

International Comparative Legal Guides



Mergers & Acquisitions 2020

A practical cross-border insight into mergers and acquisitions

14th Edition

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Mergers & Acquisitions **2020**

14th Edition

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

The European takeover legislation (Directive 2004/25/EC of 21 April 2004 on takeover bids) was implemented under Belgian law by the Law of 1 April 2007 on public takeover bids (the “**Takeover Law**”) and the implementation thereof by the Royal Decree of 27 April 2007 on public takeover bids (the “**Takeover Decree**”) and the Royal Decree of 27 April 2007 on public squeeze-out bids.

Other relevant provisions are provided for in:

- Regulation (EU) No 596/2014 of 16 April 2014 on market abuse (the “**Market Abuse Regulation**” or “**MAR**”);
- the Law of 2 August 2002 on the supervision of the financial sector and on financial services; and
- Directive 2004/109/EC of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, as implemented under Belgian law by the Law of 2 May 2007 on the disclosure of major holdings and the Royal Decree of 14 February 2008 on the disclosure of major holdings.

1.2 Are there different rules for different types of company?

The Takeover Law and its implementing Royal Decrees apply to:

1. A voluntary public takeover bid on securities within the Belgian territory.
A bid does, however, not have a public nature if:
 - a) the relevant securities are only held by qualified investors as defined in article 2, e) of Regulation (EU) 2017/1129;
 - b) it is addressed to fewer than 150 natural persons or legal entities, other than qualified investors; or
 - c) the relevant securities have a denomination per unit of more than EUR 100,000.
 Furthermore, for companies whose securities are admitted to trading on a regulated market:
 - a) if the registered office and principal market of the target is situated in another Member State, only limited provisions with respect to the acknowledgment of foreign prospectuses and publicity apply;
 - b) in addition to the provisions relating to the acknowledgment of foreign prospectuses and publicity, if the registered office of the target is situated in Belgium but is not admitted to trading on a Belgian regulated

market and has its principal market in another Member State, Belgian law applies to matters relating to (i) information to be provided to employees, and (ii) company law;

- c) if the target has its registered office in another Member State but is not admitted to trading on a regulated market there and has its principal market in Belgium, the Belgian takeover legislation only applies to matters relating to the consideration offered and the bid procedure.
2. A mandatory public takeover bid on voting securities or securities granting access to voting rights, issued by a target having its registered office in Belgium with at least part of its voting securities being listed on a regulated market or MTF.
If the target's securities are, however, not admitted to trading on a Belgian regulated market and the target has its principal market in another Member State, only the following provisions of the Belgian takeover legislation apply:
 - a) the provisions with respect to the acknowledgment of foreign prospectuses and publicity;
 - b) Belgian law governing matters relating to (i) information to be provided to employees, and (ii) company law; and
 - c) provisions relating to the determination and calculation of the threshold of a mandatory bid.
3. A mandatory public takeover bid on securities issued by a target having its registered office in another Member State, which is not admitted to trading on a regulated market there, and which has its principal market in Belgium, but only for matters relating to the consideration offered as well as the bid procedure.
4. A mandatory public takeover bid outside the scope of points 3 and 4, open to Belgium, but only for matters relating to provision of information.
5. A public (stand-alone) squeeze-out bid in accordance with Belgian company law.

1.3 Are there special rules for foreign buyers?

No; under Belgian law, currently no foreign investment control or other rules for foreign buyers exist.

1.4 Are there any special sector-related rules?

Belgian law applicable to certain businesses (*e.g.* credit institutions, brokerage firms and insurance companies) provide for a regulatory approval procedure in case of an acquisition resulting in the passing of certain thresholds of the share capital of the target.

1.5 What are the principal sources of liability?

The Belgian supervising authority (the Financial Services and Markets Authority (“**FSMA**”)) ensures compliance with the Belgian takeover legislation.

The FSMA has broad powers at its disposal to ensure compliance with the relevant legislation (e.g. demand compliance, require certain disclosures and suspend or prohibit a bid).

If the relevant party does not take the necessary actions within the requested timeframe, the FSMA may impose penalties of up to EUR 50,000 per day and up to a maximum of EUR 2,500,000 per request.

In addition, the FSMA may, in case of infringements of the Belgian takeover legislation, impose administrative fines of EUR 2,500 to EUR 2,500,000 for each specific set of facts.

Lastly, several instances of non-compliance with the Belgian takeover legislation can be criminally sanctioned with a prison sentence of one month to one year and a criminal fine of EUR 600 to EUR 120,000.

All parties involved must also ensure compliance with other legislation applicable to them (including the MAR and transparency legislation) whereby non-compliance can again be sanctioned with both administrative and criminal sanctions.

On the basis of tort law, any person violating a legal provision can also be held liable for damages incurred by third parties as a result of such violation.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

Generally, a (voluntary or mandatory) takeover bid would be the main method of acquiring a public company.

Alternatively, a merger could be contemplated. This would, however, require either a prior takeover bid or support of the target due to the fact that a merger under Belgian company law requires the approval of 75% of the shareholders of the company.

Note that where the bidder has the intention to engage in such restructuring within the target post-bid, it must inform the shareholders thereof in the prospectus, which will be scrutinised by the FSMA, who dislikes this as it by-passes the 95% squeeze-out threshold and therefore may try to oppose such merger (although such a restructuring is not subject to formal approval of the FSMA, it can influence the information flow to shareholders during the bid period and/or prior to the vote on the restructuring after the bid period).

There is also the risk that “hold out minority shareholders” (who would otherwise try to prevent a squeeze-out by holding onto or building a stake of 5%) might attack such merger based upon the theory of “abuse of rights”, so any use would have to be carefully considered.

2.2 What advisers do the parties need?

Typically, the bidder engages (i) financial advisers (for the purpose of valuation and structuring of the bid), (ii) legal advisers (for the purpose of structuring the bid and ensuring compliance with the relevant legislation), and (iii) tax advisers (for the purpose of structuring the bid).

The target board will typically engage its own financial and legal advisers to ensure compliance with the relevant legislation and to be able to opine on the bid.

As the case may be, reference shareholders may decide to engage their own legal, financial and/or tax advisers.

Even though common, there is no formal legal requirement to have a fairness opinion on either side, save in case of a bid by a controlling shareholder (see question 2.5).

2.3 How long does it take?

Assuming a voluntary bid, the timeline would be as follows:

Timing	Step
Pre-bid phase/ preparation	■ Stakebuilding (to the extent permissible under the MAR); ■ discussions with the target/ due diligence; ■ entering into a support agreement with the target (board), as the case may be; ■ preparation of the bid; ■ board approvals; and ■ informal discussions with the FSMA.
<N	As the case may be, publication of intention to launch a bid.
N	Notification to the FSMA of the intention to launch a takeover bid including draft prospectus.
N + 1 business day (“BD”)	Publication of the notification by the FSMA and notification thereof to the relevant regulated market, the target and the bidder. Sharing of the draft prospectus with the target.
N + 6 BD	Comments by the target board on the draft prospectus (on completeness and/or misleading nature) to be shared with the FSMA and bidder within 5 BD of receipt of the draft prospectus.
N + approx. 20 BD	Approval of the prospectus by the FSMA within 10 BD of receipt of a complete file. Prospectus published after approval.
(N + 20 BD) + 5 BD	Filing of the draft response memorandum by the target board within 5 BD of receipt of the approved prospectus from the FSMA.
(N + 25 BD) + 5 BD	Approval of the response memorandum by the FSMA within 5 BD of receipt of a complete file. Response memorandum published after approval.
A (= <i>de facto</i> at the earliest N + 25/30 BD + 1 BD)	Start of the acceptance period (at the earliest, 5 BD after approval of the prospectus but in any event not before approval of the response memorandum, if later).
A + 10/50 BD	End of the acceptance period: minimum two weeks and maximum 10 weeks.
(A + 10/50 BD) + 5 BD	Publication of results of the offer within 5 BD of expiry of the acceptance period.
(A + 15/55 BD) + 10 BD	Re-opening of the offer in case: ■ more than 90% of voting securities are held; ■ the bidder applies for a delisting within three months; or ■ the bidder agreed to a higher price, within 10 BD of publication of the results.
(A + 25/65 BD) + 5/15 BD	End of the re-opening period: minimum 5 BD; and maximum 15 BD.

Timing	Step
(A + 30/80 BD) + 5 BD	Publication of the results of the re-opening within 5 BD of expiry of the re-opened acceptance period.
(A + 30/80) + max. 3 months	Start of the simplified squeeze-out if thresholds are met within three months of expiry of acceptance period.
(A + 30/80 + max. 3 months) + 15 BD	End of the simplified squeeze-out: minimum 15 BD.
(A + 30/80 + max. 3 months + 15 BD) + 5 BD	Publication of the results of the simplified squeeze-out.

In case of a hostile bid where a shareholders' meeting of the target is convened to discuss the bid, the acceptance period is extended until two weeks after the date of such meeting.

In case of a mandatory bid, the FSMA must be notified within 2 BD of the acquisition that triggered the mandatory bid. The bid will be published within 3 BD of the mandatory bid being triggered. The acceptance period must start within 40 BD of the mandatory bid being triggered.

2.4 What are the main hurdles?

From a timing perspective, the main drivers would be (i) anti-trust approval and/or other regulatory approvals (to be considered in the timeline when deciding on the timing of different steps), and (ii) swiftness of the review by the FSMA.

The most significant hurdle would be shareholder support which (at least indirectly) would be impacted by the conditions (*i.e.* price) of the bid.

2.5 How much flexibility is there over deal terms and price?

Price

Consideration may be offered either in cash or in securities (exchange offer).

In case of a voluntary bid, no price minimum exists, although the FSMA will expect a price allowing a reasonable success-rate of the bid. If the bidder, however, controls (either legally or *de facto* and taking into account participations of affiliates) the target, a valuation report drawn up by an independent expert(s) will be required (to be available at the time of formal filing of the bid with the FSMA) and need to be published.

In case of a mandatory bid, the minimum price shall be equal to the higher of (i) the highest price paid by the bidder during the 12 months preceding the announcement of the bid, and (ii) the weighted average trading price over the 30 calendar days preceding the occurrence triggering the obligation to bid.

The regulator may require a price adjustment under certain circumstances.

In case of a voluntary bid by a controlling bidder or a mandatory bid, where securities are offered as consideration, an alternative consideration in cash must be offered if (i) the offered price is not liquid securities admitted to trading on a regulated market, or (ii) the bidder or a person acting in concert with him has, during the 12 months preceding the announcement of the offer or during the offer period, acquired (or agreed to acquire) more than 1% (the 1% threshold does not apply in case of a mandatory bid) of the securities against a consideration in cash.

If, during the offer period, the bidder or persons acting in concert with him acquire securities of the target outside the bid

against a higher price than the offered price, or have agreed to do so, the offer price will be adapted to such higher price.

The price of a counter-offer or higher offer must be at least 5% higher than the previously offered price.

Lastly, the bidder and any persons acting in concert with him cannot, within a period of one year from the bid period, directly or indirectly acquire securities which were subject to the bid against more favourable conditions than those of the takeover bid, unless the price difference is granted to all securities holders who accepted the bid.

Other deal terms

The offer may be made subject to certain conditions. The conditions require the approval of the FSMA and need to be of a nature that they allow the bidder to reasonably achieve the intended result of the bid. A mandatory bid shall be unconditional save with respect to the necessary fulfilment of anti-trust or other mandatory regulatory approvals.

Conditions that are generally allowed are:

- acceptance thresholds (75%–95% depending on circumstances);
- non-occurrence of a material adverse change (sufficient materiality threshold required);
- ordinary course of business safeguards (e.g. no dividends, issuances of shares, amendments to the articles of association or governance); and
- regulatory approvals (anti-trust or otherwise).

2.6 What differences are there between offering cash and other consideration?

In case of a cash offer, at the time the bid is made, the necessary funds allowing the fulfilment of the bid must be available either on an account with a credit institution or in the form of an irrevocable and unconditional credit facility opened with a credit institution. The funds must be blocked to ensure payment of the price and are solely used for that purpose.

The credit institution must be established in Belgium (*i.e.* a Belgian or foreign credit institution licensed in Belgium).

In case of an exchange offer, the bidder must either be in the possession of the offered securities, or have the necessary authority to issue or acquire a sufficient number of them within the timeframe required for the payment. To the extent it is not authorised to issue them, it must have the legal or *de facto* power to ensure that the relevant legal entity issues them.

Evidence of compliance with the above requirements must be provided to the FSMA at the time of notifying it of the intention to make a bid.

See also question 2.5 with respect to the cash alternative to be offered under certain circumstances.

2.7 Do the same terms have to be offered to all shareholders?

All shareholders must be treated equally and offered the same conditions. As an exception, if the bid covers securities of different categories, the prices offered for each category may be different to the extent the differences solely result from the different characteristics of each category.

2.8 Are there obligations to purchase other classes of target securities?

A takeover bid must be launched on all voting securities and securities giving access to voting rights (*e.g.* shares, subscription

rights and warrants and convertibles) issued by the target and not yet owned by the bidder or its affiliates.

2.9 Are there any limits on agreeing terms with employees?

The Belgian takeover legislation does not provide for specific rules: the relevant restrictions employment law will (likely) apply.

2.10 What role do employees, pension trustees and other stakeholders play?

Upon the announcement of the bid, the boards of the target and bidder must immediately inform their respective employee representatives and must immediately provide them with a copy of the prospectus upon its publication.

The board of the target considers the employees' interests in its memorandum and shares its view with the employee representatives. If timely received, the view of the target's works council on the bid and employment rate in that context are included in the memorandum.

If the target has a works council, it organises a hearing of the representatives of the board of the bidder within 10 days of the start of the acceptance period (unless unanimously waived by the works council).

During the hearing, the representatives will explain the industrial and financial policy of the bidder and its strategic plans for the target and their potential impact on the employment rate and establishments of the target. The representatives will take note of any comments of the works council of the target.

If the bidder has been invited to such hearing, any voting rights attaching to acquired securities are suspended at the shareholders' meeting of the target until the bidder's representatives participate in the hearing.

Note that no approval is required by the works council, which is only granted a right to information and consultation.

2.11 What documentation is needed?

The notification of the intention to make a bid must contain proof of fulfilment of the bid requirements (*e.g.* full bid principle and certainty of funds to be paid as consideration), the price and the conditions of the bid.

The notification contains a draft prospectus and a draft of any documents and communication relating to the bid.

The prospectus shall contain, at a minimum, the information listed in schedule I to the Takeover Decree. It shall mention the conditions of the bid and the information necessary to allow one to form an informed opinion on the transaction. The information must be presented in a manner easy to analyse and understand.

Another key document is the response memorandum by the target board.

2.12 Are there any special disclosure requirements?

The bidder is required to draw up a prospectus (to be published).

This must contain, as a minimum, the information listed in schedule I to the Takeover Decree.

Such information relates to, among others:

- the bidder (including the latest financial information and acquisitions of target securities during the 12-month period preceding the prospectus);
- the target (including financial information);

- the bid (including the valuation underlying the price);
- intentions of the bidder (position in the bidder's group, continuation of activities, restructuring, important changes in employment conditions, strategic plans, synergies, etc.); and
- the financing of the bid.

Important developments, material mistakes or inaccuracies which may influence the valuation of the bid that occur between the approval of the prospectus and the expiry of the acceptance period must be reflected in a supplement to the prospectus, to be approved in a similar manner as the initial prospectus.

The report of the independent expert (in case of a bid by a controlling shareholder) must be included in the notification of the intention to make a bid to the FSMA as well as in an annex to the prospectus.

At the request of the FSMA, parties to the bid shall:

- (i) provide the FSMA with all agreements which may have a material impact on the evaluation of the bid, its process or its conclusion; and
- (ii) publish the relevant clauses of such agreements.

Certain transactions in voting securities of the target or of the company whose securities are offered as consideration must be disclosed (see question 5.4).

Other disclosure requirements may arise under either the takeover legislation (see questions 5.3 and 8.1) or under the MAR.

2.13 What are the key costs?

The key costs are as follows:

- financial, tax, legal and other advisers' fees;
- fees payable to the FSMA for handling the file;
- translation costs;
- publication costs; and
- credit institution or brokerage firm fees for settling the securities.

2.14 What consents are needed?

Approval by the FSMA (bid, prospectus) and anti-trust approval or other specific regulatory approvals, as required (question 1.4).

2.15 What levels of approval or acceptance are needed?

The acceptance level is to be determined by reference to the level of control one wants to obtain. That being said, and even though commonly used, there is no legal requirement to set an acceptance level.

In principle, the shareholders' meeting decides by majority vote (50%+1 of shareholders present or represented). This includes the appointment of directors. The articles of association may, however, provide for more stringent requirements or, *e.g.*, different mechanisms regarding the appointment of the board. *De facto* attendance at meetings is, however, low, so control can be achieved at lower shareholding levels.

In addition, Belgian law provides for more stringent requirements for, among others, amendment of the articles of association, mergers and demergers, issuing securities, dissolution and amending the corporate purpose: shareholders representing 50% of the equity must be present or represented at the meeting and approval is required by 75% (80% for amending the corporate purpose) of the votes cast (excluding abstentions).

If, following a public takeover bid, the bidder holds 95% of the voting capital and voting securities, the bidder can trigger a

simplified squeeze-out and require remaining security holders to sell their securities against the same price of the earlier bid. In case of a voluntary bid, as an additional requirement, the bidder must have obtained acceptances for 90% of the voting capital not owned prior to the bid.

A stand-alone squeeze-out is also possible if a shareholder owns 95% of voting securities. This will, however, require a new prospectus and a fairness opinion (if resulting in a higher price, this may trigger the requirement to offer the price difference when acquiring securities within one year of the bid).

2.16 When does cash consideration need to be committed and available?

See question 2.6 as to certainty of funds and securities. The payment must be managed by a credit institution or brokerage firm and made within 10 BD of the publication of the results of the bid.

3 Friendly or Hostile

3.1 Is there a choice?

A bid may be friendly or hostile. A hostile bid will typically have a lower success rate, certainly if reference shareholders decide to oppose the bid. A hostile bid will nonetheless be possible, as ultimately the shareholders decide.

3.2 Are there rules about an approach to the target?

In principle, no specific rules exist. Caution should be exercised as an approach increases the risk of leaks which may induce the FSMA to require an announcement (see question 4.3). In addition, the provisions of the MAR should be taken into account and may result in an earlier disclosure of inside information.

Typically, confidentiality agreements will be entered into with the target and/or reference shareholders to ensure confidentiality of negotiations entered into, and one should, as the case may be, consider formally applying the wall-crossing procedures provided for under the MAR.

3.3 How relevant is the target board?

Target board approval is not strictly required. The target board will, however, have to set out its duly motivated opinion on the offer in a response memorandum (thereby taking into account the interests of the company, security holders, creditors and employees). This will include dissenting opinions of the board members, as the case may be.

Note that any shareholding held by the target board members or reference shareholders represented by them (where the response memorandum must include a statement as to the intention to tender them) as well as specific voting arrangements in the articles of association of the target may impact the success-rate of the bid and whether or not control can actually be obtained.

3.4 Does the choice affect process?

Under the takeover legislation, process-wise, a shareholders' meeting may be convened to deliberate on the bid and any actions to prevent it. In such case, the acceptance period will be extended to two weeks after the day of such meeting.

Furthermore, contacts with the target may create an obligation on its behalf to disclose inside information under the MAR. The target's willingness to engage may impact its assessment as to whether it can justify postponing the disclosure thereof, which could lead to the bidder losing control over the information flow.

Practically speaking, the difference will also lie in the potential success rate of the bid (where knowing the position of reference shareholders may be more important than the position of the board) and whether any defence mechanisms will be used.

4 Information

4.1 What information is available to a buyer?

Subject to disclosure by the target upon being engaged by the bidder, available information is limited to publicly available information, among others, on the basis of disclosure requirements of listed companies, including:

- articles of association including number of shares issued, their rights and obligations, as well as the existence of defence mechanisms;
- attendance lists of extraordinary shareholders' meetings;
- shareholding disclosures, dealings in securities by persons with managerial responsibilities within the target, significant acquisitions and disposals and material trading developments to be notified to the FSMA;
- financial information: (consolidated) annual accounts; (consolidated) annual reports; semi-annual financial reports; and analysts' coverage;
- governance information: composition of the board and other managing bodies; governance charter; dealing codes; minutes of shareholders meetings; articles of association; and shareholding (major holdings);
- additional corporate information: information in the Crossroads Database for Enterprises and publications in the Annexes to the Belgian State Gazette (including excerpts of certain shareholders' and board decisions);
- employment details; and
- press releases and prospectuses published by the target.

In case of a counterbid, as far as disclosure of information is concerned, the target must treat the bidder and any counter-bidder equally.

4.2 Is negotiation confidential and is access restricted?

Subject to the resulting increased risk of a leak which may lead to the FSMA requiring the bidder to make an announcement (see question 4.3) and compliance with the MAR, negotiations with the target and/or target shareholders are in principle allowed.

From the perspective of the target (or the bidder), knowledge of a potential bid may constitute inside information, which it should then, under the FSMA's revised attitude towards timing of market communication following the MAR, publish as soon as possible. Under the MAR, one may only decide to postpone the disclosure if (i) immediate disclosure is likely to prejudice the legitimate interests of the target, (ii) delay of disclosure is not likely to mislead the public, and (iii) the target is able to ensure the confidentiality of that information. If confidentiality can no longer be ensured (e.g. in case of a press leak), the target must immediately disclose such information.

Any (inside) information acquired by the bidder during negotiations would not prevent the bidder from proceeding with the

takeover bid, provided that the information is disclosed by the time of the acceptance of the offer (notwithstanding that the FSMA may still deem behaviour illegitimate if there was another illegitimate reason for it). The FSMA, in this context, provides as an example of legitimate negotiations, negotiations between the bidder and target shareholders regarding irrevocables. It, furthermore, states that any disclosure of the intention to bid as part of such negotiations could constitute legitimate behaviour as a market sounding under the conditions set out by the MAR.

4.3 When is an announcement required and what will become public?

Voluntary bid

In principle, an announcement only takes place after formally notifying the FSMA who publishes the announcement 1 BD after receipt of the notification mentioned under question 2.11.

As an exception, the FSMA may request a potential bidder to announce the intention to proceed with a bid prior to filing with the FSMA, if the FSMA deems this to be required for the proper functioning of the market. Based thereon, the FSMA expects that, at the latest at the time the board of the bidder has decided to launch a bid, the bidder contacts the FSMA of its own initiative with a view to publish a press release regarding its intention to launch a bid.

In addition, in case a person (also if through a spokesperson) makes statements or there are rumours retraceable to such person, which raise questions as to its intention to launch a bid, the FSMA may request such person to clarify its intentions within 10 BD through a public statement. In case of a confirmatory statement, a formal notification must be filed within the timeframe set out by the FSMA. If the intention to bid is not (timely) confirmed, the relevant person may not launch a bid during the next six months unless it can show that certain circumstances have drastically altered the situation of the target (the so-called “put up or shut up” rule).

Mandatory bid

The FSMA must be notified within 2 BD of the acquisition that triggered the mandatory bid. The bid will be published within 3 BD of the mandatory bid being triggered.

The notification must include the information referred to in questions 2.11 and 2.12, which will become public information.

4.4 What if the information is wrong or changes?

The bidder has an obligation to update the prospectus (see question 2.12).

Upon approval of the FSMA, the bidder may amend or revoke its bid within 5 BD of a notification by the target of: (i) the issuance of new voting securities, unless the issuance constitutes less than 1% of the total securities issued and results from commitments pre-dating the bid period; or (ii) decisions or transactions (potentially) resulting in a significant change in the composition of the assets or liabilities of the target, or commitments entered into against zero consideration.

In addition, a bid may be revoked in the following circumstances:

1. a counter-bid or higher bid;
2. lack of necessary regulatory approval (other than anti-trust approval);
3. non-fulfilment of a condition (e.g. due to a MAC), outside the will of the bidder; and
4. in exceptional circumstances preventing the completion of the bid, on objective grounds and outside of the will of the bidder, upon the motivated approval of the FSMA.

The publication of wrong information is sanctioned through various legal provisions, also resulting in a civil liability risk (see question 1.5).

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Stakebuilding is defined in the MAR as an acquisition of securities which does not trigger a legal obligation to make an announcement of a takeover bid. As soon as the bidder is in the possession of inside information, stakebuilding (either privately or through the stock exchange) is not allowed. A specific (not gradual) acquisition while there is an intention to proceed with a bid resulting in a mandatory bid (crossing of the 30% threshold) would in principle be allowed if it is otherwise legitimate under the MAR.

The moment at which inside information is obtained is thus relevant. It will be difficult, if not impossible, to argue one was not in the possession of (and used) inside information (*i.e.* the knowledge that a bid would be made) with respect to the acquisition as of the moment there was a firm intention to proceed with a bid.

5.2 Can derivatives be bought outside the offer process?

Yes, although depending on the timing and circumstances, acquisitions of derivatives may constitute insider dealing under the MAR and/or may need to be disclosed under the transparency legislation.

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

Participations in companies whose shares are admitted to trading on a regulated market having their registered office in Belgium or outside the EEA but who have selected Belgium as the state of origin must be disclosed under the transparency legislation both prior to and during the offer period.

The requirement covers voting securities and is very broad in the sense that it relates to any type of direct or indirect acquisition as well as persons acting in concert.

The following are treated as voting securities: (i) financial instruments which on the basis of a formal agreement grant, on their due date, either an unconditional right or the right to freely decide to acquire voting securities already issued; and (ii) financial instruments not covered under (i) but linked to voting securities already issued and the economic effect of which is similar to that of the financial instruments covered under (i), regardless of whether they grant the right to a physical settlement. If falling under (i) or (ii), this may thus include certificates, tradeable securities, options, futures, swaps, contracts for differences and any other such contracts.

Persons are deemed to act in concert (i) if they have entered into an agreement (even orally in principle) regarding the exercise of their voting rights to ensure a durable common policy towards the issuer, or (ii) if they are cooperating (including on the basis of an oral agreement) for the purpose of obtaining control over the target, blocking a bid or retaining control over the target.

Disclosures are required when passing (upwards or downwards) a multiple of 5% of the total voting rights. The articles

of association of a Belgian company may add 1%, 2%, 3%, 4% and/or 7.5% as additional threshold, which is publicly available information (3% as an additional threshold is common). The disclosure must be made within four trading days of the requirement being triggered.

The disclosure requirement applies to all parties involved, including the target.

As of the moment the intention to proceed with a bid is published upon the request of the FSMA and during the offer period, each BD after close of trading, the FSMA must be notified of the acquisition or disposal of voting securities or securities granting voting rights issued by the target or, as the case may be, the company whose securities are offered as consideration. The requirement applies to:

1. the bidder;
2. the target;
3. the board members of the bidder or the target;
4. persons acting in concert with the bidder or the target; and
5. persons directly or indirectly holding at least 1% of voting securities of the target.

The FSMA publishes such transactions daily on its website.

5.4 What are the limitations and consequences?

See question 5.1.

6 Deal Protection

6.1 Are break fees available?

Yes, (reverse) break fees may be agreed between the target and the bidder. The agreed percentages are typically lower than in US/UK transactions.

6.2 Can the target agree not to shop the company or its assets?

Yes, a no-shop commitment during a certain (exclusivity) period can be agreed with the target, subject to fiduciary duties and the interest of the company (allowed to respond to a non-solicited competitor). Such arrangements must be disclosed and will be scrutinised by the FSMA.

6.3 Can the target agree to issue shares or sell assets?

Support agreements can be entered into and can cover a wide range of commitments.

While theoretically possible, to avoid personal liability, the board must be able to argue that such arrangement and actions are in the interest of the company. Such arrangements must also be disclosed and will be scrutinised by the FSMA.

See also limitations of the board under question 8.2.

6.4 What commitments are available to tie up a deal?

Irrevocables can be entered into with reference shareholders. "Hard" irrevocables preventing or making it very burdensome for the shareholder to accept a competing bid may, however, be considered as acting in concert and potentially trigger a mandatory bid in case of actual acquisitions of securities.

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

See question 2.5.

Within 5 BD of the expiry of the acceptance period, the bidder must announce whether the conditions were satisfied and, if not, whether it waives them.

7.2 What control does the bidder have over the target during the process?

The bidder does not have control over the target during the process. A certain level of protection can be obtained through conditions (no MAC, ordinary course of business) or through support agreements by the target.

7.3 When does control pass to the bidder?

Control passes to the bidder upon settlement of the successful offer and passing of ownership of the shares. The level of control will depend on the number of voting securities acquired (see also question 2.15) as well as the governance arrangements applicable within the company. By default, board members can be appointed by a simple majority vote by the shareholders' meeting.

7.4 How can the bidder get 100% control?

A bidder can get 100% control via the squeeze-out procedure (see question 2.15).

8 Target Defences

8.1 What can the target do to resist change of control?

Generally, the target has broad options and the board may take protective measures, which include share transfer restrictions (provided for in the articles of association), issuance of securities or poison pills. Belgian company law, however, contains certain restrictions in the context of a takeover bid.

In case the board refuses to grant the necessary approval or in case a right of first refusal is exercised after the notification of the takeover bid to the target, the shareholders must be allowed to transfer their shares to an alternative buyer at a price at least equal to the price of the bid.

As of the notification of the takeover bid to the target, only the shareholders' meeting may take resolutions which have a material impact on the assets and liabilities of the company. Such resolutions may not be conditional on the success or failure of the takeover bid.

In order to be valid, rights which have a material impact on the assets of the company or create a material debt or obligation on its account and are conditional on the issuance of a takeover bid (e.g. poison pills) require the approval of the shareholders' meeting and their existence must be made public prior to the company being notified of the bid by the FSMA.

Furthermore, as of the publication of the bid, certain limitations apply with respect to an issuance of securities by the board (only allowed upon prior authorisation by the shareholders' meeting) and strict requirements apply to share buy-backs.

Lastly, a target having its registered office in Belgium, of which at least part of the voting securities are admitted to trading on a regulated market, may include certain provisions in its articles of association limiting the powers of the board and requiring prior shareholder approval in case of certain other protectionary measures being considered following the notification of a bid.

8.2 Is it a fair fight?

As far as disclosure of information by the target is concerned, the bidder and any competing bidder must be treated equally. In addition, the board's fiduciary duty to act in the interest of the company will act as a limitation on the preferential treatment of a certain bidder.

Furthermore, a counterbid is only admissible in case of a 5% price increase, which protection, however, only kicks in following the publication of the formal notification of the bid by the FSMA.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

The main driver is the price, which will in turn be the main factor in determining whether or not the bid will be supported by the board and/or (reference) shareholders.

9.2 What happens if it fails?

If the relevant threshold set as a condition to the bid is not reached, the bid fails in its entirety, save where the condition is waived.

If no threshold was set, the bidder acquires any securities tendered in the process and, as the case may be, may remain a minority shareholder in the target. Subject to having passed the 30% threshold, it would then be in a position to acquire further shares without being under a further mandatory bid obligation, while in the meantime, as the case may be, disposing of *de facto* control.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in your jurisdiction.

New Belgian Code of Companies and Associations

A new Belgian Code of Companies and Associations was issued, which fully entered into effect on 1 January 2020 (subject to more specific transitional provisions).

Listed companies now have the option to implement a multiple voting shares mechanism subject to certain limitations:

- limited to double voting rights;
- only for registered shares; and
- only for shares held by the same person for an uninterrupted period of two years (subject to exceptions like a transfer to an affiliate).

In the context of the takeover legislation, it has been clarified that the number of voting securities rather than the number of votes are taken into account in determining whether the threshold for a mandatory bid has been passed.

SRD II

A proposal on a law implementing Directive (EU) 2017/828 of 17 May 2017 ("SRD II") is currently pending in the Belgian federal parliament, which will apply to listed companies.

SRD II, among others, intends to make it easier for shareholders to exercise their rights, requires more transparency on directors' pay and related party transactions and intends to encourage long-term shareholder engagement.

Foreign investment control

Regulation (EU) 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union will apply as of 11 October 2020 and targets screening of foreign direct investments on the grounds of security or public order.



Jan Peeters specialises in mergers and acquisitions (of both public and private companies), capital market operations (IPOs, public takeover bids, and public-to-private transactions), corporate finance, and venture capital transactions. In addition, he is active in the regulation of activities of domestic and foreign credit institutions, investment firms, and insurance companies active in Belgium.

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