

THE TRIANGULAR MERGER

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The triangular merger process may be central for cross-border acquisition of a company established in the United States. Through this process, the shareholders of the target company shall receive shares of the mother company of the acquirer.

Cross-border merger mechanism

In the context of certain acquisition transactions governed by the laws of a US state, Belgian practitioners are asked to implement transactions referred to as either “triangular mergers” or “reverse triangular mergers”:

Triangular merger

In a “triangular merger” transaction, all assets and liabilities of a target company are transferred to a subsidiary of a parent company, it being understood that the shareholders of said target company are granted shares of the parent company instead of shares of the acquiring subsidiary.

Reverse triangular merger

In a “reverse triangular merger” transaction, the target company acquires all assets and liabilities of the subsidiary of a parent company of the acquiring group, it being understood that the shareholders of said target company contribute in that context their target company's shares to the parent company, in exchange for shares of the parent company. Such mechanism allows preventing the winding-up of the target company, along with the difficulties resulting therefrom, for instance as regards to the transfer of certain assets or the request of administrative authorisations.



Process under US law

Under the state laws, said transaction is based on the general rule according to which the shareholders of an acquired company may be granted, as a result of the merger, a consideration other than shares of the acquiring company.

The shares held in the acquired company are in such case converted into a right to receive not only shares of the acquiring company, but instead also transferable securities, movable assets or cash as referred to in the draft terms of merger.

In principle, that conversion does not take place by operation of law but requires the setting-up of a process enabling the exchange of shares against the abovementioned right.

Belgian law

A simplification of the definition of merger under the laws of Belgium would allow the regulation the triangular merger transactions, as it has been done under Dutch law to a certain extent.

The triangular merger transactions involving a company governed by the laws of a US state may however be implemented by a parent company organised under Belgian law*.

Modalities for the parent company organised under laws of Belgium

Hence, where the triangular merger transaction implies both an acquiring and an acquired companies subject to state laws in the US, and where the consideration attributed to the shareholders of the acquired company for the merger only consists in shares of a parent company organised under the laws of Belgium, the transaction is implemented as follows :

1. The parent company, its subsidiary and the target company enter in principle into an agreement under which the subsidiary and the target company undertake to merge; the shareholders of the target company agree on the merger, provided that they are attributed shares of the parent company as a result of the transaction, and the parent company undertakes to issue the shares required to implement the transaction.
2. The merger takes place between the subsidiary and the target company without the parent company being involved therein (it not being a “*constituent corporation*”). The assets and liabilities of the target company are transferred to the subsidiary and the shareholders of the target company are granted shares of the subsidiary.
3. As far as the parent company is concerned, the transaction takes the form of a mere capital increase – if applicable, within the framework of the authorised capital –, as a result of which each shareholder of the target company contributes to the parent company the shares newly issued and held in the subsidiary, the merger then coming into effect. The process must be organised in such a way that the shares issued by the subsidiary may be subject to such contribution.

The sequence of such transaction, as well as the proper drafting of the merger agreement and of the contribution deed, prevent any inconsistencies between the legal systems concerned.

* For further details : T. TILQUIN et J.-A. DELCORDE, « Les restructurations transfrontalières en droit belge », in *Fusions transfrontalières de sociétés : droit luxembourgeois et droit comparé*, Bruxelles, Larcier, 2011, p. 212 et s.

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