The Legal 500 Country Comparative Guides

Belgium: Mergers & Acquisitions

This country-specific Q&A provides an overview to mergers & acquisitions laws and regulations that may occur in Belgium.

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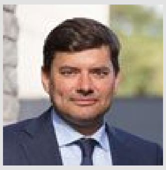

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1. **What are the key rules/laws relevant to M&A and who are the key regulatory authorities?**

The following (Belgian) regulation is typically relevant to M&A:

- the Belgian Code for Companies and Associations that entered into force on 1 May 2019 for general principles of company law and laying down the procedures for (de)mergers;
- the Belgian Code of Economic Law, which contains rules on competition;
- public takeover bids are governed by the Takeover Bid Act of 1 April 2007 and its executing Royal Decrees of 27 April 2007 (i.e. the Takeover Bid Decree and the Squeeze-Out Decree);
- the Belgian Civil Code, which sets out the general principles of contract law;
- the Market Abuse Regulation will need to be taken into account in public M&A.

There are mainly two key regulatory authorities:

- the Financial Services and Markets Authority (FSMA), which is the relevant regulatory authority in respect to public takeover bids;
- the Belgian Competition Authority is the competent administrative body in relation to competition law.

Specific rules may apply (and the involvement of other regulatory authorities may be required) for M&A transactions in particular sectors, such as the financial sector (e.g. specific rules apply to (de)mergers of insurance companies or credit institutions and the energy sector).

2. **What is the current state of the market?**

2019 was a great M&A year compared to 2018, with 40 billion euro (compared to 23 billion euro in 2018) of transactions involving a Belgian acquirer, seller or target.* This increase is mainly due to certain mega deals involving AB InBev (for a total value of 14,5 billion euro). In addition, the number of M&A deals over 500 million euro increased in 2019 compared to 2018.

2020 looks like a promising M&A year given various acquisition deals have been initiated.

* According to the financial newspaper De Tijd and Dealogic

3. **Which market sectors have been particularly active recently?**

The food& beverage sector as well as the pharma, tech; biotech and chemical sectors were particularly active in 2019 and will likely continue to be in 2020.

4. **What do you believe will be the three most significant factors influencing M&A activity over the next 2 years?**

The (low) interest rate, Belgian tax reform (with further significant tax reductions in 2020) and the geopolitical climate, e.g. growing protectionism, Brexit and the “trade war” between the USA and China. The corona virus may also impact M&A activity in 2020.

5. **What are the key means of effecting the acquisition of a publicly traded company?**

Generally speaking, acquisitions in Belgium usually take the form of a share deal or an asset deal. In a share deal, the shares of the target company are being transferred by means of a share purchase agreement. Through an asset purchase agreement, all or certain (cherry-picking) assets of the target company are being transferred.

Given the larger number of shareholders in a publicly traded company, it might prove difficult to enter into separate share purchase agreements. A controlling interest in publicly traded companies is usually acquired following a mandatory or voluntarily public offer for the shares of the target company.

Alternatively, a publicly traded company can be merged with another Belgian or EU company under the Belgian Code for companies and associations. This type of transaction involves a transfer of the company’s assets and liabilities by operation of law. It can be implemented through the absorption of a company or through merging into a new entity.

6. **What information relating to a target company will be publicly available and to what extent is a target company obliged to disclose diligence related information to a potential acquirer?**

Publicly available information

Publicly traded companies are by law required to disclose quite some information to the public. They are subject to recurring and ad hoc reporting requirements.

The following information would typically be publicly available:

- the company’s articles of association;
- the (statutory and consolidated) annual accounts;
- the annual report, including the corporate governance statement and remuneration report; publicly traded companies are further required to include certain takeover-relevant information in their annual report (such as transfer restrictions, shareholders’ agreements, etc.);

- the bi-annual financial report (including certain financial information and intermediate annual report)
- transparency disclosures and information on shareholding structure;
- dividend related information;
- information on and minutes of shareholders’ meetings;
- certain special reports of the board of directors;
- information on reported manager’s transactions;
- publications in the annexes to the Belgian Official Gazette, including amongst others capital movements; appointment/dismissal of members of the board of directors, members of the legal management committee, daily managers and the statutory auditor;
- certain basic company information, including information about its business units (through the website of the Crossroad Bank for Enterprises);
- information about registered IP and domain names;
- information on owned real estate;
- certain information on short positions;
- approved prospectus;
- press releases.

Websites of financial analysts also make available certain information and analyses about publicly traded companies.

Other information

The board of directors of the target company will further decide to what extent and the circumstances under which information that is not subject to a legal disclosure requirement will be made available. When taking such a decision, the directors should especially consider the corporate interest, their confidentiality obligation, equal treatment requirements and restrictions relating to market abuse regulation.

7. **To what level of detail is due diligence customarily undertaken?**

In private M&A deals, it is common to undertake a due diligence. The scope usually covers financial, tax and legal aspects of the target company.

In public M&A, the level of detail will typically depend on:

1. the friendly (recommended) or hostile nature of the public offer, which will cause the board of directors of a target company to be more or less willing to share information respectively; and
2. legal restrictions that may limit information sharing, such as the corporate interest, the confidentiality obligation of directors, equal treatment requirements and restrictions in view of market abuse regulation.

What are the key decision-making organs of a target company and what approval rights do shareholders have?

The board of directors has general decision-making power with the exception of those items explicitly requiring a decision of the shareholders' meeting.

Depending on the nature of the M&A transaction and from a target company's perspective, the decision-making powers can lie with:

- the shareholders' meeting of the target;
- the individual shareholders of the target;
- the board of directors of the target.

Transactions taking place in application of a procedure laid down in the Belgian Companies' Code (such as mergers, demergers, a transfer of a universality of goods) will typically require a decision of the shareholders' meeting. The board of directors will be involved in the preparatory phase (and will for example prepare the proposal for the transaction, which must include certain mandatory information in relation to the companies involved and some transactional related information, and might be required to issue a special report, in which it explains the proposed transaction from a legal and economic perspective – also see below – question 9).

In share deals, including public offers, it is up to the individual shareholders of the target to decide whether to sell their shares. There might, however, be certain transfer restrictions pursuant to which the prior approval of the target's shareholders' meeting is required (more relevant in private M&A). Also, the board of directors of a target may influence the deal by deciding to frustrate a public bid and take action accordingly (see in this regard below – question 24).

Cherry-picking asset deals through an asset purchase agreement may occur by means of a decision of the board of directors. It, however, occurs in practice that transactions exceeding a certain threshold require the prior consent of the shareholders' meeting.

9. **What are the duties of the directors and controlling shareholders of a target company?**

A board of directors has the duty to exercise its powers in the interest of the company.

The board of directors of a target company may further have certain specific duties in relation to M&A transactions in application of procedures laid down in the Belgian Code for companies and associations. For example, the board of directors of companies intending to merge are required to establish a merger proposal, which needs to be made public and
8. approved by the shareholders. Further, the board of each company involved in the merger

should in principle issue a special report setting out the state of the assets and liabilities of the companies to be merged and explaining and justifying (from both a legal and economic perspective) the desirability of the merger, the conditions and arrangements for it and its effects, the methods used to determine the share exchange ratio, and the relative importance attached to these evaluation methods.

Belgian regulation on public offers imposes certain duties upon the board of directors of a target company. These include certain information obligations towards employees (see below – question 10) and providing its opinion on the offer in a response memorandum, covering amongst others (i) the consequences of the bid, taking into account the interests of the company, the shareholders, the employees and creditors, and (ii) the bidder's strategic plans for the target and related estimated impact on the target's result and employment. If the board's opinion is not unanimous, the dissenting opinions should be included in the response memorandum.

If a voluntary public offer is launched by a bidder that is already in control over the target, the independent directors of the target have the specific duty to appoint an independent expert to issue a report in relation to the securities that are the object of the offer. The bidder must cover the cost of the independent expert.

Notwithstanding the foregoing, Belgian law does not impose specific duties upon a controlling shareholder in connection with M&A transactions.

10. **Do employees/other stakeholders have any specific approval, consultation or other rights?**

Employees

Belgian employment law requires that employees/employees' representative are informed and consulted in relation to envisaged restructurings of a company, including in case of a merger.

In addition to this general requirement, Belgian regulation on public offers imposes specific obligations towards the employees/employees' representatives. The board of the target and bidder are required to inform their respective employees' representatives or their employees of the offer and provide them with a copy of the prospectus once it is made public. The board of directors of the target company must further inform the employees' representatives or the employees about its opinion on the offer.

When the target company has a works council, the latter may hear the representatives of the bidder's management body. The representatives must provide the works council with certain information, including information on the bidder's industrial and financial policy and its strategic plans for the target company. The works council can submit its comments, if any, to the bidder's management.

In the event of a change of employer (which will not be the case in a share deal) as a result of a contractually agreed (partial) transfer of the business, all employees concerned are in principle automatically transferred to the acquiring entity with preservation of their rights under the employment contract pursuant to the Collective Bargaining Agreement No 32bis, the Belgian implementation of the European Transfers of Undertakings Directive.

Others

In specific sectors, an M&A transaction might require the prior approval of a regulatory authority. In particular, this will be the case for companies active in the financial services sector (such as insurance companies and financial institutions).

Some M&A transaction might also require prior clearance from the competition authorities. Whether any prior clearance is required, depends on the size of the target company and the bidder.

11. **To what degree is conditionality an accepted market feature on acquisitions?**

In private M&A, parties are free to include conditionality in a deal, subject, however, to some limits.

The inclusion of conditionality is more restricted and regulated in public M&A transactions.

In addition to the possibility to make the bid conditional upon approval by the competition authorities in accordance with the Takeover Bid Decree, a voluntary bid can be subject to other conditions (such as the offer reaching a certain level of acceptance), but these must allow the bidder to achieve the intended result. The conditions must be communicated to and approved by the FSMA.

A mandatory bid must be launched once all legal requirements hereto are fulfilled (see below – question 25). As a consequence, it principally cannot include conditionality.

12. **What steps can an acquirer of a target company take to secure deal exclusivity?**

In private M&A, exclusivity arrangements are quite common. Parties often agree not to negotiate with any other party for a certain period time.

A target's board is required to act in the best interest of the company. In view of this requirement, granting deal exclusivity is not always that straightforward.

Bearing this in mind, certain circumstances may allow the board of a target in a voluntary public offer to agree to a no shop commitment and not to solicit alternatives for a fixed period of time.

13. **What other deal protection and costs coverage mechanisms are most frequently used by acquirers?**

A bidder could build a stake in the target company prior to announcing the bid. Depending on the size of the stake, disclosure and other requirements may apply.

Break fees payable by a target in public M&A are not common in Belgium. The board of a target company should take into account the company's interest when deciding whether to agree to such break fees.

Belgian publicly traded companies typically have one or more reference shareholder(s). A bidder can approach such reference shareholder(s) with the purpose of enhancing and securing the success rate of the public offer. It may seek certain commitments from these shareholders to support the offer, not to solicit any bid by another party and not to dispose of its shares.

14. **Which forms of consideration are most commonly used?**

In the context of a public offer, the consideration commonly used is cash but the consideration can also consist of securities or a combination of cash and securities.

The price is regulated in a mandatory bid context. It should be at least equal to the higher of: (i) the highest price paid over a period of 12 months before the announcement of the bid for the securities concerned by the bidder or a person acting in concert and (ii) the weighted average of the trading prices on the most liquid market for the securities concerned over the last thirty calendar days before the event giving rise to a mandatory bid (also see below – question 18).

The price in case of a voluntary offer can be freely determined by the bidder. The price should, however, allow the bidder to achieve the result it intends. The price should in principle be the same for all shareholders (also see below – question 18). The necessary funds to accomplish the bid must be available either through the deposit on an account opened with a specific credit institution or in the form of an irrevocable and unconditional credit facility opened for the bidder by a specific credit institution. The funds must be blocked in order to ensure payment of the price or must be used exclusively for such purpose. In case of an exchange offer, the Bidder either should already own the securities to be offered in return or should have the power to issue or acquire them in sufficient number and within the period prescribed for payment. If the bidder is not authorized to issue these securities, he must have the legal or factual power to procure that the legal entity concerned issues the securities.

In a merger context, the shareholders of the company/ies that will be dissolved receive shares in the surviving or new merger company.

15. **At what ownership levels by an acquirer is public disclosure required (whether acquiring a target company as a whole or a minority stake)?**

Disclosure to the FSMA and the target publicly traded company is principally (there are exemptions) required whenever a natural or legal person acquires directly or indirectly voting securities of the target, representing 5 % or more of the total voting rights. This notification is also required if, as a result of the direct or indirect acquisition of securities conferring voting rights, the number of voting rights reaches or exceeds any multiple of 5% (i.e. 10 %, 15 %, 20 %, etc.) of the total voting rights. The articles of association of the target may include lower thresholds and thresholds between the statutory thresholds (the following thresholds can be included in the articles of association 1 %, 2 %, 3 %, 4 % and 7,5 %).

Further, there are specific disclosure requirements in cases of persons acting in concert and when, following a transfer, the amount of securities carrying voting rights falls below certain thresholds.

16. **At what stage of negotiation is public disclosure required or customary?**

Negotiations will in principle be confidential prior to the official notification to the FSMA. Of course, there might be legal grounds for disclosure under the markets abuse regulation. Under certain circumstances, delayed disclosure is, however, possible.

Someone having the intention to launch a public offer is required to formally notify the FSMA. The FSMA will publish this notification. Prior to this publication, it is not allowed to announce a bid in any form whatsoever. There are, however, exceptions to this principle:

- if deemed necessary for the proper functioning of the market, the FSMA may request a person who might be involved in a possible public takeover bid to publish a notice without delay or do so itself;
- following the so-called “put up or shut up” principle, if a person itself or through an intermediary, has made statements that raise questions about its intention to make a bid, the FSMA may request the publication of a notice clarifying this intention. The person who has confirmed its intention to make a bid shall give formal notice within the time limit set by the FSMA. The person who does not confirm its intention to make a bid in due time is prohibited to submit a bid for the securities of the target company concerned for a period of six months.

17. **Is there any maximum time period for negotiations or due diligence?**

There are no general rules as to the timeframe for negotiations or due diligence. The bid process itself is, however, subject to a certain timeframe.

18. **Are there any circumstances where a minimum price may be set for the shares in a target company?**

Mandatory public offers are subject to a minimum bid price. More in particular, the bid price should at least be equal to the higher of:

- the highest price paid over a period of 12 months before the announcement of the bid for the securities concerned by the bidder or a person acting in concert; and
- the weighted average of the trading prices on the most liquid market for the securities concerned over the last thirty calendar days before the event giving rise to a mandatory bid.

Further, the FSMA is entitled to impose conditions or adjustments to the price in certain circumstances.

There is no minimum bid price requirement in case of a voluntary public offer. There is, however, a general requirement that the bid price must allow the offer being successful. If a counter or higher offer would occur, the consideration must be at least 5% higher than the consideration of the latest offer.

Both for mandatory and voluntary public offers, the consideration must be equal for all shareholders. If the offer concerns securities of different categories, the prices offered for each of those categories may not contain differences other than those resulting from the respective characteristics of each category.

If, during the bidding period, the bidder or persons acting in concert with the bidder, acquire or undertake to acquire securities of the target outside the offer at a price higher than the offer price, the offer price will be adjusted to that higher price.

For a duration of one year as of the end of the bid period, the bidder or persons acting in concert with the bidder cannot acquire directly or indirectly securities that were the object of the public offer at more favorable terms than those set out in the public offer, except where the price difference is granted to all security holders who have taken part in the bid.

19. **Is it possible for target companies to provide financial assistance?**

Financial assistance by a target through the advance of funds, the granting of loans or securities for the acquisition of its shares is in principle (there are certain exemptions) possible when certain conditions are respected, amongst others the applicable regime for a public limited liability company (“naamloze vennootschap” / “société anonyme”) requires that:

- the transaction is carried out under the responsibility of the board of directors and at fair

market conditions. The creditworthiness of each counterparty involved must be assessed;
  - the transaction is subject to a prior resolution of the general meeting, taken with a qualified majority;
  - the board of directors must draw up a report stating the reasons for the transaction, the interest of the company in entering into such a transaction, the conditions under which the transaction is entered into, the risks associated with the transaction for the liquidity and solvency of the company and the price at which the third party is deemed to acquire the shares;
  - the amount set aside for that transaction must be available for distribution;
  - the company must include in its balance sheet a reserve, unavailable for distribution, corresponding to the total financial assistance.

20. **Which governing law is customarily used on acquisitions?**

Acquisitions of a Belgian target company are usually governed by Belgian law. Parties may opt for foreign law to govern the deal.

Certain issues will, however, be mandatorily governed by Belgian law, notably in case of a public offer relating to a Belgian publicly traded target company.

21. **What public-facing documentation must a buyer produce in connection with the acquisition of a listed company?**

A bidder is required to produce various documents following a public offer.

A person having the intention to launch a public offer is first of all required to notify the FSMA, who will publish this notification.

The bidder is further required to draft and publish a prospectus, which must be approved by the FSMA. The content of the prospectus is included in an annex to the Royal Decree of 27 April 2007 on public offers. It should enable the holders of securities of the target company to form an informed opinion on the transaction.

In the event of a voluntary public offer by a shareholder having control over the target company, the independent directors of the target should appoint an expert. The bidder should cover the costs. The expert is required to issue a report on the securities that are the object of the offer. The report should be made public by the bidder as annex to the prospectus.

At the request of the FSMA, the parties to the bid shall immediately transfer all agreements which may have a material impact on the assessment of the bid, its course and outcome and these agreements might need to be made public. It concerns for example commitments to contribute to the offer, an arrangement defining preferential rights to transfer or acquire voting securities of the target company, agreements conferring rights on a party to require the creation of new shares.

Further certain information on the transactions regarding the securities of, amongst others, the target and the bidder might need to be communicated to the FSMA during the offer period. Amongst others the bidder, the target company or persons acting in concert with the aforementioned entities and members of the board of the bidder or the target company are subject to this requirement.

The board of the bidder has certain information obligations towards the employees' representatives or the employees. Notably, they should be informed about the publication of the public offer and should be provided with a copy of the prospectus (see also above – question 10).

Finally, some public announcements by the bidder in relation to the offer, such as the outcome of the offer, are required.

22. **What formalities are required in order to document a transfer of shares, including any local transfer taxes or duties?**

A transfer of shares usually implies the following formalities:

- the entering into a share purchase agreement;
- authorization and approval of the share transfer by the seller and the purchaser;
- registration of the share transfer in the share register (for registered shares).

In principle, a transfer of shares does not give rise to Belgian stamp or registration duties.

23. **Are hostile acquisitions a common feature?**

Belgian publicly traded companies are usually featured by having one or more reference shareholder(s). In order for a public offer to be successful, the approval of the reference shareholder(s) will be required. As a result hereof, hostile acquisitions are rare in Belgium.

24. **What protections do directors of a target company have against a hostile approach?**

The board of directors has some options to frustrate a bid, although the possibility to act can be restricted once it has been informed by the FSMA about the public offer. The most common defense measures are:

- proceeding with a share capital increase within the limits of the authorized capital (if authorized to do so);
- proceeding with an acquisition of the target's own shares;
- selling the target company's "crown jewels";

- issuing warrants and convertible bonds.

25. **Are there circumstances where a buyer may have to make a mandatory or compulsory offer for a target company?**

    The acquisition of a certain percentage of securities carrying voting rights of a publicly traded company or the holding company thereof, may give rise to a mandatory public offer in the following scenarios:

    1. when a person, as a result of its acquisition or the acquisition by a person acting in concert, holds more than 30% of the securities carrying voting rights of a publicly traded company ;
    2. when , as a result of an acquisition, a person directly or indirectly acquires control of a holding company, i.e. a legal entity holding more than 30% of the securities carrying voting rights of a publicly traded company;
    3. when persons acting in concert, as a result of an acquisition of securities by one of those persons, exceed the threshold of 50 % of the voting securities of a holding company,e. a legal entity holding more than 30% of the securities carrying voting rights of a publicly traded company;
    4. when persons acting in concert acquire more than 50 % of the voting securities of a person who directly or indirectly exercises legal control over the holding company,e. a legal entity holding more than 30% of the securities carrying voting rights of a publicly traded company.

    There are additional requirements to launch a mandatory public offer for persons acting in concert.

26. **If an acquirer does not obtain full control of a target company, what rights do minority shareholders enjoy?**

    Sell-out right

    Minority shareholders of a publicly traded company have a sell-out right under certain circumstances (see below – question 27). If a public offer has taken place, the remaining minority shareholders may require the bidder to purchase their securities with voting rights or giving access to voting rights when:

    - the bidder owns a 95% interest in the capital of the target;
    - the bidder holds 95% of the voting securities;
    - if it concerns a voluntary offer, the bidder, as a result of the public offer, has acquired voting securities representing 90% of the capital of the target.

    For purposes of determining the stake of the bidder in the target, the stake of persons acting in concert with the bidder is also taken into account.

These remaining shares shall be acquired at the bid price.

Other minority rights

Further, minority shareholders have certain rights under the Belgian Code for companies and associations. Examples are the possibility to initiate a minority claim against the board of directors and to add items on the agenda and submit proposals for decision-making. These possibilities are, however, only available to minority shareholders when a certain ownership threshold is met.

27. **Is a mechanism available to compulsorily acquire minority stakes?**

First of all, there is a principle requirement to proceed with a mandatory public offer if a person or several persons acting in concert acquire(s), directly or indirectly, at least 30% of the securities with voting rights in a publicly traded company (see also above – question 25).

Further, minority shareholders of publicly traded companies can be squeezed out.

(i)

If a public offer has taken place, a bidder may force the remaining shareholder to sell their securities with voting rights or giving access to voting rights and the remaining shareholders have sell-out rights (see above – question 26) when:

- the bidder owns a 95% interest in the capital of the target;
- the bidder holds 95% of the voting securities;
- if it concerns a voluntary offer, the bidder, as a result of the public offer, has acquired voting securities representing 90% of the capital of the target.

For purposes of determining the stake of the bidder in the target, the stake of persons acting in concert with the bidder is taken into account.

The securities are acquired at the bid price.

(ii)

A majority shareholder further has the possibility to squeeze-out minority shareholders in the absence of a preliminary public offer. Such squeeze-out procedure can be initiated when a natural or legal person, together with persons acting in concert and the target company, holds 95 % of the voting securities of a publicly traded company and seeks to acquire the remaining securities with voting rights or which give access to voting rights of the target. The Code for companies and associations specifies that for purposes of calculating the 95%

threshold, the double voting rights that may be attached to securities of publicly traded companies are not taken into account.

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