Belgium

Steven De Schrijver, Lorenz

www.practicallaw.com/1-385-7796

MARKET AND REGULATION

1. Please give a brief overview of the public M&A market in your jurisdiction. (Has it been active? What were the big deals over the past year? Please distinguish between trade buyers and private equity backed deals.)

The Belgian M&A market has fallen in recent months, despite a good year for M&A activity in 2007 and initial expectations for 2008 that the credit crunch would have less of an impact on Belgium (as most transactions in Belgium are small- to medium-sized and less leveraged than in other jurisdictions). Both trade buyers and private equity houses have been less active and adopted a wait and see approach. As a result, there was an overall decline in M&A activity in 2008.

General

During the first half of 2008, the largest deal in Belgium was the acquisition in the energy sector of Distrigas (formerly Distrigaz), a Belgian gas distributor, by ENI, an Italian energy company, for EUR4.8 billion (about US$6.15 billion). This was a direct result of the merger between French energy groups Suez and Gaz de France (GDF), and the subsequent European Commission decision that required Suez to sell its majority interest of 57.24% in Distrigas. Publigas, Belgium's municipal holding company for gas companies, acquired an interest of 31.25% and the Belgian government received a "golden share". However, on 4 November 2008, ENI launched a bid for the remaining 31% of shares held by Publigas. Finally, Publigas agreed in January 2009 to sell 6.25 of its 31.25% stake in Distrigas to ENI, lowering its stake to 25%.

During the second half of 2008, the Belgian M&A market was dominated by bank rescue deals:

- The EUR12.8 billion (about US$16.4 billion) acquisition by the Dutch government of Fortis Bank Nederland and the EUR4 billion (about US$5.2 billion) acquisition by the Dutch government of the Dutch Fortis insurance arm (which is still subject to court and shareholder scrutiny).
- The acquisition by BNP Paribas of Fortis Bank Belgium through a share deal with the Belgian government and the EUR5.7 billion (about US$7.3 billion) acquisition by BNP Paribas of the Belgian Fortis insurance arm (which is still subject to court and shareholder scrutiny).

Other large transactions in 2008 included:

- The EUR750 million (about US$961.3 million) acquisition by DSV of ABX Logistics.
- The EUR427 million (about US$547.3 million) acquisition of Interkabel by Telenet.
- The EUR316.9 million (about US$406.2 million) acquisition of ICOS Vision Systems by KLA-Tencor.
- The EUR65 million (about US$83.3 million) acquisition of a 45% stake in SN Brussels Airlines (with an option to buy the remaining shares in 2011).

2008 did see numerous acquisitions by Belgian companies abroad, including:

- The US$70 billion (EUR54.7 billion) acquisition of Anheuser-Bush by Inbev (US).
- The EUR41 million (about US$52.5 million) acquisition of the entertainment division of EM.Sport Media by Studio 100.
- The EUR207 million (about US$265.3 million) acquisition of Tele 2 by Belgacom (Luxembourg/Liechtenstein).
- The US$50 million (EUR39.04 million) acquisition of Diamond Glass by D'Ieteren (US).
- The EUR35.6 million (about US$45.6 million) acquisition of High End Systems by Barco (US).
- The acquisition of a portfolio of 32 health care institutions in France with an investment value of EUR230 million (about US$294.8 million) by Cofinimmo.
- The EUR185 million (about US$237.1 million) acquisition of Scarlet (The Netherlands) by Belgacom.

Private equity

Although the private equity sector in Belgium became less active towards the end of 2008, the limited amount of large-cap deals (that is, exceeding EUR500 million (about US$640.85 million)) in the Belgian market has helped to cushion it from the worst effects of the credit crunch. In this respect, the crisis has had a rather limited impact on Belgian private equity compared to foreign private equity. This is mainly because the Belgian mid-market, involving small- and medium-sized companies, which represents the majority of private equity deals in Belgium, requires less debt and fewer subscribers and because Belgian private equity houses tend to use less leverage to finance their buy-outs.

Belgium's welcoming legislative framework, combined with a high number of family-owned businesses, many of which will be up for

sale as the owners retire in the coming years, creates fertile ground for private equity. In addition, its thriving biotech sector puts Belgium in a strong position for future investment.

Although venture capital remains strong on the Belgian market, the focus has shifted towards management buyouts (MBOs). While private equity investors are often not familiar with the business, MBOs offer certain benefits because financial investors can add to the company's financial position, management reporting and corporate governance, and complement the existing management who are familiar with the business.

Within the venture capital segment of the market, there has been an increase driven mainly by expansion capital, while seed and start-up capital have decreased. However, government initiatives are being taken to encourage the creation of mechanisms to ease the shortage of funds for start-ups. The Flemish Fund for Innovation (VINNOF) is an example of such an initiative.

Outlook

According to analysts, the outlook for Belgium over the coming year is probably brighter than for some other countries in the EU, given the country's welcoming legal regime and the relatively small effects of the credit crunch on the economy. A survey among listed companies has shown that they expect only a slight decrease in M&A activity on the Belgian market and a shift from diversification towards a focus on the core business.

IPOs and other transactions are expected to increase, especially in the consolidating bank sector, the transforming energy sector and the growing biotech industry. Other sectors that are expected to increase are the hotel and real estate sectors and the strong family-run businesses, particularly with the lack of large international deals.

Mid-market activity is expected to remain stable, while some larger private equity deals will have to be put on hold due to tightened lending conditions.

However, the expectations are that M&A will pick up in 2009 as the Belgian market still offers a lot of interesting opportunities. There will be bargain-hunting by well-capitalised buyers, non-core disposals by restructuring companies, and all-stock defensive deals, in some instances government-induced. In any event, it will be much more of a buyer's market than it was, meaning that prices will be weaker and deals will take longer.

2. What are the main means of obtaining control of a public company? (For example, public offer, legal merger, scheme of arrangement and so on.)

Control of a public company is generally obtained by one or a combination of the following:

- Public takeover offer for cash.
- Public takeover offer for shares.
- Public takeover offer for a mixture of cash and shares.
- Negotiated acquisition of a controlling shareholding (possibly through a controlled auction).
- Systematic purchase of stock on a financial market.
- Legal merger governed by the Company Code (including the possibility of a cross-border merger).

A public takeover offer can be either voluntary or mandatory.

3. Are hostile bids allowed? If so, are they common? If they are not common, why not?

Hostile bids are allowed, but are not common for two reasons:

- Belgian companies (even listed companies) are generally family-owned or at least owned by a single controlling shareholder. A hostile bidder is more likely to encounter a strong opponent than numerous powerless individuals.
- Preventing unjust hostile takeovers is central to the takeover bid regulations, introduced after the hostile bid by Carlo de Benedetti for Société Générale de Belgique in November 1988. These regulations contain strict transparency requirements (*see Question 8*) and oblige a bidder to treat all shareholders equally.

The Royal Decree of 27 April 2007 on Public Takeover Bids (Takeover Bid Royal Decree) contains provisions that could make hostile takeovers in Belgium easier. The Takeover Bid Royal Decree introduces the "speak-out or shut-up" rule, which gives the Banking, Finance and Insurance Commission (BFIC) (*see box, The regulatory authorities*) the authority to force the parties involved in a potential takeover to make their takeover intentions known through a press release.

If those parties subsequently do not publicly confirm their takeover intentions within a reasonable timeframe, they lose their right to launch their takeover bid for the target company for a period of six months. This could limit the use of the "white knight" defence (a strategy where a friendly company offers to buy the target before the hostile bidder gets a chance).

4. How are public takeovers and mergers regulated and by whom?

Regulation

The core takeover provisions are set out in legislation, in particular:

- The Company Code of 7 May 1999 (Company Code), which contains general provisions on company law, including takeovers.
- The Law of 16 June 2006 on the Public Offering of Investment Securities and the Admission to Trading of Investment Securities on a Regulated Market (Prospectus Law).
- The Law of 1 April 2007 relating to Public Takeover Bids (Takeover Bid Law).
- The Takeover Bid Royal Decree.
- The Royal Decree of 27 April 2007 relating to squeeze-out procedures (Squeeze-Out Royal Decree).
- The Law of 2 May 2007 relating to the Disclosure of Important Participations in Listed Companies (Disclosure Law).

- The Law of 8 June 2008 (which entered into force on 26 June 2008) implementing Directive 2005/56/EC on cross-border mergers of limited liability companies into Belgian law and introducing a Chapter V *bis* in the Company Code dealing with cross-border mergers and assimilated operations.
- The Law of 11 December 2008 (which entered into force on 12 January 2009) aligning Belgian tax legislation with Directive 90/434/EEC as amended by Directive 2005/19/EC on the taxation of mergers.

In addition, the BFIC produces relevant guidance that:

- Ensures the practical implementation and interpretation of the statutory provisions by regularly issuing circulars on particular topics.
- Supervises the fairness of public bids and ensures compliance with the legal regulations, which is summarised and commented on in annual reports.

The regulator

The BFIC is an independent public institution with its own legal personality. In relation to public takeovers, it supervises compliance with the rules aimed at protecting the interests of savers and investors in transactions of financial instruments, ensuring the smooth operation, integrity and transparency of the financial markets. It also verifies information provided in relation to transactions in listed instruments (such as prospectuses and reply memoranda to prospectuses).

PRE-BID

5. What due diligence enquiries does a bidder generally make before making a recommended bid and a hostile bid? What information is in the public domain?

Recommended bid

Before initiating a bid, a prospective bidder usually conducts a due diligence investigation in co-operation with the target's board of directors (board) to assess the value of the business and to identify the risks involved. The decision whether or not to proceed is based mainly on the results of that investigation.

Due diligence for a public takeover bid strongly resembles that of a negotiated acquisition and, depending on the nature of the target's business, focuses on:

- Corporate matters, for example, the structure of the business and the articles of association.
- Real estate portfolios.
- Equipment.
- Shareholdings.
- Financing arrangements.
- Insurance.
- Employment matters.
- Tax matters.
- Litigation and claims.
- Licences.
- Environmental risks.
- Intellectual property.
- Commercial matters, for example its main customers and commercial terms.

Hostile bid

The organisation of a data room and management presentations usually require the co-operation of the target's board of directors and so are normally only possible in recommended takeovers. As a result, in the event of a hostile bid, the prospective bidder can usually only rely on information that is publicly available.

However, during Belgacom's hostile bid for Telindus in 2005, the board of directors of Telindus granted Belgacom access to its data room, providing the hostile bidder with information about Telindus' market performance, business strategy and reorganisation process.

Public domain

The following information on a target company is publicly available:

- Corporate brochures (often also including some business information).
- The notarial deeds (outlining the articles of association), which contain critical information such as the founders of the company, the share capital, the persons that can validly represent the company and specific provisions regarding capital increases.
- All official publications including, among others, details of directors (including independent directors who do not have an executive role and mainly assume a supervisory function), daily management and the management committee.
- Annual accounts and the related directors' and auditors' reports as well as all minutes dealing with conflicts of interest within the board.
- Corporate governance-related information, including the governance charter, the functioning of the board and the board committees and relations with the controlling shareholder.
- Employment details.
- Real estate details such as the location, title, mortgages and other charges affecting the property.
- Details with respect to floating charges relating to the business of the company.
- Any listing of particulars or prospectuses.
- Research published by investment banking analysts.

- Details of major new developments, including significant acquisitions and disposals and material trading developments (occasional information), which must be notified to the BFIC by listed companies.

Listed companies must also publish half-yearly financial information and other routine information (such as the results of meetings and dividend details). This information is published by the market authority of the financial market concerned, as well as on the company's own website.

6. Are there any rules as to maintaining secrecy until the bid is made?

Any entity planning to announce a public bid must notify its intention to the BFIC. A draft prospectus must be submitted to the BFIC together with any other relevant information that will help it analyse the draft prospectus. Once the prospectus has been accepted by the BFIC, it will be published on its website and a notice will be printed in one or more newspapers (*see Questions 12 and 14*).

Prior to acceptance of the prospectus and the notice, parties are prohibited from announcing a bid. In addition, the parties to a recommended takeover usually enter into a secrecy or confidentiality agreement, or include such clauses in other contractual documents (*see Question 7*).

Note that a listed company should make any information public as soon as it is accurate and could influence the stock price. It may decide to delay such disclosure, provided that it takes all measures to avoid leakages and insider trading.

7. Is it common to obtain a memorandum of understanding or undertaking from key shareholders to sell their shares? If so, are there any disclosure requirements or other restrictions on the nature or terms of the agreement?

A memorandum of understanding is often the first step in a recommended takeover. It usually includes:

- Confidentiality obligations.
- Details of the implementation of the transaction.
- A fixed and (in principle) binding time frame.
- Certain basic understandings, for example:
  - the scope of the transaction; and
  - the obligation to negotiate the final documentation in good faith.

If the memorandum is between the bidder and key shareholders of the target company, it may include a conditional undertaking from the shareholders to sell their shares. Whether such undertakings are binding is uncertain; the Takeover Bid Royal Decree only provides that the period of acceptance of a bid starts five days after the approval of the prospectus or the reply memorandum in response to the prospectus, whichever comes first.

Undertakings are often disclosed in the prospectus. If they are not, the remaining shareholders learn of their existence in the board's opinion on the bid (*see Question 12*), in which the board members explain whether or not they, in their capacity as shareholders, or the shareholders they represent, will accept the offer. The report must be disclosed, and is generally inserted in the prospectus. Since most key shareholders are represented on the board, the remaining shareholders are informed of their intentions in relation to the offer in the directors' report.

8. If the bidder decides to build a stake in the target, either via a direct shareholding or by using derivatives, before announcing the bid, what disclosure requirements, restrictions or timetables apply? Are there any circumstances in which shareholdings, or derivative holdings, of associates could be aggregated for these purposes?

Disclosure requirements

There are strict disclosure (transparency) requirements, which were recently amended following the implementation of Directive 2004/109/EC on transparency requirements for securities admitted to trading on a regulated market and amending Directive 2001/34/EC (Transparency Directive).

The Transparency Directive focuses on four key areas:

- Periodic financial reporting.
- The disclosure of voting rights over securities.
- The dissemination and storage of regulated information.
- The information to be provided to the holders of securities in connection with general meetings.

The most important changes resulting from the implementation are the following:

- The mandatory thresholds for notification of a bid remain the same but the possibility of providing for different thresholds for notification in the target's articles of association has changed. While under previous legislation, the threshold could be set below 5% but could be no less then 3%, the Act of 2 May 2007 (which implemented the Transparency Directive) allows for the possibility of setting notification thresholds at 1%, 2%, 3%, 4% or 7.5%.
- Notification to the issuer must be effected as soon as possible, but no later than four trading days after the threshold is met (compared with two days under previous legislation).
- On notification of a bid by a shareholder, the issuer must publicly disclose the notification within three days (previously within one day).
- Notification is mandatory when the thresholds are crossed (up or down) due to the acquisition or disposition of shares. This is now also mandatory when passive thresholds are crossed (for example, following a capital decrease or capital increase).

Aggregated shareholdings

In relation to the above notification requirements, the shareholding of the acquiring party is aggregated with any shares acquired or transferred by any of:

- A third party acting on the acquirer's behalf.
- A natural person or legal entity affiliated with the acquirer (*Article 11, Company Code*).
- A third party who acts on behalf of an affiliated party of the acquirer (*Article 11, Company Code*).

In addition, shareholdings of the following type are included in the aggregate: those owned or transferred by persons acting in concert for the acquisition or transfer of shares, to which at least 5% of the voting rights in the company are attached.

A specific regime applies to groups of companies that must draft consolidated annual accounts. If such a group undertakes an acquisition or transfer requiring a notification, the companies within the group are exempted from the notification obligation, provided that the notification is made by the company that drafts the consolidated annual accounts. In addition, where the relevant shares are owned or transferred by parties which, acting in concert, hold a 5% stake (but do not individually hold a 5% stake), a common notification is sufficient.

9. If the board of the target company recommends a bid, is it common to have a formal agreement between the bidder and target? If so, what are the main issues that are likely to be covered in the agreement? To what extent can a target board agree not to solicit or recommend other offers?

The initial notification and the prospectus are normally the only documents recording the terms of the agreement between the parties. Formal agreements are uncommon. In certain cases, the parties' understanding of matters, such as the future conduct of the target's business, may be recorded in comfort letters and letters of intent.

Although a letter of intent is not meant to be legally binding in most cases, there are certain clauses that the parties may want to make legally enforceable. One of those clauses is an exclusivity clause that obliges the seller to deal only with the prospective purchaser for a certain time, and to refrain from negotiating with or soliciting other purchasers.

10. Is it common on a recommended bid for the target, or the bidder, to agree to pay a break fee if the bid is not successful? If so, please explain the circumstances in which the fee is likely to be payable and any restrictions on the size of the payment.

Break fees can in principle be obtained from both the target and/or its controlling shareholder but are not frequently used or discussed. A break fee would probably be allowed if it merely provided compensation to the disappointed bidder for the out-of-pocket expenses it incurred in connection with the transaction. However, a break fee may be illegal if it greatly exceeds such costs (constituting a barrier to rival counter-bids or higher bids and adding to market inefficiency). In any event, the target must be able to justify that such fees are in the corporate interest.

11. Is committed funding required before announcing an offer?

Before announcing a bid, the bidder must provide adequate comfort that the necessary funds will be available if the bid is accepted and the transaction completed.

In the case of a cash consideration, all funds necessary for the realisation of the bid need to be available. The funds must be deposited in a blocked bank account or the bidder must obtain an irrevocable and unconditional line of credit from a bank to guarantee the payment for all the shares included in the bid.

In the case of a share exchange, the bidder must have at its disposal either:

- The shares offered as consideration.
- The authority to issue or to acquire the shares offered as consideration in sufficient number and within the established payment term. If the bidder is not entitled to issue the shares itself, it must have at its disposal (legally or factually) the necessary means to ensure the transfer of the shares.

ANNOUNCING AND MAKING THE OFFER

12. Please explain how (and when) the bid is made public (highlighting any relevant regulatory requirements) and set out brief details of the offer timetable. (Consider both recommended and hostile bids.) Is the timetable altered if there is a competing bid?

Pre-bid formalities and undertakings

Before announcing a bid, a potential bidder must inform the BFIC of its intention to make a bid and wait for the BFIC's approval of the draft prospectus (*see Question 14*). The bidder must commit itself to treat all shareholders equally and bring the bid to a conclusion. A credit institution or stock exchange company established in Belgium must be appointed to ensure the receipt of bid acceptances and payment.

In principle, the BFIC publishes the notification, at the bidder's expense, the day after its receipt. On the same day, the following parties are informed about the publication:

- The management committee or market authority of the stock exchange, if the shares of the target are listed on a Belgian regulated market.
- The target.
- The bidder.

If the BFIC reasonably finds that the prospectus is incomplete, it may request the bidder to provide additional information. In such a case, the BFIC should notify the bidder within ten business days of receipt of the prospectus (*Article 19, Takeover Bid Law*). If it fails to do so, the bidder can formally request the BFIC to make a decision.

The bidder can ask for the ratification of a prospectus if this prospectus has already been accepted by a competent authority, as defined by Article 4 of Directive 2004/25/EC on takeover bids (Take-

over Directive) (*Article 20, Takeover Bid Law*). In such a case, the BFIC must communicate its decision regarding the ratification request within ten business days. If the BFIC does not make a decision within ten business days of such a request, the requesting parties can send a registered letter to the BFIC urging it to make a decision. If the BFIC subsequently does not decide within ten business days of receiving the registered letter, the request will be considered to be accepted.

Within five days of receipt of the draft prospectus, the target's board of directors must provide the BFIC with its opinion on the bid (reply memorandum). It must balance the interests of the different stakeholders involved, such as the security holders, creditors and employees of the company.

The reply memorandum also:

- Sets out the company's intentions in relation to pre-emptive clauses and approval clauses.
- Confirms whether or not the directors in their own capacity and the shareholders they represent will accept the offer.

Other requirements regarding the reply memorandum are specified in the Takeover Bid Royal Decree.

The reply memorandum should be published as part of the prospectus, or as a separate document. If the BFIC finds that the information provided in the reply memorandum is incomplete, then it must notify the target company within five business days. The BFIC must accept or reject a completed reply memorandum within five business days of its receipt. If the BFIC fails to come to a decision, the target company can launch an appeal.

The offer period

An offer should remain open for a minimum of two weeks and a maximum of ten weeks (*Article 30, Takeover Bid Royal Decree*). This period starts no earlier than five business days after the approval of the prospectus or the approval of the reply memorandum of the target company, whichever comes first.

However, the offer period is extended if a general shareholders' meeting of the target has been convened to discuss the offer or possible strategies to frustrate the offer. In these cases, the offer period is extended until two weeks after the shareholders' meeting (*Article 31, Takeover Bid Royal Decree*).

During the offer period, strict disclosure requirements apply regarding dealings in the target's issued securities (*see Question 28*).

Completing the offer

In the case of an unconditional offer, the bidder acquires the shares of the shareholders who have accepted the offer. If the offer is conditional on a minimal acceptance threshold and the amount of shares that are offered for sale is lower than the threshold, the bidder may still acquire those shares, if it stipulated this in the initial notification.

Within five days of the closing of the bid, the bidder must inform the public of its decision in relation to the acquisition of the presented shares. It must also inform the public and the BFIC how many shares it is acquiring and how many it will hold after the completion of the bid. In a conditional bid, the bidder informs the public whether the required conditions were met or, alternatively, whether it is prepared to give up those conditions. If the bid was successful, the bidder must pay the agreed price within ten days of publication of the results of the bid.

In the case of a share exchange, if the bid is successful, the bidder must apply for a listing of the shares that were given in exchange within one month of closing of the bid.

The offer period is re-opened if one of the following conditions is met:

- The bidder, after closing the bid, holds 90% or more of the target company's voting securities.
- The bidder applies for a de-listing of the target company's securities within three months of closing of the bid.
- The bidder, before the closing of the offer period, has committed itself to purchase the securities of the target company for a higher price than the offered price.

In the case of a re-opening, the bidder must re-open the bid for an additional period of a minimum of five and a maximum of 15 business days to provide the remaining security holders with the opportunity of accepting the bid. The bid is re-opened within ten business days of the publication of the reason for the reopening.

In the case of a counter-bid or a higher bid, the same rules, in principle, apply. However, any new bid should be notified to the BFIC, at the latest, two days before the closing of the last bid.

13. What conditions are usually attached to a takeover offer (in particular, is there a regulatory requirement that a certain percentage of the target's shares must be offered/bid)? Can an offer be made subject to the satisfaction of pre-conditions (and, if so, are there any restrictions on the content of these pre-conditions)?

The types of conditions that are attached depend on the offer. However, in every public offer it is mandatory to make an offer on all the shares of the target.

Any type of condition can be included, with the exception of conditions that depend solely on the action of the bidder and conditions that make it (virtually) impossible for the offer to succeed.

A takeover offer is typically made conditional on obtaining clearance from the competition authorities or on consent from the regulatory authorities. An offer can also be made conditional on obtaining a certain amount of acceptances.

14. What documents do the target's shareholders receive on a recommended and hostile bid? (Please briefly describe their purpose and main terms, and which party has responsibility for each document.)

The main documents are the initial notification of the offer to the BFIC and the prospectus (*see Question 12*). The board of the potential bidder bears responsibility for the accuracy of both documents.

Initial notification of the offer

The initial notification to the BFIC must contain sufficient information demonstrating that the basic requirements for a public offer are satisfied (*Article 5, Takeover Bid Royal Decree*). Specifically, the initial notification must contain:

- The bid price.
- The conditions and main terms of the bid.
- Evidence that the following conditions are met (*Article 3, Takeover Bid Royal Decree*):
  - the bid must relate to all voting securities of the target that are not yet in the possession of the bidder;
  - all funds required for the realisation of the bid must be available, either in an account with a credit institution or in the form of an irrevocable and unconditional credit facility made available to the bidder by a credit institution;
  - in the case of a share exchange, the bidder must have at its disposal the securities that are to be offered as consideration, or have the authority to issue or acquire such securities in sufficient number and within the payment term;
  - the terms and conditions of the bid must comply with the provisions of the Takeover Bid Law and the Takeover Bid Royal Decree;
  - if the bid involves different categories of securities and the prices vary between the different categories, those price differences can only be attributable to the inherent differences between the different securities;
  - the bidder must commit itself to bring the bid to an end; and
  - a credit institution or stock exchange company (incorporated in Belgium or with a branch office in Belgium) must ensure the receipt of acceptances of the bid and the payment of the price.

In addition to the notification, the bidder must submit a file that conforms to the instructions of the BFIC, containing, among other things, the draft prospectus and a copy of any advertising to be used in relation to the bid.

If the public offer concerns an offer for the securities of a Belgian company by an entity that already has a controlling stake in that company, the notification should also contain a report of an independent expert (as defined in Articles 22 to 23 of the Takeover Bid Royal Decree).

The notification must be sent to the BFIC by registered letter. On receipt of the notification, the BFIC notifies the target company, the bidder and the relevant market authority if the securities are listed. In addition, the BFIC makes the notification public, at the latest, on the following business day (*see Question 12*).

Prospectus

The prospectus requires the prior approval of the BFIC.

The prospectus must contain all of the information that the public needs to make an informed assessment of the nature of the transaction and the rights attached to the securities. It must also mention that it was only published after approval by the BFIC, but that this approval does not entail an appraisal of the transaction, or of the position of the bidder.

New significant facts, which may have an influence on the assessment of the offer by the public, must be published in an update of the prospectus. Failure to do so entitles the BFIC to suspend the transaction until the new information has been made public.

The following information is attached to the prospectus:

- The position of the target's board.
- Potentially, the report of an independent expert (*see above, Initial notification of the offer*).
- Potentially, the position of the target's employee representation body.

The Takeover Bid Royal Decree details the elements that must be incorporated in the prospectus. A template of the prospectus is also attached to the Takeover Bid Royal Decree.

15. Are there any requirements for a target's board to inform or consult its employees about the offer?

The Takeover Bid Law provides that, as soon as a takeover bid has been made public, the management of both the bidder and the target must inform their employees or the representatives of the employees about the offer. They have the right to be consulted on the impact of any structural changes on the prospects of employment, work organisation and employment in general.

If there is a works council in the target company, the representatives of the bidder are obliged to attend a hearing with the works council, if it requests one. If the bidder does not attend this hearing, it may not exercise the voting rights that it has already acquired during the course of the offer.

Both management and the works council must give their opinion on the proposed takeover and present a written copy to the employees or their representatives. These opinions are attached to the prospectus (*see Question 14*).

16. Is there a requirement to make a mandatory offer? If so, when does it arise?

A shareholder must launch a public takeover bid for the rest of the voting shares of another company as soon as the shareholder directly or indirectly acquires 30% of that company's voting shares (*Takeover Bid Royal Decree*). In this case, the bidder must offer all remaining shareholders of the company the same price (and conditions) that it paid for acquiring control. This price must be the higher of:

- The average trading price on the most liquid stock market where the securities are listed during the 30 calendar days preceding the moment that the bid obligation arose.

- The highest price paid over the last 12 months by the bidder or persons acting in concert with it.

Certain transitional provisions were put in place when the Takeover Bid Law entered into force on 1 September 2007 to safeguard existing shareholders (a "grandfathering" regime) (*see Question 29*). These measures expired on 21 February 2008.

CONSIDERATION

17. What form of consideration is commonly offered on a public takeover?

A bid can either take the form of:

- A share purchase, where the consideration is cash.
- A share exchange, where the consideration is securities of the bidding company or another company.

As is the case in most jurisdictions, a cash offer is usually preferred over an exchange offer. The procedure is slightly more cumbersome when a bidder offers shares as consideration (*see Questions 11 and 12*).

The Takeover Bid Royal Decree provides that, in a mandatory public offer (*see Question 16*), the offer can take the form of cash, shares or a combination of both.

18. Are there any regulations that provide for a minimum level of consideration? If so, please give details.

In a voluntary bid, the bidder is entirely free to set the price and conditions of the offer (a bid is voluntary when, at the moment the bidder announces the offer, it either has no control over the target or already controls the target).

However, the consideration must be equal for all security holders. The fairness of the consideration is one of the main concerns of the BFIC when analysing the draft prospectus. The BFIC does not merely look at or limit itself to the (current) market price of the security.

In accordance with the equality requirement, if the bidders or persons acting in concert with it acquire shares outside the offer at a higher price than the offer price, the offer price is by law set at that higher price. The same applies if the bidder, pending the offer, commits itself to acquiring the shares of the target at a higher price than the offer price: in that case, the bidder must extend the offer at this higher price.

A counter-offer or a higher offer must be at least 5% higher than the last offer, counter-offer or higher offer. If the offer price is (partially) composed of listed shares, the value of such shares is determined at the moment that the bidder notifies its intention to announce its bid to the BFIC.

For a mandatory public offer, the Takeover Bid Royal Decree provides that the minimum level of consideration should be the higher of the following two amounts:

- The highest price paid for the shares by the bidder during the 12 months before the announcement of the offer.
- The weighted average listed market price of the shares during the 30 days before the announcement of the offer.

19. Are there additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders? If so, please give details.

There are no specific restrictions or requirements for foreign bidders on the form of consideration. However, if the offer price is not expressed in euros in the bid prospectus (*see Question 14*), the BFIC may request the bidder to do so (out of concern for investor protection).

POST-BID

20. Can a bidder compulsorily purchase the shares of remaining minority shareholders? If so, please give details.

There are two types of squeeze-out procedures under Belgian law: general squeeze-out proceedings and squeeze-out proceedings following a takeover bid.

General squeeze-out proceedings

A natural person or legal entity can acquire all the voting securities of a Belgian public limited liability company if it holds, directly or indirectly, alone or in concert with another person, 95% of the voting securities of that company and if the following conditions are satisfied (*Article 2, Squeeze-Out Royal Decree*):

- The bidder makes a public offer for:
  - all voting securities, which may or may not represent capital, not yet owned by the bidder, affiliated persons or persons acting in concert with it; and
  - all securities that give a right to subscribe, acquire or convert those securities.
- All funds necessary for the realisation of the bid are available, either in an account with a credit institution established in Belgium or in the form of an irrevocable and unconditional credit facility made available to the bidder by a credit institution established in Belgium (similar to takeover bid proceedings) (*see Question 11*).
- The terms of the offer comply with the applicable regulations and must safeguard the minority shareholders' interests (in particular with relation to the price).
- A credit institution or a stock exchange company established in Belgium is appointed to ensure payment of the price.

Squeeze-out proceedings following a (successful) voluntary or mandatory takeover bid

A simplified squeeze-out procedure can be initiated by a bidder who, following the bid (*Articles 42 to 44, Takeover Bid Royal*

Decree), owns 95% or more of the securities of the company, but only if the bidder, through the bid, acquired 90% of the shares not owned at the start of the bid.

If the above test is satisfied, the bidder can re-open the bid under the same conditions, for at least 15 business days, within three months of the end of the offer period. Those securities that are not offered after closing the re-opened bid are considered to have been transferred to the bidder by operation of law.

21. If a bidder fails to obtain control of the target, are there any restrictions on it launching a new offer or buying shares in the target?

There are no rules that prevent a further bid by the same bidder if the initial bid fails.

22. What action is required to de-list a company?

After squeeze-out proceedings, the relevant market authority, in principle, automatically proceeds to de-list. However, it can make a decision to de-list subject to certain conditions, if this is necessary to preserve the smooth running of the market or to protect the interests of investors.

TARGET'S RESPONSE

23. What actions can a target's board take to defend a hostile bid (pre- and post-bid)?

Defensive measures

Defensive measures are used at both the pre-bid and post-bid stages.

The usual pre-bid defensive measures are:

- Pre-emptive shares (rights of existing shareholders to have first refusal on the sale of shares).
- Approval (by the board of directors) clauses.
- Limitation of the voting rights of shareholders.
- The use of a trustee company to hold shares and issue depository receipts representing the beneficial interest in the shares, while the trustee retains the voting rights.

The usual post-bid defensive measures are:

- The use of authorised capital (that is, the amount that the board of directors may use to increase the stated capital without holding a general shareholders' meeting).
- Issuing non-voting shares.
- The acquisition of the company's own shares (up to a 20% maximum financed through distributable reserves), provided that the board is explicitly mandated by the shareholders' meeting and is of the opinion that the offer poses a serious imminent threat to the target.
- The sale of valued assets of the company (crown jewels).
- The search for a more favourably viewed bidder (white knight).
- The issuing of rights to the company's existing shareholders to acquire additional securities at a below market price, diluting the bidder's voting power (poison pills).

Only the shareholders' meeting can:

- Grant rights to third parties that would have an impact on the assets of the company or create an obligation for the company, if such rights or obligations are dependent on the announcement of a takeover bid.
- Decide on transactions that would substantially change the composition of the target's assets and liabilities or that would assume commitments without real consideration. Such a decision may not be taken under condition precedent of success or failure of an offer.

Regulation of defensive measures

Between receipt of notification of the bid and the end of the bid, the target's board of directors cannot (*Article 607, Company Code*):

- Increase the target's capital with a contribution in cash or in kind while restricting or suspending the shareholders' preferential subscription rights (by which a shareholder has a priority, in the case of capital increase, to subscribe to new shares in proportion to the number of shares he currently holds).
- Make decisions or enter into transactions that may significantly modify the target's assets and liabilities.
- Issue voting securities (whether or not representing capital) or subscription rights in relation to voting securities (unless such securities or rights are first offered to existing shareholders in proportion to the capital their shares represent).

The Takeover Directive also addresses the issue of defensive measures. EU member states can opt in or out of the directive's provisions concerning such measures. However, if a member state decides not to make them mandatory, it cannot prevent companies from applying these rules on a voluntary basis.

The Takeover Directive contains:

- With respect to post-bid defences (that is, once the company has become subject to a takeover bid), a prohibition on the target's board taking any action (such as share buybacks), which may result in the frustration of the bid, without the shareholders' consent (*Article 9, Takeover Directive*). This duty of board neutrality may facilitate takeover activity by limiting the board's power to raise obstacles to hostile takeovers to the detriment of shareholders' interests.

- Breakthrough provisions, providing for the unenforceability of restrictions on transfers of securities and other corporate devices that serve as defensive structures, such as preferential shares or voting structures (*Article 11, Takeover Directive*). By neutralising these pre-bid defences during a takeover bid, the breakthrough provisions are considered to be a radical tool for facilitating takeovers.

- The reciprocity exception, providing that a company subject to either or both Articles 9 and 11 can dis-apply them if it becomes a target of a bid launched by a company that is not subject to these restrictions (*Article 12, Takeover Directive*). In this instance, the target's board can take frustrating action against such a bidder.

Belgium opted out of Articles 9 and 11 but individual companies can (voluntarily) opt-in to these provisions. The existing protection measures therefore remain the same, unless an individual company chooses to apply more stringent provisions.

The reciprocity exception has been implemented in Belgium and can be used if a Belgian target has voluntarily decided to opt-in to Article 9 or Article 11.

TAX

24. Are any transfer duties payable on the sale of shares in a company that is incorporated and/or listed in your jurisdiction? Can payment of transfer duties be avoided?

No transfer duties are payable in Belgium on the sale of shares where the company is incorporated or listed in Belgium.

OTHER REGULATORY RESTRICTIONS

25. Are any other regulatory approvals required, such as merger control and banking? If so, what is the effect of obtaining these approvals on the public offer timetable (for example, do the approvals delay the bid process, at what point in the timetable are they sought and so on)?

Regulatory approvals

Merger control in Belgium is regulated under the Law of 15 September 2006 on the protection of economic competition (Competition Law), except where transactions are governed by European Community (EC) law under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings. The Competition Law provides that concentrations must be notified to the Competition Council (*see box, The regulatory authorities*) when both of the following quantitative thresholds are met:

- The combined Belgian turnover of the undertakings concerned (including their affiliates) exceeds EUR100 million (about US$128.1 million).

- At least two of the undertakings concerned (including their affiliates) each have a Belgian turnover exceeding EUR40 million (about US$51.3 million).

THE REGULATORY AUTHORITIES

Banking, Finance and Insurance Commission (BFIC)

Head. Jean-Paul Servais (Chairman)

Address. Congresstraat 12-14 Rue du Congrès
1000 Brussels
Belgium
T +32 2 220 52 11
F +32 2 220 52 75
E *Press@cbfa.be* (spokesperson)
W *www.cbfa.be*

Main area of responsibility. The BFIC is responsible for the supervision of financial information and the financial markets.

Contact for queries. Luk Van Eylen (spokesperson) (*see e-mail address above*).

Obtaining information. Main switchboard (*see telephone number above*).

Competition Council

Head. Stefaan Raes

Address. North Plaza A
Koning Albert II-laan 9 Boulevard du Roi Albert II
1210 Brussels
Belgium
T +32 2 277 52 72
F +32 2 277 53 23
E *raco@mineco.fgov.be*
W *www.mineco.fgov.be*

Main area of responsibility. The Competition Council is responsible for supervising anti-trust regulation and merger control.

Contact for queries. Main switchboard.

Obtaining information. Main switchboard.

Notification is mandatory whenever a transaction meets the above thresholds and amounts to a "concentration" (*Article 7, Competition Law*). A concentration is caused by one of the following:

- The merger of two or more previously independent undertakings.

- The acquisition of direct or indirect control by one or more persons, already in control of one or more undertakings, over the whole or parts of one or more other undertakings, whether by purchase of securities or assets, by contract or by any other means.

- The creation of a joint venture which performs on a lasting basis all the functions of an independent economic entity (*Article 6, Competition Law*).

Effect on the public offer timetable

Notification must be filed before the completion of the concentration and after (*Article 9, §1, Competition Law*):

- The conclusion of the agreement.
- The announcement of the public bid.
- The acquisition of a controlling interest.

The parties to the transaction must refrain from taking any action that could hinder the reversibility of the transaction until the Competition Council has made its decision on the proposed transaction. This provision does not prohibit a transaction from being completed before a final ruling of the Competition Council. However, parties bear the risk and possible costs of completing a transaction that may subsequently be dissolved.

The Competition Council must adopt a decision within 40 working days of notification (*Article 58,§2 (3), Competition Law*). If it fails to do so, the proposed concentration is deemed to be cleared (*Article 58,§2 (3), Competition Law*).

The Competition Council can allow the concentration (with or without constraints) or it can decide that there are serious doubts surrounding the notification and that a second phase investigation is necessary. If the Competition Council begins a second phase investigation, it must reach a decision within 60 working days of the start of such an investigation (*Article 59,§6 Competition Law*). Failure to do so results in the proposed transaction being tacitly approved (*Article 59,§6 Competition Law*).

Following a second phase proceeding, the Competition Council can either allow the transaction or prohibit it because it creates or strengthens a dominant position that significantly hinders effective competition within the relevant market.

26. Are there restrictions on foreign ownership of shares (generally and/or in specific sectors)? If so, what approvals are required for foreign ownership and from whom are they obtained?

Although there are some sector-related restrictions on the acquisition of shares, none of them is specifically aimed at foreign owners. Therefore, in principle, foreign investors have the same rights as Belgian investors to acquire or sell interests in business enterprises. Any discrimination between Belgian investors and EC investors would also be a serious violation of EC law.

The federal and regional Ministers of Economic Affairs and the Ministry of Finance must be notified in advance of a transfer of one-third or more of the equity of a company conducting its business in Belgium, if that company's net assets are EUR2.5 million (about US$3.2 million) or more (*Law of 30 December 1970 on economic expansion*; *for Flanders this law has been replaced by the Decree of the Flemish Council of 31 January 2003 (article 41)*). A failure to notify does not give rise to any penalty, and this provision is therefore rarely complied with in practice.

27. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies? If so, please give details.

There are no exchange control rules for foreign companies.

28. Following the announcement of the offer, are there any restrictions or disclosure requirements imposed on persons (whether or not parties to the bid or their associates) who deal in securities of the parties to the bid?

During the offer period, all dealings in the target's issued securities must be disclosed to the BFIC on a daily basis, if carried out by:

- The bidder.
- The bidder's directors.
- Any other natural person or legal entity acting in concert with the bidder or its directors.

In the case of a share exchange, the same disclosure obligation applies to dealings in the bidder's issued securities. This obligation applies to the bidder as soon as it has sent the bid notification to the BFIC and to the target as soon as it has received the public announcement.

Persons not subject to these disclosure obligations, but holding, whether directly or indirectly, at least 1% of the securities of the bidder or the target, are subject to the same disclosure obligation from the date of the public announcement.

In addition, any broker dealing in target securities must, if requested by the BFIC, disclose the identity of the person for whom they are acting to that authority. The same obligation applies to any subsequent broker. Brokers who act for others must inform their principal in advance that they can only trade after that requirement is fulfilled, and that the principal must accept the disclosure of its identity to the BFIC.

REFORM

29. Please summarise any proposals for the reform of takeover regulation in your jurisdiction.

There are currently no proposals for the reform of takeover regulation in Belgium.

The impact of the recently adopted Takeover Bid Law is yet to be seen. The "grandfathering" regime allowed existing shareholder syndicates to escape the mandatory takeover bid rule when exceeding the 30% threshold for a transitional period (*see Question 16*). During this time, many shareholders of listed companies adapted and reinforced their syndicates accordingly. As a result, it is likely that the Takeover Directive's aim of avoiding shareholders in listed companies controlling more than 30% of the shares will not be achieved straight away.

CONTRIBUTOR DETAILS

Steven De Schrijver
Lorenz
T +32 2 239 20 00
F +32 2 239 20 02
E *sdeschrijver@lorenz-law.com*
W *www.lorenz-law.com*

Lorenz

Brussels Bishkek Geneva

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Lorenz International Lawyers
Troonstraat 14-16 B.5 Rue du Trône - B-1000 Brussels - Belgium
T. +32 2 239 20 00 - F. +32 2 239 20 02
www.lorenz-law.com