



Belgium

M&A + TMT Law Firm of the Year



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In the technology sector, mergers and acquisitions come with specific challenges. For tech companies, the ultimate purpose is to absorb the technology and know-how of the target company and to use it for the development of its own technology. Therefore the challenge is to overcome inherent hurdles in melding staff and technologies for a successful corporate transaction and fruitful product development.

Steven De Schrijver is the head of the corporate / M&A and the IT & New Media Departments of Lorenz in Brussels. Lorenz closely follows new developments and innovations in the technology sector and focuses on delivering bench-mark advice with respect to new legal problems that arise as a result of these new developments and innovations. Thanks to its thorough understanding of the industry and its sector-specific expertise, Lorenz advises some of the largest technology companies in the world as well as innovative entrepreneurs on a variety of commercial and information technology law matters. Lorenz has also been involved in numerous mergers and acquisitions and advised multiple companies in the technology sector on their corporate transactions.

As winner of the M&A and the Technology Media Telecommunications Law Firm of the Year Awards, Lorenz is perfectly placed to advice tech companies on their corporate transactions in Belgium.

Tech companies wishing to acquire a company should be aware of the encumbrances in transactions in the technology sector and the specific pitfalls that will require special attention. The two key issues with respect to corporate deals in the technology sector relate to IP/IT and employment.

1. IP and IT due diligence

Since the target's technology and intellectual property are the most valuable assets to an acquiring tech company, a thorough and comprehensive due diligence of such assets is essential. This due diligence should not only focus on the value of the intellectual property rights, but also - and most of all - on their transferability.

In respect of intellectual property that is not owned, but merely licensed by the target, it is crucial to examine whether the license agreements contain a change of control clause, prohibiting the target company transferring the licenses to the acquirer without the licensor's prior consent. Another potential pitfall in transferring IP consists of exclusive rights granted to local distributors in a specific region, which could be incompatible with the existing distribution network of the acquirer.

Moreover, it should be verified whether the target's employees, who have contributed to the development of the company's software, have validly assigned all their intellectual property rights in relation to such software to the

target. Belgian law provides that if an employee develops new software in the execution of his duties or upon the instructions of his employer, economic and IP rights in relation to such software are automatically assigned to the employer, unless otherwise provided by contract. Thus, the target company's employment contracts should be checked for clauses preventing the automatic assignment of the intellectual property rights to the employer. If software is developed by free-lance contractors, there is no automatic assignment of IP rights, so it should be verified who holds the intellectual property rights under the contract.

Another aspect that is often overlooked is the presence of Open Source code in the developed software. Such Open Source codes are available to everyone. Cisco experienced the consequences of the presence of Open Source codes in the target's software when it acquired Linksys in March 2003 for 500 million dollar. After the deal was closed Cisco was contacted by the Free Software Foundation, which determined that the Linksys software contained Open Source code. Since it would be very cost prohibitive to reengineer the software, Cisco had to release the source code, which then became available to anyone at no cost.

2. Employment issues

Companies in the technology sector often work with independent contractors or so-called freelancers. Often, however, these contractors work exclusively for one company, as a result of which their working conditions are very similar to those of employees performing their duties upon instruction and under the supervision of their employer. The acquiring company should therefore make a thorough assessment of the working situation of these freelancers and their relationship with the target company. It should also obtain appropriate warranties from the target company in case the independent contractors would be re-qualified as employees by tax - and social security authorities, as such requalification gives rise to additional taxes and social security contributions would be imposed on the company. Possibly also their working post-closing situation will need to be reviewed.

Finally, it is common practice in the technology sector to outsource employees to other companies to carry out specific assignments. Nevertheless, companies should be careful when doing this. The Belgian law of July 24, 1987 on the Secondment of Employees for the Benefit of Users, prohibits placing employees at the disposal of third parties. Employers breaching this law can be held criminally and civilly responsible. Consequently, this liability risk needs to be well assessed and covered by adequate warranties from the target company.