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Corporate M&A 2023

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Law and Practice

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Contents

Van Bael & Bellis is a leading independent law firm based in Brussels, with offices in London and Geneva. Alongside its strong transactions practice, the firm is highly regarded for its extensive expertise in EU competition, EU and international trade, and EU regulatory law. The firm has a team that is recognised as one of the leading independent M&A and Banking and Finance and Projects practices in Belgium. Its lawyers have in-depth experience in providing advice to clients in complex Belgian and cross-border transactions, regularly advising international clients active in highly regulated industries. The team's expertise extends to all aspects of finance and corporate law, including private M&A, public M&A and capital markets (debt and equity), project finance, insolvency and restructuring, private equity and venture capital transactions, corporate real estate transactions, corporate governance and corporate litigation, and acquisition finance.

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1. Trends

1.1 M&A Market

In terms of M&A deal volume, it was expected in 2023 that the war in Ukraine, rising inflation, surging interest rates, pressure on profit margins, supply chain disruption and an energy crisis would undermine business confidence and the appetite for deal-making at the outset of a potential recession.

The impact of this range of negative factors on the Belgian M&A market is so far mainly visible on high-value and leveraged deals, which is particularly due to the fact that the price of money has increased significantly in 2022. Private equity players (both international and local) in particular continued to be active (although less compared to previous years) in the Belgian M&A market. However, the financial terms of private equity transactions were often reassessed during the transaction process, or transactions were put on hold, as a result of the impact of the war in Ukraine and its financial and economic consequences on the profits of the target.

The pace of deal activity (particularly high-value and leveraged deals) is expected to slow down to a certain extent in the coming months, and it remains to be seen what impact the continuing war in Ukraine, the significant increase in energy costs – and the economic consequences thereof in terms of inflation, higher financing costs and higher prices for raw materials – as well as the increase in salary and personnel costs since January 2023, will have on the international markets and deal activity (worldwide and in Belgium). Further, the M&A market will have to readjust, both from a sell-side perspective in terms of expectations regarding sale conditions and from a purchaser-side perspective in terms of leveraging ratios.

In the meantime, inflation is showing pockets of easing and energy prices appear to be under greater control than was the case in the second half of 2022. This being said, it may be expected that stability and predictability on the macro-market and financing sides will be the key for the return of robust M&A activity in 2023 (rather than, for instance, interest rates going back to historically low pre-COVID levels).

Against expectations, the number of bankruptcies and insolvencies fell to record lows following the COVID-19 fallout and, whereas Belgium saw an increase in these in 2022 (also compared to the number of bankruptcies in 2019, pre-COVID), the number of bankruptcies still remains lower than what had been expected (particularly taking into account the energy crisis the country, as well as the rest of Europe, has been facing over the last year). This is likely due to the continuing financial support measures made available by the government authorities to those sectors hit hardest by both the COVID-19 and energy crises. In any case, it can be expected that the impact on certain companies will create new market opportunities.

1.2 Key Trends

As is usual in Belgium, the SME segment of the market accounted for the majority of deals. This is due to the fact that family-owned businesses are still at the heart of the Belgian economy (and even listed entities are often still controlled by a group of family shareholders). There has been continued interest from international private equity players in the Belgian market (see also **1.1 M&A Market**) and buy-and-build strategies continue to be many investors' preferred route. It should be noted that ESG has become an increasingly important topic for investors.

For "big-ticket" transactions, securing warranty and indemnity insurance is becoming a more-and-more common market practice (whereas until a few years ago this was still exceptional in the Belgian M&A market, which can probably be explained by the fact that the market is characterised by small and mid-sized transactions).

1.3 Key Industries

As mentioned (see **1.2 Key Trends**), the Belgian M&A landscape is marked by a majority of smaller and medium-sized transactions, in relation to which publicly available information is rather limited. Overall, the life sciences/pharmaceutical, (bio)technology, (renewable) energy and healthcare industries remain highly valued in Belgium. Belgium is also home to various energy intensive manufacturing industries, where the current economic environment may lead to vibrant M&A activity in the coming months/years.

2. Overview of Regulatory Field

2.1 Acquiring a Company

The acquisition of a company may be structured as a share deal or an asset deal. Tax considerations, and the scope of the envisaged acquisition, play an important role when considering the acquisition of a business through a transfer of shares or a transfer of assets.

Alternatively, and less commonly, an acquisition of a business could be structured through a (de)merger. The Belgian Companies and Associations' Code (BCAC) contains a regime for mergers through the acquisition of an existing company or the incorporation of a new company. The BCAC also contains provisions on demergers into an existing company or a newly incorporated company, as well as mixed demergers.

Share Deal

A share deal is the most straightforward structure used to acquire a business as formalities for transferring shares are fairly limited. However, a share deal implies that all the underlying assets and liabilities of the acquired business are also (indirectly) transferred. The acquirer cannot pick and choose certain assets and liabilities of the business, unless those assets and liabilities were to be transferred from the target company into a new company prior to the closing of the share transfer (through an asset deal, a demerger, a transfer of a branch of activities, or any other similar operation).

Asset Deal

By contrast, an asset deal does allow the acquirer to pick and choose the assets and liabilities it deems useful or necessary. The other assets and liabilities remain with the business. This is often the preferred route for deals involving distressed companies, where potential tax and bankruptcy liability issues may be at stake.

In the case of an asset deal, the assets may be purchased individually (ut singuli), or as a "universality of goods" (ut universali) or a "branch of activities".

In the case of a transfer of individual assets and liabilities, all legal formalities required to transfer such individual assets and liabilities must be complied with. For example, the transfer of an agreement requires the consent of the other contracting party. In addition, specific, rather onerous and time-consuming formalities apply to the transfer of intellectual property rights and real property.

In the case of a transfer of a universality of goods or a branch of activities in accordance with the procedure set out in the BCAC, all assets and liabilities that are part of the universality of goods or the branch of activities are automatically transferred by operation of law, provided that the specific requirements for the transfer of these assets have been fulfilled. As a result, the acquirer has less flexibility to cherry-pick the assets and liabilities of the business.

2.2 Primary Regulators

Private M&A transactions typically do not require the involvement of a primary regulator. Public M&A transactions (such as public takeovers, IPOs, secondary offerings and bond issues) require the involvement of the Financial Services and Markets Authority (FSMA).

M&A activity in certain sectors may be regulated by sector-specific regulators, for example the Belgian National Bank for transactions involving financial institutions or insurance companies, the Belgian Federal Agency for the Safety of the Food Chain for transactions in the food industry, the Belgian Federal Agency for Medicines and Health Products for transactions in the healthcare/pharmaceutical sector, the Belgian Institute for Postal Services and Telecommunications for the telecoms sector, etc.

For more information on other regulators, see **2.3 Restrictions on Foreign Investments**, **2.4 Antitrust Regulations** and **2.6 National Security Review**.

2.3 Restrictions on Foreign Investments

Belgium's open economy usually welcomes foreign investors and is typically considered to be one of the most flexible countries for foreign investment in Europe. However, in certain regulated industries (such as financial institutions and insurance, maritime ports, food, energy, pharmaceuticals, broadcasting, telecoms and postal services), a notification to, or the authorisation of, the relevant regulator may be required.

For more information on national security review of acquisition, see **2.6 National Security Review**.

2.4 Antitrust Regulations

National Merger Control

Provided that the business combination is not subject to EU merger control and the turnover thresholds in Belgium are reached, mergers, acquisitions and joint ventures that result in a sustainable change in the control over the companies concerned must be notified to, and approved by, the Belgian Competition Authority before implementation.

Business combinations are subject to Belgian merger control if they meet the following two turnover thresholds:

- the undertakings concerned have a combined turnover in Belgium of more than EUR100 million; and
- at least two of the undertakings concerned each have a turnover in Belgium of at least EUR40 million.

Whether any involved company has its registered office or owns assets in Belgium is irrelevant. As a result, foreign-to-foreign combinations of companies that have substantial sales in Belgium and that do not exceed the EU thresholds may be subject to Belgian merger control.

The approval must be obtained before the implementation of the proposed combination. So-called gun-jumping must be avoided, especially in view of the fact that competition authorities throughout Europe have made this a focal point of attention. As a result, merger approval is typically construed as a condition precedent to closing, and no business combination may be implemented before then (which may raise questions in relation to pre-closing covenants or anti-leakage provisions, which are typically included in acquisition agreements). In addition, commercially sensitive information cannot be shared during negotiations or the due diligence process, unless sufficient non-disclosure and/or "clean team" arrangements are in place. Upon notification, the Belgian Competition Authority will assess whether the transaction could significantly impede effective competition in the relevant market. This may be the case when the proposed concentration could create or strengthen a dominant position in the market for the company involved.

The notification to, and approval by, the Belgian Competition Authority is subject to a payment by the notifier of a flat fee of EUR52,350 for an ordinary merger filing procedure and EUR17,450 for a simplified merger filing procedure.

EU Merger Control

Transactions between companies active on an EU or worldwide scale are likely to meet the European turnover thresholds. In that case, the parties must notify the proposed concentration to, and obtain approval from, the European Commission, which is exclusively competent to deal with concentrations with an EU dimension.

2.5 Labour Law Regulations

Information and Consultation

The employer must inform (and under certain circumstances also consult) the works council or, in its absence, the trade union delegation or, in its absence, the committee for prevention and protection at work, prior to any publication of the decision regarding a merger, demerger, transfer or acquisition of all shares in the company or its assets. Failing the presence of an employee representative body, the employees should be directly informed about most transactions (for example a merger or demerger). In the case of a transfer of a minority of shares, an information obligation may apply towards the employee representative body if that decision has an important impact on the company.

However, the consent of the employees' representatives is not required. The employees' representatives cannot change the employer's decision or obstruct the negotiations or the transaction.

The information (and consultation) must relate to the economic, financial or technical factors of the proposed transaction and the economic, financial and social implications thereof for the company and its employees and the envisaged measures in relation to the employees (ie, repercussions on their employment), the organisation of their employment, and the employment in general. A consultation involves an exchange of views between the management and the employees' representatives, on the occasion of which the representatives may ask questions and voice any criticism, suggestions or objections.

Violation of these information and consultation rights may lead to administrative or criminal sanctions.

Protection of Employees Against Dismissal

In the case of a share deal, the employees' situation is not affected since the employer remains unchanged. Consequently, the general employment termination rules should be complied with in the case of a dismissal of one or more employees.

However, this is different in the case of an asset deal which qualifies as a transfer of a going concern (for example, in the case of a transfer of a branch of activities or a "universality of goods"). Pursuant to the Collective Bargaining Agreement (CBA) No 32bis, the rights and obligations of the transferred employees arising from their employment agreements are automatically transferred to the transferee. This implies that, on the date of the transfer of a business, all employees of the target will be automatically transferred from the transferring employer to the acquiring company, with preservation of all rights (exceptions for pension rights may apply) and obligations resulting from the employment agreement.

In principle, all employees belonging to the transferred business will automatically transfer to the acquiring company. The acquirer cannot choose which employees will be transferred and the transfer of a business, as such, does not constitute justified grounds for dismissal. In the event of a dismissal, damages for manifestly unfair dismissal of up to 17 weeks' gross salary may be due on top of mandatory severance pay. However, a dismissal remains permitted for serious cause; or for economic, technical or organisational reasons (not directly linked to the transaction) entailing changes in the employment in general.

In addition, the acquiring company may not unilaterally alter the working conditions to the detriment of the transferred employees. If important working conditions are amended unilaterally (for example salary, working time or function level), the employee can, amongst other things, claim that the acquiring company has terminated the employment agreement. In such cases, the acquiring company will be liable for the payment of a severance pay and potential additional damages resulting from the termination of up to 17 weeks' gross salary.

The acquiring company and the transferred employees are, however, free to negotiate a new employment agreement or new terms of employment subject to the employees' consent and as long as these are in line with the terms of employment resulting from applicable collective bargaining agreements.

Moreover, the transferring employer and the acquiring company are jointly and severally liable, vis-à-vis the employees concerned, for the payment of any debts resulting from the employment relationship and existing at the time of the transfer.

2.6 National Security Review

Belgium does not currently have a foreign direct investment (FDI) screening mechanism at national level. However, against the backdrop of Regulation (EU) 2019/452 establishing a framework for the screening of FDI into the EU, the Belgian federal and regional governments have agreed on a draft bill establishing a national FDI screening mechanism. This bill has already been introduced in, and approved by, relevant parliaments in early 2023 and, in view of their governments' prior approval of the bill, is expected to enter into force on 1 July 2023.

The scope of the mechanism promises to be broad and open-ended as any investments that can affect national security, public order or the strategic interests of the Belgian federated entities are being targeted. The proposed mechanism requires foreign investors to notify investments relating to a broad range of sectors – including energy, transport, water, health, biotech, cybersecurity, communications, media, data management, critical infrastructure (physical and digital), critical inputs, food security, tech (such as AI, robotics and semiconductors), aerospace, defence, private security, media pluralism, electoral institutions, financial infrastructure and dual-use products – to the Interfederal Screening Committee (ISC), prior to their implementation, provided that they meet the notification threshold. Investors from other EU member states are not targeted by the mechanism. Conversely, the proposed mechanism will have a considerable impact on non-EU investors envisaging investing in Belgian companies.

The notification obligation would enter into force as of 1 July 2023 at the earliest, but the effective entry into force may still be postponed. The ISC would also be allowed to launch an ex officio review of recently completed transactions.

Further, the Region of Flanders introduced a safeguard mechanism which entered into force on 1 January 2019. This mechanism allows for the annulment of foreign investments in certain Flemish public authorities and institutions for the protection of public security. The scope of the mechanism is therefore limited and does not concern private enterprises. The mechanism is triggered when a non-EU or non-EEA person obtains control or decision-making power over an institution which is capable of endangering Flemish strategic interests. In such cases, the mechanism allows the Flemish government to annul, suspend or declare a transaction inapplicable. It is also free to determine the scope and consequences of its decision on a case-by-case basis and based on sufficiently justified grounds. It is expected that this Flemish mechanism will become inoperable upon entry into force of the envisaged national FDI screening mechanism.

3. Recent Legal Developments

3.1 Significant Court Decisions or Legal Developments

New Belgian Civil Code

In addition to the recent modernisation of Belgian company law, the Belgian legislature is now also implementing a new Civil Code, which is being adopted book by book. Certain new books of the Civil Code will also be relevant for M&A transactions, in particular the transaction documents (this is, for example, the case for the new books on contract law and property law). The new property law entered into force on 1 September 2021, whereas the new book on contract law applies to agreements entered into as of 1 January 2023 (unless otherwise agreed between the contracting parties).

Temporary Pre-packaged Insolvency Procedure

In March 2021, the Belgian legislature adopted a law amending Book XX (on bankruptcy and insolvency procedures) of the Code of Economic Law to better satisfy the needs of companies in the context of the economic crises caused by the COVID-19 pandemic. The main novelty of this law is that it introduces a pre-packaged insolvency procedure and adopts a few measures that aim at making the judicial reorganisation procedure more accessible. While most provisions of this law were initially intended to only apply until 30 June 2021, the Belgian legislature has now extended its application several times, most recently until 30 September 2023. It is expected that the main principles of this law will be incorporated into the national laws implementing the Restructuring Directive in Belgium (see the New Directive on Restructuring and Insolvency section below).

Envisaged Introduction of a Foreign Direct Investments Screening Mechanism

See **2.6 National Security Review**.

New Directive on Restructuring and Insolvency

On 16 July 2019, Directive (EU) 2019/1023 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (the "Restructuring Directive") entered into force. The Restructuring Directive introduces minimum standards among EU member states for effective preventive restructurings, including measures to increase the efficiency of insolvency procedures in general. Belgium was obliged, in principle, to implement the Directive into its national laws by 17 July 2021 at the latest but availed itself of the possibility foreseen in the Directive to benefit from an extension of the implementation period (the law is expected to be adopted in the course of 2023).

SR Directive II

On 16 April 2020, the Belgian federal Parliament adopted a law regarding the encouragement of long-term shareholder engagement, implementing EU Directive 2017/828, also known as the Shareholder Rights Directive II (the "SR Directive II"), into Belgian law. The SR Directive II and the implementing Belgian law seek to:

- encourage effective and sustainable shareholder engagement;
- enhance transparency regarding the remuneration of various corporate officers; and
- promote discussions and interaction between issuers and investors, in order to improve the financial and non-financial performance of listed companies in the EU (see also **11.1 Shareholder Activism**).

New Rules on Remote Participation and Voting at Shareholders' Meeting

Furthermore, a law was adopted on 20 December 2020 which introduces a series of measures to facilitate the remote participation of, and voting by, the shareholders or members of limited liability companies, private limited liability companies, co-operative companies and (international) non-profit associations in meetings of the shareholders or members (see **6.9 Voting by Proxy**).

New Directive on Cross-Border Conversions, Mergers and Demergers

On 1 January 2020, Directive (EU) 2019/2121 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (the "Mobility Directive") entered into force.

The Mobility Directive aims at removing barriers to the freedom of establishment of EU limited liability companies by facilitating cross-border conversions, mergers and demergers within the EU. At the same time, the Mobility Directive aims at safeguarding the interests and rights of employees, creditors and minority shareholders. Although it should have done so by 31 January 2023, Belgium has not yet implemented the Directive into its national laws (expectations are that the implementing law will be adopted and published still in the first half of 2023).

3.2 Significant Changes to Takeover Law

No significant changes have been made in the past 12 months, or are expected in the coming 12 months, to takeover laws in Belgium.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies

Prospective acquirers will typically try to build a stake in the target prior to the announcement of a public offer. The main goal of stakebuilding is to deter a third party from launching a competitive counterbid. One textbook example is Gilead Sciences' gradual stakebuilding in Galapagos, which increased from about 10% to almost 30%.

Whereas stakebuilding as such is not prohibited, the FSMA considers stakebuilding to be a form of insider dealing if the stakebuilding entity envisages launching a public takeover bid when having acquired a sufficiently high stake or in the longer term.

4.2 Material Shareholding Disclosure Threshold

Pursuant to Section 6 of the Law of 2 May 2007 on public disclosure of important participations of the issuer of which the shares are admitted to trading on a regulated market (the "Law on public disclosure of important participations"), the FSMA and the issuer must be notified every time:

- an acquirer of securities with voting rights holds (directly or indirectly), as a consequence of the transaction, 5% or more of the total existing voting rights;
- a shareholder acquires securities with voting rights and, as a result of such acquisition, the total number of voting rights it holds (directly or indirectly) exceeds any other multiple of 5% of the total existing voting rights; and
- securities with voting rights are transferred, directly or indirectly, as a result of which the total number of voting rights held by the transferor drops below one of the above-mentioned thresholds.

Furthermore, private individuals and legal entities are considered to act in concert when they co-operate with an offeror, the offeree company or with other persons on the basis of an agreement, aimed either at obtaining control over the offeree company, frustrating the successful outcome of a bid or maintaining control over the offeree company.

4.3 Hurdles to Stakebuilding

Companies can also introduce additional hurdles to stakebuilding. One of the more common hurdles is the inclusion of a provision in the target's articles of association for additional reporting thresholds. Pursuant to Section 18 of the Law on public disclosure of important participations, such additional thresholds can only be set at 1%, 2%, 3%, 4% and 7.5% of the voting rights.

In addition, the articles of association may permit the board to take various defensive measures making takeovers more difficult; for example, to increase the capital of the company within certain limits or purchase shares in the company without prior shareholders' approval.

4.4 Dealings in Derivatives

Dealings in derivatives are allowed under Belgian law. Regulation (EU) No 648/2012 on over-the-counter (OTC) derivatives, central counterparties and trade repositories, which is directly applicable in Belgium, is the most relevant source in relation to these dealings. This Regulation includes provisions on exchange traded derivatives, but mainly provides a legal framework for OTC derivatives, which account for almost 95% of the derivatives markets within the EU.

4.5 Filing/Reporting Obligations

Pursuant to Section 6, paragraph 6 of the Law on public disclosure of important participations, financial instruments linked to securities conferring voting rights, where the exercise of those instruments might lead to the acquisition of voting rights, are subject to the same reporting regime as the voting securities themselves (see **4.2 Material Shareholding Disclosure Threshold**). Examples of financial instruments that could meet these requirements are warrants, futures and swaps.

If such financial instruments are exercised, resulting in the acquisition of the shares the financial instrument was linked to, the same rules apply once again.

4.6 Transparency

When bidders acquire shares, they are generally not under an obligation to disclose the purpose of their acquisition, nor their intention regarding control of the company (if they were to have such an intention).

There is, however, an exception to this rule, which applies if a bidder intends to acquire portfolio management and investment advice companies, management companies of undertakings for collective investment and management companies of public alternative investment funds.

Furthermore, the bidder shall have an obligation to notify the FSMA of a decision to acquire shares or shareholder rights in the entity if the bidder would, as a result of the intended acquisition:

- acquire a "qualifying holding"; or
- increase an existing qualifying holding so that the proportion of the voting rights, or of the capital held, will cross the thresholds of 20%, 30% or 50%, or so that the target would become its subsidiary.

The Law of 1 April 2007 on public takeovers (the "Public Takeover Law") also contains a "put up or shut up" rule, allowing the FSMA to require a potential bidder to disclose its intention to launch a bid following market rumours. If no intention to launch a bid is announced, this person will be precluded from making a bid on the same target company for six months (save in exceptional circumstances).

5. Negotiation Phase

5.1 Requirement to Disclose a Deal

In the case of an acquisition of a private company, there is no obligation to disclose the deal. As parties are frequently bound by non-disclosure agreements, the acquisition is often only announced as soon as signing or closing has taken place (assuming the parties wish to disclose the deal).

If a company intends to acquire a listed company, the Public Takeover Law provides for several notification and publication requirements (see also **6.1 Length of Process for Acquisition/Sale**). Companies that are submitting a public takeover bid must notify this to the FSMA, who will release a public announcement before the bidder does so. In view of this, bidders are encouraged to reach out to the FSMA early in the process to discuss the envisaged timeline. The FSMA may also require the parties involved in a potential takeover bid to issue a press release.

In the case of a public takeover bid, the Royal Decree of 27 April 2007 on public takeovers (the "Takeover Decree") requires that the same information be provided to all competing bidders. The bidder must also avoid receiving insider information.

If the bidder nevertheless obtains insider information, it must disclose this in the prospectus. Regulation 596/2014 on market abuse defines insider information as "all information that relates, directly or indirectly, to particular instruments or issuers, is of a precise nature, has not been made public, and if it were made public, would be likely to have a significant effect on the price of those instruments".

Finally, there are some employee information and consultation obligations (see **2.5 Labour Law Regulations**).

5.2 Market Practice on Timing

Market practice on the timing of disclosure does not typically differ from legal requirements. In general, in private M&A transactions, the acquirer and the target often prepare a common announcement and agree in advance on the content and timing of announcements. The most common market practices are to disclose the deal after signing or after closing (or both).

However, the timing of the announcement may vary depending on the factual circumstances of the deal. The parties may sometimes consider it more useful or appropriate to already communicate information of a potential forthcoming deal during the due diligence process or upon execution of a memorandum of understanding.

5.3 Scope of Due Diligence

The scope of due diligence depends on the activities of the target, the dynamics between the parties, whether warranty and indemnity insurance is taken out and the timeframe within which the due diligence has to be conducted.

Although conducting due diligence is not compulsory, prospective buyers typically conduct operational, legal, financial and tax (including pensions and social security) due diligence over the target. Sometimes, technical and environmental due diligence may be undertaken, as well as an insurance audit. At the outset and throughout the due diligence process, management presentations and specific documents and information are made available to the potential acquirer, and its advisors, through a (typically virtual) data room.

Impact of COVID-19 on Due Diligence

The due diligence process has not been significantly affected by COVID-19. In terms of the scope of due diligence, most prospective buyers will now also look into the impact of COVID-19 on the target's business and turnover and the prospects thereof in the short and longer term. This will also be taken into account when determining the valuation of the target. In addition, as part of due diligence, potential acquirers will assess whether the target was forced to take measures to mitigate the effects of the COVID-19 pandemic on its business and activities and whether the target company had to make use of the financial support measures made available by governmental authorities. Furthermore, the compliance with COVID-19 restrictions and policies will be assessed as well as part of due diligence.

5.4 Standstills or Exclusivity

Standstill provisions are frequently included in non-disclosure agreements and are fairly common in hostile takeovers. In private M&A transactions, standstill provisions are rather rare.

It is common for potential buyers to request exclusivity for a relatively short period of one to three months. Such exclusivity clauses are typically inserted in the offer letter or letter of intent, but parties may also enter into separate agreements on exclusivity. In public M&A, exclusivity is, however, not often granted (also in view of the target's statutory obligations in case of competing bids).

In principle, the completion of a transaction in breach of an exclusivity clause or agreement will only result in the unwinding of the transaction if it has been established that the third-party acquirer acted in bad faith (ie, that party was aware that the transfer would be a breach of the exclusivity agreement). In that case, the third-party acquirer may also be held liable for damages. In all other cases of a transaction in breach of an exclusivity clause or agreement, the seller will, in principle, be exposed to damages incurred by the potential acquirer that had obtained exclusivity.

In any case, the negotiating parties should be cautious not to share information that could be qualified as insider information (eg, information that has not been made public relating to an issuer which, if it were made public, would be likely to have a significant effect on the prices of the (related derivative) financial instruments) as this may hinder a subsequent acquisition of the financial instruments.

5.5 Definitive Agreements

While allowed, tender offer terms and conditions are rarely documented in a definitive agreement. Such agreements would potentially risk being qualified as behaviour of different potential acquirers acting in concert and therefore be subject to sanctions (for the definition of acting in concert, see **4.2 Material Shareholding Disclosure Threshold**).

6. Structuring

6.1 Length of Process for Acquisition/Sale

The time taken to acquire/sell a business in Belgium may vary from a few weeks to several months.

Private M&A Transactions

With respect to private M&A transactions, the length of the transactional process will depend on the specific circumstances of the case. For instance, prior consents from regulatory authorities or the duration of the due diligence process may impact the flow of a transaction. The transaction process may also take longer when it is structured by way of an auction process, instead of a bilateral negotiation process (although it is not uncommon to pre-empt the auction process by requesting bilateral negotiations). The higher the deal value, the more likely it is that the transaction will be organised through an auction. Furthermore, taking out warranty and indemnity insurance, and the underwriting process within that context, may also have an impact on the process and timing of a transaction.

Public M&A Transactions

For public M&A transactions, the timing of the takeover process is strictly regulated. The overall procedure of a voluntary takeover bid is similar to a mandatory takeover bid:

- the bidder must first make an initial confidential notification (including an offer notice, a draft prospectus, a draft press release and any relevant documents) to the FSMA;
- at the latest on the day after having received the initial notification, unless the FSMA grants an exception (see **7.1 Making a Public Bid**), the FSMA publishes it and makes an official announcement to the bidder, the target, the public and the relevant stock exchange;
- after having received the draft prospectus from the FSMA, the target's management body must notify the FSMA and the bidder within five business days of any potential missing or misleading information in the draft prospectus;
- as soon as the FSMA receives a complete file for examination, it has ten business days to approve the prospectus – if the FSMA has not taken a decision in this respect at the end of this period, the bidder can urge it to do so, if the FSMA does not react within ten business days after having received this reminder, the prospectus is deemed to be denied;
- within five business days after receiving the approved prospectus by the FSMA, the target's management body must file a response memorandum with the FSMA for approval;
- if complete, the FSMA must decide on the approval of the response memorandum within five business days;
- the acceptance period during which the securities holder can accept the offer commences at the earliest after five business days following the approval of the prospectus or of the response memorandum (if this approval is made before the approval of the prospectus), the bid must remain open for a minimum of two weeks and a maximum of ten weeks (with a possible extension of two weeks under certain conditions);
- no later than five business days from the closure of the acceptance period, the bidder must publicly announce the results of the bid; and
- if the bid is successful, the bidder pays the price within ten business days from the publication of the results of the bid (or requests to be listed within one month following the end of the bid procedure in the case of an exchange offer).

Because of the limited size of the Belgian stock market, the number of private M&A transactions outweighs the number and total value of public M&A transactions by far.

Impact on the Transaction Process of Government Measures to Limit the Negative Consequences of COVID-19

Due diligence exercises now typically include a specific COVID-19 analysis and some buyers (depending on the sector in which they and the target are active) have been experiencing more difficulties obtaining external financing (recently this has proven to be difficult mainly due to rising interest rates, and no longer as a result of COVID-19 crisis).

No significant delays, however, have been experienced in the timing of the transaction process as a result of the government measures imposed to address the pandemic, both in terms of due diligence, co-operation and negotiation between the parties, and obtaining the necessary regulatory approvals.

6.2 Mandatory Offer Threshold

Belgium has a mandatory offer threshold in the case of an acquisition of securities with voting rights in a Belgian listed company.

A mandatory takeover bid for all remaining shares of the company must be launched when a person, as a result of its own acquisition, or the acquisition by persons acting in concert with it, holds directly or indirectly more than 30% of the securities with voting rights in a Belgian company whose securities (i) are admitted to trading on a regulated market, or (ii) more than 50% thereof are admitted to trading on MTF Alternext or the Free Market and no securities are admitted to trading on a regulated market.

However, in certain exceptional circumstances, a mandatory bid is not required when the 30% threshold is exceeded. For example, within the context of a voluntary takeover bid, a transfer between affiliated companies, or a share capital increase with preferential subscription rights. In addition, the obligation to launch a mandatory offer does not apply where a third party controls the target or owns a larger stake than the person(s) acquiring 30% of the voting rights securities. This exception will no longer apply when, within a period of three years after the acquisition, the entity or person that initially exceeded the 30% threshold obtains the largest stake or control following a subsequent acquisition.

An exception also applies when the threshold is temporarily exceeded by a maximum of 2%, provided that the buyer (i) sells the excess within 12 months, and (ii) does not exercise its voting power relating to the excess.

In relation to squeeze-out thresholds, see **6.10 Squeeze-Out Mechanisms**.

6.3 Consideration

In principle and subject to certain exceptions, consideration offered within the framework of both private and public acquisitions can consist of cash, securities, or a combination of both. Consideration in cash is almost exclusively used for both private and public M&A transactions in Belgium. Exchange bids are extremely rare on the Belgian market, and are more common in private M&A transactions. In the case of mandatory takeover bids, a cash alternative must, in some circumstances, be offered to the security holders. If the consideration offered by the bidder does not consist of liquid securities listed on a regulated market or if the bidder, alone or acting in concert, has acquired securities of the target in cash during the 12 months prior to the announcement of the bid or during the offer period, the bidder must foresee a consideration in cash as an alternative.

The most common tool used to bridge value gaps is an earn-out mechanism. Furthermore, warranty and indemnity insurance is now more frequently used to bridge more general negotiation gaps, including to resolve valuation discussions on certain issues.

6.4 Common Conditions for a Takeover Offer

A mandatory takeover bid must be unconditional, whereas a voluntary takeover bid can be subject to certain specific conditions, which need to be pre-approved by the FSMA.

If the conditions of the voluntary takeover bid are not met, the bidder may modify the offer or notify the FSMA of an intention to withdraw the offer. An offer may, for instance, be subject to:

- a minimum acceptance threshold to ensure that the bidder can control the target company after the bidding process (eg, the obtaining of 60% of the shares);
- the non-occurrence of an event beyond the bidder's control; or
- amendments to the target company's articles of association.

In any case, the bid should normally allow the offeror to achieve the intended result. In practice, the FSMA is reluctant to approve any specific conditions if they are likely to limit (or even undermine) the success of the bid.

Furthermore, a bidder may withdraw its voluntary offer if the European Commission and/or of the relevant national competition authority decide that the takeover would constitute a concentration which is incompatible with applicable competition law.

6.5 Minimum Acceptance Conditions

A voluntary tender offer can be subject to conditions (see **6.4 Common Conditions for a Takeover Offer**). One of the most common conditions included by the bidder in its offer, is a minimum level of acceptance to ensure that the bidder can control the target company after the bidding process. Thresholds have varied between 50% and 95%. In practice, the FSMA is reluctant to approve any specific conditions, such as minimum acceptance, if they are likely to limit the success of the bid.

6.6 Requirement to Obtain Financing

In public M&A transactions, a bid cannot be conditional on obtaining the necessary financing. The funding must be entirely committed before the bid is announced. The bidder must provide evidence to the FSMA that it has the necessary funding to pay in full the bid price, either in the form of an unconditional and irrevocable bank credit facility concluded with a Belgian credit institution, or in a special bank account opened with a Belgian credit institution. In exchange offers, the bidder must provide evidence to the FSMA that the securities to be offered in exchange are available to it, or that it has the power to issue or acquire these securities from another person (for example, an affiliate).

In private M&A transactions, it is possible to include the obtaining of financing as a condition precedent in the acquisition agreement. While it is not uncommon, the seller will always try to avoid a financing condition precedent. If unavoidable (including, for instance, when the purchaser is a private equity player), the seller may sometimes try to negotiate thresholds for obtaining the financing (ie, a sufficiently high interest rate and leverage ratio).

6.7 Types of Deal Security Measures

In principle, a non-solicitation clause pursuant to which the company undertakes not to solicit any additional offers from other bidders is valid. However, the validity of (other) deal security measures is debated under Belgian law as it could be argued that they are not in the corporate interest of either the bidder or the target company. Therefore, deal protection measures such as match rights, force-the-vote provisions or break-up fees are rare, and it may be delicate to enforce such measures under Belgian law.

However, break-up fees are included from time to time in documentation regarding private M&A transactions, in particular in competitive auction processes or in larger transactions, where the parties are already committed, or will commit, to each other between signing and closing.

Managing Pandemic Risk in the Interim Period

The impact of COVID-19 on deal security measures has been fairly limited. In general, the pandemic has mainly resulted in a particular focus on the impact of COVID-19 on the business and its turnover during operational due diligence. The impact of COVID-19 was therefore mainly reflected in the valuation of targets. Furthermore, as the impact of COVID-19 on the business is no longer considered to be a new element, the inclusion of a material adverse change clause in this regard between signing and closing as a condition precedent is rather rare in practice.

New Regulatory Environment Impacting the Length of Interim Periods

There have been no changes to the regulatory environment that have impacted the length of the interim periods.

6.8 Additional Governance Rights

Where a bidder does not seek to acquire 100% ownership of a target company, it may choose to strengthen its governance rights by entering, for instance, into a shareholders' agreement with the remaining principal shareholder(s) of the target. Shareholders' agreements will typically include clauses regarding governance at the level of the board of directors and the shareholders' meeting (including quorum, majority and/or voting requirements, or providing veto rights for certain essential decisions). They also typically include share transfer restrictions (pre-emption rights, tag-along rights, drag-along rights, call and put options).

For listed companies, a shareholders' agreement concluded between shareholders may qualify as a concerted action within the meaning of Belgian takeover legislation, and therefore trigger the obligation to launch a mandatory takeover offer if the mandatory offer threshold of 30% would be met.

6.9 Voting by Proxy

Shareholders may vote by proxy. The shareholder may specify precise voting instructions or leave the voting up to the discretion of the proxyholder. The articles of association may not suppress a shareholder's right to appoint a proxyholder, but it is possible to modulate this right (eg, a proxy can only be granted to other shareholders, and only one proxy per shareholder). Furthermore, the articles of association may impose a registration procedure on shareholders represented by proxy. This will, in particular, be the case for listed companies.

In addition, and driven by the need for more flexibility for remote participation and voting at shareholders' meetings during the COVID-19 crisis, the law of 20 December 2020 introduced more flexible rules to the BCAC for companies that wish to organise their shareholders' meetings virtually (see **3.1 Significant Court Decisions or Legal Developments**). Such virtual shareholders' meetings are still subject to certain conditions on security and identity verification and simultaneous participation.

6.10 Squeeze-Out Mechanisms

Within the framework of a takeover bid, if the bidder holds, directly or indirectly, at least 95% of the share capital conferring voting rights and 95% of the voting securities in the target as a result of the tender offer (and provided that the bidder acquired 90% of the share capital conferring voting rights of the target in the course of the bid), the bidder can squeeze out the remaining security holders under the same conditions as the initial bid. The bidder must reopen the bid within three months as from the closing of the acceptance period. The offer period must be a minimum of 15 business days, during which the remaining minority security holders may communicate any objections to the FSMA. Any securities not tendered to the reopened bid are considered transferred to the bidder by operation of law. On the other hand, under these circumstances, the remaining securities holders also have a sell-out right following a public takeover bid.

Furthermore, the BCAC also provides for a squeeze-out mechanism outside the framework of a public takeover bid. The securities holders of listed limited liability companies which, acting alone or in concert, hold 95% of the securities conferring voting rights are, subject to certain conditions, entitled to require that all the remaining minority security holders sell their securities at an equitable price. The securities not offered at the end of the acceptance period of the offer are transferred automatically to the offeror.

Finally, the BCAC provides for a squeeze-out mechanism for non-listed companies. Both the majority security holders of limited liability companies which are not listed on a regulated market, as well as the majority security holders of private limited liability companies, have a similar squeeze-out right. However, as opposed to the minority security holders of listed liability companies, the minority security holders who have explicitly confirmed in writing their refusal to sell their securities to the offeror, will not be squeezed out at the end of the acceptance period of the offer.

The validity of other squeeze-out mechanisms under Belgian law, such as an asset sale to a special purpose vehicle, will be subject to scrutiny and may result in director's liability.

6.11 Irrevocable Commitments

Many Belgian companies (both private and listed) are characterised by a concentrated (family) shareholder structure. Consequently, a tender offer for a Belgian listed company is often only successful if the majority/significant shareholders of the company have committed to tender their shares to the bidder.

In practice, a bidder will therefore negotiate with the principal shareholders of the target company before submitting its offer. In this respect, it is not uncommon to obtain the irrevocable commitment of the principal shareholder(s) to tender their shares within the context of the offer. However, the validity of such a commitment cannot be fully guaranteed, as a security holder who has accepted within the context of the offer may always withdraw their acceptance at any time during the acceptance period of the offer.

7. Disclosure

7.1 Making a Bid Public

Unlike public takeover bids, bids in the context of negotiated business combinations are not subject to specific disclosure requirements.

Takeover bids on shares of listed companies are subject to strict disclosure requirements. In this case, only the FSMA is allowed to publicly announce a bid following the notification thereof by the bidder. Upon notification of the bid, the bidder should submit the following information to the FSMA:

- information regarding the bid;
- any envisaged advertisement or publication;
- the draft prospectus; and
- if the bidder controls the target, an independent expert's report.

The FSMA will subsequently publish the notification the following working day. No public announcements regarding the bid are allowed prior to such publication.

If the target has voting shares listed on a regulated market in a different EU member state, the bidder must also notify its bid in that EU member state in accordance with local regulations.

Should there be rumours and speculation in the market, the FSMA can instruct a party to make a public announcement clarifying its intentions. Should the party confirm its intentions to launch a bid, it must proceed to notify that bid to the FSMA. If the party rejects the rumours, it is prohibited from launching a bid during the following six months ("put up or shut up" rule).

7.2 Type of Disclosure Required

Non-listed companies must prepare a board report (and a statutory auditor's report) when issuing new shares. The issuance of new shares (and the amendment of the articles of association resulting therefrom) must be established through a notary deed. In addition to submitting these reports to the shareholders, they should be filed with the clerk's office of the competent Commercial Court, together with the decision of the shareholders, an extract of which will be subject to publication.

If shares are issued within the context of a statutory procedure (ie, a (de)merger or contribution of a branch or universality of assets) the companies involved should prepare a proposal, a board report and a (statutory) auditor's report. These documents should be submitted to the shareholders and filed with the clerk's office of the competent Commercial Court, together with the final decision of the shareholders, an extract of which (and for (de)mergers, also the proposals) will be published. In addition, the shareholders in (de)merger operations must have access to the annual accounts, board reports and statutory auditor's reports of the (de)merging companies of the past three years, possibly together with recent financial statements should the annual accounts be outdated.

If a listed company envisages issuing shares, it should in principle, save for certain exceptions, publish a prospectus. Alternatively, the publication of a more limited information memorandum may suffice, should the total value of the issued shares not exceed EUR5 million (or EUR8 million, if the securities are traded on MTF Alternext or the Free Market) over a period of 12 months.

7.3 Producing Financial Statements

In private M&A transactions, it is unusual for the bidder to produce its financial statements. However, should the business combination be structured as a (de)merger, the bidder may be required to make its annual accounts, or more recent financial statements if the previous financial year was closed more than six months before the date of the (de)merger proposal, available to the shareholders (which can be waived unanimously by the shareholders) (see **7.2 Type of Disclosure Required**).

Bidders launching a public takeover bid are required to submit the latest annual accounts and/or consolidated annual accounts of the bidder and the target as part of the prospectus. Should the annual accounts be older than nine months or should the company have undergone material changes in the meantime, more recent financial statements must be added to the prospectus. If the annual accounts are not in line with EU law and do not represent a true and fair view, additional information must be submitted.

Belgian listed consolidating companies must prepare International Financial Reporting Standards (IFRS) consolidated annual accounts. Other Belgian companies should prepare their annual accounts in accordance with Belgian generally accepted accounting principles (GAAP).

7.4 Transaction Documents

In the context of private M&A transactions, no transaction documents must be published. However, business combinations structured against the background of a statutory procedure (merger, demerger, etc) are subject to certain disclosure and publication requirements (see **7.2 Type of Disclosure Required**).

Within the context of public takeover bids, certain transactional documents should be disclosed and published in full. The prospectus will be published upon its approval by the FSMA. If the bidder controls the target, an independent expert's report will also be published as an annexe to the prospectus. The target's board of directors then has five working days following the approval of the prospectus to submit a draft response memorandum to the FSMA. The target should publish the response memorandum upon approval by the FSMA. Finally, the bidder should publish the results of the public takeover bid upon expiry of the acceptance period, together with the amount of the securities it holds following the completion of the bid.

8. Duties of Directors

8.1 Principal Directors' Duties

As a general rule, directors are required to act in the best interest of the company. The interest of the company is principally determined by the collective profit interest of the current and future shareholders of the company. This remains, however, a highly factual (rather than purely legal) assessment and may include (or better, overlap with) the interests of other stakeholders (such as employees or creditors).

However, within the context of a takeover bid on listed shares, the target's board of directors should take into account the (broader) overall interests of the target and its securityholders, as well as its creditors and employees, when explaining the board of directors' position with regard to the bid in the response memorandum and its possible consequences regarding employment.

8.2 Special or Ad Hoc Committees

The Belgian (soft law) Corporate Governance Codes for listed companies (2020 Belgian Code on Corporate Governance) and non-listed companies (2020 UNIZO Code on good governance) provide that the board of directors may create specialised committees to advise on specific matters and strategic decisions, without delegating such decisions. In addition, the articles of association or internal rules of the board of directors could explicitly provide for the creation of specialised committees.

It is, however, rather uncommon for a board of directors to formally create a special or ad hoc committee to advise on business combinations. It is more common to set up informal specific ad hoc working groups tasked with advising and monitoring business combinations. The composition and functioning of these groups are flexible and will depend on the specific needs of the business combination. Other committees, such as an audit committee, may also be involved to perform their specific role vis-à-vis the business combination.

While the creation of a special committee might be recommended in the event of certain conflicts of interest, this is not required under Belgian law. Mandatory statutory conflict of interest procedures require the conflicted directors to disclose their conflict and to abstain from the decision-making process (both the deliberation and the vote). The remaining directors can subsequently proceed with the deliberation and decision. Should all directors be conflicted, they are required to submit the envisaged decision or transaction to the general meeting of the shareholders for their approval. However, the board of directors of a listed company is required to create a special committee for every decision or transaction of the company or its non-listed subsidiaries relating to an affiliated individual or company that is not a subsidiary. This special committee, composed of three independent directors and one or more independent experts, prepares a written and motivated report to advise the board of directors on the envisaged decision or transaction.

8.3 Business Judgement Rule

Belgian courts may not substitute directors' decisions with their own personal judgement when those decisions lie within the discretionary powers of the directors. Courts can only review such decisions under a marginal test within the context of director liability disputes – ie, whether the decision falls outside of the margin of possible decisions that a careful, diligent and reasonable director placed in similar circumstances would take.

8.4 Independent Outside Advice

Depending on the size and scope of the business combination, directors will often appoint independent outside advisers to consult on financial, legal and tax aspects of the business combination and assist with the due diligence and valuation of the target.

Independent expert advice may be required in certain circumstances; for example, within the context of (de)mergers or the takeover bid of a controlling bidder on shares of a listed company.

8.5 Conflicts of Interest

Under Belgian company law, a conflict of interest is defined as a personal direct or indirect interest, of a financial nature, of a director of a company that conflicts with the interests of that company. A functional conflict of interest – eg, both the acquiring and the target company sharing a director – does not trigger the conflict-of-interest procedure under Belgian law.

A director with a conflict of interest must inform the other directors thereof before any decisions in this regard are adopted and may no longer participate in the deliberations or the voting.

As a preliminary remark, relatively few judgments of Belgian courts are published and, as a result, not many judicial decisions are publicly available.

That being said, conflicts of interest of directors of a target company in a public takeover context have been the subject of judicial scrutiny in two notable cases before the Brussels Commercial Court and Brussels Court of Appeal. The case law has established that the mandatory statutory conflict of interest procedure is not applicable in the mere context of a public takeover bid whereby conflicted directors of the target do not abstain themselves from the preparation of the response memorandum, even where those directors are also directors in the bidder.

Within the context of a public takeover bid, the prospectus should mention the intention of the bidder regarding the (mandate of the) directors of the target. This should allow the target's shareholders to accordingly weigh the response memorandum, should it be overwhelmingly positive or negative.

9. Defensive Measures

9.1 Hostile Tender Offers

Hostile tender offers are allowed, yet sporadic, in Belgium. Recommended takeovers are by far the most frequently occurring type of takeover. This is mainly due to the nature of Belgian listed companies, which are often family-owned or controlled by one or several shareholders. Consequently, in such cases, irrevocable commitments by the controlling shareholders will typically be required. This, in turn, makes hostile tender offers rather unusual.

9.2 Directors' Use of Defensive Measures

Directors can take defensive measures as long as these are in the interest of the company as a whole. Specifically, for public takeovers, Section 9, 3° of the Public Takeover Law reflects this principle. Generally, directors must always exercise their powers in the company's best interest.

Shareholders can, however, include restrictions in the articles of association on the directors' freedom to frustrate a hostile takeover. For instance, the articles of association may include (i) a requirement for the prior authorisation of the shareholders' meeting before the directors can take any action susceptible to frustrate a bid, or (ii) a provision making restrictions on the transfer of securities with voting rights unenforceable during the bid. In addition, the shareholders could also make certain voting and other rights, provided for in the articles of association or in contractual agreements between the target and the target's shareholders, unenforceable during the bid (the "breakthrough rule").

Companies can also link the above to a reciprocity condition, meaning that the implementation of these restrictions can be subject to the same rules being applied by the bidder.

9.3 Common Defensive Measures

The most common defensive measures taken by the board to frustrate takeovers are the increase of the share capital under the authorised capital procedure (ie, the delegation of the powers needed to increase the share capital by the shareholders' meeting to the board of directors), the issuance of warrants or bonds that become convertible in the case of a hostile takeover, and the buy-back of shares without the prior approval of the shareholders' meeting. For all these measures, however, the prior approval of the shareholders' meeting is needed, and such approval may only be granted for a renewable period of, at most, five years.

Shareholders frequently protect their interests from a hostile takeover by including restrictions on the transfer of shares in the articles of association and shareholders' agreements. Common examples are the inclusion of a pre-emption right, a right of first refusal or approval, standstill provisions and tag-along rights. Under the BCAC, shareholders can also protect their interests by granting multiple voting rights to certain shares in the articles of association. Besides the above, shareholders can also adopt a disposal-of-assets measure prior to the offer period and make this conditional upon an offer being launched.

Additionally, the inclusion of change-of-control clauses in important agreements is another common possible measure. While it is not a measure specific to tackling a potential hostile takeover, it could have a dissuasive effect for any potential buyer. For listed companies, the shareholders' meeting needs to approve them as well.

The COVID-19 pandemic has not had an impact on the prevalence of defensive measures.

9.4 Directors' Duties

At the risk of being held personally liable, directors should always act in the best interest of the company. This also applies when taking defensive measures.

9.5 Directors' Ability to "Just Say No"

Directors can combine a refusal to negotiate with an unwillingness to waive defensive measures, but only if this in the best interest of the company. As this is usually hard to assess upon receipt of a first offer, it is recommended for directors to have at least initial talks regarding the offer to avoid any personal liability.

The directors of the target do, however, need to draft a memorandum in reply to the takeover offer. If directors take a different position, in this memorandum, to the shareholders, this could influence the shareholders' positions. Regardless of the position of the directors, the shareholders make their own assessment of the offer and decide on the offer independently.

For more information on disclosure requirements in the case of a public takeover bid, see **7.1 Making a Bid Public.**

10. Litigation

10.1 Frequency of Litigation

As court judgments in Belgium are not (immediately) published, it is hard to assess the frequency of litigation in connection with M&A deals. The trend, however, seems to be that litigation is becoming increasingly common (but still far less common than in, for example, the USA). If the deal concerns a hostile takeover (which does not occur often), litigation is a common strategy to frustrate or delay the bid.

10.2 Stage of Deal

Pre-closing litigation is rather common in the event of a hostile takeover (see also **10.1 Frequency of Litigation**).

In the case of private M&A deals, the vast majority of litigation proceedings occur in the post-closing stage. In such cases, purchasers often seek damages for breaches of representations, warranties or specific indemnities.

10.3 "Broken-Deal" Disputes

As mentioned in **10.1 Frequency of Litigation**, court judgments in Belgium are in general not published, and if decisions are published, there is often a delay. There is thus very little information on "broken-deal" disputes and how frequently they occur.

In general, despite the fact that the COVID-19 pandemic has had a significant impact on the organisation of businesses, the (M&A) market has shown itself to be remarkably resilient (mainly due to the digital tools and solutions available). Despite the drop in M&A activity at the start of the pandemic, it is apparent that it has been business as usual since then. As a result, it is still recommended to enter into a detailed term sheet before entering into more detailed negotiations to avoid misunderstandings as to the general terms and conditions of the transaction at a later stage.

11. Activism

11.1 Shareholder Activism

Shareholder activism in Belgium is not common as minority shareholders within large Belgian companies often lack an incentive to take such action. Large shareholders usually own sufficient shares to control the company and can, therefore, often significantly impact the appointment of directors and the strategy of the company. In view of this, it is very difficult for minority shareholders to have any influence on the corporate decision-making process. Additionally, the minority shareholders can piggyback on the efforts of larger shareholders. However, with respect to certain topics, such as director remuneration, shareholder activism has increased. It should be noted that when shareholder activism does occur, it seems to find its source in organisations located in neighbouring countries and not in Belgium itself.

11.2 Aims of Activists

Generally, shareholders in Belgian companies tend to limit their activism to reacting to the behaviour of the company to protect their own interests. It is unusual for a shareholder in a Belgian company to try to actively impact the corporate policies pursued by a company.

Reactive (and, less commonly, proactive) activism can be aimed at both financial and non-financial aspects of the management of a company. In relation to M&A in particular, activist shareholders have questioned the financial and strategic motivation of certain boards. As far as can be identified, the COVID-19 pandemic and the energy crisis have not had a particular impact on this.

11.3 Interference With Completion

Activist shareholders in Belgian companies have, on occasion, tried to interfere with the completion of announced transactions. A failed example of such interference was the exercise of the right to ask questions during the annual general meeting, in relation to a proposed merger, and the questioning of the independence of the independent directors, by the minority shareholders of Immobel. An example of successful interference was the shareholder activism in relation to the proposed merger between Picanol and Tessenderlo.

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