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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the fifth edition of *Private M&A*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Latvia and Spain.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Will Pearce and Louis L Goldberg of Davis Polk & Wardwell LLP, for their continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

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Belgium

Dries Hommez and Florent Volckaert

Stibbe

STRUCTURE AND PROCESS, LEGAL REGULATION AND CONSENTS

Structure

1 How are acquisitions and disposals of privately owned companies, businesses or assets structured in your jurisdiction? What might a typical transaction process involve and how long does it usually take?

Acquisitions and disposals of privately owned companies between a seller and a purchaser generally take place through the execution of a share purchase agreement if the shares in a company are being transferred; or an asset purchase agreement if all or part of the assets, liabilities, or both of a company are being transferred. Alternatively, it is also possible for an investor to acquire a participation in a company by subscribing to a capital increase whereby new shares in the company are issued, in which case an investment agreement will generally be entered into. Share purchase agreements, asset purchase agreements and investment agreements partly differ due to their particular subject matter, but are also comparable in numerous respects (eg, they often include comparable indemnification and limitation mechanisms).

Transaction processes can largely be divided into two categories: bilateral transactions whereby a purchaser directly approaches a seller or vice versa and negotiations are entered into directly; or auction processes, often managed by a corporate finance firm or investment bank that contacts various potential bidders in the framework of a competitive process.

In a direct bilateral transaction, the structure will depend on the type of business and the parties involved, but generally this will consist of a preliminary negotiation phase during which parties will discuss the proposed transaction, after which a letter of intent may be issued or a (binding or non-binding) term sheet can be agreed upon, together with a non-disclosure agreement that should contain clean team arrangements if target and purchaser are competitors of each other. Following this preliminary stage, due diligence will often take place, followed by the drafting and negotiating of detailed transaction documents. The length of this process can vary significantly from a couple of weeks or months to up to a year. This will very much depend on the interest and motivation of the parties involved, given that there will be no formal organised process as is the case in an auction.

An auction process generally starts with the preparation and distribution of an information memorandum to potential bidders and the signing of a non-disclosure agreement. When the interest of potential bidders is still unclear, they may initially only be provided with a teaser, which in essence is a summary of a more comprehensive information memorandum. In the next stage, non-binding bids will be solicited on the basis of which bidders will be selected to proceed to the next round, in which they will generally be allowed to perform due diligence on the target. This due diligence process may be facilitated by the provision of a vendor due diligence report to the bidders. The larger a transaction, the more likely it is that a vendor due diligence report will be provided. During the due diligence stage, draft transaction documents will be provided by the seller to the bidders. At the end of the due diligence stage, bidders will be requested to submit binding bids together with mark-ups of the transaction documentation. On the basis of said bids, the seller will choose one or more bidders to continue negotiations with until an exclusive bidder remains and final transaction documentation is entered into. The duration of an auction process will much depend on the size of the target and can range from two to six or more months.

Legal regulation

2 Which laws regulate private acquisitions and disposals in your jurisdiction? Must the acquisition of shares in a company, a business or assets be governed by local law?

Belgian corporate law is set out in the Belgian Code of Companies and Associations. Certain less common company types, furthermore, remain partially subject to the old Code of Companies. These company types are less relevant in an international M&A context.

The Code of Companies and Associations includes the basic principles on the transferability of shares and various procedures for corporate restructurings for the various types of companies in Belgium. Additionally, it will need to be assessed whether a merger filing is required by applicable national and European competition laws. In the case of a transfer of assets or liabilities, further regard will, inter alia, need to be had to legislation governing the transfer of employees, tax legislation, legislation governing the transfer of contracts, title to (real) property, permits and government authorisations and intellectual property.

Share or asset transactions can be governed by foreign laws provided that certain local law formalities (eg, registration of a transfer of shares in the share register of the company, registration of a transfer of real estate in the mortgage register) are complied with. Moreover, the Code of Companies and Associations provides for some procedures for transfers of assets or liabilities. These procedures are characterised by certain advantages (eg, transfer of assets or liabilities by law). These benefits can be taken advantage of only if Belgian law procedures are followed.

Legal title

3 What legal title to shares in a company, a business or assets does a buyer acquire? Is this legal title prescribed by law or can the level of assurance be negotiated by a buyer? Does legal title to shares in a company, a business or assets transfer automatically by operation of law? Is there a difference between legal and beneficial title?

In Belgium, full legal title to shares or assets is generally transferred and sellers usually give unlimited warranties in the transaction documentation that they have full, valid and unencumbered title to the shares or assets they are transferring, as well as the capacity to perform such transfer.

Title to shares in a company, in principle, transfers upon signing of the contract, but such transfer is in practice always postponed until closing of the transaction if such closing does not coincide with signing. The transfer of title to the shares becomes effective towards the target company and third parties upon the registration of the share transfer in the share register of said company. Title to assets, in principle, transfers upon there being a valid transfer agreement (provided that there may be certain transfer formalities for certain assets such as real estate, permits, intellectual property, contracts, etc), but can also transfer by operation of law if one of the special asset transfer procedures set forth in the Code of Companies and Associations is complied with.

In Belgium, the full ownership of shares or assets can be split up into bare ownership and (temporary) usufruct; however, in private M&A, the full ownership of shares and assets is generally transferred, and such distinction is not made. If real estate is involved in the transaction the situation might be different, because land ownership can be structured and split up in different manners (eg, the granting of rights to build, long lease rights, easements).

Multiple sellers

4 Specifically in relation to the acquisition or disposal of shares in a company, where there are multiple sellers, must everyone agree to sell for the buyer to acquire all shares? If not, how can minority sellers that refuse to sell be squeezed out or dragged along by a buyer?

The principle is that for all the shares in a company to be transferred, all shareholders will need to agree to such transfer. When there are different shareholders, a shareholders' agreement will often be in place that may include provisions regulating the transfer of shares in the company, such as a drag-along provision pursuant to which certain shareholders can force the other shareholders to sell their shares in certain circumstances. Such provisions can also be set forth in the articles of association of the company.

Apart from contractual arrangements or arrangements in the articles of association, the Code of Companies and Associations does not provide for a general drag-along procedure for private companies. A squeeze-out procedure can be triggered by shareholders holding 95 per cent or more of the shares of a limited liability company (NV/SA or BV/SRL). However, each remaining shareholder may object to the squeeze-out; thus, this procedure is hardly ever used in a private M&A context. Only in exceptional circumstances is it possible to claim the exclusion of a shareholder in court.

Exclusion of assets or liabilities

5 Specifically in relation to the acquisition or disposal of a business, are there any assets or liabilities that cannot be excluded from the transaction by agreement between the parties? Are there any consents commonly required to be obtained or notifications to be made in order to effect the transfer of assets or liabilities in a business transfer?

There are two main options for structuring the sale of a business or assets and liabilities in Belgium: either the assets and liabilities to be transferred are chosen specifically, or the transaction is structured through one of the procedures set forth in the Code of Companies and Associations as a sale of a business branch or universality.

In the case of a transfer of individual assets and liabilities, parties can at their discretion determine the scope of the assets and liabilities to be transferred, provided that for each asset and liability the legally required transfer formalities are complied with (eg, notifications to or consents from counterparties to contracts).

Structuring the transaction through one of the procedures in the Code of Companies and Associations has the advantage that the transfer takes place by operation of law, without the need to comply with the specific transfer formalities per asset or liability (subject to certain exceptions). On the other hand, such procedure entails that all the assets and liabilities that are part of the transferred business branch or the whole business are transferred without the possibility of cherry-picking.

In addition to the above and irrespective of the corporate procedure that is chosen, if the Belgian regulations regarding transfers of undertakings, as laid down in the Belgian national Collective Bargaining Agreement No. 32-bis, are applicable, the buyer is obliged to take over all rights and obligations that arise from the employment agreements regarding the employees who are part of the transferred business, as these employees are, in principle, automatically transferred to the buyer.

Consents

6 Are there any legal, regulatory or governmental restrictions on the transfer of shares in a company, a business or assets in your jurisdiction? Do transactions in particular industries require consent from specific regulators or a governmental body? Are transactions commonly subject to any public or national interest considerations?

When shares in a company, a business or assets are transferred, the applicable competition laws should be regarded. In Belgium, pursuant to the Code of Economic Law, mergers need to be notified to the Belgian Competition Authority when the involved undertakings jointly realise a turnover in Belgium exceeding €100 million, and at least two of the undertakings involved each realise a turnover of at least €40 million in Belgium. However, if the transaction meets the turnover thresholds set out in the EU Merger Regulation, and hence a notification to the European Commission is required, no separate notification will be required in Belgium.

Besides merger control, transactions in Belgium are generally not subject to government approval; nor are they subject to public or national interest considerations (but exceptions may exist in very specific sectors). That said, government-issued permits, concessions and the like may be subject to change of control, transfer or similar restrictions, which may indirectly result in governmental consent being required to properly effect a transaction.

7 Are any other third-party consents commonly required?

A sale of shares in a company in principle does not require any third-party consents other than approval by the competition authorities if the relevant thresholds are met. However, contractual arrangements,

subsidies, public tenders, etc, may include change of control provisions requiring the notification or prior approval of a contemplated share transaction.

If a sale of assets is structured through one of the procedures in the Code of Companies and Associations, the transfer takes place by operation of law and third-party consents will, in principle, not be required (subject to exceptions, such as very specific transfer restrictions in contracts). However, if an asset sale is not structured through such procedure, the formalities applicable to each asset will need to be complied with to effect its transfer. This will likely include the requirement to obtain consent from counterparties to contractual arrangements if obligations under such contracts are transferred and the requirement to notify debtors if rights are transferred. Additionally, the transfer of certain assets will require registration or notification (eg, in the mortgage register in the case of a transfer of real estate, changes to intellectual property registrations, notification of a transfer of an environmental permit) for the transfer to be effective towards third parties.

Regulatory filings

8 Must regulatory filings be made or registration (or other official) fees paid to acquire shares in a company, a business or assets in your jurisdiction?

Transfers of shares, in principle, do not require regulatory filings or the payment of registration fees. If assets are transferred through the procedures provided in the Code of Companies and Associations, the intervention of a notary public will be required, which will entail notary costs and the requirement to pay certain nominal registration duties.

If real property is transferred in the context of an asset sale, real estate transfer tax (at a rate of 10 per cent in the Flemish Region or 12.5 per cent in the Brussels or the Walloon Region) will be due. Such real estate transfer tax is in principle (provided there is no abuse) not due if shares are sold in a company that owns real estate. Furthermore, an exemption exists for certain restructurings, such as mergers, demergers or contributions of a business branch, provided that all conditions for such exemption are met.

If other assets are transferred that require registration, additional limited registration fees may be due (eg, to change intellectual property registrations).

The transfer of a business or assets often requires government notifications with respect to the transfer of (or, as the case may be, reapplication for) permits. The transfer of real estate might specifically also give rise to soil Investigation and remediation measures that will require government filings.

If the transfer of shares results in a change of the ultimate beneficial owners of the target company, the management body of the target company will be required to update the information disclosed in the ultimate beneficial owner register accordingly within one month of closing. If the transfer of shares results in a change of the directors, registered office or articles of association of the target company, these changes will have to be filed with the clerk office of the competent court.

ADVISERS, NEGOTIATION AND DOCUMENTATION

Appointed advisers

9 In addition to external lawyers, which advisers might a buyer or a seller customarily appoint to assist with a transaction? Are there any typical terms of appointment of such advisers?

In the event of an auction process, a seller will generally appoint a financial adviser to structure and lead the process. In addition, an accountant may be engaged to perform an audit of the accounts and to provide tax structuring advice. A buyer will, in addition to lawyers, also generally be assisted by a financial adviser and an accountant, who will be responsible for the financial and tax due diligence, and who may be charged with, for example, setting up a debt pushdown structure. In the context of due diligence, it is further possible that certain specialised consultants are engaged to perform, for example, commercial, strategic, environmental or pensions due diligence.

These advisers will generally be engaged on the basis of their proper standard terms of engagement, which are rarely negotiated in detail. Fees may take the form of a success fee, be based on the transaction value and complexity, or simply be invoiced at set hourly rates.

Duty of good faith

10 Is there a duty to negotiate in good faith? Are the parties subject to any other duties when negotiating a transaction?

Under Belgian law, parties to a potential transaction are in principle free to negotiate and to terminate negotiations. Certain conduct during the negotiations, however, can be regarded as running counter to an implicit legal duty of care or good faith and give rise to pre-contractual liability.

A case in point is the termination of negotiations without valid reason and without respect for the reasonable expectations of the other party, such as the termination of negotiations that have reached a stage where it would be reasonable for the other party to expect that a contract would be entered into. This will most often be the case when there is practically a full and valid agreement with regard to the essential characteristics of the transaction.

A failure to disclose certain information to the other party can also result in pre-contractual liability.

Parties can impose explicitly a duty of good faith on each other by agreeing to binding heads of terms.

Documentation

11 What documentation do buyers and sellers customarily enter into when acquiring shares or a business or assets? Are there differences between the documents used for acquiring shares as opposed to a business or assets?

When shares in a company are being transferred, the parties will enter into a share purchase agreement. It is also possible that an investor acquires a participation in a company by subscribing to a capital increase whereby new shares in said company are issued, in which case an investment agreement will generally be entered into. In addition, if all the shares are not sold, or if under a capital increase new shares are issued, such that one or more of the existing shareholders will continue to be shareholders next to the purchaser, a shareholders' agreement setting forth governance and share transfer arrangements is generally entered into.

In the case of a transfer of a business or assets, an asset purchase agreement will be entered into. If the asset transfer is effected in accordance with one of the procedures set forth in the Code of Companies and Associations, additional documentation will need to be drafted in accordance with the requirements of the relevant procedure (eg, board reports, a shareholders' meeting before a notary public). Specific documentation for the transfer of certain assets may also be required, such as for the transfer of real estate, which needs to take place in notarial form.

Share purchase agreements, asset purchase agreements and investment agreements partly differ due to their particular subject matter. Asset purchase agreements will, for example, include substantial provisions delineating the scope of the assets or liabilities to be transferred and detailing the relevant transfer formalities, whereas a transfer of shares is much more straightforward in that respect.

However, these agreements are also comparable in numerous other respects and will, for example, often include comparable indemnification and liability limitation mechanisms.

Additional ancillary documentation and agreements entered into may consist of, inter alia, non-disclosure agreements, transitional supply or services agreements, licencing agreements, (new) management agreements and intellectual property transfer agreements.

12 | Are there formalities for executing documents? Are digital signatures enforceable?

The civil law principle that applies in Belgium is that every contract must be initialled (on each page) and signed by all the parties thereto in as many originals as there are parties. This, however, does not prevent signature of documents in counterparts. Signature needs to take place by persons who are authorised to sign. This is straightforward for natural persons (save in exceptional circumstances, such as if the person signing is incapacitated or incompetent to sign, and always taking into account the person's marital status), but this requires attention for legal entities such as companies. It will need to be assessed whether the person or persons signing on behalf of a legal entity are empowered to do so on the basis of either the entity's articles of association or a validly issued power of attorney. Powers of attorney, whether granted by a natural person or a legal entity, do not need to be in notarial form.

In the context of a sale of assets, certain documents (eg, for the transfer of real property) should take the form of a notarial deed, so they must be executed in the presence of and by a civil law notary.

Electronic signatures are enforceable pursuant to Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions. Work from home orders in the context of the covid-19 pandemic have led to more widespread use of electronic signatures. The increased popularity of e-signatures is expected to last beyond the health crisis.

DUE DILIGENCE AND DISCLOSURE

Scope of due diligence

13 | What is the typical scope of due diligence in your jurisdiction? Do sellers usually provide due diligence reports to prospective buyers? Can buyers usually rely on due diligence reports produced for the seller?

Due diligence will practically always relate to at least the legal, financial, tax and commercial aspects of a company or business. In addition, depending on the type of business, separate in-depth investigations may be conducted in relation to specific subjects such as environmental risks and pension obligations, but these can also be part of the overall legal due diligence exercise. A legal due diligence exercise will generally focus on corporate matters, commercial (customer and supplier) agreements, real estate (including, as the case may be, environmental matters), employees (including, as the case may be, pensions), intellectual property, information technology and financing agreements.

In small and medium-sized transactions, vendor due diligence reports are not often provided, whereas in auction processes relating to large or complex targets it is customary to facilitate and accelerate the due diligence phase of the auction process by providing candidate buyers with vendor due diligence reports. Most buyers will still conduct a limited confirmatory due diligence on the basis of these reports when evaluating a transaction. Reliance on the provided vendor due diligence reports is often provided to the successful bidder and its financing banks.

Liability for statements

14 | Can a seller be liable for pre-contractual or misleading statements? Can any such liability be excluded by agreement between the parties?

The seller has a pre-contractual obligation to inform. If he or she fails to notify the (potential) buyer about possible deal-altering information, he or she could be held liable pre-contractually even if a contract is not ultimately entered into. Parties can by agreement exclude their extra contractual liability; however, no such exclusion is possible in the case of fraud or deceit.

Publicly available information

15 | What information is publicly available on private companies and their assets? What searches of such information might a buyer customarily carry out before entering into an agreement?

A number of documents relating to private companies need to be deposited at the registry of the enterprise court in the territorial jurisdiction in which the company has its registered office. Such documents include the deed of incorporation, amendments to the articles of association and important corporate decisions. Extracts of these documents often also need to be published in the Annexes to the Official Belgian Gazette.

Furthermore, if a company has changed its articles of association since 1 May 2019, the full text of the latest version of the articles of association can be consulted online. A company also needs to deposit its annual accounts at the National Bank of Belgium, which are made available publicly online. In addition, the Crossroads Bank of Enterprises, with which each company needs to be registered, includes certain basic information in relation to each company. However, this is not always accurate and should always be verified against the official publications in the Official Belgian Gazette. Finally, it is possible to consult the identity of the ultimate beneficial owners of a company in the ultimate beneficial owner UBO register.

Certain other databases, such as Graydon, may include additional information relating to, for example, the financial health of a company, but these are rarely used in the context of due diligence processes.

In relation to real estate, searches of the mortgage register can be conducted. Certain pledges over non-financial assets can be consulted in the Belgian pledge register. In relation to soil, depending on the location of the land, certain online public registers exist on the basis of which rudimentary information in relation to previously conducted soil investigations can be consulted. In addition, following the basic principle of government transparency, complete permits and certain soil investigations can be requested. However, such information would generally form part of the data room.

The status of registered IP rights and domain names can generally also be verified quite easily in freely accessible online registers.

The above searches are usually conducted in addition to and to verify, where possible, the information provided through the data room.

Impact of deemed or actual knowledge

16 | What impact might a buyer's actual or deemed knowledge have on claims it may seek to bring against a seller relating to a transaction?

Transaction documentation will often specify whether a buyer is permitted to issue a claim on the basis of the matters or circumstances of which it was aware at the time of entering into the agreement. It is fairly common to exclude the possibility for the buyer to claim if he or she had actual knowledge of a matter (anti-sandbagging clause). The exclusion of deemed knowledge is less common but occurs from

time to time. Such purchaser's knowledge provision is often included in addition to the concept of (fair) data room disclosure. Conversely, parties may also specify that the buyer's actual or deemed knowledge of matters that could give rise to a claim does not limit the right to file a claim against a seller (pro-sandbagging clause).

In the context of an agreement containing a pro-sandbagging clause, the Belgian Supreme Court recently held that a buyer signing a purchase agreement 'claim in pocket' does not commit an abuse of rights when subsequently filing that claim against the seller, as a consequence of which the claim was successful; however, it cannot be excluded that in future cases, the courts may still consider a buyer to be acting in bad faith even in the presence of a pro-sandbagging clause, especially if the pro-sandbagging clause is boilerplate provision and the buyer did not disclose, during contract negotiations, actual knowledge about a specific matter that could lead to a claim.

In the absence of a pro- or anti-sandbagging clause in the contract, the fact that a buyer has knowledge of a certain matter, such as a breach of representations and warranties, will, in principle, not prevent the buyer from claiming damages from a seller.

Certain scholars and case law, however, consider that in cases where the buyer had actual knowledge of the matter, the argument could be raised that the buyer is acting in bad faith, which is against the general principle that an agreement must be performed in good faith. This could potentially limit a buyer's chances of successfully claiming damages. A buyer may be acting in bad faith if he or she has knowledge of certain matters of which the seller or target is not necessarily aware (eg, in the context of a due diligence conducted by the buyer assisted by professional advisers). If a buyer negotiates a warranty with fraudulent intent in relation to a matter known to the buyer but of which the seller is unaware, the seller could even claim the annulment of the purchase agreement in court.

Buyers who have actual knowledge of matters that could lead to a claim and who wish to reserve the right to seek indemnification in that respect should, therefore, request to include specific indemnities in the purchase agreement covering those matters. A specific indemnity is preferred over an open-ended pro-sandbagging clause (or should be included in addition thereto) as it avoids a bad faith or abuse of rights debate in relation to the buyer's knowledge.

PRICING, CONSIDERATION AND FINANCING

Determining pricing

17 | How is pricing customarily determined? Is the use of closing accounts or a locked-box structure more common?

Closing accounts and locked-box mechanisms are commonly used.

In transactions involving a sale of shares in a company, the use of locked-box accounts is most common, because company-specific accounts are generally readily available. Besides this, locked-box accounts have the obvious advantage of providing a final purchase price on the closing date.

Closing accounts generally prove more useful in asset transactions in which (part of) a business is being carved out, where the valuation may depend more on the value of the assets that are actually transferred (eg, stock), rather than on the (expected) profitability, as is generally the case for companies.

Form of consideration

18 | What form does consideration normally take? Is there any overriding obligation to pay multiple sellers the same consideration?

Cash is by far the most common form of consideration, provided that the cash consideration may partly be structured through deferred payment mechanisms such as vendor loans or, more commonly, earn-outs. If one or more sellers reinvest in the target, shareholder loans often take the place of vendor loans. Payments in securities, other than in a reinvestment scenario in which shares in the acquisition vehicle may be acquired, are very rare in private M&A transactions.

There is no overriding obligation to treat sellers equally in terms of the consideration paid to them; however, discrepancies in the (pro rata) payments received by sellers are, for obvious reasons, rare to non-existent, and this may also have a tax impact. This is, however, subject to the caveat that payment structures may differ between sellers depending on, for example, reinvestment and earn-out arrangements.

Earn-outs, deposits and escrows

19 | Are earn-outs, deposits and escrows used?

Earn-outs may be used, for example, where part of the valuation is based on future performance of the target, whereby the sellers continue to render (transitionary) management services during the earn-out period, or where part of the valuation is based on the occurrence of (uncertain) future events (eg, the obtaining of certain permits, timely completion of a project).

The use of deposits is extremely rare, but can occur when it is uncertain whether the purchaser will be able to proceed to closing (eg, due to the economic climate in the jurisdiction it is based in).

The use of escrows is quite common as security for claims in cases of a breach of the representations and warranties or as security for indemnity claims.

Financing

20 | How are acquisitions financed? How is assurance provided that financing will be available?

Where the purchaser is an industrial party (such as a multinational acquiring a small or medium-sized enterprise active in the same or a complementary business), acquisitions may be fully equity-funded. However, more commonly and in practically all acquisitions involving a private equity fund as purchaser, funding will be structured through a mix of equity and external bank debt. In addition, the financing structure may be supplemented with subordinated shareholder loans or vendor loans.

The obtainment of bank funding may be included as a condition precedent in the transaction documentation. However, in competitive auction processes purchasers will try to avoid imposing such condition to provide deal certainty to the seller. Therefore, purchasers will often strive to obtain committed financing term sheets from banks prior to signing.

Where the purchaser is a newly incorporated company and if committed financing is not yet available, sellers will often request an equity commitment letter or parent guarantee to be certain that sufficient funding will be available.

Limitations on financing structure

21 Are there any limitations that impact the financing structure? Is a seller restricted from giving financial assistance to a buyer in connection with a transaction?

In this respect, the restriction on financial assistance in article 7:227 of the Code of Companies and Associations (and similar provisions with respect to other company forms) should be taken into account, which provides that a Belgian limited liability company may in principle not provide loans or collateral to finance the acquisition of its own shares (or profit certificates) unless certain strict requirements are complied with. The result of this is that financial assistance within the strict meaning of this provision and in compliance with the legal requirements is rarely provided.

It is, however, generally accepted that article 7:227 of the Code of Companies and Associations should be interpreted restrictively, as a consequence of which debt pushdown techniques such as capital decreases and dividend distributions to repay acquisition loans taken out at the level of the purchaser are possible.

A seller is in any event not restricted by law from giving financial assistance to a buyer in connection with a transaction.

CONDITIONS, PRE-CLOSING COVENANTS AND TERMINATION RIGHTS

Closing conditions

22 Are transactions normally subject to closing conditions? Describe those closing conditions that are customarily acceptable to a seller and any other conditions a buyer may seek to include in the agreement.

In competitive auction processes, a purchaser will strive to include as limited a number of closing conditions (commonly referred to in transaction documentation as conditions precedent) as legally possible and will, if possible, suggest the simultaneous signing and closing of the transaction. Certain closing conditions, such as approval of the transaction by the competent competition authorities, may not be avoidable but will often also be acceptable to the seller as they will often apply irrespective of the identity of the purchaser.

In bilateral transactions or less competitive auctions, additional closing conditions may be included, such as the entry into certain agreements with third parties, obtaining of certain waivers or completion of a pre-closing restructuring. However, even in this context parties often strive to limit the number of such conditions and agree on simultaneous signing and closing if possible.

23 What typical obligations are placed on a buyer or a seller to satisfy closing conditions? Does the strength of these obligations customarily vary depending on the subject matter of the condition?

Transaction documentation will generally include that parties must use their (reasonable) best efforts to strive for satisfaction of the closing conditions.

If approval by the competition authorities is required, the extent of the obligations of the parties will generally be the subject of negotiation; for example, whether conditions imposed by the competition authorities, such as divestments, should be complied with. Although in competitive auction processes a seller may impose a 'hell or high water' standard on the purchaser for obtaining competition approval, such standard is rarely included in its strict sense in final documentation.

Pre-closing covenants

24 Are pre-closing covenants normally agreed by parties? If so, what is the usual scope of those covenants and the remedy for any breach?

In transactions with a locked-box mechanism, which is most common for transactions involving a transfer of shares, customary pre-closing covenants will consist of an ordinary course of business (in accordance with past practice) obligation (such obligation generally also being included in transactions with closing accounts) as well as a no leakage obligation, each time for the period from the locked-box accounts date until the signing date as well as for the period between signing and closing. Specific lists of what is considered as being in any event outside the ordinary course of business and of leakage and permitted leakage items will generally be included and be the subject of negotiation. Another customary pre-closing covenant of a softer nature is a general undertaking by the parties to cooperate in good faith to reach closing.

The remedy for leakage will be an undertaking by the seller to indemnify the purchaser for any loss (indirectly) resulting from such leakage.

With respect to ordinary course obligations, a specific remedy in the case of a breach is rarely provided as damages are often more difficult to quantify or predict in relation to such breach and damages, or the possibility for specific performance will need to be assessed on a case-by-case basis.

Termination rights

25 Can the parties typically terminate the transaction after signing? If so, in what circumstances?

The possibilities for termination of a transaction following signing are generally kept to an absolute minimum. Termination will be possible if a closing condition is not satisfied (or is waived by the party to whose benefit it is) prior to an agreed 'long-stop date'. Termination may also be possible if, on closing, one of the parties does not comply with its closing obligations (eg, payment of the purchase price, delivery of the shares or assets), with the non-defaulting party being able to claim damages in such case (which may or may not be liquidated in the form of a break fee).

The possibility to terminate a transaction on the basis of a breach of other obligations than closing obligations, such as a breach of the representations and warranties or an ordinary course obligation, is often contractually excluded, with damages being the exclusive remedy.

26 Are break-up fees and reverse break-up fees common in your jurisdiction? If so, what are the typical terms? Are there any applicable restrictions on paying break-up fees?

It is rather unusual for break fees to be included in documentation regarding private M&A transactions. Nonetheless, these are included from time to time, in very competitive auction processes or in transactions in which parties are already seriously committed or will seriously commit (eg, financially or commercially) to each other between signing and closing, and may in such case be reciprocal. If a break fee is not included, the non-defaulting party will generally still be able to claim damages; however, these may be difficult to assess. In general, it is fairly rare that a transaction is terminated after signing.

The general principle under Belgian law is that liquidated damages provisions, including break fees, may not have a punitive character, but need to be based on a realistic assessment of the damages that the parties could reasonably expect to incur in the case of a breach of obligations at the time the amount was agreed upon. If this limitation is disrespected and a dispute arises, a judge will be able to mitigate

liquidated damages it considers excessive to a reasonable amount. However, a judge cannot mitigate the amount to an amount lower than the amount that could have been claimed if no liquidated damages amount was agreed upon.

REPRESENTATIONS, WARRANTIES, INDEMNITIES AND POST-CLOSING COVENANTS

Scope of representations, warranties and indemnities

27 Does a seller typically give representations, warranties and indemnities to a buyer? If so, what is the usual scope of those representations, warranties and indemnities? Are there legal distinctions between representations, warranties and indemnities?

A seller will practically always give representations and warranties to a certain extent. The bare minimum is that these are given in relation to the capacity to enter into the transaction and in relation to title to the shares or assets that are transferred. In addition, the other matters in relation to which representations and warranties are given and their scope will depend on the nature of the target and the competitiveness of the process. Commonly included representations and warranties relate to corporate matters, accounts, assets, material agreements, permits and environmental matters, IP, IT, insurance, employees, litigation and tax.

A seller will be reluctant to grant specific indemnities, but in the case of clearly defined substantial risks that have been identified during due diligence or that have been disclosed (eg, ongoing litigation, a pending tax audit, potential soil pollution), a limited number of indemnities may be included. In such a case, the seller will want to describe the scope of the indemnity in as much detail as possible. Over the past few years, tax covenants have made their appearance in Belgian private M&A agreements, even though, if the sales process is competitive, a seller will often be reluctant to accept a full-fledged tax indemnity in addition to the customary tax warranties.

The terms 'representations' and 'warranties' are commonly used together and interchangeably. In the case of a breach of a representation or warranty, the purchaser will be entitled to claim damages to cover such amount of loss required to put it in the position it would have been in should the representation or warranty have been accurate (such loss can be incurred directly by the purchaser or indirectly through, for example, its shareholding in the target company). Claims based on representations and warranties are generally subject to a number of liability limitations.

Specific indemnities relate to specific risks known to the parties and will entitle the purchaser to claim damages if the matter envisaged by the indemnity gives rise to a loss for the purchaser. Specific indemnities are subject to no or only a limited number of limitations.

An indemnity does not have an 'on demand' character under Belgian law.

Limitations on liability

28 What are the customary limitations on a seller's liability under a sale and purchase agreement?

Liability limitations are primarily agreed in relation to the representations and warranties that are given, whereas claims based on breaches of other undertakings (eg, confidentiality) will generally not be limited. Specific indemnities will generally not be subject to the limitations applicable to the representations and warranties discussed below, although sometimes separate limitations may be agreed for indemnities (such as a separate liability cap or time limitations).

It is common to provide that a purchaser is not entitled to claim in relation to facts, matters or circumstances that have been disclosed by the seller, such as in the data room that was established for the due diligence. A purchaser will want to include a 'fair' disclosure standard, in the sense that something will be considered disclosed only to the extent a reasonably acting purchaser in the same position would have been able to identify the risk and the potential impact of it on the company, business or assets.

Other recurring and heavily negotiated limitations are de minimis (no possibility to claim for a certain matter if the resulting loss is below a certain amount) and aggregate (no possibility to claim if the aggregate amount of all claims is below a certain amount, also referred to as a 'basket') thresholds, whereby the basket may be tipping (ie, once the threshold is exceeded, the full amount of the loss can be claimed) or function as a franchise (ie, only the excess loss above the threshold can be claimed for), as well as an overall cap on the potential liability of the seller for all claims. The aforementioned limitations may be included as nominal amounts or as percentages of the purchase price.

The period during which a claim can be issued for certain matters will generally be subject to contractually agreed limitation periods, which may be longer or shorter depending on the perceived importance of the subject matter (eg, longer time limitations for tax are quite common).

In addition to the above, a set of other, less controversial limitations will often be included, for example, relating to changes in law and subsequent recovery from third parties.

Transaction insurance

29 Is transaction insurance in respect of representation, warranty and indemnity claims common in your jurisdiction? If so, does a buyer or a seller customarily put the insurance in place and what are the customary terms?

Warranty insurance is making its way into the Belgian market, especially in secondary transactions with private equity sellers. Both buyer and seller may put the insurance in place, but the buy-side policy is most commonly used in practice. In competitive auctions, the sellers often propose a soft stapling of the insurance solution as part of the auction process.

Post-closing covenants

30 Do parties typically agree to post-closing covenants? If so, what is the usual scope of such covenants?

Typical post-closing covenants are a non-competition undertaking by the seller, and a non-solicitation undertaking that may be reciprocal or undertaken by the seller only.

To be valid, a non-competition undertaking must be limited in scope (generally to the activities in which the transferred company or business is active), geography (generally to the countries in which the company or business is active or, on the signing or closing date, contemplates to be active in) and time (two to a maximum of three years are the most common time limits). Whereas previously a non-compete obligation risked being declared null and void in its entirety, if it was not adequately limited as aforementioned, the Belgian Supreme Court now allows mitigation of excessive non-compete obligations.

Non-competition and non-solicitation clauses will often also include a liquidated damages provision.

TAX

Transfer taxes

31 Are transfer taxes payable on the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

Transfers of shares are generally not subject to Belgian stamp or registration duties or any other similar transfer taxes. Conceptually, Belgian stock exchange tax may be due by the seller, the purchaser, or both (normally at a rate of 0.35 per cent), but this would, inter alia, require that a professional financial intermediary such as a broker intervenes in the relevant transaction, which is typically not the case in a private M&A context.

The transfer of certain types of company assets (either on a standalone basis or as part of a business branch) may, depending on the type of transaction, give rise to Belgian registration duties. Most importantly, a sale of real estate is generally subject to a registration duty of 10 per cent (for real estate located in the Flemish Region) or of 12.5 per cent (for real estate located in the Brussels or the Walloon Region). This real estate transfer tax is computed on the higher of the purchase price or the market value of the relevant real estate. The tax does not apply if the transfer is subject to VAT (which is normally the case only where the transferred real estate qualifies as a new building) and exemptions may apply to certain restructurings, including mergers, demergers or contributions of a business branch. Moreover, a transfer of certain rights in rem (such as building rights or long-term lease rights) with respect to Belgian real estate may give rise to a 2 per cent registration duty, whereas a transfer of a lease agreement regarding Belgian real estate may trigger a 0.2 per cent registration duty. In both cases, the registration duties are to be computed on the basis of the amounts that remain outstanding under the relevant agreement or agreements at the time of the transfer, increased by the amount of the consideration (if any) that is payable to the transferor in this respect. It is customary in the Belgian market that the above-mentioned registration duties are borne by the purchaser or transferee.

Corporate and other taxes

32 Are corporate taxes or other taxes payable on transactions involving the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

Capital gains on shares realised by Belgian companies (or by Belgian establishments of foreign companies) are generally fully exempt from Belgian corporate income tax provided that the relevant shares qualify for Belgium's participation exemption (which essentially implies that the company that has issued the shares is subject to a normal corporate tax regime and that the relevant shares are part of a shareholding that represents at least 10 per cent of the issuing company's share capital or that has an acquisition value of at least €2.5 million). Nevertheless, capital gains on shares may be subject to a special capital gains tax if the gain is realised prior to the expiry of a one-year holding period (in which case the applicable rate is 25 per cent). Capital gains on other types of assets realised by Belgian companies (or by Belgian establishments of foreign companies) are generally subject to Belgium's ordinary corporate income tax of currently 25 per cent, it being understood that deferred taxation may be available in certain circumstances, and that subject to certain conditions a number of types of transactions (such as mergers and demergers) may benefit from a tax-neutrality regime.

Capital gains on shares realised by Belgian private individuals are generally exempt from Belgian personal income tax unless the gain results from a transaction that can be considered speculative or as not falling within the normal management of the seller's private estate, in which case a 33 per cent tax applies; or where the shares are part of a 'substantial shareholding' and are transferred to a non-EEA-resident legal entity (either directly or indirectly, within a period of 12 months following initial closing), in which case a 16.5 per cent tax applies.

Value added tax (VAT) is due (generally at a rate of 21 per cent) on supplies of goods or services for consideration by taxable persons for VAT purposes and supplies that are not exempt supplies. Generally a sale of shares will be an exempt supply for VAT purposes. A sale of a business may be outside the scope of VAT if it qualifies as a transfer of a going concern for VAT purposes and where the transferee has the right to recover at least part of the VAT that would conceptually be due in relation to the relevant transfer. The person liable to account for VAT will depend on the nature of the supply, the nature of the parties and where the supply is treated as taking place for VAT purposes.

EMPLOYEES, PENSIONS AND BENEFITS

Transfer of employees

33 Are the employees of a target company automatically transferred when a buyer acquires the shares in the target company? Is the same true when a buyer acquires a business or assets from the target company?

The acquisition of the shares of a Belgian company does not alter the employment relations a company has with its employees.

Where a business is transferred in Belgium by way of a transfer of (part of) the assets (and liabilities) of a company, it should be examined whether the Belgian regulations regarding transfers of undertakings – as laid down in the Belgian national collective bargaining agreement No. 32-bis – are applicable. If so, all rights and obligations (ie, all individual and collective employment conditions) that arise from the employment agreements of the employees who are part of the transferred business, with the exception of supplementary pension schemes, are, in principle, automatically transferred to the buyer. The buyer, in principle, does not have the possibility to unilaterally provide equivalent benefits to the transferred employees.

Notification and consultation of employees

34 Are there obligations to notify or consult with employees or employee representatives in connection with an acquisition of shares in a company, a business or assets?

Under Belgian employment law, an acquisition of (a substantial amount of) shares is generally considered as an important change of structure, which results in an obligation for both the divesting company and the acquiring company to inform their works council or, in the absence thereof, union delegation or, in the absence thereof, committee for prevention and protection at work. If the envisaged acquisition would affect the personnel's employment perspectives, the work organisation or the employment policy in general, there is also an obligation to consult on these three elements. Within the framework of such consultation, the competent employee representative body cannot block, reject or impose additional conditions with regard to the transfer (no veto right).

In the case of an acquisition of assets or of a business that qualifies as a transfer of (part of) an undertaking within the meaning of the Belgian regulations regarding transfers of undertakings, the seller and buyer are also required to inform and possibly also consult their competent employee representative body. In the absence of a competent employee representative body, the seller must individually inform the transferring employees concerned.

Specific consultation obligations could be applicable with regard to supplementary pension schemes.

Transfer of pensions and benefits

35 Do pensions and other benefits automatically transfer with the employees of a target company? Must filings be made or consent obtained relating to employee benefits where there is the acquisition of a company or business?

Pensions and other benefits remain unaffected in the context of a share deal, as the identity of the employer does not change because of a transfer of shares.

In an asset deal, by way of exception, the Belgian regulations regarding transfers of undertakings provide that employees' rights to old age, invalidity or survivors' benefits under supplementary company or intercompany pension schemes, in principle, do not automatically transfer to the buyer. This principle is, however, not applicable, and such benefits will, therefore, transfer to the buyer, if:

- such schemes are part of a collective bargaining agreement;
- the individual employment agreements of the transferring employees contain clauses that explicitly provide entitlements to such schemes; or
- according to part of the legal doctrine, the transaction is structured as a contribution or a transfer of a universality or a branch of activity as defined by the Code of Companies and Associations.

Additionally, the buyer will have to verify whether a legally valid unilateral changes clause is included in the schemes or in the individual employment agreements of the transferring employees. If none of the aforementioned exceptions apply, the buyer is not obliged to continue the schemes as from the date of the acquisition. It should, however, be stressed that, as the employer's contributions to the schemes are regarded as an essential employment condition, the transferring employees are in any event, even if the buyer does not have an obligation to continue the schemes, entitled to an equivalent benefit from the buyer.

If the buyer decides to continue the supplementary pension schemes and to change pension provider or transfer pension reserves built during past service, a specific consultation obligation applies and a specific formal procedure has to be complied with, which could require closing a collective bargaining agreement or obtaining individual consent from the persons affiliated to the schemes. In this event, the Financial Services and Markets Authority (the Belgian pensions regulator) has to be informed prior to the acquisition. The aforementioned obligations in general apply for the seller.

UPDATE AND TRENDS

Key developments

36 What are the most significant legal, regulatory and market practice developments and trends in private M&A transactions during the past 12 months in your jurisdiction?

The Act of 4 February 2020 reforms the Belgian legislation on goods. The reform creates a more flexible legal framework for rights in rem, whereby most legal provisions are non-mandatory and can, therefore, be amended by contract. Parties are, however, not allowed to create rights in rem by contract that are not recognised by the law.

Particularly relevant for businesses is the fact that building rights can now be granted for up to 99 years instead of 50 years under the previous legal framework. The minimum term for long lease rights has been reduced from 27 to 15 years, and usufruct rights can be granted to legal entities for up to 99 years instead of 30 years. The reform entered into force on 1 September 2021.

As of 1 August 2021, pursuant to the application of a European Directive, it is possible to incorporate the main Belgian company types digitally (ie, without appearing in person in front of a notary public). The intervention of a notary public will still be required, but the incorporation deed will be in dematerialised form. This legislative change will not have a major impact on Belgian private M&A as, to date, a similar result could be reached by granting a proxy to lawyers or staff members of the notary public, who would then sign the notary deed on behalf of the incorporator. The new law will also create a mandates database, making it easier to do a public search on delegations of powers by legal entities. Owing to the long transition phase, it will, however, take time before details for a majority of existing companies will be reflected in the database.

The Belgian state is expected to create a legal framework for ex ante foreign direct investment (FDI) screening. This legislative initiative will create a notification mechanism for non-EU persons investing in certain strategic sectors. The screening mechanism will apply to both share deals and asset deals. The timing for the approval and entry into force of the FDI notification scheme is unclear at this moment.

Coronavirus

37 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Belgian federal and regional parliaments and governments have taken several measures in response to the covid-19 pandemic. The emergency regulations do not directly affect M&A transactions and regulation applicable to M&A deals.

The following measures may indirectly have an impact on M&A transactions:

- widespread use of the temporary unemployment scheme to protect employment by temporarily providing government-funded unemployment contributions to employees in the scope of the scheme while relieving businesses from paying wages to these employees;
- a loan guarantee scheme (whereby new loans are guaranteed by the Belgian state) and a payment deferral scheme (whereby reimbursement of existing loans should be deferred by credit institutions), each time in relation to businesses affected by the crisis;

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- several temporary tax relief measures, such as deferral of tax prepayments, and due dates for VAT and wage withholding payments for the first quarter and April, an automatic extension by two months of the payment date for income taxes, the possibility to create a temporary tax-exempt reserve and a carry-back regime for tax losses;
- compensation premiums granted to businesses that were or are required to close during the successive lockdowns or who suffered a material loss of turnover; and
- a temporary moratorium on bankruptcy, which has ended but has since been replaced by a temporary set of measures making certain aspects of insolvency reorganisation proceedings more flexible.

The covid-19 pandemic has led to a permanent modification of company law, as a result of which shareholder meetings can now be organised electronically without authorisation in the articles of association being required. However, companies cannot require shareholders to participate electronically to shareholder meetings and a physical venue therefore continues to be required.

Clients are advised to clearly assess the impact of the pandemic on M&A deals and deal financials.

Parties should be aware of the fact that events that are foreseeable cannot be considered to constitute force majeure under standard provisions of Belgian law; therefore, standard force majeure provisions may not provide relief under contracts that have been executed at the time that the scope of the pandemic and its economic consequences became known. The obligation to pay a monetary purchase price can, in principle, never be excused for reasons of force majeure. A payment obligation may be suspended if a contract party has suspended its own contractual obligations, including for reasons of force majeure. Under current Belgian law, no concept of hardship is available to excuse performance under a contract. Parties can, however, negotiate a specific contractual hardship clause.

From a seller's perspective, it is important to verify whether the pandemic and its consequences are excluded from the scope of any material adverse change clauses in contractual documents. Prospective buyers should, for the same reason, take any consequences of the pandemic into account in their business case when engaging in an M&A transaction. Parties may, however, freely decide to take the crisis into account in transaction documents (eg, by setting financial thresholds above which walk-away rights or price correction mechanisms would be triggered).

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