

THE MAGAZINE DEDICATED TO THE DEALMAKERS

# DealMakers

MONTHLY

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## Law Firm of the Year – Corporate, Tax and M&A

### *A Word to the Wise: Acquisition Vehicles in Europe vs. the US*

**W**hen working on a transaction requiring the formation of a new acquisition vehicle, whether for a share or asset sale/purchase, a merger or a reorganization, most U.S. practitioners would consider the formation of an acquisition or special purpose vehicle nothing more than a mere formality, something which can be completed as late as the eve of closing. After all, States such as Delaware<sup>1</sup> offer expedited processing within an hour of receipt,<sup>2</sup> and the information that needs to be filed in the State's public records is minimal.<sup>3</sup> For the most part, it is sufficient to provide: (1) the entity's (proposed) name; (2) the address of its agent for service of process (a service that can be provided for a nominal fee by a number of professional organizations with offices throughout the country); (3) the corporate purpose (or objects) clause of the entity, which can be as broad as "any lawful act or activity" permitted under the laws of the respective State; and (4) the total number of shares that the entity will be authorized to issue, if any,<sup>4</sup> and the par value of such shares, which can actually be set at zero.<sup>5</sup> In fact, there is no corporate law requirement that any shares be issued at the time of formation. Furthermore, the incorporator/organizer of the company need not be, and most frequently is not, a future shareholder in the company. In fact, any person over the age of 18 (or other legal entity) may incorporate or organize a company, and then be released from liability upon turning over management functions to the newly-appointed directors.

Under Civil Law in continental Europe,<sup>6</sup> by contrast, the formation of an acquisition vehicle is a lengthier and much more formal process, which requires some advance planning and

preparation. The formation of most companies occurs when a Civil Law Notary executes a Notarial Deed, containing the new company's Articles of Association. An appointment with a Notary Public usually takes at least several days of advance notice, and the Articles of Association is a fairly detailed document, which is more akin to a U.S. company's Bylaws than its bare-bones Certificate of Incorporation/Formation.<sup>7</sup> Only the founding shareholder(s) of the new company can act as its organizer(s), and must appear in person before the Notary Public (unless a third party is authorized to do so on its/their behalf via a Power of Attorney, witnessed by a Notary and legalized via apostille). Most importantly, most European jurisdictions mandate that a certain minimum amount of the company's share capital be issued at the time of incorporation,<sup>8</sup> which, unlike in the U.S., means that a minimum amount of money must actually be deposited in a blocked bank account in the new company's name. The Civil Law Notary will require written confirmation of this from the respective bank, which must be located in the jurisdiction of incorporation.

To expedite the incorporation process in Europe as much as possible, at the very outset, a founder should already have determined a number of details, such as where the new entity will fit in its organizational structure, the activities in which it will engage in and what amount of share capital it will dispose of. In the heat of deal negotiations or in the larger context of reorganization planning, these details may seem secondary. Nonetheless, they are crucial if one is to avoid the nightmarish scenario where the underlying transaction is affected by the failure to timely incorporate an acquisition vehicle.

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- 1 Corporate law in the United States is a matter of State law. Thus, each of the States will have slightly different rules and regulations, which should of course be confirmed in each case. This article will summarize general principles that are common across all States, with a focus on Delaware as the most popular State, at least for the time being, for new incorporations.
- 2 <http://corp.delaware.gov/experv.shtml>.
- 3 The mandatory filing is most often called a Certificate of Formation or Certificate of Incorporation.
- 4 The number of shares that a company can issue is not mandated by corporate law, but is primarily affected by (usually franchise) tax considerations. Certain entity types, e.g., non-stock corporations and limited liability companies, need not issue shares at all.
- 5 It is important to note that the authorized share capital of a U.S. company is not a capitalization requirement – U.S. companies are not, generally speaking, required to have any specific amount of funds on their bank accounts as a matter of corporate law.
- 6 As in the case of the U.S., corporate law diverges from one European country to another. Hence, this article will only summarize general principles common across continental European jurisdictions.
- 7 Additionally, European jurisdictions require a more detailed statement of the company's purpose (the standard U.S. phrasing of "any lawful act or activity" would not usually be acceptable in Europe).
- 8 For example, depending on the type of corporate entity, €18,550 in Belgium, €18,000 (or perhaps 0, in the future) in The Netherlands, etc.

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