

# IBA Guide on Shareholders' Agreements

## Belgium

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### **1. Are shareholders' agreements frequent in Belgium?**

Shareholders' agreements are frequently entered into in Belgium.

### **2. What formalities must shareholders' agreements comply with in Belgium?**

There are no Belgian laws imposing specific formalities to which shareholders' agreements must comply.

As with any other private agreements, shareholders' agreements must be made in as many originals as there are parties, and they must be dated and signed by all parties involved.

There are no obligations as to filing with authorities, nor as to formal notifications to any party whatsoever. The company itself must not be a party to the shareholders' agreement.

### **3. Can shareholders' agreements be brought to bear against third parties such as purchasers of shares or successors?**

Shareholders' agreements are only binding upon the parties to the shareholders' agreement and to their heirs and legal successors (unless the latter are explicitly excluded).

In principle, third parties can not be forced to respect shareholders' agreements, nor can they derive any rights thereout.

On the other hand, third parties must recognise the existence of the shareholders' agreements and must recognise their consequences between contracting parties.

In exceptional situations a third party can contest the validity of an agreement (the *actio pauliana* in case an agreement is made with a fraudulent intention to harm a third party), or a third party can issue a direct claim against a party to the contract to respect its contractual obligation.

A third party can be held liable if, knowing that a contractual relationship existed, the third party actively participated in or facilitated the breach of contract by a party to that contract.

A buyer of shares is a third party. Shareholders' agreements often include a clause which obliges a transferor to obtain from the transferee, prior to the transfer of the shares, that the transferee will adhere to the shareholders' agreement upon becoming a shareholder.

### **4. Can a shareholders' agreement regulate non-company contents?**

The Belgian law does not prevent shareholders' agreements from regulating non-company matters, in addition to customary corporate issues.

It is, for instance, common practice to include confidentiality clauses or non-competition clauses in a shareholders' agreement.

#### **5. Are there limits on the term of shareholders' agreements under the law of Belgium?**

Whether or not the term of a shareholders' agreement is limited by law depends on its content.

Stand still clauses must be limited in time and must be justified in the interest of the company.

The same principle applies for voting arrangements between shareholders in general meeting. While such arrangements are explicitly made possible by law, such arrangements must be limited in time and must be justified in the interest of the company.

So, it is common practice to set out a limited duration in the shareholders' agreements, in most cases their duration is limited to ten years. A renewal is possible.

#### **6. Are shareholders' agreements related to actions by directors valid in Belgium?**

It is common practice to include in shareholders' agreements clauses regarding: the composition of the board of directors; the way different shareholders are represented on the board; the powers of the board; the quorum and majorities required; the powers of the managing directors; the representation powers; and the frequency of the organisation of the board of directors.

Such clauses are valid as long as they respect the mandatory rules regarding those topics laid down in the company law and do not excessively limit the voting rights of the shareholders.

Most of those rules will also be covered in the articles of association of the company.

Limitations to the powers of the board of directors and the repartition of the tasks between the directors can validly be agreed in shareholders' agreements and articles of association but those limitations are not enforceable towards third parties even if published in the Belgian State Gazette. On the other hand, agreements on the joint or individual representation powers are enforceable towards third parties.

#### **7. Does the law of Belgium permit restrictions on the transfer of shares?**

The most common types of company in Belgium are the Private Limited Liability Company ("Société Privée à Responsabilité Limitée" – "Besloten Vennootschap met Beperkte Aansprakelijkheid") and the Limited Liability Company ("Société Anonyme" – "Naamloze Vennootschap").

In a Private Limited Liability Company, the transfer of shares is already limited by law imposing a right of refusal in case of a transfer to parties other than a shareholder. The refusal can be challenged in court and if it is considered abusive then the refusing shareholders have three months to find a buyer for the shares. In the event of failure to propose such a buyer, the shares can be transferred notwithstanding the refusal. Shareholders' agreements often include more stringent rules including pre-emption rights, tag along and drag along rights and/or more precise procedures as to how those rights can be exercised.

In a Limited Liability Company, in principle the shares can freely be transferred without restriction. It is common practice to include in the articles of association or in a shareholders'

agreement restrictions to the transfer of shares by including a right of refusal, pre-emption rights, tag along and drag along rights and/or precise procedures as to how those rights can be exercised.

Article 510 of the Company Code sets out that the non-transferability clauses must be limited in time and must be in accordance with the company's interest. In the event that the limitation is the result of approval clauses or pre-emption rights, the non transferability may not last longer than six months from the date of the request of approval or invitation to exercise the pre-emption right.

## **8. What mechanisms does the law of Belgium permit for regulating share transfers?**

The type of mechanism used in shareholders' agreements will be influenced by the shareholders' structure, the nature of the shareholders (e.g. private equity fund, family-owned business...) and the relationship between the shareholders.

Common mechanisms that are used are:

- Standstill clauses

This is a clause which forbids the shareholders during a specific period to transfer any share.

According to Belgian law, standstill clauses must be limited in time and must be in accordance with the company's interest.

- Approval clauses

Approval clauses aim to limit the free transferability of the shares. The shares may only be transferred after approval.

In Belgium, a refusal will typically include an obligation to find another buyer since, under Belgian law, a refusal may not block the transfer of shares for more than six months as from the date of the request of approval.

- Pre-emption right clauses

In case of a transfer of shares the shares must first be offered to the other shareholders.

Under Belgian law, pre-emption clauses may not block the transfer of shares for more than six months as from the date of the invitation to exercise the pre-emption right.

- Tag along right

A contractual obligation aimed to protect a minority shareholder.

If shareholders, owning shares exceeding an agreed threshold, sell their shares, then the other shareholders have the right to join the transaction and sell their shares under the same conditions.

- Drag along right

A contractual obligation included mainly to protect a majority shareholder or an external investor (e.g. private equity fund).

If shareholders, owning shares exceeding an agreed threshold, sell their shares, then those shareholders have the right to force the other shareholders also to sell their shares in order to make it possible to realise a 100% transfer.

The clause will in most cases specify conditions under which the right can be triggered (e.g. minimum selling price).

- Put option

An option clause that gives the beneficiary the right, but not the obligation, to sell a specified number of shares at a specified price within a specified time period. The clause will, in most cases, specify conditions under which the right can be triggered.

- Call option

A clause that gives the beneficiary the right (but not the obligation) to buy shares at a specified price within a specific time period. The clause will, in most cases, specify conditions under which the right can be triggered.

## **9. In Belgium, do bylaws tend to be tailor-drafted, or do they tend to use standard formats?**

Depending on the requirements of the client, the bylaws are standard or tailor-made.

If a company has shareholders of different categories or shareholders which might have different interests, the standard formats will in most cases be completed with tailor-made clauses.

## **10. What are the motives in Belgium for executing shareholders' agreements?**

In Belgium the rights of shareholders are regulated by law, in the articles of association or shareholders' agreements.

Shareholders' agreements offer the advantage that they are more flexible to agree on. A modification of the articles of association requires specific formalities to be respected.

Shareholders' agreements will often also cover items which go beyond the scope of the articles of association of the company.

Shareholders' agreements also offer the advantage that agreements can be made between specific shareholders without having to involve all shareholders of the company.

Shareholders also often opt for shareholders' agreements instead of clauses in articles of association for confidentiality reasons. The articles of association of a company constitute a public document which can be consulted by everybody. Shareholder' agreements are private documents and the parties thereto often do not want to disclose to third parties the agreements they have made between each other.

On the other hand, to improve the enforceability of some clauses of shareholder's agreements, parties will often undertake to amend some clauses of the articles of association in conformity with the shareholders' agreements.

### **11. What contents tend to be included in shareholders' agreements in Belgium?**

Contents that tend to be included in shareholders' agreements are:

- The business and objectives of the company;
- The financing of the company;
- The transfer of shares and exit clauses;
- The composition and decision-making process of the board of directors;
- The decision-making process in the general meeting;
- Reporting obligations to shareholders;
- Policies regarding allocation of profits;
- Procedures to solve conflicts of interest;
- Procedures to solve deadlock situation;
- Confidentiality issues;
- Non-competition issues.

### **12. What determines the contents included in shareholders' agreements in Belgium?**

The contents of shareholders' agreements will mainly be influenced by the type of shareholders in the company, their reasons to be (come) a shareholder and their mutual relationships. For instance, the shareholders in a family-owned business will have other interests to protect in shareholders' agreements than shareholders in a company of which private equity funds are important shareholders. The more diverse and complex the mutual relationships between shareholders are, the more complex the shareholders' agreements tend to be.

### **13. What are the most common types of clause in shareholders' agreements in Belgium?**

Shareholders' agreements tend to include clauses relating to the following matters, among others:

- Description of the business and common objectives;
- Funding of the business;
- Clauses on the transfer of shares, such as lockup clauses, approval clauses, pre-emption rights, tag along rights, drag along rights, put options, call options, exit clauses in case of deadlock;
- Clauses regarding the composition of the board of directors: number of directors, representation of the different categories of shares in the board, nomination of chairman and CEO;
- Clauses regarding the decision-making process in the board: number of meetings, quorum, majorities and qualified majorities, powers of the directors, deadlock resolution, daily management, representation towards third parties;
- Clauses regarding the decision-making process in the general meeting of shareholders: quorum, majorities and qualified majorities, deadlock resolution;
- Reporting obligations to shareholders: clauses on reporting obligations regarding budget, business plans, intermediary accounts etc.;
- Policies regarding allocation of profits;
- Procedures to solve conflicts of interest;
- Procedures to solve deadlock situation;
- Confidentiality clauses;

- Non-competition clauses;
- Duration of the agreement;
- Notices;
- Dispute resolution.

**14. What mechanisms does the law of Belgium permit to ensure the participation of minorities on the board of directors and its control?**

Belgian law permits the division of shares into classes of shares whereby the shareholders of each class can propose a number of directors as fixed in the articles of association or in the shareholders' agreement.

Furthermore, minority interests can be protected through special majorities and/or veto rights in respect of agreed issues.

Representation clauses often foresee that joint representation is necessary in relation to important decisions.

**15. Is it possible in Belgium to ensure minority shareholder control by means of a shareholders' agreement?**

The division of shares into classes can make it possible to maintain control without the need to hold a majority of shares. Since as a rule the majority principle applies within each class, the shareholder having a majority in the controlling class can maintain control over the board of directors without holding a majority of the company's capital.

It should be noted, however, that a shareholders' agreement is always subject to mandatory law and that it is only binding between parties.

**16. What are the usual valuation mechanisms in connection with rights of first refusal or share transfer regulations?**

In many cases, it is referred to the offer received by the selling shareholder in so far that it is a bona fide offer. In case of dispute, the matter of valuation is often referred to an independent expert with or without predefined methodological criteria.

Sometimes formulas to calculate the value of a company are included in the shareholders' agreements. The most common mechanisms for valuing companies are diverse versions of the book or net worth value, value based on future earnings, value based on a multiple of past earnings, and value based on a multiple of EBITDA or EBIT.

**17. Is it admissible for a shareholders' agreement clause to refer dispute resolution to courts other than those of Belgium and/or under a law other than that of Belgium?**

It is admissible in a shareholders' agreement to refer dispute resolution to a court outside Belgium and to make the agreement subject to law other than that of Belgium. Such will however not prevent the application of mandatory Belgian law where the shareholders' agreement deals with issues which govern the company's structure and decision-making process.

It is therefore advisable to make Belgian law applicable, and to opt for Belgian courts (including arbitration venues) for dispute resolution.

**18. Is it admissible for a shareholders' agreement to include an arbitration clause with its seat outside Belgium and/or under a law other than that of Belgium?**

It is admissible in a shareholders' agreement to refer dispute resolution to arbitration with its seat outside Belgium and to make the agreement subject to law other than that of Belgium. Such will however not prevent the application of mandatory Belgian law where the shareholders' agreement deals with issues which govern the company's structure and decision-making process.

It is therefore advisable to make Belgian law applicable to the agreement.

Belgium has a number of competent arbitration institutes which reduces the need to go to another jurisdiction for arbitration.