of the company if the decision or action:

1. Is not contrary to a statutory provision
2. Is not contrary to a contractual provision –and–
3. Does not result in a disproportionate financial burden for the company and can reasonably result in a future benefit for the company

Are there any forms of joint ventures or strategic alliances that are more typically used in certain industries (such as real estate, pharmaceutical, or technology)? Why are such forms favored?

There is no standard corporate form for joint ventures in certain industries or sectors. However, certain corporate forms are more common in certain industries.

Public Limited Liability Company and Private Limited Liability Company

In Belgium, the most commonly used corporate forms are the public limited liability company and the private limited liability company. As previously discussed, a private limited liability company is eligible for U.S. check-the-box treatment, allowing it to be considered transparent for U.S. tax purposes. See answer to question: *What are some of the key corporate governance, tax, regulatory, and timing considerations that could impact the choice of a structure?* This has led to a large number of multinationals changing from a public limited liability company to a private limited liability company. Coca-Cola Enterprises Belgium, for instance, is now a private limited liability company.

Special Partnership

In the real estate sector where large-scale construction projects often require joint ventures between investors, contractors and other real estate professionals, the special partnership (*tijdelijke handelsvennootschap / société momentanée*) is the most commonly used corporate form. This corporate form allows the partners to jointly participate in invitations for tender and, by doing so, benefit from the know-how, track record, and other resources of the various partners. The fact that the partners are jointly and severally liable to third parties is often a condition *sine qua non* in order to successfully pitch for a large real estate project. Finally, the fact that the partnership automatically comes to end when the specific project is finished allows for smooth dissolution.

Cooperative Companies

Historically, Belgium has had a large number of cooperative companies, particularly in the agricultural and pharmaceutical sectors (specifically for the distribution of medicines). Some large financial institutions in Belgium also use cooperative companies to structure their independent retail networks and, more generally in the financial sector, banks, and insurance companies sometimes opt to take the form of a cooperative company. Finally, Belgium has numerous cooperative companies in industries with licensed professionals (*vrije beroepen / professions libérales*), such as architects, law firms, auditors, doctors, dentists, etc. Not only are cooperative companies very flexible structures, they also allow their shareholders to benefit from a number of advantages, such as the power of numbers (stronger negotiating position), a larger market, a stronger brand name, the use of common infrastructure, etc.

Are there any industries that would not permit or would not be conductive to a joint venture or strategic alliance?

In Belgium, there are no sectors or industries that prohibit joint ventures. However, in all cases, it is important to comply with the anti-trust rules. See answer to question: *Are there any anti-trust matters to be considered in forming a joint venture or strategic alliance?* In addition, depending on the activities conducted by the joint venture and the sector(s) in which it is active, among other factors, certain European, federal, regional, or local rules and regulations may apply, which could impact the entity. Furthermore, certain activities will require permits, licenses, etc. Regulatory consent is often required in order to become a shareholder in a regulated entity (e.g., a financial institution), as well as for management and, in general, corporate governance decisions. Other sectors in which limitations typically apply are the energy sector and aviation sector.

How is a joint venture or strategic alliance structured to minimize potential liability? Are there instances where parties to a venture or alliance may knowingly choose a vehicle without limited liability and, if so, why would such party make that choice?

For a discussion regarding the liability of partners and shareholders to third parties, see answer to question: *What are the standard forms of joint ventures / strategic alliances and common features of each?*

Contractual Relationships

A joint venture agreement governs the contractual relationship between the contracting parties. In principle, this agreement will not have an impact on third parties (customers or suppliers of the joint venture). Indeed, customers or suppliers contract directly with one or more of the parties to the joint venture or strategic alliance. The rights and obligations of each party, the allocation of risk, and the manner in which disputes will be resolved are specified in the agreement.

Nevertheless, Belgian literature provides for the concept of good faith. The concept of good faith is well-known in continental European countries. In common law jurisdictions, good faith is typically not part of the legal framework. This is one of the reasons why, in general, agreements subject to UK or U.S. law tend to be much more detailed.

There is no statutory definition for good faith. This principle ensures a certain flexibility in the interpretation of agreements and prevents paralysis in the event of certain disputes. It can be described as the presumption that the parties to an agreement will act honestly and fairly in their dealings with each other, so as not to completely destroy the right of the other party or parties to receive benefits pursuant to the agreement. Objective good faith implies compliance with a standard of conduct, which includes a duty to act properly in the exercise of contractual rights and obligations in accordance with the requirements of reasonableness and fairness, as a reasonably prudent person would act in the same circumstances.

As mentioned above, companies without legal personality (e.g., an ordinary law partnership, a special partnership, or a silent partnership) qualify as contracts. However, since they are also considered companies under the Belgian Company Code, the prohibition on unconscionable clauses (*leeuwenbeding/clause léonine*) applies to them (for more information, see the discussion on Entity-Based Structures below).

Entity-Based Structures

Depending on the corporate form, the potential liability of the partners will vary (see Table 2 in Structures above).

At first glance, a company with limited liability may appear to be the best choice to structure a joint venture. However, there are valid reasons to opt for a corporate form with unlimited liability. Tenders for certain (construction) projects will sometimes require the partners to be jointly and severally liable together with the partnership. Banks and other creditors may, in the event of a company with limited liability, require personal guarantees from the shareholders (or from the parent companies or relatives of the shareholders). In larger corporate groups, unlimited liability in the lower echelons of the corporate structure is not always considered a major issue and may be remedied by including a limited liability company higher up in the corporate chain.

It is important to bear in mind that the shareholders can allocate the profit, risk, and liabilities amongst themselves in the instrument of incorporation, the articles of association, a shareholders' agreement, or elsewhere (e.g., an option agreement). Disproportionate treatment is allowed, provided the shareholders are treated fairly. Under Belgian law, the possibility to treat shareholders disproportionally is limited by what is commonly known as the prohibition on unconscionable clauses (*leeuwenbeding/clause léonine*). This prohibition applies to all companies described and states that agreements allocating all profits to one or more shareholders or releasing one or more shareholders from their duty to cover the company's losses are null and void (Article 32 of the Belgian Company Code).

Put and call options are popular in entity-based joint venture agreements to effectively minimize (or exclude) the risk or possibility to share in the profits of the company. A put option is an option that grants its beneficiary the right to require another party to purchase shares from the beneficiary at a certain point in time (determined by the beneficiary or upon the fulfilment of certain conditions) and at a predetermined or determinable price. A call option is an option that grants its beneficiary the right to require another party to sell shares to the beneficiary at a certain point in time (determined by the beneficiary or upon the fulfilment of certain conditions) and at a predetermined or determinable price. Such options can be declared null and void pursuant to the prohibition on unconscionable clauses if it can be shown that, as a result of such a clause or option, a shareholder no longer shares in the profits or bears the risk of losses. The Belgian Company Code, however, does not contain a list of prohibited clauses and merely provides for the general principle stated above.

Belgian case law has clarified the prohibition on unconscionable clauses and promotes two theories, the second of which currently appears to be accepted by the Supreme Court. Please note, however, that the facts underlying the Supreme Court ruling were very specific (a short-term equity investment); therefore, a number of scholars have criticized the extension of this decision.

1. **The interdependence theory.** This theory states that a put or call option in an agreement can be declared null and void if it affects the functioning of the company and as a result directly or indirectly violates the articles of association.

2. **The corporate interest theory.** This theory accepts the validity of put and call options, provided that the agreement respects the corporate interest.

When assessing a potential violation of the prohibition on unconscionable clauses, the court will consider the intention of the parties. Consequently, parties to agreements that are at risk of being challenged pursuant to the prohibition on unconscionable clauses should ensure that their agreement is well documented and be able to explain why a clause (or a call or put option) is in the interest of the company (e.g., without the call or put option a shareholder would not be willing to invest in the joint venture). In addition to proper justifications in shareholder or subscription agreements, explanations in board minutes of the joint venture partners or in e-mails or minutes of meetings between the parties, etc. can be kept on file for purposes of substantiating the validity of put and call options.

Please note, however, that if a court finds that a put or call option is null and void on the ground that it is not in the corporate interest and the option is deemed essential to the decision to enter into the shareholders' or subscription agreement, the entire agreement could consequently be declared null and void.

Finally, taking into account the complexity of put and call options in the context of the prohibition on unconscionable clauses, such options should be carefully scrutinized (by legal counsel) on a case-by-case basis.

Statutory Framework

What is the applicable statutory framework for each structure discussed in this Guide?

Contractual Relationships

Choice of Court

Based on the principle of freedom of contract, the parties to a contractual relationship and companies without legal personality can generally choose the competent court. Article 25 of the recast Brussels I Regulation (hereinafter "Brussels I Recast") expressly provides for the possibility to integrate a choice-of-forum clause in the agreement, regardless of the domicile of the parties. However, the clause must be in writing, or in a form that is consistent with practices the parties have established among themselves, or with a usage widely known in the particular trade or commerce concerned. The substantive validity of the clause is determined by the *lex fori*.

Choice of Law

According to Article 3 of the Rome I Regulation, the parties are free to choose the applicable law. They can opt for national law (including the law of a non-Member State of the European Union), non-state law (e.g., CISG (United Nations Convention on Contracts for the International Sale of Goods)), and even rules of substantive European Community contract law. Parties can select the law applicable to the entire contract or only a part thereof. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the parties' choice may not prejudice the application of provisions of the law of that other country that cannot be deviated from by agreement. Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

Entity-Based Structures

As regards the question of international jurisdiction, both Brussels I Recast and the Belgian Code of Private International Law must be consulted. Pursuant to Article 24(2) of Brussels I Recast, the courts of the Member State of the European Union in which the company, legal person, or association has its seat shall have exclusive jurisdiction, regardless of the domicile of the parties, in proceedings that have as their object the validity of the constitution, the nullity or dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs. In order to determine where the "seat" is located, the court shall apply its rules of private international law. Article 109 of the Belgian Code of Private International Law states that a Belgian court has exclusive jurisdiction when the "real seat" or registered office is situated in Belgium. Despite Belgium's choice in favor of the real seat doctrine, this article also includes the incorporation theory. In this way, the Belgian courts extend their international jurisdiction. Article 4 § 3 of the Belgian Code of Private International Law defines the term real seat as the place where the company has its administrative or business center or center of activities.

As regards the question of applicable law, only the Belgian Code of Private International Law need be consulted. Article 110 of the Code states that the applicable law is determined by the real seat of the company. In contrast to the above-mentioned Article 109, this article is a clear application of the real seat theory. However, Article 110 provides for the possibility of *renvoi*. Indeed, if the designated foreign law refers to the place of incorporation (the incorporation theory), that law applies.

Article 111 § 1 of the Code of Private International Law defines the material scope of the law applicable pursuant to Article 110, in particular:

1. Existence and corporate form of the legal entity
2. Firm or company name
3. Incorporation, dissolution, and liquidation
4. Legal capacity of the entity
5. Composition, powers, and functioning of its corporate organs
6. Internal relations among its partners or members as well as relations between the entity and its shareholders or members
7. Acquisition and loss of capacity of partners or members
8. Rights and obligations attached to profit shares and shares and their exercise
9. Liability for breach of company law or the articles of association –and–
10. Extent to which the legal entity is obliged to pay debts incurred by its corporate organs to third parties

Are there statutory or other limits on the duration of a joint venture or strategic alliance?

Contractual Relationships

The duration of a joint venture or strategic alliance established solely by agreement will be determined in the agreement. When this date passes or a certain event occurs, the contract will end by operation of law (*van rechtswege/de plein droit*) without judicial intervention being required. Termination can be subject to a notice period or effective immediately, depending on the provisions of the agreement.

Unless provided otherwise in the agreement and subject to general rules of civil law (such as *force majeure*), an agreement for a fixed term cannot, in principle, be terminated by a party other than on the date specified in the agreement.

The parties can agree not to fix the term of their agreement. Agreements with an indefinite period of time can be terminated by either party at any time, as long as they have complied with the notice period specified in the agreement or, if no notice period is mentioned, with reasonable notice. This follows from the general rule that a party cannot be bound, or bind another party indefinitely.

For corporate forms without legal personality that qualify as contracts (e.g., an ordinary law partnership, a special partnership, or a silent partnership), the rules applicable to entity-based structures set forth below apply *mutatis mutandis*.

Entity-Based Structures

All corporate structures automatically end when:

1. Their set term expires
2. The activity for which they were incorporated is discontinued –or–
3. When the activity or project for which they were incorporated is accomplished

For special partnerships and companies with a fixed term of existence, it is obvious when termination occurs or should occur. However, even for these types of corporate forms, the partners can unanimously decide to extend the term of existence.

Many joint venture vehicles are incorporated for an unlimited term.

A general partnership and limited partnership can be terminated in the event of the death, manifest insolvency, incompetence, or bankruptcy of one of the partners, unless provided otherwise.

Do joint ventures or strategic alliances have to be registered with any federal or local body?

Contractual Relationships

For contractual joint ventures, the agreement governing the relationship should specify the formalities that need to be fulfilled. In principle, contractual joint ventures do not require specific formalities to be complied with (other than those mentioned in the answer to question: *What are the standard forms of joint ventures / strategic alliances and common features of each?*), and no notarial instrument or registration with federal or local authorities is required.

In principle, companies without legal personality qualify as contracts, and no specific formalities (other than those included in Table 1 above), notarial instrument, or registration with federal or local authorities are required. However, contributions by the partners of real estate and intellectual property rights will result in additional formalities (for real estate, a notarial instrument and registration and, for IP, registration formalities).

Entity-Based Structures

The incorporation process will depend on the corporate form. In general, companies with unlimited liability have fewer formalities to fulfil than companies with limited liability.

Below is a summary of generic registration formalities (without distinguishing between corporate forms).

Instrument of Incorporation

The first formality to be fulfilled when incorporating a company is to draw up an instrument of incorporation (*oprichtingsakte/acte constitutif*). The instrument of incorporation contains provisions on the incorporation of the company, its articles of association (often referred to as "bylaws" in common law jurisdictions), and other provisions, such as the appointment of directors and the statutory auditor (if any), the closing date of the first financial year, an undertaking by the company to accept obligations incurred in its name prior to incorporation, etc. Companies with unlimited liability do not require a notarial instrument for incorporation (except when real estate or intellectual property rights are contributed); a private agreement between the founders is sufficient. The founders can of course always opt to incorporate in front of a notary. For companies with limited liability, a notarial instrument is required. For the additional formalities and documents required to incorporate a company, see answer to question: *Should contributions to the joint venture or strategic alliance be documented? If so, what is the typical form of documentation?*

Filing of Instrument of Incorporation

After execution of the instrument of incorporation, either in the form of a private agreement or a notarized document, it must be filed with the clerk's office of the commercial court in the judicial district where the company's registered office is located. Filing must occur within 15 days following incorporation. In addition, the instrument of incorporation must be recorded with the Register of Legal Entities (*Rechtspersonenregister/Registre des personnes morales*). For companies with limited liability, the notary will handle these formalities. A company will obtain legal personality at the time its instrument of incorporation is filed with clerk's office of the commercial court (as evidenced by a stamp on the filed form or electronic proof of filing).

Submission of the Company's Information into Crossroads Enterprise Database and Related Filings

Following filing of the instrument of incorporation, the clerk's office of the commercial court will submit the company's information to the Crossroads Enterprise Database (*Kruispuntbank der Ondernemingen/Banque-Carrefour des Entreprises*). This will allow the company to receive an enterprise number, which is its unique identification number with the relevant Belgian authorities (tax, social security, etc.) and the courts. This number must be indicated on all corporate documents, including invoices and judicial documents. Failure to register is a criminal offense. In addition, claims on behalf of a company that is not registered will be inadmissible in court, and the company may be ordered to discontinue its business. For regulated activities and small or medium-sized enterprises (SMEs), registration is subject to prior approval by the competent authorities. If the company (regardless of its size) conducts regulated activities for which an authorisation is required (e.g., banking), it will not be registered unless it can demonstrate that it has obtained the required operating licence. A small or medium-sized enterprise that performs activities requiring registration with the Crossroads Enterprise Database must be managed by a person meeting certain requirements in terms of managerial skills. In practice, proof that the company does not qualify as an SME may take the form of a sworn statement or an appropriate mention in the instrument of incorporation (and may have to be supported by evidence upon registration).

The following are deemed SMEs:

- Businesses with no more than 50 employees on average on an annual basis
- Businesses, 25% of whose shares or voting rights are held by one or more other companies that are not SMEs –and–
- Businesses whose annual turnover does not exceed €7,000,000 or whose balance sheet total does not exceed €5,000,000

The clerk's office of the commercial court also ensures that the instrument is published in the annexes to the *Belgian State Gazette* (*Bijlagen bij het Belgisch Staatsblad/Annexes aux Moniteur belge*).

In addition, the instrument of incorporation must be recorded with the registry of the Ministry of Finance (Land Registry, Department of Registration and Domains). Registration fees will need to be paid. If the instrument of incorporation takes the form of a notarised document, registration should occur within 15 days following incorporation before the notary. For private agreements, the partners must do so within four months.

Further, the company must register with a social insurance fund within three months from the filing of its instrument of incorporation.

If the company performs activities subject to VAT, it must also register with the VAT authorities, withhold the applicable taxes, and remit these to the tax authorities.

The hiring of personnel by a company gives rise to a number obligations on the part of the employer, vis-à-vis the National Social Security Office (ONSS/RSZ) and tax authorities. Indeed, the employer must register with the ONSS/RSZ, withhold social security contributions from its employees' salaries, and remit employer and employee contributions quarterly to the social security administration. Furthermore, every employer must register with a family allowances fund and an external service for health and safety at work and have occupational accident insurance. Work rules (i.e., a type of employee handbook) must be drafted by the employer and mandatory payroll documents must be prepared and maintained.

With respect to registration and other duties of foreign shareholders or partners, please see answer to question: *What permits, consents or registrations are required by foreign members/partners of a joint venture or strategic alliance?*

Regulatory Environment

Are joint ventures or strategic relationships specifically regulated?

Joint ventures are not specifically regulated due to the fact that they are voluntary forms of cooperation.

In general, the Belgian Civil Code, general principles and customs of Belgian law, and provisions of public policy or mandatory law govern agreements *stricto sensu*.

In addition, companies without legal personality and entity-based structures are subject to the Belgian Company Code, which regulates almost every aspect of the incorporation, governance, and termination of joint venture companies. Nevertheless, it is possible to deviate (in the articles of association, a shareholders' agreement or otherwise) from all provisions that are not of public policy.

Finally, depending on the activities conducted by the joint venture and the sector(s) in which it is active, among other factors, certain European, federal, regional, or local rules and regulations may apply, which could impact the entity. Furthermore, certain activities will require permits, licenses, etc. Regulator consent is often required in order to become a shareholder in a regulated entity (e.g., a financial institution), as well as for management and, in general, corporate governance decisions. Other sectors in which limitations typically apply are the energy sector and aviation sector.

Are there any anti-trust matters to be considered in forming a joint venture or strategic alliance?

Merger Control

The Belgian Competition Act is included in Book IV of the Code of Business Law (*Wetboek Economisch Recht/Code de droit* économique). Pursuant to Article IV.6 of the Code, the creation of a joint venture that will perform on a long-term basis the functions of an autonomous economic entity constitutes a concentration. The creation of such a joint venture is therefore subject to merger control, as is the case under EU Merger Regulations.

Notification to the national competition authority is required for concentrations that meet the following thresholds:

1. Aggregate Belgian turnover of the undertakings concerned in excess of €100 million –and–
2. At least two of the undertakings concerned each has turnover in Belgium of at least €40 million

The parties are prohibited from implementing the proposed transaction before approval has been obtained from the Belgian competition authority.

Restrictive Practices

Even if the joint venture does not constitute a concentration, it nevertheless remains subject to the competition law rules on restrictive practices (such as the prohibitions on cartels and abuse of a dominant position). These rules are set forth in Articles IV.1 and IV.2 of the Code of Business Law that adopt the wording of Articles 101 and 102 TFEU. The Belgian competition authority has not adopted specific guidelines or block exemptions applicable to joint venture agreements. Belgian competition law follows EU law in this respect, in accordance with Article IV.4 of the Code of Business Law. Therefore, EU law applies and it is necessary to assess whether the joint venture agreement complies with these rules, including, among other things, the block exemption regulations on horizontal agreements, R&D agreements and specialization agreements, and the guidelines of the European Commission on the applicability of Article 101 TFEU to horizontal cooperation agreements.

Formation

What are the procedures in forming a joint venture or strategic alliance?

In addition to what is mentioned elsewhere in this Guide on constituent elements to form a contract or legal entity, there are a number of requirements for persons to be able to perform legal acts (such as serve as the founder of a joint venture) in Belgium.

A natural person must have reached the age of majority (18 years of age in Belgium) and have legal capacity in order to enter into a contract and serve as a founder.

A legal person must also have capacity to enter into a contract and serve as a founder. For Belgian companies entering into a joint venture or strategic alliance, it must be verified whether:

- Entering into a joint venture or strategic alliance is within the scope of its corporate purpose.
- Entering into a joint venture or strategic alliance is in its corporate interest.
- The Belgian company is validly represented when entering into the joint venture.
- The competent corporate body of the Belgian company has approved entering into the joint venture.
- No other statutory or contractual provisions or provisions of the company's articles render entering into a joint venture difficult or impossible.

It is also necessary to check whether similar requirements for foreign founders apply and have been complied with.

What documentation/agreements are required to form a joint venture or strategic alliance?

For a discussion of registration formalities, please see answer to question: *Do Joint Ventures or Strategic Alliances have to register with any federal or local body?*

Joint ventures can be formed by an agreement between at least two parties. For more information, see answer to question: *What are the standard forms of joint ventures / strategic alliances and common features of each?* Such an agreement can even be oral (unwritten). However, taking into account legal certainty and the burden of proof, it is advisable to have a written agreement setting out the rights and obligations of the parties to the joint venture or strategic alliance. With respect to choice of law and jurisdiction, see also answer to question: *What is the applicable statutory framework for each structure discussed in this Guide?*

The Belgian Company Code sets out the requirements to establish a company without legal personality and to incorporate a company with legal personality.

The form of the company will determine the formalities applicable to its instrument of incorporation (private agreement or notarized document) and registration requirements.

Below is a description of some of the key agreements entered into upon the formation of a joint venture or strategic alliance:

- **Subscription agreement.** A subscription agreement is often entered into by the (future) shareholders of a company, typically describing their contributions as well as the essential aspects of their cooperation.

- **Shareholders' agreement.** A shareholders' agreement, in addition to the articles of association, is also very common. Often, the provisions of a subscription agreement and a shareholders' agreement are combined in a single agreement. The articles of association are applicable to all shareholders and the company; a shareholder becomes bound by the articles of association by subscribing to or acquiring shares in or by becoming a partner of the company. A shareholders' agreement can be entered into by all shareholders or a particular group of shareholders. The company itself may or may not be a party to the shareholders' agreement. If the company is a party to the shareholders' agreement, its provisions will be enforceable against the company and its corporate bodies. Further, if the company is a party to the shareholders' agreement, its corporate bodies can be used to streamline the mechanisms and procedures provided for by the agreement (e.g., notifications in view of pre-emptive rights or other transfer restrictions).

For companies with legal personality and limited liability, a major difference between the articles of association and a shareholders' agreement is the fact that the former is a public document (available at the clerk's office of the competent commercial court) and, therefore, enforceable against third parties, whereas the latter need not be filed or published. Consequently, a shareholders' agreement is not enforceable against third parties. In addition, a shareholders' agreement can only be terminated with the consent of all parties thereto, whereas the articles of association can be changed subject to the quorum and majority requirements provided for by law.

Other agreements. Often, other agreements exist between the shareholders and/or the joint venture or strategic alliance. Examples are service level, management, and technical agreements, etc. Of course the relationship between members of a joint venture or strategic alliance that takes the form of an entity-based structure is also governed (or at least influenced) by the decisions of the entity's corporate bodies and committees (as documented in minutes, reports, etc.).

Specific Provisions of Articles of Association/Shareholders' Agreements

It is useful to briefly summarize a number of provisions often seen in articles of association and/or shareholders' agreements of joint ventures (with limited liability).

Voting Agreements at the Level of the General Meeting of Shareholders

A shareholders' agreement often contains voting arrangements at the level of the general meeting of shareholders. Such arrangements are valid if the following conditions are met:

- They are limited in time.
- They do not violate provisions of the Belgian Company Code or the corporate interest of the company.
- Shareholders do not agree to vote in accordance with guidelines from or approve proposals by the company, a subsidiary of the company, or the corporate bodies of the company or a subsidiary.

The fact that voting arrangements must be in the corporate interest (not only when entered into but at all times) results in legal uncertainty as to their validity. The maximum time limit for voting agreements is no longer stipulated in the law. Previously, the law provided for a maximum period of five years. In practice, this five-year limit is still often used. In exceptional circumstances, supported by comprehensive arguments, a longer period could be acceptable, for instance in the case of a joint venture with a project that will take longer than five years to implement. In any case, voting agreements for longer periods of time should be carefully scrutinized (by legal counsel) on a case-by-case basis.

The validity of voting agreements at the level of the board of directors is debated in the literature. Since directors have a fiduciary duty to the company and must at all times act in the corporate interest, a majority of scholars argues that voting agreements at the level of the board of directors are not valid. One solution could be for shareholders to agree to ensure that the board of directors will approve certain decisions (or transfer certain decisions to the general meeting, see below).

Transfer Restrictions

For differences among a private limited liability company, a public limited liability company, and a cooperative company, see also answer to question: *What are the standard forms of joint ventures / strategic alliances and common features of each?*

Joint ventures by nature often require a lockup or standstill period during which shareholders are not allowed to sell their shares and exit the joint venture. Standstill clauses must be in the interest of the company and limited in time (maximum five years, or longer in exceptional circumstances). Most standstill provisions are drafted in order to allow transfers approved by some or all of the other shareholders and within the same group of companies, to spouses, children, and grandchildren.

Pre-emptive right clauses grant certain persons the right to acquire shares at a price determined by a third party or in the clause. When determining the price, the prohibition on unconscionable clauses must be taken into account. This prohibition applies to all companies described and states that agreements allocating all profits to one or more shareholders or releasing one or more shareholders from their duty to cover the company's losses are null and void (Article 32 of the Belgian Company Code). Such clauses must be limited in time (maximum six months from the request for consent to transfer the shares or exercise the pre-emptive right). Parties have substantial freedom to structure pre-emptive rights (e.g., a right of all other shareholders to acquire the shares pro rata, a right granted to only certain shareholders or certain third parties such as management, etc.). Often, the pre-emptive right is in fact a right of first refusal. Accordingly, if the beneficiaries of the right do not exercise it, the transferor can transfer the shares to the proposed transferee.

Consent clauses require a potential transferor to obtain prior (written) consent from all or some of the other shareholders, a corporate body, or a committee to the transfer of shares. Such clauses must be limited in time (maximum six months from the request for consent). Often, a consent clause is linked to a pre-emptive right or—in the event of refusal—a put option in favour of the potential transferor.

In the framework of an exit, tag-along and drag-along rights are often used in order to avoid being left behind in a joint venture after the exit of one or more shareholders or not being able to sell all shares to the potential purchaser, as the case may be. A tag-along right allows a minority shareholder to sell its shares, together with the majority shareholder, at the same conditions to the potential purchaser. A drag-along right allows a majority shareholder to force a minority shareholder to sell its shares at the same conditions to the potential purchaser. Tag-along and drag-along rights are sometimes linked to put and call options.

Rights to Appoint Board Members

Often, a category of shareholders or one or more shareholders holding a certain percentage of the share capital will be granted the right to appoint one or more directors to ensure proportionate or disproportionate representation on the board of directors. Two or more candidates will be presented to the general meeting of shareholders, which will ultimately decide which to appoint.

The right to propose candidates for directorships is often associated with a list of matters for which consent is required by a director appointed by a certain category of shareholders or by one or more shareholders or with a list of matters on which such a director has a veto right.

Antidilution Measures

Several methods of protection against dilution are seen in shareholders' agreements in a joint venture context, ranging from amendments increasing the number of shares to antidilution warrants. An antidilution warrant entitles its holder to acquire, during a new financing round, additional shares at a price lower than the price initially paid. Through exercise of the antidilution warrant, the holder acquires the same number of shares as if its initial investment had been made during the new financing round at the new issue price. Antidilution protection is complex from a legal perspective and must always be carefully scrutinized (by legal counsel) on a case-by-case basis as to its validity and enforceability.

Reserved Matters

Since directors have a fiduciary duty to the company and must at all times act in the corporate interest, requiring approval for certain decisions by a director appointed by a particular category of shareholders or by one or more shareholders holding a certain percentage of the share capital is sometimes problematic when a decision is in the corporate interest of the company but not in the interest of the shareholders that appointed the director. A solution is to draw up a list of matters that require the approval of the general meeting, a given category of shareholders, or one or more shareholders holding a certain percentage of the share capital. In order not to paralyze the company's management, it is important to keep the list short and to the point. It should be noted that the board of directors cannot be stripped of all its powers.

For public limited liability companies, the following powers are reserved to the board of directors and cannot be delegated to another corporate body, shareholder, or third party:

- Determining the company's general strategy and policy
- Supervising the company's management
- Appointing and removing members of the management committee
- Calling the general meeting of shareholders

- Drawing up the annual accounts
- Deciding to increase the capital within the limits of the authorised capital
- Deciding to distribute an interim dividend
- Making proposals to the general meeting of shareholders on capital increases outside the authorised capital
- Mergers
- Demergers and other types of reorganisations
- Winding-up of the company

If there is no documentation forming the joint venture or strategic alliance, is there a standard form that exists by default? Are there any attendant risks of falling within that category?

Any form of cooperation between two or more parties does not automatically qualify as a company. A company is an agreement on the basis of which two or more persons agree to contribute something for the purpose of performing one or more precisely described activities with a view to procuring a direct or indirect financial advantage for the partners. Therefore, as soon as parties contribute something with a view to sharing profit and loss, their cooperation will be qualified as a company. It is accepted that the default form of a company is an ordinary law partnership (*maatschap/société de droit commun*), a partnership without legal personality. Partners are—unless expressly agreed otherwise in writing with third parties—jointly and severally liable to third parties. The unlimited liability of the partners in an ordinary law partnership is of course a significant risk. In practice, when entering into a contractual joint venture, it is of the utmost important to carefully check whether the contract qualifies as an ordinary law partnership and, if so, consider the attendant risks. Finally, labeling an agreement differently when the constituent elements of an ordinary law partnership are present will not help the parties avoid joint and several liability. Indeed, the courts are not bound by and can ignore the characterization given by the parties to their agreement.

Becoming a Member/Partner

What are the different levels of equity and voting participation in the various forms of joint ventures and strategic alliances? How flexible is each of the structures?

In general, please refer to Table 2 in Structures above (especially with respect to nonvoting shares, warrants, profit shares, etc.).

In addition, with respect to public limited liability companies, please note that:

- When shares represent an equal percentage of the share capital, they each carry one vote.
- When shares do not represent an equal percentage of the share capital, the voting rights are determined based on the proportion of the share capital they represent, it being understood that the share representing the lowest percentage of the share capital shall have one vote and that fractions of votes are disregarded.
- Equal voting rights for shares issued at different prices can be achieved by allocating a portion of the issue price to the share capital and the remainder to an issue premium.

Although somewhat more flexible, the same rules apply to private limited liability companies.

The most flexible entity-based structure is the cooperative company.

From a tax point of view, a nil (or low) equity basis combined with substantial indebtedness may trigger application of the thin capitalization (or thin cap) rules. Belgium has a 5:1 debt-to-equity ratio: if the total indebtedness of the company exceeds five times the sum of its taxable reserves at the start of the relevant financial year and the paid-in capital at the end of that financial year, the interest on debt exceeding this ratio will no longer be tax deductible. This rule applies to inter alia all intragroup loans (group is defined in Article 11 of the Belgian Company Code). An anti-abuse measure provides that loans guaranteed or funded by a third party (bearing some or all of the risk associated with the loan, known as a “tainted third party”) shall be deemed extended by this third party. The disallowance of interest deductions will not lead to additional tax being due if the excess profit arising from the non-deductibility can be offset against losses carried forward or other deductions.

Further to Council Directive 2016/1164 of July 12, 2016, laying down rules against tax avoidance practices that directly affect the functioning of the internal market (ATAD Directive), the Belgian thin cap rules must be amended. According to the ATAD Directive, borrowing costs must be deductible in the tax period in which they are incurred only up to 30% of the taxpayer's earnings before interest, taxes, depreciation, and amortization (EBITDA). The directive gives the Member States more time (until 2024) to implement the EBITDA rule. Moreover, the interest limitation rule in the proposed ATAD Directive offers the Member States a number of options: exemption of up to €3 million on interest, standalone and PPS exclusion, transitional rules for existing loans, the transfer of non-deductible interest, etc.

What forms of contributions (e.g., cash versus in kind) may be made by members/partners?

The possible forms of contributions will vary depending on the corporate form. In general, there are three forms of contributions: contributions in cash, contributions in kind, and contributions of services.

Contributions in the form of services are only possible in partnerships. Please note, however, that profit shares, which do not represent share capital, can be issued in public limited liability companies in return for the contribution of services.

Contributions in kind in companies with limited liability are only possible if the contributed assets can be valued in monetary terms. Special reporting requirements apply to contributions in kind (reports by the board of director and the (statutory) auditor).

Should contributions to the joint venture or strategic alliance be documented? If so, what is the typical form of documentation?

The instrument of incorporation will, among other things, stipulate the contributions of each partner. Companies with unlimited liability do not require a notarial instrument for incorporation (except when real estate or intellectual property rights are contributed), a private agreement between the founders being sufficient. The founders can of course always opt to incorporate in front of a notary. Companies with limited liability require a notarial instrument. The same holds true for later contributions.

Although not required by law, contributions are often documented in subscription agreements.

For limited liability companies, the following additional documents and/or procedures are required:

- **Financial plan.** Upon incorporation, a financial plan justifying the share capital (and other resources and expected revenue) must be drawn up and provided to the notary. The financial plan is not made public but will be kept in the notary's file. It is important to draw up the financial plan with care, since if the company declares bankruptcy within three years following its incorporation, the founders can be held liable if it can be proven that the share capital upon incorporation was clearly inadequate to exercise the company's activity for at least two years. The financial plan is one factor that will be taken into account when assessing the founders' potential liability.

- **Special bank account.** Both upon incorporation and during the term of existence of a limited liability company, when a contribution in cash occurs, a special account must be opened with a Belgian bank in the name of the company (in formation), the amounts corresponding to the contribution must be wired to that account, and the bank must provide the notary with a certificate evidencing the availability of the funds.

- **Reports for contributions in kind.** Both upon incorporation and during the term of existence of a limited liability company, when a contribution in kind (a building, equipment, claims, etc.) is made, special reports on the proposed contribution must be drawn up by the founders (upon incorporation) or the board of directors / director(s) (during the company's term of existence) and the (statutory) auditor. The auditor's report shall contain a description of the contribution in kind and the valuation methods applied, an assessment of whether the resulting valuation corresponds at least to the number and (nominal or par) value and, as the case may be, the issue premium of the shares to be issued, and the actual consideration offered in return for the contribution. The founders' report (for contributions upon incorporation) shall explain why the contribution in kind is in the interest of the company and, if applicable, why they deviate from the auditor's opinion. The board of directors / director(s) report (for contributions during the company's term of existence) must explain why the contribution and the capital increase are in the interest of the company and, if applicable, why its report differs from the auditor's conclusions.

Are there any statutory or other requirements regarding the number (i.e., minimum or maximum) or type of members (as in age requirements or legal status; individual or juridical person) in the joint venture or strategic alliance?

Contractual Relationships

The minimum number of parties to a contractual joint venture is two. The law does not provide for a maximum number.

Entity-Based Structures

The minimum number and type of members will depend on the corporate form of the company and are governed by Belgian law and the company's articles of association. In principle, a company is incorporated by and must have at least two members/shareholders.

When choosing between forming a public limited liability company or a private limited liability company, it is advisable (for a private limited liability company) and required (for a public limited liability company) to have at least two founders and, subsequently, it is advisable for both corporate forms to have at least two shareholders during their existence.

- A public limited liability company must have at least two shareholders (natural or legal persons). If, during the company's term of existence, the number of shareholders drops to one for a period of more than a year, this sole shareholder shall be jointly liable with the company for all liabilities of the latter that arose from the time all shares were consolidated in the hands of this shareholder.

- A private limited-liability company can be established by one or more natural or legal persons. A private limited liability company established by one person is known as an *eenpersoons-BVBA/société privée à responsabilité limitée unipersonnelle*. A private limited liability company can become an *eenpersoons-BVBA/société privée à responsabilité limitée unipersonnelle* if one person acquires all of its shares (the paid-in capital, in this case, must reach €12,400 within one year unless, during that time, a new shareholder joins the company or the company is wound up). The sole shareholder shall be jointly liable with any other private limited liability company that (s)he incorporates afterwards or for which (s)he becomes the sole shareholder unless the shares are transferred to him or her upon death of a third party. Joint liability ceases when a new shareholder joins the company or the company is wound up. If a private limited liability company is established by a legal person or if, during the company's lifetime, the number of shareholders is reduced to one legal entity for a period of more than one year, the sole shareholder shall be held jointly liable with the company for all of the company's liabilities that have arisen as of the date on which it became the sole shareholder. Joint liability ceases when a new shareholder joins the company or the company is wound up.

A cooperative company may be incorporated by at least three natural or legal persons.

With respect to the type of members/shareholders, there are a number of requirements in order for persons to be able to perform legal acts in Belgium. A person must have reached the age of majority (18 years of age) and have full legal capacity in order to enter into a contract. In Belgium, a minor cannot be a shareholder (or, more accurately, cannot exercise shareholder rights independently). A guardian (*voogd/tuteur*) or parent must represent the minor for these purposes. If a minor does not have a guardian or a parent, the court can appoint a third party to represent him or her.

Can a public sector body be a member/partner in the joint venture or strategic alliance?

The federal government, communities, regions, provinces, municipalities, and other public authorities exercise many governmental tasks directly. However, some tasks in the public interest are exercised by individual legal entities or by public-private partnerships. Such legal entities can be incorporated by one or more governmental authorities and one or more private partners and can be contracted to carry out one or more, mostly governmental tasks. The incorporation of a public law legal entity and the setting up of public-private partnerships are subject to strict rules. Governmental authorities can only incorporate legal entities or set up public-private partnerships if a law, decree, or ordinance allows them to do so (and within the limits and scope thereof). In addition, the public procurement and state aid rules must be taken into account when cooperating with the private sector. Finally, the joint venture or strategic alliance must fit in with the constitutional tasks of the government/governmental authority.

Restrictive Covenants

What restrictive covenants can apply to members/partners relating to corporate opportunity, noncompetition and non-solicitation?

Restrictive covenants in joint venture agreements or shareholders' agreement are very common.

Noncompetition

A non-compete clause in a joint venture agreement, shareholders' agreement, share purchase agreement, employment contract, or other agreement is a provision that prohibits a shareholder (employee or consultant) from starting a competing business or working for a competitor for a specified number of years in a given geographic area after leaving the company. In order to be enforceable, the clause must be sufficiently precise. Consequently, a general non-compete clause is invalid. First, a non-compete provision should cover only activities similar to those carried out by the joint venture. Second, a non-compete clause must be geographically restricted to the countries, regions, or areas where competition can actually occur, taking into account the nature of the activities carried out by the joint venture. Third, the non-compete clause must be limited in time. A non-compete clause for a period of 12 months following a shareholder leaving the company is generally acceptable. Longer periods, from two to three years, also appear acceptable under certain circumstances (except with respect to employment contracts where the maximum term seems to be 12 months). It should be noted that a non-compete clause is in principle invalid if any of these conditions is not respected.

Non-solicitation

By signing a non-solicitation clause, a former shareholder (or a former employee or consultant) of the company agrees not to solicit employees or consultants of the company to leave their current position. Non-solicitation clauses are in principle less heavily negotiated than non-compete clauses.

Confidentiality

Other restrictive covenants often seen in joint venture documentation are confidentiality provisions prohibiting shareholders (employees or consultants) from using confidential information during and after leaving the joint venture or strategic alliance.

Doctrine of Corporate Opportunity

In addition to restrictive covenants, Belgian law provides for a general duty of loyalty. A duty of loyalty is applicable to shareholders and directors in their relations with the company and among themselves, even if not provided for in a contract. Although not provided for by the Belgian Company Code, the corporate opportunity doctrine, which is based on the duty of loyalty, should also be borne in mind. A corporate opportunity refers to any business opportunity that may benefit the company and that should thus be deemed a corporate asset. The corporate opportunity doctrine has only recently received attention in Belgian literature and, in the absence of substantive case law on the subject, is mostly based on U.S. examples.

Pursuant to the corporate opportunity doctrine, directors, officers, and shareholders in a company should not appropriate the company's opportunities for themselves without first disclosing the opportunity to the board of directors / director(s) of the company and obtaining consent from the board/director(s) to pursue the opportunity. Sanctions for violation of the corporate opportunity doctrine may include directors' liability, damages, removal of a director and, in the event of unfair competition, cessation of the offending activity.

Management

How is the joint venture or strategic alliance managed in the different structures? Are there statutorily mandated supermajority provisions?

In general, a company is managed by one or more directors or a board of directors.

Limited liability companies also have a general meeting of shareholders. The general meeting has the power to approve the annual accounts (discharge the directors and the statutory auditor, decide on the distribution of dividends), initiate claims against directors, appoint, remove and determine the remuneration of directors and the statutory auditor, amend the articles of association, and vote on mergers and demergers, contribution of a branch of activity, winding-up, etc.

An ordinary general meeting must be held annually within six months from the close of the financial year, on the date and at the time stipulated in the articles of association. For companies with limited liability, decisions by the general meeting are in principle (see the exceptions below) adopted by a simple majority of votes cast and without a quorum being required, unless the articles of association provide otherwise. For other corporate forms, decisions must in principle be adopted unanimously, unless the articles of association provide otherwise.

An extraordinary general meeting must be called to vote on amendments to the articles of association of a private limited liability company, a public limited liability company, a cooperative company, and a partnership limited by shares. The Belgian Company Code provides that for these corporate forms, the following quorum and majority requirements apply to amend the articles of association: a quorum of at least half the share capital and a majority of at least three quarters of the votes cast. More stringent quorum and majority requirements apply for instance to amend the company's corporate purpose.

What mechanisms are there for resolving deadlocks on major decisions?

A deadlock on major decisions can always occur in a joint venture, especially in a 50-50 joint venture.

Therefore, it is important to acknowledge the risk of deadlock from the outset of the joint venture and to create mechanisms to avoid and/or resolve them. Various mechanisms can be considered, including:

- Deciding vote (tiebreaker) by the chair
- Deadlock provision in the joint venture or shareholders' agreement. A deadlock provision is a provision that determines how disagreements on key issues are to be resolved in relation to the management of the joint venture. Deadlock provisions often introduce cooling-off periods (during which the parties can try to reach a consensus on a deadlocked matter) and often lift the matter to higher management echelons within the shareholders' corporate structures. If at the end of the procedure, the matter still cannot be resolved, the following mechanisms may apply.
- Binding third-party decision
- Deadlock put option, allowing a minority shareholder in the event of a deadlock to sell all of its shares to the majority shareholder (or to a group of majority shareholders on a pro rata basis) at fair market value (agreed by the parties or determined by an independent expert or a committee of independent experts) or a determined price
- Deadlock put option is often combined with a deadlock call option. If the minority shareholder does not exercise the deadlock put option within six weeks from the time it is entitled to do so and if the shareholders have not reached a consensus on the matter during this period, the majority shareholder (or a group of majority shareholders pro rata) will be entitled to purchase all of the minority shareholder's shares at fair market value (determined by the parties or, if no agreement can be reached, by an independent expert or a committee of independent experts) or a determined price.

Note that under Belgian law a deadlock put option, alone or in combination with a deadlock call option, may be limited by the prohibition on unconscionable clauses (l*eeuwenbeding/clause léonine*), as discussed in more detail in this Guide above. This prohibition applies to all companies described and states that agreements allocating all profits to one or more shareholders or releasing one or more shareholders from their duty to cover the company's losses are null and void (Article 32 of the Belgian Company Code).

A number of dispute resolution procedures are provided for by the Belgian Company Code (e.g., expulsion or resignation of a shareholder) and, ultimately, the winding-up of the company can be requested.

What procedures apply for removing managers in joint ventures and strategic alliances?

In principle, directors may be removed from office *ad nutum* or at will (i.e., without grounds for removal being required and without notice). This principle is considered to be a matter of public policy in public limited liability companies.

In a private limited liability company, a director can be appointed for a limited or unlimited period of time. In addition, a permanent director (*statutaire zaakvoerder /gérant statutaire*) can be appointed. Such a director holds office for the company's entire term of existence. A permanent director can only be removed (1) unanimously by the shareholders or (2) for serious cause (e.g., the director is declared incompetent, is seriously ill for an extended period of time, displays a complete lack of interest in the company's affairs, etc.). As a result, a permanent director holding at least one share in a private limited liability company can de facto not be removed from office. The possibility to appoint a permanent director is interesting for a number of reasons (e.g., to ensure the representation of minority shareholders in the management of the company, representation (or even control) of management of the company for the pater familias in the framework of succession structures, etc.).

Allocating Profits, Losses, and Distributions

How are profits, losses, and distributions allocated among partners/members? Are there legal or regulatory restrictions that may limit the ability of the partners/members to make such allocations on their own?

In principle, profits are allocated in proportion to the contributions of the partners/shareholders, unless the articles of association provide otherwise.

It is important to bear in mind that the shareholders can allocate the profit, risk, and liabilities amongst themselves in the instrument of incorporation, the articles of association, a shareholders' agreement, or elsewhere (e.g., an option agreement). Disproportionate treatment is allowed, provided the shareholders are treated fairly. Under Belgian law, the possibility to treat shareholders disproportionally is limited by the prohibition on unconscionable clauses (*leeuwenbeding/clause léonine*). This prohibition applies to all companies described and states that agreements allocating all profits to one or more shareholders or releasing one or more shareholders from their duty to cover the company's losses are null and void (Article 32 of the Belgian Company Code).

For companies with limited liability, no allocation of profits is allowed if, at the close of the financial year, the net asset value has dropped below or will, as a result of the allocation, drop below the paid-up capital (or the called-up capital, whichever is higher) plus those reserves that cannot be distributed by law or pursuant to the articles of association. In addition, at least 20% of the net profits should be set aside each year and placed in a statutory reserve; this obligation ends when the reserve reaches 10% of the share capital (or fixed share capital for a cooperative company with limited liability).

From a tax point of view, net operating losses carried forward may be forfeited in the event of a change in control of the company, except in the case of legitimate financial or economic needs. This concept is not defined in the law. The legislative history, however, provides an example of such needs: if further to a change in control of a company in financial difficulty both the employment and the business carried on prior to the change in control can be maintained and preserved. A ruling can be obtained to confirm (1) whether or not there is a change in control and, if this is the case, (2) whether legitimate financial or economic needs exist. Obtaining such a ruling generally takes three to six months.

Indemnification

What indemnification provisions would apply in a joint venture or strategic alliance?

In theory, there is freedom of contract with respect to indemnification between the parties.

The parties can in principle be exonerated for misconduct, even willful misconduct (pursuant to most legal scholars), but not fraud. Exoneration for criminal penalties and fines is in general not accepted.

Exit or Termination

How is a joint venture or strategic alliance terminated?

Contractual Relationships

The terms for the termination of a contractual relationship are stipulated in the agreement. If the agreement has an indefinite term, it can be ended with a reasonable notice period.

A special partnership is wound up automatically when the purpose for which it was formed ends. In addition, special partnerships can be wound up unanimously by the partners or by a court for serious cause (e.g., serious differences of opinion between the partners making it impossible to work together, serious and continuous abuse of majority rights, the long-term illness of a partner, etc.).

With respect to companies without legal personality, the general rules on the division of estates between heirs will apply to the partners. In principle, the liquidation proceeds will be divided among the partners pro rata to their contributions. As is the case with the distribution of profits, liquidation proceeds can be allocated disproportionately amongst the partners. Disproportionate allocations of liquidation proceeds cannot however violate the prohibition on unconscionable clauses. This prohibition applies to all companies described and states that agreements allocating all profits to one or more shareholders or releasing one or more shareholders from their duty to cover the company's losses are null and void (Article 32 of the Belgian Company Code).

In any case, it is advisable to include detailed provisions with respect to termination and the procedure to be followed in the event of termination in the joint venture agreement.

Entity-Based Structures

With respect to companies with legal personality, the following methods of termination of the joint venture are worth mentioning:

- **Automatic winding-up *(ontbinding van rechtswege/dissolution de plein droit).*** The company terminates upon expiration of the period for which it was incorporated or completion/extinction of the purpose for which it was formed.

- **Winding-up due to termination *(ontbinding ingevolge opzegging/renonciation).*** This form of winding-up is only applicable to general partnerships and limited partnerships entered into for an indefinite period and occurs by way of a declaration by one or more partners that they no longer wish to be part of the partnership.

- **Judicial winding-up *(gerechtelijke ontbinding/résolution judiciaire)***. Judicial or involuntary winding-up can occur when there is a reason stipulated in the law and, for companies with limited liability, when the net asset value drops below the amount provided for by the Belgian Company Code (€61,500 for public limited liability companies and €6,200 for private limited liability companies and cooperative companies). Winding-up can be ordered at the request of an interested party or a shareholder for serious cause. So-called dormant companies (i.e., those that have not filed annual accounts for three consecutive years) can be wound up at the request of any interested party or the public prosecutor.

- **Voluntary winding-up *(vrijwillige ontbinding/dissolution volontaire).*** Voluntary winding-up requires an amendment to the articles of association, which must be approved by the general meeting of shareholders in accordance with the quorum and majority requirements stipulated by the Belgian Company Code (see also answer to question: *How is the joint venture or strategic alliance managed in the different structures? Are there statutorily mandated supermajority provisions?*). The Belgian Company Code provides in detail the procedure for voluntary winding-up and liquidation.

For private limited liability companies, public limited liability companies, cooperative companies with limited liability, and partnerships limited by shares, a statement of assets and liabilities no older than three months must be prepared as well as a (statutory) auditor's report on the statement of assets and liabilities and a special report by the board explaining why it proposes liquidation. Subsequently, an extraordinary general meeting will be held before a notary to vote on the winding-up and liquidation of the company. With respect to general partnerships and limited partnerships, no notarial instrument is required, but the decision by the partners must be taken by at least half the partners holding at least three quarters of the company's capital.

At this stage liquidation starts, which is in principle a very formal, lengthy, and costly procedure.

However, a company can also be dissolved and liquidated by way of a single document if the following cumulative conditions are met:

- No liquidator is appointed.

- No liabilities appear from the statement of assets and liabilities (all liabilities have been settled or the necessary funds have been consigned).

- All shareholders are present or validly represented at the extraordinary general meeting and the decisions are taken unanimously.

- The remaining assets will be transferred to the shareholders.

If an auditor's report must be drawn up, it must mention the fact that the liabilities have been settled or that the necessary funds have been consigned. In practice, we notice that more and more companies opt to fulfil these conditions in order to qualify for simplified winding-up and liquidation.

If the above conditions for simplified winding-up and liquidation are not fulfilled, the normal liquidation formalities must be complied with, which include:

- Petition to the commercial court requesting confirmation of the appointment of the liquidator(s)

- Court hearing to confirm the appointment of the liquidator(s)

- Confirmation by the commercial court of the appointment of the liquidator(s)

- Liquidation of the company by the liquidator(s)

- Preparation of a draft distribution plan by the liquidator(s)

- Petition to the commercial court requesting approval of the draft distribution plan

- Approval of the draft distribution plan by the commercial court

- Preparation of draft liquidation accounts by the liquidator(s)

- Auditor's (or statutory auditor's) report on the liquidation accounts

- Preparation of a draft liquidation report

- Unanimous written resolutions by the shareholders or general meeting resolving to close the liquidation

- Publication of the close of liquidation

- Deregistration of the company with the Crossroads Enterprise Database
- Deregistration of the company with the VAT authorities
- Filing of an income tax return for the period between the filing of the latest annual accounts and the closing date of liquidation
- If applicable, drawing up of a certificate that the conditions to withhold tax are satisfied and the filing of a tax return for the liquidation proceeds

Bankruptcy proceedings, while not a way to terminate a joint venture, should be mentioned here for the sake of completeness. If the conditions for bankruptcy are met, a company must file for bankruptcy and, after the bankruptcy proceedings are closed, the company is wound up and ceases to exist.

Is the termination of a joint venture or strategic alliance subject to the approval of any governmental body?

No approval of governmental bodies is required. However, the commercial court in liquidation proceedings or the commercial court, trustee in bankruptcy, etc. in bankruptcy proceedings plays an important role. Furthermore, where activities require permits, licenses, etc., additional notifications to or consent from governmental bodies may be required.

Foreign Members/Partners

What statutes or rules govern joint ventures or strategic alliances with foreign parties?

There are no specific rules governing joint ventures with foreign parties. Belgian law (including the Belgian Civil Code and the Belgian Company Code) will apply.

What constitutes a "foreign" member or partner of a joint venture or strategic alliance? If there is an attribution rule that traces the ultimate ownership of a local member/partner to a foreign entity, what are the equity-holding and voting-rights thresholds for deeming "control" at each ownership chain?

The Belgian Company Code does not contain a definition of a foreign member or partner of a joint venture or strategic alliance.

With respect to how control is construed in Belgian corporate law, it should be noted that control over a company is defined as the power de jure or de facto to exercise a decisive influence on the appointment of a majority of the company's directors or the orientation of its policy.

De jure control is irrefutably presumed:

1. From possession of a majority of the voting rights attached to the company's shares
2. When a shareholder has the right to appoint or dismiss a majority of the company's directors
3. When a shareholder, pursuant to the articles of association or agreements entered into with the company, has the power to control the company
4. When a shareholder, pursuant to an agreement entered into with other shareholders, holds a majority of the voting rights attached to the company's shares –and–
5. In the event of joint control

De facto control results from factors other than those mentioned above. A shareholder shall be deemed, unless proven otherwise, to have de facto control over a company when that shareholder has, at the last and next-to-last general meetings, exercised voting rights representing a majority of the voting rights attached to company's shares represented at those meetings.

Both domestic and foreign investors in joint ventures are subject to the rules and regulations on the prevention of money laundering and terrorist financing. The Act of 11 January 1993 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, as amended (the AML Act), governs the prevention of money laundering and terrorist financing. The AML Act implements Directive 2005/60/EEC of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (e.g., the obligation to identify and take adequate risk-based measures to verify the identity of ultimate beneficial owners (UBOs)). A UBO is a natural person on whose behalf a transaction is executed or a client relationship is entered into or a natural person who ultimately owns or controls the client.

Do such statutes or rules have any limitations regarding foreign members/partners in a joint venture or strategic alliance?

No restrictions on the level of participation or management are stipulated in the Belgian Company Code; however, the articles of association (or other agreements among partners/shareholders) can provide otherwise. In addition, depending on the activities conducted and the sector in which these activities are conducted, among other factors, certain European, federal, regional, or local rules and regulations may apply to the industry in which the joint venture or strategic alliance operates, which could impact the entity. Furthermore, certain activities will require permits, licenses, etc. Regulator consent is often required in order to become a shareholder in a regulated entity (e.g., a financial institution), as well as for management and, in general, corporate governance decisions. Other sectors in which limitations typically apply are the energy sector and aviation sector.

What permits, consents, or registrations are required by foreign members/partners of a joint venture or strategic alliance?

With respect to foreign partners and shareholders of entity-based structures, no specific forms of consent or registrations apply (see below for more information). However, if the foreign partners or shareholders (or other foreign nationals) carry out activities in Belgium as an employee or self-employed person, this conclusion could be different.

In order to work as an employee or carry out self-employed activity in Belgium, the following permits or consent are required for non-EU nationals (i.e., nationals of countries other than the EU Member States, Iceland, Norway, Liechtenstein, and Switzerland).

Non-EU nationals are not allowed to work in Belgium on the basis of an employment contract alone. They must also hold a work permit, which is in principle valid for one year, but can be renewed.

An application must be filed with the work permit authorities before the employee enters the Belgian territory.

Certain categories of non-EU nationals are exempt from the obligation to obtain a work permit (e.g., persons taking part in a traineeship for a limited period of time, persons attending meetings, or on a business trip for a limited period of time, etc.).

Belgian law provides for the imposition of criminal, civil, or administrative sanctions on both the employer and the employee if foreign nationals are employed in violation of the above rules.

Once a work permit has been obtained, the employee must apply for a residence permit from the Belgian consulate/embassy at his or her place of residence abroad.

Any non-EU citizen who performs self-employed professional activities in Belgium, either as an individual or on behalf of a company, must have a professional card. In order to obtain a professional card, a non-EU citizen must file an application. After having obtained a professional card, the non-EU national must apply for a residence permit. This rule does not apply to non-EU nationals who live abroad and who are only on a business trip to Belgium, provided the total duration of their visits to Belgium does not exceed three months during any six-month period. Trips to Belgium by non-EU nationals to attend board or shareholders' meetings are considered business trips, for which no professional card is required, provided these individuals are not involved in the day-to-day management of the company.

In addition to the general requirements applicable to all self-employed persons, special formalities apply to certain categories of self-employed individuals relating to the entrepreneurial skills required by a given trade or profession (e.g., basic knowledge of management) and in order to obtain specific licenses or permits.

Further, every foreign employer/self-employed person must complete a mandatory electronic declaration (the so-called Limosa declaration) for the National Social Security Office (ONSS/RSZ) for each employee (as of January 1, 2017, the obligation for self-employed persons will be limited to certain sectors) seconded to Belgium, prior to the employee's/self-employed person's arrival in Belgium. Certain categories of seconded employees and self-employed persons are exempt from the Limosa requirement.

Are there any economic incentives for foreign direct investments in a joint venture or strategic alliance?

Like most EU Member States, Belgium is keen to attract business, including joint ventures, with foreign investors. The following tax advantages and/or incentives are worth mentioning and are applicable to both domestic and foreign joint ventures.

Belgium actively supports R&D and IP-heavy businesses by means of a variety of tax incentives, some focused on companies and some on employees. Belgium is continually improving and extending these incentives.

The main corporate tax incentives are:

- **Accelerated depreciation.** Assets used in R&D may qualify for accelerated three-year (rather than five-year) depreciation.
- **R&D investment deduction.** In addition to ordinary depreciation of research costs, a company is allowed an additional one-shot or spread investment deduction for R&D investments, resulting in a "super deduction" of up to 120.5% of the investment.

- **Patent income deduction (PID).** The Act of 3 August 2016 abolished the current Belgian PID as of July 1, 2016, albeit accompanied by a (optional) transition period of five years. The reason for this abolition can be found in the Base Erosion and Profit Sharing (BEPS) action plan that aims to prevent harmful tax practices. On February 2, 2017, the House of Representatives adopted the draft bill providing for a new tax deduction for innovation income. The new rules will enter into force on the law's publication date in the Belgian State Gazette and will apply with retroactive effect as of July 1, 2016. Under the new rules, the PID will be broader and extend to copyright-protected software, plant breeders' rights, and orphan drug designations. Furthermore, the deduction is expected to be raised to 85%, from the currently applicable 80%, and it will be possible to carry forward excess deductions to future financial years.

- **Notional interest deduction (NID).** Belgian corporate taxpayers (and foreign corporate taxpayers with a permanent establishment in Belgium) can benefit from a tax deduction corresponding to a percentage of fictitious interest on their adjusted equity.

- **Well-established advanced tax ruling practice.** From 2003, a taxpayer is able to request from the Advance Ruling Commission (*Dienst voorafgaande beslissingen in fiscale zaken / Service des Décisions Anticipées en matière fiscale*) a formal ruling on all tax queries, unless the relevant tax law specifically indicates that a ruling may not be requested. A ruling binds the tax authorities. A ruling is generally valid for a period that may not exceed five years, but may be granted for a longer period in certain cases.

- **R&D salary withholding tax incentive for qualifying companies.** Eighty percent of the taxes withheld on wages for qualifying researchers need not be remitted to the tax authorities. This incentive results in an approximately a 25% decrease in the salary cost of a researcher working on qualifying R&D projects.

- **Expat tax status for qualifying executives and researchers.** Certain foreign executives and researchers temporarily assigned to Belgium are granted non-resident tax status (i.e., they are only taxable on income sourced in Belgium) and may receive tax-free allowances of up to €29,750, reimbursement of certain expenses (installation costs, school fees, etc.), and a business travel exclusion.

- **Other employment-related tax benefits.** R&D premium (i.e., a premium of up to one month's gross salary per employee that is exempt from social security contributions and taxes in the hands of the employee and tax deductible for the company), etc.

Are there mandatory minimums or maximum equity investments or contributions for a foreign joint venture or strategic alliance member/partner?

No, this is not the case under Belgian corporate law. The same minimum capital requirements apply to companies incorporated by foreign or Belgian partners and shareholders.

Are there any restrictions regarding distributions to, or repatriation of profits by, foreign partners/members?

No, this is not the case under Belgian corporate law.

This is also not the case under Belgian tax law. However, please note that repatriation of profits may trigger taxation in Belgium (as defined by the ITC and limited by any applicable tax treaties).

Moreover, under certain circumstances, the payment of dividends by a Belgian company may give rise to fairness tax. The fairness tax is a separate assessment at a rate of 5.15% borne by the company distributing the dividends. The fairness tax is not the same as the withholding tax borne by the beneficiary of the dividend and constitutes a separate levy.

The tax is only applicable if, during the tax period in question, on the one hand, dividends were distributed by the company and, on the other hand, all or part of the taxable profit was offset against the notional interest deduction and/or carried-forward tax losses. Hence, the fairness tax is not applicable when a company distributes dividends in a given year if it has not used the notional interest deduction and/or carried-forward tax losses to offset taxable profits in that year.

The fairness tax is currently being challenged before the Court of Justice of the European Union. On November 17, 2016, Attorney-General Kokott stated that the fairness tax constitutes a violation of Article 4 of the Parent-Subsidiary Directive: when a Belgian company receives dividends from a subsidiary, these dividends, which should be tax exempt, are subject to the fairness tax upon redistribution by the Belgian company.

Last but not least, all payments between a company and related parties should be at arm's length. This principle is codified in Article 185(2) ITC and enables both upward and downward corresponding adjustments for non-arm's-length payments between related parties. If a payment made by the company is not at arm's length (i.e., too high), this could give rise to an upward adjustment of its profits. This will not result in additional (effective) taxation if the additional profit arising from the adjustment can be offset against losses carried forward or other deductions. This applies to any payment (interest, royalties, management fees, etc.).

Before enacting Article 185(2) ITC, the Belgian tax authorities made use of other, more general, provisions in the ITC to challenge transfer prices. These general provisions still exist and are still relied on by the tax authorities. The most relevant for our purposes are:

- **Article 49 ITC.** This provision sets out the general rule on the deductibility of (business) expenses. It stipulates that a tax deduction is allowed only if an expense is incurred for the benefit of the taxpayer and is connected with the taxpayer's business activity. Lately, the application of this rule has been more closely monitored before relief is granted, particularly with respect to fees paid to companies to serve as directors or fulfil similar functions and for management services.

- **Article 55 ITC.** This provision relates to interest payments. It provides that interest is a tax deductible business expense, but only if the rate does not exceed normal rates after taking into account the specific risks of the transaction, in particular the financial situation of the debtor and the terms of the loan.

- **Article 53(10) ITC.** This article provides for the non-deductibility for any excessive expenses (unlike Article 55 ITC, which is limited to interest payments). To the best of our knowledge, no case law exists on the application of this article in the context of transfer pricing.

- **Article 26 ITC.** This article allows the tax administration to increase the tax base of a company or enterprise where the authorities can demonstrate that profit transfers represent an "abnormal or non-arm's-length benefit" to individuals or companies established in Belgium or abroad. This applies to any advantage granted by the company (interest, royalties, management fees, etc.) unless the beneficiary of the advantage is taxed (in Belgium) on it.

- **Article 207 ITC.** This article provides that a Belgian company that receives (directly or indirectly) abnormal or gratuitous benefits from a company on which it is directly or indirectly dependent may not use any current losses or losses carried forward or apply certain other deductions against the taxable income arising from the benefit.

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