Belgium

Negotiated M&A Guide 2022

Corporate and M&A Law Committee

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1. INTRODUCTION

1.1 Belgian M&A market insights

The Covid-19 pandemic had a major impact on many Belgian M&A transactions in 2020, especially from mid-March 2020 when the Belgian Federal Government mandated the first nationwide lockdown. This caused many deal processes to suffer unanticipated delays or suspensions, some even permanently.

Although certain sectors (such as tourism, aviation, energy, etc.) were hit hard by the pandemic, the overall Belgian M&A market recovered quickly. Analysts remain bullish about it, and it is safe to say that enterprises in certain sectors (such as healthcare, tech, the stay-at-home market, etc.) have even been able to use the market effects of the pandemic to their advantage. In the second half of 2020, during the summer following the relaxation of the containment measures, interest in those markets grew. The number of deals multiplied impressively, and deal values gained a significant uptick.

Just as in many M&A markets around the world, the pandemic has left its mark on the Belgian M&A market. It has done this in different ways, such as affecting transaction documentation. Surveys show that the Covid-19 pandemic impact has found its way into agreements, with as many as one in five acquisition agreements containing Covid-related clauses (such as shifting deadlines for conditions precedent, adding qualifications to the representations and warranties, adding impact-of-Covid-19 exceptions to material adverse change (MAC) definitions, and adding specific exceptions to leakage). There are other notable developments too, including: the increase in auctions, locked-box pricing mechanisms, deferred payments, MAC clauses, and an increased usage of warranty and indemnity (W&I) insurance.

Covid-19 certainly gave rise to many market predictions, but not all of them came true. Contrary to what was predicted for the second half of 2020 and the beginning of 2021, there was no increase in assets deals on the Belgian M&A market. Many practitioners expected a significant rise in the number of bankruptcies and distressed M&A, but with the Belgian legislature's introduction of a bankruptcy moratorium, and with government financial support and other relief measures on an unprecedented scale, far fewer businesses became insolvent than previously foreseen.

In the first half of 2021, Belgian enterprises continued to attract private equity firms and strategic dealmakers. Driven by growth objectives and a search for high multiples, investors continue to look for targets on the Belgian market to execute their buy-and-build strategies.

1.2 Recent developments in law

There have been many new developments in Belgian law since 2019. Many have or will have a significant effect on M&A deals. Below are the most important changes that are relevant to M&A.

1.2.1 A new code for companies and associations

The Belgian Federal Parliament adopted the new Belgian Company and Associations Code (BCCA) in March 2019. This new law aims to modernise Belgian corporate law and compete with other jurisdictions. The BCCA will gradually replace the Belgian Companies Code completely, given that its predecessor dates from 1999. We highlight some key changes that are relevant to the M&A market.

The main types of Belgian companies

The legislature was intended to simplify Belgian corporate law: it reduced the number of types of companies that can be incorporated in Belgium to engage in business activities. The BCCA permits four main company types, while the others (from the Company Code of 1999) have either been abolished or allowed to continue to exist as a subtype of one of the four main types. The legislature also made the four main company types more flexible.

*BV/SRL (*besloten vennootschap/société à responsabilité limitée*)*

This limited liability company type (BV/SRL) has replaced the former BVBA/SPRL (*besloten vennootschap met beperkte aansprakelijkheid/société privée à responsabilité limitée*). It has been put forward as the reference company type.

The BV/SRL does not have required share capital, but rather equity (*eigen vermogen/fonds propres*) only. No share capital means stricter rules apply to all kinds of distributions. For example, distribution is authorised only if both of the following are met:

(i) if the net assets are not and will not become negative as a result of the distribution; and
(ii) if, according to reasonably foreseeable developments, the company will still be able to meet its obligations over a twelve-month period after the distribution.

Founders and shareholders are free to structure the rights that are attached to shares. For instance, they can issue shares with multiple voting rights and shares with rights to a preferential dividend. Shares that have different rights attached to them than other shares constitute separate classes (see the Securities section below). The legislature therefore abolished the old company law's prohibition of the BVBA/SPRL entity type from issuing classes of shares.

If a BV/SRL's bylaws provide for this possibility, then a shareholder's exit (ie, withdrawal or exclusion) can take place at the expense of the company's assets.

Given the flexibility of the BV, as highlighted above due to the BCCA, there have been more incorporations of BV/SRLs than in the past. It is expected that founders will resort to incorporating the NV/SA type of entity only for very large companies or for listed companies.

NV/SA (naamloze vennootschap/société anonyme)

As part of the company law reform, the legislature made the public limited liability company type (NV/SA) more flexible, albeit with some restrictions due to mandatory EU laws that apply to the NV/SA. One example of this flexibility is the fact that an NV/SA can now have a sole director. This company type requires a minimum capital of €61,500, which must be fully paid up at the time of incorporation, and 25 per cent of every share that has been issued in return for a contribution of cash must also be fully paid up.

Although shares of a BV/SRL can also be listed on a stock exchange, the NV/SA continues to be the archetypal company type for very large companies and listed corporations. Both a BV/SRL and an NV/SA can be incorporated by one person. The two other company types (not addressed in this guide) are the CV/SC (*cooperatieve vennootschap/société cooperative*) and the partnership (*maatschap/société de droit commun*), which require three and two founders, respectively.[1]

[1] The CV/SC company form can be used only for truly cooperative purposes. Besides this requirement, it follows the rules that have been set for the BV/SRL company type. The partnership: in the past, there were three so-called contractual legal entity

This guide will focus on the BV/SRL and the NV/SA company types because they are the most relevant to M&A.

Freedom to structure rights attached to shares and securities

For non-listed companies, the BCCA no longer requires that there be proportionality between the voting rights attached to a share and the shareholder's share in the capital (one share, one vote). It gives shareholders a lot of discretion to structure the rights that are attached to shares, eg, the company could issue shares with multiple voting rights, preferential dividends, etc. In other words, besides the mandatory rule that a company must issue at least one share with one vote, the only limit is your imagination.[2]

Parties to an M&A transaction must be mindful that, when you create shares with different rights attached to them compared to other shares that have already been issued, those newly created shares become a separate class (*soort/classe*) of shares based on the rights attached to them. Issuance of a new share class requires compliance with a specific procedure set out in the BCCA. This entails the adoption of a special board report and a report drawn up by the statutory auditor (*commissaris/commissaire*) or business auditor (*bedrijfsrevisor/réviseur d'entreprise*) if financial data underpins the board report. Any changes to the rights attached to share classes, or a share issuance that does not occur proportionately in each class, requires the two abovementioned reports to be drawn up, and decisions on them must be approved by a majority of 75 per cent in each class. This means that a minority shareholder holding 25 per cent plus one vote has the power to veto decisions.

Furthermore, both company types, the public limited liability company (NV/SA) and the private limited liability company (BV/SRL), can issue all types of securities that are not prohibited by law.

Restrictions on share transfers

The Company Code of 1999 prohibited founders and shareholders from changing the rules on transferability of shares in a BV/SRL by making them less strict than what was imposed by law. The BCCA radically changes this, allowing the transfer of shares in a BV/SRL to be made freely or with restrictions. As a default rule in an NV/SA, shares can be transferred freely, yet founders and shareholders can impose restrictions on the transferability of shares on condition that the restrictions satisfy a legitimate interest, especially in terms of their validity period. The Company Code of 1999 required that share transfer restrictions be in the interest of the company, and made it possible for that interest in question to be assessed at any time. Now the legitimate interest is assessed at the time when the restriction on share transfers is agreed upon.

Share transfer restrictions can be stipulated in a company's articles of association, a deed of issuance and other agreements. Further, the BCCA requires that share registers stipulate the

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types without legal personality that were permitted under the Company Code of 1999. They were a partnership, a temporary company, and a secret company. The BCCA has now merged them into one generic entity type – partnership. A partnership requires two founders. It is often used as part of real estate planning and in construction. This company form is transparent from a tax perspective.

[2] Different rules apply to listed companies, where shares with multiple voting rights are prohibited and the issuance of shares will need to comply with the principle of proportionality of voting rights, ie, the voting rights attached to each share should be proportionate to their respective par value *(fractiewaarde/pair comptable)*.

transfer restrictions that are set out in the articles of association.[3] Any arrangement on the transfer of shares that is not set out in the articles of association (eg, a shareholders' agreement) need not be included in the register unless one of the parties requests it (the request should be addressed to the governing body).

A transfer that violates a transfer restriction in the articles of association is not enforceable against the company and other third parties, regardless of the good faith of the transferee. However, a transfer that violates a transfer restriction under a shareholders' agreement is enforceable against the company or other third parties, which means that the company will have to recognise the transferee as a shareholder. If the transferee was aware of the transfer restriction, then the other shareholders can seek annulment of the transfer (sale) by applying to the court.

Leonine clause

Joint venture agreements and shareholders' agreements often include put options that allow a shareholder to sell its shares to the other shareholders at a price equal to at least the initial investment. The validity of such options under the Company Code of 1999 was debated as it was argued that these put options contravened the ban on leonine clauses (*leeuwenbeding/clause leonine*), which is set out in Article 32 of the Company Code of 1999. This provision prohibits clauses that exempt monies or goods contributed to the company by one or more shareholders from any contribution to the loss and/or the profits of the company. Under the BCCA, a shareholder cannot be exempt from any profit-sharing that is related to the shares, but the shareholder can be exempt from bearing their share in the losses.

Financial assistance

Financial assistance is still restricted by law, but breaches of the rules on it are no longer a criminal offence.

The BCCA requires that financial assistance meet the following conditions:

(a) the assistance is authorised by a prior resolution of the general meeting;
(b) the amount of the assistance can be distributed based on the net assets test (and liquidity test[4]);
(c) the board of directors draws up a special report on the assistance; and
(d) the amount of the assistance is recorded as an unavailable reserve in the balance sheet.

The financial assistance procedure remains very strict. In practice, parties typically try to structure around it in order to avoid the strict procedure under law.

Governance

The BCCA abolishes the mandatory character of the *revocation ad nutum* principle, whereby the general meeting may revoke a director's mandate at any time without having to pay the director an indemnity or give a notice period. Under the BCCA, a company's articles of association, or its appointment decision, can stipulate that a director may be dismissed only if the company serves a specified notice period or pays the director an indemnity.[5]

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[3] The articles of association take precedence over the register in the event of any discrepancy between what is set out in the register and what is set out in the articles of association.

[4] Only for BV/SRLs.

[5] A director can always be dismissed for legitimate reasons.

Regarding corporate governance, the law gives parties wide discretion to determine how a company should be governed, depending on its needs. An NV/SA is considered the most sophisticated company type because it has three governance models to choose from:

(a) a collegial board of directors (*raad van bestuur/conseil d'administration*);
(b) a dual system that consists of a supervisory board (*raad van toezicht/conseil de surveillance*) and a management board (*directieraad/conseil de direction*); or
(c) the sole director model (*enige bestuurder/administrateur unique*).

The BV/SRL founders can opt for a governance model with one or more directors who act as a collegial body or not. The dual system is therefore not available to a BV/SRL.

Online meeting attendance

The pandemic prevented companies from holding their general shareholders' meetings in person. This caused companies to quickly turn to remote conferencing, with or without video. Although many companies' articles of associations stipulated that an in-person gathering should be organised, they did not foresee the possibility of allowing shareholders to attend the general meeting online. Having regard to the effects of the pandemic, the legislature, in its Act of 20 December 2020, gave company boards of directors the possibility to allow shareholders to attend the meetings online without the need for articles of associations to require any specific authorisation.

The electronic means of communication used or the means for the shareholder to attend the meeting online must enable the company to verify the capacity and identity of the person partaking in the meeting. Moreover, the tool must also at least enable participants to take direct, simultaneous, and uninterrupted note of the meeting – and, in principle, allow them to exercise their right to vote and ask questions. However, a meeting is not allowed to be held completely online. Belgian company law requires the members of the bureau (which is made up of the chair and, if applicable, one or more secretaries and persons counting the votes) to be present in person at the place where the general meeting is held. This because they are the ones who are in charge of the redaction and signing of the minutes of the general meeting, as well as being responsible on behalf of the company for the valid composition and organisation of the meeting in which remote shareholders can participate.

Liability of directors

The BCCA caps directors' liability towards the company and third parties at a certain value, which ranges between €125,000 and €12m based on the company's turnover. The cap covers one or more facts, or a series of related facts, that could give rise to liability of the directors, regardless of the number of claimants or claims brought against the directors. The cap applies to all directors together but it does not apply if the claim relates to minor errors that are committed habitually, gross errors and late payment of certain taxes. Given these exceptions to the application of the cap, a corporate group typically takes out directors and officers (D&O) liability insurance.

Actual-seat doctrine abolished

The BCCA abolished the actual-seat doctrine and laid down the statutory-seat doctrine instead: if a company's statutory seat is in Belgium, then the applicable *lex societas* is the BCCA. In principle, the BCCA does not apply to legal entities whose statutory seat is outside Belgium.

Electronic shareholders' register

Modernising and digitalising Belgian company law was one of the priority intentions of the legislature. The Royal Decree implementing the BCCA therefore introduced the possibility for a BV/SRL, NV/SA, and CV/SC to create an electronic register for shares and other securities that the company has issued. However, to safeguard legal certainty, the legislature imposed strict requirements for creating and keeping electronic registers.

Digital incorporation of companies

Since 1 August 2021, companies can be incorporated digitally. This means founders do not have to appear in person before a notary to incorporate a Belgian company. The incorporation deed can be signed electronically during a video conference with the notary.

1.2.2 UBO Register

The Belgian Act of 18 September 2017 created a centralised register (*Register van ultieme begunstigden/Registre des bénéficiaires effectifs*) of ultimate beneficial owners (UBOs). It obliges a company's management body to register its UBOs in the specifically designated register.[6] UBOs are natural persons who (1) hold, directly or indirectly, a sufficient percentage of the voting rights or ownership interest in the company or (2) who control the company through other means. Any natural person who holds an interest of more than 25 per cent of the voting rights or more than 25 per cent of the shares is considered an indication of a sufficient percentage of the voting rights. If no such natural persons can be identified, then the executives of the parent entity that holds a sufficient percentage in the company have to be recorded as UBOs.[7] The UBO register is managed by the Federal Public Service Finance.

1.2.3 Reform of the Civil Code

A new Civil Code (New Civil Code), containing nine books,[8] was enacted in April 2019. Since then, its predecessor, the Civil Code of 21 March 1804, has been renamed the 'Old Civil Code' (*Oud Burgerlijk Wetboek/Ancien Code Civil*). For the time being, only two of these books have come into force, namely Book 8 on Evidence and Book 3 on Goods. The New Civil Code clarifies certain concepts and anchors new ones that have been laid down by case-law or doctrine. For example, Book 5 on Contracts & Obligations creates a statutory framework for the transfer of contracts, which is relevant in asset deals.

1.2.4 B2B legislation prohibiting unfair clauses

Just as consumers are protected against an imbalance in bargaining power, the Belgian legislature sought to limit the bargaining power of companies by prohibiting clauses that create a 'significant imbalance' between contracting enterprises.

In April 2019, the Belgian Federal Parliament adopted a new law prohibiting unfair clauses in agreements between enterprises (B2B Law). This law introduced new provisions in the Code on Economic Law (*Wetboek Economisch Recht/Code de droit économique*) and applies to all B2B

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[6] The same obligation applies to not-for-profit organisations and foundations.

[7] Anyone with a Belgian E-ID card can access the general information recorded in the register (person's name, type of UBO).

[8] Book 1. General Provisions, Book 2. Persons, family and community of property law, Book 3. Goods, Book 4. Inheritances, gifts and wills, Book 5. Contracts & Obligations, Book 6. Special Contracts, Book 7. Securities, Book 8. Evidence and Book 9. Statute of Limitations.

agreements signed, amended, or renewed after 1 December 2020.

The scope of application of the B2B Law is broad.[9] Its protection measures are two-fold: (1) a general ban on clauses that create a significant imbalance between the rights and obligations of the parties, and (2) two lists of specifically forbidden clauses, which can be categorised as a 'black list' (ie, clauses that are always forbidden) and a 'grey list' (ie, clauses that are presumed unlawful, but a party can prove that the clauses being invoked by the party relying on them are not unfair).

The legislature did not define the concept of significant imbalance deliberately, so it could be a catch-all provision. The fact that an acquisition agreement has been heavily negotiated would not prevent a judge from finding one or more of the contractual clauses or the agreement as a whole to be imbalanced. To mitigate such risk, parties in practice tend to stipulate in the preamble that all parties to the contract acknowledge and accept that the contract is well-balanced.

Because the B2B Law applies to all agreements between enterprises and bans clauses and contracts that create a significant imbalance between parties, it would apply to earn-out mechanisms, option agreements, representations and warranties, and specific indemnities, which are all key subject-matters in any M&A transaction.

Parties could seek to minimise the risk of a clause being declared unfair (and hence null and void), by documenting their negotiations on the concessions made by each party and/or by stipulating in the agreement the concessions that have been made reciprocally.

1.2.5 E-signatures

The Belgian Federal Parliament has enacted various laws to transpose the European Union's Electronic Identification, Authentication and Trust Services (eIDAS) Regulation's new provisions into a comprehensive Belgian legal framework. These laws include the Act of 21 July 2016 amending the Code of Economic Law and the New Civil Code (in particular, Book 8 on Evidence).

Belgian law now recognises the possibility for agreements and other documents to be validly signed electronically. It distinguishes between qualified e-signatures, advanced and ordinary signatures.

1.2.6 Foreign Direct Investment Screening Committee

The foreign direct investment (FDI) screening mechanisms that allow a country to monitor, investigate, assess, condition, prohibit, or unwind an investment made by a foreign investor are set out below.

Current FDI framework in Belgium

Although Belgium does not have a nationwide FDI screening mechanism, it does have a limited one in place in the Flemish region. Article III.59 to III.60 of the Flemish Governance Decree of 7 December 2018 (*Bestuursdecreet*) allows the Flemish Government to annul any legal act whose effects are that:

[9] The preparatory legislative works indicate that the B2B Law contains mandatory provisions, which ought to apply regardless of the parties' choice of law, if all denominating factors of the subject matter of the agreement connect to Belgium.

(i) the foreign natural person or foreign legal person concerned obtain control or obtain decision-making power over a Flemish governmental body, entity, or agency (including those at municipal and provincial levels and other government-controlled entity);[10] and whereby

(ii) the strategic interests of the Flemish community or the Flemish region become threatened.

The Flemish Governance Decree's use of the term legal act implies that the decree applies to all types of transactions, including share deals, asset deals and any other transaction type through which a foreign entity (ie, any non-Belgian entity, EU or non-EU investors) obtains control.

The Flemish FDI screening mechanism is not limited to specific sectors, but it is clearly narrow in scope as point (i) refers only to public institutions and authorities that are controlled by the Flemish government.

Future FDI frameworks in Belgium

Following the adoption of an EU Regulation on FDI in 2019, the Belgian Federal Government is in the process of drafting a bill of law to introduce an *ex ante* FDI screening mechanism at a federal level. It will have a broad scope and is expected to apply to investments made by foreign investors from non-EU countries that intend to invest in several strategic sectors such as energy, healthcare, transportation, communications, defence and key infrastructure. The new law, if adopted, is expected to create a new commission at the Federal Public Service of Economic Affairs that will oversee screening potentially 'harmful' investments in certain key sectors. Because this bill of law is still being refined behind closed doors in the Cabinet of the Minister of Economic Affairs, any information available regarding this topic at Belgian level is very limited.

1.2.7 Environmental, social and corporate governance (ESG)

The ever-growing importance of ESG cannot be ignored. This is simply because investors are increasingly applying these non-financial factors as part of their analysis and decision-making, especially during the due diligence phase of an M&A transaction.

Article 3:6 of the BCCA requires a company to add in its annual report an analysis that 'includes key performance indicators that are both financial and, if appropriate, non-financial in nature and, if appropriate, non-financial key performance indicators relating to the specific business of the company, plus information on issues pertaining to the environment and staff.' This information should fall under the section on the company's development and the risks and uncertainties that the company is facing, to the extent necessary for the understanding of the business development.

1.3 Legal framework for private M&A transactions

The BCCA governs Belgian corporate law matters, such as the transfer of shares, the powers of corporate bodies, as well as the various procedures on corporate restructurings.

Besides these new provisions, which are relevant to M&A, the general law of obligations on a sale–purchase transaction laid down in the Civil Code are also relevant. National and EU competition laws come into play if a merger filing is required to consummate the transaction. See section 6.2.1 for more on merger control and antitrust clearance.

[10] Foreign: not established in a member state of the European Economic Area.

Furthermore, the obligations to inform and consult employees about an M&A transaction (see section 6.2.4) can also come into play. Tax legislation and other specific laws and regulations regarding the transfer of real property (including soil remediation), transfer of permits, transfer of intellectual property, and privacy and data protection will also have to be taken into account by the parties.

Data shows that, across deal value, the acquisition agreement regarding Belgian targets or assets is usually governed by Belgian law. An asset deal or share deal can be governed by foreign law, but the local formalities under Belgian law must be complied with. These include the recording of the transfer of the shares in the share register and registering the real estate in the mortgage register. Further, if it is an asset deal and if the parties want to benefit from the automatic transfer of liabilities, then they will have to follow the BCCA corporate restructuring procedures on, eg, the transfer of a branch of activity, the contribution or the transfer of a universality, and mergers.

Relevant federal authorities and regulators

There is no general obligation to seek approval from a Belgian government authority to complete a transaction, unless the transaction should go through the FDI screening mechanism (in Flanders), which is very limited in scope (see section 1.2.6), and unless the transaction meets the relevant thresholds and must therefore be notified to the Belgian competition authority. For certain specific sectors, regulators can be required. For example, the National Bank of Belgium must approve a merger in advance if it concerns payment institutions or the transfer of a payment institution.

1.4 Buyers' or sellers' market?

Given the prevailing seller's market, there has been an increase in the use of competitive auctions across all deal values. Therefore, it is no surprise that sellers have been pushing back hard on the execution risk, and the burden has often been put on the buyer by introducing 'hell or high water' clauses and reverse break fees. This sellers' market has a clear impact on certain key terms such as the increasing use of locked-box accounts to the detriment of closing accounts, minimum and cap levels, escrow levels, conditions precedent (as defined below in section 2.1), representations and warranties and specific indemnities, and the use of warranty and indemnity insurance.

2. TYPES OF TRANSACTION STRUCTURES USED IN PRIVATE M&A TRANSACTIONS

2.1 General

Private M&A transactions can be performed in one or two steps. One-step transactions can be signed and closed on the same day. In two-step transactions, the closing depends on conditions precedent (*opschortende voorwaarden/conditions suspensives*) (CPs), such as obtaining certain approvals, permits/authorisations, and licences.

In Belgium, a private M&A transaction is generally structured as (1) a share deal (ie, a purchase of the target's shares in exchange for cash consideration or shares) or (2) an asset deal (ie, a purchase of the target's assets in exchange for cash consideration or shares, or both). Asset deals can be performed as a means of a sale and purchase under the Civil Code, or can be transferred under a BCCA procedure.

However, many transactions cannot be classified as a mere share deal or an asset deal because they are of a hybrid nature. This is especially true in the current M&A landscape in which parties want to focus on their core business. Imposing the performance of a carve-out as a CP has become quite common (see common CPs under section 6.1). The following is a more detailed explanation about share deals and asset deals.

2.1.1 Share deal

In a share deal, the buyer acquires the shares of the target (and possibly control over it as well), but the target will remain the owner of its assets and liabilities.

There are two types of share deals: (1) an acquisition of the target's existing shares and (2) an ‘acquisition’ of the target's new shares that have been issued through a capital or equity increase. The second type is not a sale and purchase *sensu stricto*, but a capital or equity increase, which is a type of transaction that is governed by the BCCA.

2.1.2 Asset deal

General

In some situations, it might be more advantageous for a buyer to not acquire the target's shares but to acquire its assets and liabilities instead (see section 2.2.1).

Belgian law allows assets to be transferred one by one (*transfer ut singuli*) as a sale and purchase or under one of the corporate transfer procedures provided for by the BCCA. These are:

(a) a transfer of a branch of activity (*de overdracht van bedrijfstak/le transfert d'une branche d'activité*) or
(b) a transfer of a universality of goods (*de overdracht van algemeenheid/le transfert d’une universalité*).

The BCCA defines a branch of activity as ‘a business unit that conducts activity autonomously from a technical and operational perspective and that is capable of functioning by itself’, and a universality of goods is ‘the entirety of the assets and liabilities of the company’. The question whether assets characterise a branch of activity or whether they are a mere collection of assets depends mainly on whether the entity is technically and administratively independent from the company and can function on its own.

Authorised decision-making bodies

In principle, the seller's board of directors is authorised to decide on the transfer of the assets and liabilities without the need to involve the general meeting of shareholders. However, the general meeting will have to approve the transfer if: (1) the company's articles of association stipulate this, or if (3) the transferor (seller) and the transferee (buyer) choose to follow the BCCA's corporate procedure for a transfer of a universality of goods or a contribution of a branch of activity.[11]

[11] A transfer of a universality of goods must in principle be approved by both the seller’s and buyer’s shareholders’ meetings. A contribution of a branch of activity will cause the receiving company to issue shares to the company contributing the branch of activity. This must therefore be approved by the shareholders’ meeting of the company receiving the branch of activity.

Procedure

The formalities that are required for a transfer of assets depend on how the to-be-transferred assets and liabilities are categorised and whether a BCCA corporate procedure is used.

The *transfer ut singuli* of each asset is a transfer whereby the buyer 'cherry-picks' the asset for the transfer. What is 'picked' could even constitute a branch of activities or a universality of goods. Such transfer must be made in accordance with the provisions of the Civil Code concerning a sale and purchase.

The *transfer ut universali* of the assets that are considered a branch of activity or a universality of goods does not have to be done through a detailed corporate procedure prescribed by the BCCA, as this is not mandatory. The parties can decide to transfer a branch of activity under the provisions of the Civil Code.

A transfer under the BCCA corporate procedure consists of two main phases and takes at least six weeks. In the first phase, the board of directors of both the buyer and seller must draft an authentic or private instrument proposing the transfer/contribution. This must then be filed with the clerk's office of the Court of Enterprises that has jurisdiction (ie, the court with jurisdiction over the judicial district where the target is located) at least six weeks before the transfer/contribution and, if appropriate, before the transferor's (seller's) general shareholders' meeting, which will decide on the transfer/contribution. The transferor's board of directors must draft a written report on the state of the assets explaining and justifying the following:

(a) the desirability of the transfer or contribution from legal and economic points of view;
(b) the conditions and manner of the transfer or the contribution; and
(c) the consequences of the transfer/contribution.

An excerpt from this report must be sent to the registered shareholders at least one month before the general meeting. In the second phase, the transferor's general shareholders' meeting will decide on the transfer/contribution. If the buyer (transferee) treats the transfer/contribution of assets as a capital increase, it will have to comply with the applicable provisions of the BCCA. These provisions impose additional reporting obligations and require a decision from the buyer's general shareholders' meeting about the transfer/contribution.

As indicated above, if the to-be-transferred assets of the target are categorised as a branch of activity or a universality of goods, the parties can choose to have the assets transferred either (1) under the BCCA corporate procedure or (2) as a sale and purchase under the Civil Code.

If the actual asset transfer amounts to a transfer of a complete or part of an undertaking (*overdracht van een onderneming/transfert d'une entreprise*) as referred to in Collective Bargaining Agreement no. 32bis (CBA 32bis), then the employment contracts of the relevant employees (ie, all rights and obligations under those contracts) are transferred automatically to the transferee (except for certain rights, such as supplementary provident schemes (pension, death and incapacity insurance). For more information on the duty to inform and consult employees in this type of transfer, see section 6.2.4.

2.2 Overview of the two transaction structures

Whether the transaction is a share deal or asset deal, they each have their pros and cons. There are also factors that enable the parties to choose which transaction type is most appropriate.

2.2.1 Pros and cons

Share deal

One of the advantages of a share deal is that it is generally easy to execute because there will usually be no disentanglement issues with any of the target's assets that are not transferred.

The disadvantages are mainly two-fold: (1) the buyer acquires all assets and liabilities subject to the carving-out of certain activities before closing, and (2) a buyer of shares has limited legal protection under the Civil Code (see section 2.2.2 below). To reduce the effect of these disadvantages in a share deal, one should therefore draft the representations and warranties very carefully and include a non-competition clause in the share purchase agreement.

Asset deal

If a BCCA transfer procedure is used, all the target's assets and liabilities are (in theory) transferred automatically. This means the branch of activities or the universality of assets will be automatically transferred as a whole under one of the specific procedures in the BCCA. Even unknown debt can also be transferred automatically, but the following cannot: *intuitu personae* contracts and particular types of assets such as real estate, permits and intellectual property. A transfer of these types of assets requires certain formalities to be completed. Furthermore, asset deals must comply with a specific procedure that entails reporting, which requires time.

If parties decide not to follow a BCCA corporate procedure for the transfer, the transfer of assets will then have to take place *ut singuli* in accordance with the Civil Code. This requires every asset to be transferred individually, so an exhaustive list must be drawn up of all assets, rights, and obligations that are to be transferred. This list is typically included in the sale and purchase agreement. Any item that is not mentioned on the list is considered not to be part of the assets that will be transferred.

2.2.2 Common factors that influence each structure type

Belgian M&A transactions are generally structured as an asset deal or a share deal. Below are some of the most common factors that influence the decision on the deal structure type.

Complexity level

Share deals are less complex. In this type of deal, the target itself continues to own all its assets and liabilities after the transaction; only the control changes because the buyer merely acquires the shares of the target.

Transfer formalities

Share deals have fewer formalities than those required of an asset deal. The legal rules governing asset transfers in principle apply to every individually transferred asset (a *transfer ut singuli*). In addition, the requirements for the transfer of each individual asset that bind third parties must be complied with. However, if the assets are transferred *ut universali* under the BCCA procedure, the transferee becomes the legal successor of all those assets. This means the transferee takes over all the rights and obligations of the target (or the rights and obligations of the universality of goods or complete branch of activity) without the need to follow the rules of ordinary law on binding third parties, subject to those related to intellectual property or real estate.

Protection under the Civil Code

The Civil Code protects the transferee-buyer from hidden defects and grants it the right to undisturbed possession and enjoyment of its property. A buyer can automatically seek remedy from the seller if the transferred assets contain any hidden defects. For the claim to be admissible, the buyer must prove that the defect prevents or restricts its use of the transferred/sold asset in such a way that – had it not been for those defects – the buyer would not have purchased that asset or would have paid less for it. The law does not require the seller to be aware of these hidden defects. Secondly, because the buyer is entitled to undisturbed enjoyment of its property, the seller may not do anything that can cause the transferred asset to depreciate or deteriorate. The seller is therefore bound by a de facto non-competition clause; any competition in which the seller participates would prejudice the buyer's right to undisturbed possession and enjoyment of the purchased asset. In a share deal, the Civil Code does not bind the seller to any non-competition obligation. Parties should therefore include a non-competition clause in the share purchase agreement so that it binds the seller.

Cherry-picking of assets and liabilities

For buyers that are not interested in all the activities of the target, an asset deal is more appropriate because the buyer can choose the activities or assets and liabilities that it prefers, whereas a share deal implies the purchase of all the target's assets and liabilities.

Restrictions on share transfers

The target's articles of association could restrict share transfers. Please see section 1.2.1. Consequently, parties might opt for an asset deal instead of a share deal to avoid these restrictions.

Acquisition finance

For share deals, the Belgian rules on financial aid limit the financing of share transfers. Because these rules do not apply to a sale of assets, buyers considering a share deal should consider this when deciding which type of deal structure it should use for the transaction.

Non-assignment clauses

Contracts that contain a clause prohibiting any assignment cannot be transferred to the buyer if the parties to the contract concerned do not approve of the transfer. This could be an obstacle in an asset deal. If the asset transfer is conducted according to a BCCA procedure (eg, a transfer of a branch of activity), then in principle all contracts become transferred automatically by operation of law (with some exceptions). In a share deal, however, the contract will not be transferred to a third party in any event because the target continues to be a part to the contract.

Change of control clauses

Contracts with a change of control clause requiring the contracting party's prior approval of the transaction can be an obstacle in a share deal because obtaining consent takes time. This is less of an issue for an asset deal: in principle, there will be no change of control over the target.

Minority shareholders

Buyers that are contemplating acquiring the entire business of the target can be confronted by certain minority shareholders who refuse to sell their shares. In such scenario, the buyer could opt for an asset deal: this type of transaction, in principle, requires the decision of the target's board of directors (which is controlled by the majority shareholders). Even so, this does not eliminate the risk that the refusing minority shareholders could sue the majority for abuse of majority position.

Tax aspects

There are different tax implications for each transaction type. See section 2.4 for more on these.

Joint and several liability

Liabilities for income tax, VAT and social security in a transfer by way of an asset deal are effective and enforceable only after one month from the date a certified copy of the asset purchase agreement has been submitted to the relevant authorities. In addition, the buyer will be jointly liable for any outstanding income tax, VAT and social security liabilities, the sum of which could reach up to the purchase price that the buyer would have to pay (or up to the debt that would be transferred to the purchaser) before the end of the abovementioned period. A buyer can be exempt from these liabilities if valid certificates, which are issued by the relevant authorities, stating that the seller does not have any outstanding income tax, VAT and social security liabilities, are attached to the submitted asset purchase agreement. These certificates may not be older than 30 days from the date of the submission.

2.3 Typical documentation for each structure

Parties enter into a share purchase agreement in a share transfer. If a company must issue new shares to an investor, then parties sign an investment agreement as well as a shareholders' agreement, which governs the relationship among all shareholders, including the new ones.

In an asset transfer, parties will enter into an asset purchase agreement. If assets are transferred under a BCCA procedure, then additional documents will be required, depending on the procedure used and the assets concerned. These documents can include a report drawn up by the board of directors and a notarial deed.

The two agreements (one for share purchase and the other for asset purchase) have their own indemnification mechanism. In general, the indemnification mechanism under an asset purchase agreement, ie, the representations and warranties (R&W) and the specific indemnities are less elaborate because the Civil Code already provides the buyer of assets with a certain level of protection (see section 2.2.2 below). In a share purchase agreement, the wording is more straightforward because there is no need to identify and describe each individual asset that will be transferred.

Signing of ancillary documents is required for either transaction type. They include transitional services agreements, licence agreements, management agreements, and so forth.

2.4 Tax aspects of M&A deals

The main tax aspects of share deals and asset deals are stipulated in the Belgian Income Tax Code.

2.4.1 Share deal

Income tax – personal

Capital gains (*meerwaarde/plus value*) on shares realised by natural persons within the normal management of private assets are exempt from Belgian income tax. If they are realised outside of the normal management of private assets (eg, speculative), they are taxed at a rate of 33 per cent.

Capital gains realised by a natural person in the transfer of significant shareholdings to a foreign company (ie, a company outside the European Economic Area), are taxed at a rate of 16.5 per cent. This rate applies only to the personal income tax scheme and is subject to the following conditions: (1) the transferor must have owned directly or indirectly, alone or with their family, at any time over a five-year period before the transfer, more than 25 per cent of the rights in the company whose shares are transferred; (2) the transferee is a non-resident legal entity that does not have its registered office, principal place of business, or place of management or administration in the European Economic Area. If the transferee on its turn transfers within one year the shares to a legal entity not established in the European Economic Area, the capital gain realised on the initial transfer is taxed at 16.5 per cent in the hands of the original transferor. To avoid this, a specific non-alienation clause relating to the resale of the shares for the concerned period is often added to the share transfer agreement.

Income tax – corporate

Capital gains on shares are usually tax exempt if all of the following are met: (1) the company whose shares are sold is subject to corporate taxation; (2) the seller company holds full ownership of at least 10 per cent of the shares representing the capital of the target, or the investment value of the participation must reach at least €2.5m; and (3) the shares have been held in full ownership for one year without any interruption.

Value added tax (VAT)

VAT is due on the supply of goods and services and supplies that do not qualify for an exemption under the Belgian VAT code. Share transfers are in principle not subject to VAT as they do not qualify as either a service or a supply.

2.4.2 Asset deal

Income tax – corporate

Any capital gains realised on the assets and goodwill from an asset deal transaction will be considered taxable profit that is subject to the normal corporate income tax rate (which was 25 per cent in 2021). Capital losses realised on assets in such type of deal are usually tax deductible.

Registration duty

Since 1 January 2022, real estate transfers are subject to a registration duty of 12 per cent (in Flanders) and 12.5 per cent (in Brussels and Wallonia), levied on the sale price. For a transfer of a commercial lease agreement (*handelshuur/bail commercial*), the transfer will be subject to a 0.2 per cent tax on outstanding rent and charges due under the original lease. A transfer of an emphyteusis (*erfpacht/droit d'emphytéose*) is subject to a 2 per cent tax. No registration tax is due if the transfer is already subject to VAT, for example, if the transaction concerns the transfer of a new building (ie, a building less than two years old).

Value added tax (VAT)

In principle, asset transfers are subject to VAT as they fall under the definition of a supply of goods. However, if the asset transfer relates to a universality of business or a branch of activity (*algemeenheid van goederen of van een bedrijfsafdeling/universalité de biens ou d'une branche d'activité*), no VAT would be due. Universality means a collection of different goods brought together to form a whole by reason of their common use. A branch of activity is understood as a unit that is autonomous in terms of technical and organisational aspects and can operate on its own.

There will be a transfer of a branch of activity if all the elements necessary for the operation of the business are transferred. If this condition is not met, the general 21 per cent VAT rate will apply to the transfer, and the buyer must pay this to the seller, which, on its turn, will have to pay it to the authorities.

2.5 Specific compliance considerations for each transaction type

Transactions in the finance, insurance, and real estate sectors must meet specific conditions for compliance. This M&A guide does not cover them.

See also the sections concerning the requirement for merger and antitrust clearance (section 6.2.1) and FDI screening (section 1.2.6).

Privacy and General Data Protection Regulation (GDPR) concerns are relevant in all types of transactions, but these require specific attention in asset deals.

3. PRE-AGREEMENT DOCUMENTATION

3.1 Pros and cons of having pre-agreement documentation for each transaction type

3.1.1 General

During pre-contractual negotiations, parties usually draw up preliminary documents such as a non-disclosure agreement (NDA) (*vertrouwelijkheidsovereenkomst/accord de confidentialité*) or a (binding or non-binding) letter of intent (LOI) (*intentiebrief/lettre d'intention*) or both. For an auction sale in particular, the process is slightly different. It starts with the distribution of an information memorandum to potential bidders and the signing of an NDA at the same time. Afterwards, non-binding bids are called, and bidders eligible for the next round will be selected. Those selected will usually be allowed to conduct a due diligence investigation of the target. In larger transactions, the due diligence can be facilitated by a vendor due diligence report. At the end of the due diligence stage, bidders will be requested to submit binding bids, together with mark-ups of the sale purchase agreement. The seller will then choose one or more bidders from these bids, who will proceed to the negotiations stage. The negotiations continue until only one bidder remains and the final transaction documentation with that bidder is signed. Parties can enter into so-called clean team agreements (CTA) if target and buyer are competitors. In addition, agreements governing data room access have also become more common.

3.1.2 Non-disclosure agreements

Parties usually sign an NDA at the start of the negotiations. The duration of the non-disclosure obligation is typically two years. The NDA aims to protect the confidentiality of the negotiations and all information exchanged between the parties. Under Belgian law, not having an NDA in place or an explicit confidentiality clause in another agreement does not mean that the discloser of the confidential information is not protected. A judge can order the receiver of the information to be bound by confidentiality, although the exact scope of such confidentiality obligation is unclear. Furthermore, the NDA can also contain exclusivity and non-solicitation clauses. The NDA is more effective if it contains a liquidated damages clause (*schadebeding/clause pénale*).

Belgian law allows liquidated damages if the amount of the liquidated damages does not exceed the damage that was potentially foreseeable at the time when the parties agreed upon the liquidated damages clause. However, in the early stages of negotiations, such liquidated damages are rather uncommon. Without such clause, it will often be difficult for the seller to establish the value of the damage if a breach of confidentiality does occur.

3.1.3 Letter of intent

Signing an LOI before a sale and purchase agreement is common practice. Parties usually wish to set out in this document their understanding of certain basic elements of the transaction before they proceed to the due diligence phase and negotiate the terms of the sale and purchase agreement. An LOI is also called a term sheet, memorandum of understanding (MOU), pre-offer, indicative offer or heads of agreement. The structure of these documents vary in many ways, with some letter of intents being remarkably short and simple, while others can be rather lengthy.

LOIs should be drafted with utmost care and precision because an agreement between parties under Belgian law constitutes a binding commitment if the parties agree on the essential and substantial elements of the transaction. These elements differ based on:

(a) the type of transaction or contract, assessed objectively (for example, for a purchase of goods, the consensus reached between parties is considered binding if they agree on the subject matter of the transaction and its price, whereas for a share subscription, the essential elements would be the number of shares and the amount of the investment); and

(b) what the parties themselves consider to be a substantial element of the specific transaction. (That is, what the parties consider to be the determining factor that will influence their consent to the transaction (assessed subjectively), even though this would not be essential from an objective point of view. Because these essential elements are subjective in nature, they can be considered substantial only if they have been clearly communicated as such during the pre-contractual negotiations.)

On assessing whether an LOI is binding or non-binding, the contents of the letter will prevail over the form of the document, regardless of any disclaimers stating the contrary, its name or how the parties categorise it. Typically, non-binding LOIs indicate only a price range instead of a fixed price, and they make the transaction subject to several assumptions and conditions.

LOIs should reflect the intention of the parties especially in respect of their binding nature. Ultimately, a judge will find whether a letter of intent is binding or not based on the wording of it, other communications between the parties, and even their subsequent behaviour.

3.2 Binding nature of clauses in the pre-contractual documentation

The recitals of NDAs and LOIs often indicate which clauses are binding and which ones are not. In practice, any clauses on confidentiality (type of information, term of confidentiality), non-solicitation and non-compete, liquidated damages, costs, exclusivity, applicable law and jurisdiction are in principle declared to be binding from the outset, despite the non-binding nature of the other clauses and sections of those documents. In addition, clauses on compliance with the GDPR and on privacy, which have become common in NDAs and LOIs, are also binding.

4. DUE DILIGENCE STAGE

4.1 Points of attention

In a Belgian M&A transaction, parties must act in a diligent manner regarding the initiative, the continuation and the termination of the negotiations. Failure to do so could potentially give rise to liability for a pre-contractual fault. This section explains some key aspects of the due diligence stage

4.1.1 Parties must act diligently

Belgian law requires parties to act diligently – ie, as a normal and reasonable person would do in the same circumstances. Even if a party is engaged in non-binding discussions, the negotiating party must consider the interests of the other party.

Depending on whether the parties have entered into a contract, the defaulting party can be held liable for having committed a *culpa in contrahendo* or a *culpa in non contrahendo* under general tort law. As a general rule, the defaulting party could be ordered to indemnify the injured party so that the latter's position is restored as if the wrongful act had not occurred.

It is generally accepted that the indemnification should cover the so-called negative interest of contract, such as the costs that were incurred for negotiations, the time lost and the impossibility to seize other opportunities. Whether the injured party could successfully bring a claim for any (additional) compensation for having lost the positive interest of contract – ie, compensation for lost profits because of the absence of contract – has been subject of debate in jurisprudence. Book 5 of the New Civil Code recognises that, in exceptional circumstances, the positive interest of contract is eligible for compensation if there was a legitimate expectation that an agreement would definitely be concluded.

The party alleging that it has suffered loss must also prove its loss and the causal link between the loss and the wrongful act. The court assesses on a case-by-case basis whether a party has committed a wrongful act by terminating the negotiations depending on the behaviour of both parties, the length of the negotiations and the costs involved.

4.1.2 Right to information

Currently, Belgian law does not explicitly impose an obligation on a seller to disclose information about the target to the purchaser during the pre-contractual phase. Article 5.16 of the draft Book 5 of the New Civil Code however requires parties to provide each other, during pre-contractual phase, with the information required by law, by good faith and custom, given the capacity of the parties, their reasonable expectations and the specific subject matter of the contract. Parties can of course agree in an NDA or LOI on what kinds of information about the target that the seller must share. The fact that there is currently no specific legal provision imposing an obligation to disclose information does not mean there is no obligation to disclose information about the target. Considering the general legal principles and developments in case law, the matter is much more nuanced. For example, there is a general obligation for all parties to act in a prudent and diligent manner, also during negotiations in the pre-contractual phase. Moreover, there is an obligation to provide essential information to one another so that the other party's consent to enter into the agreement is not vitiated (eg, by error, fraud or duress).

Furthermore, certain sector-specific rules can also impose an obligation to disclose information. For example, in a deal (commercial partnership) that involves the transfer of know-how, the party granting the right to use the know-how must provide certain information to the other party at least one month prior to the signing of the agreement.

4.2 Typical issues in a Belgian M&A transaction – an overview

The areas of focus in a due diligence investigation vary from project to project, but they will generally include corporate, tax, labour, commercial, litigation, real estate, environment and regulatory matters. Depending on the findings from the due diligence, the parties will negotiate CPs and specific indemnities, and stipulate specific representations and warranties. According to M&A surveys, indemnities across deal value typically relate to tax (67 per cent of all indemnities included a tax indemnity). Other common indemnities relate to labour (32 per cent), litigation (29 per cent), existing agreements (25 per cent) and environment (24 per cent).

The specific indemnities are generally governed by a separate liability system that is, unlike the representations and warranties, not subject to the same liability cap and other limitations.

Before the pandemic, the buyer usually conducted a standard due diligence on the target and its business. Now, we see that the buyer is more preoccupied with the target's business as a whole and the target's capacity to react to uncommon and highly disruptive events. For example, the buyer will examine the agility of the business to scale downwards and upwards, supply chain integrity, the ability to adjust and change suppliers, and the robustness and integrity of IT systems. This means that the buyer's due diligence checklist needs to be broad enough to leave no stone unturned. The seller must be prepared to give appropriate answers or justifications to the buyer.

5. MAIN ACQUISITION AGREEMENTS

5.1 Formal requirements

The form and contents of the sale and purchase agreement will vary depending on the transaction type and on the transaction-specific circumstances. A share purchase agreement (SPA) governs a transfer of existing shares; a subscription agreement a subscription to new shares; and an asset purchase agreement (APA) an asset transfer. One agreement can govern all these transactions.

For example, a transfer of assets *ut universali*, a merger or a transfer of a branch of activity will require a specific proposal drawn up by the company's board of directors and shareholders' approval in an authentic deed, respectively. A valid agreement under Belgian law must have four elements: the consent of the parties to be bound under it (*wil/volonté*), their capacity under law (*bekwaamheid/capacité*) to enter into the agreement, a precise object (*voorwerp/objet*), and a lawful cause (*oorzaak/cause*). The parties' agreement does not have to be in writing, as in Belgium the theory of consensualism applies. Therefore, parties should refrain from agreeing on a price and an object because these constitute the elements that are essential for the formation of a binding agreement (see section 3.1.3).

In practice, the SPA will stipulate that share ownership in a company will be transferred to the buyer upon signing of the SPA, or upon closing if these two events are not simultaneous. The share transfer will bind third parties (including the target) once the share transfer has been recorded in the target's share register. Besides this, there are no other formalities for share transfers. Asset ownership in principle will transfer when there is a valid agreement on it (and subject to the fulfilment of additional transfer formalities for certain assets, such as real estate and intellectual property).

5.2 Typical clauses in the acquisition agreement

A typical acquisition agreement will have the following sections and clauses.

5.2.1 Preamble

The preamble of an acquisition agreement is the introductory section that essentially provides a background on the transaction, identifies the target and explains the interconnection of the document with any other transaction agreements. From the seller's perspective, the preamble, which is followed by paragraphs known as recitals, can also indicate that a due diligence has been performed by the buyer and its advisers. Parties should state in the recitals that nothing in the agreement should be interpreted against a party because it was responsible for drafting it. Parties should also add that they consider that the draft does not create an economic imbalance between them, given the new B2B legislation (see section 1.2.4).

5.2.2 Definitions

Definitions are typically the first or second section in any acquisition agreement. It is a list of the defined terms used throughout the agreement.

5.2.3 Object clause

As stated above regarding the formation of a contract, the object of the sale or purchase must be clearly defined. There is no sale if the parties have not agreed on the object of the transfer.

The object of a share deal is straightforward: the seller’s shares are the object, and they will be transferred with all related rights. Parties should set out in the agreement how the dividend distributions for the ongoing financial year and/or any outstanding dividend payments for previous financial years should be allocated between the seller and the buyer. The agreement should also indicate whether the shares are transferred free of any liens and encumbrances.

Drafting an object clause is more complex in an asset deal. Generally, a separate schedule describing the object, ie, the assets and liabilities that will be transferred and/or the assets and liabilities that are explicitly excluded from the scope of the transaction, form an integral part of the agreement. It should be mentioned in that schedule whether the assets are transferred free of any liens and encumbrances.

5.2.4 Purchase price

General

A valid purchase price under Belgian law must or can be determined based on objective elements that are outside the scope of the parties’ will. Therefore, all components of the purchase price should be clearly defined in the agreement. For example, if an earn-out mechanism applies, the price-setting should be rigorously described, especially when considering potential future conflicts of interests between the parties after the transfer of ownership. Similarly, payment conditions (including the terms, conditions, amount, bank account receiving the payment, payer, and beneficiary) should be clearly stated.

In two-step transactions (ie, when signing and closing take place at different times), and subject to the locked box mechanism currently applied, it is common practice to include a price adjustment mechanism, following which the purchase price will be adjusted higher or lower based on certain financial factors (net debt, cash, etc.) at closing. Parties would usually go through tough negotiations to come up with a clearly defined calculation procedure and different components of such mechanism that they agree on.

It is common to include a clause requiring a third-party expert to come up with the final calculation and method if the parties' disagreement on this persists. Such a clause is valid if the third-party expert accepts the instruction, and if the agreement contains objective calculation components that enable the third-party expert to complete their task.

Depending on the seller's financial situation – thus, the likelihood that a seller can indemnify the buyer in the event of breach – a buyer can demand the seller to agree on certain protection mechanisms by using part of the purchase price to this effect. In practice, this is required only if certain risks have been identified after the due diligence investigation. Contrary to the French law system of *garantie de garantie*, this is not standard practice in Belgium. There are several mechanisms for this, each with their own advantages and drawbacks.

Escrow account
An escrow account is a blocked special purpose bank account that holds a part of the paid purchase price for a certain period of time. This bank account is contractually stipulated and agreed upon (for example, the time period during which the buyer can bring a claim for breaches of the representations and warranties). The parties could agree on a reduction of the blocked amount, for example, on each anniversary date of the transfer.

The escrow account can be held in the name of the seller, the buyer, or both jointly. More importantly, parties should clearly stipulate that the interest gained on the balance of this account will accrue to the party who is entitled to the escrow amount and how the procedure for releasing the amount should be handled. This procedure should be detailed in an escrow agreement, which is also signed by the escrow bank, and whose clauses are aligned closely with the clauses of the acquisition agreement. In this respect, the escrow agreement should explicitly state that all its provisions prevail over any conflicting provisions in the bank's general terms and conditions. Contrary to the system under English common law, where the escrow concept originated, an escrow account may not be enforced under Belgian law against other creditors if concurrent rights exist, ie, when the account holder is in a state of insolvency.

An alternative to this could be to open a bank account in the seller's name and to pledge the potential claims towards the seller in favour of the buyer.

A bank guarantee entails a similar technique: the seller is the one who receives the entire purchase price at closing, and the seller – through the bank – provides security to the buyer.

The bank guarantee can be subject to several conditions. The bank could also demand that the seller block a certain sum in a bank account held at the same bank (but this effectively defeats the greatest advantage of the guarantee mechanism). Depending on the acquisition agreement, the guarantee can be payable on first demand or upon presentation of certain documents by the buyer.

Alternatively, a third party (for example, the seller's parent company) could be the one providing the guarantee to secure the seller's obligations under the acquisition agreement, including those with respect to the representations and warranties made and breaches of them. From a buyer-side perspective, it is advisable to include a clause stating that the seller and guarantor are jointly and severally liable for these obligations.

Deferred payment

A deferred payment means that the buyer pays a certain percentage of the purchase price at a later point in time. Before then, it has the right to withhold this amount and use it to set off any indemnification payments that the seller would owe under the acquisition agreement.

This deferred payment mechanism is different to the other two in that the buyer's ability to withhold a certain amount of the purchase price enables it to decrease its risk exposure if the seller becomes insolvent, although in principle, any set-off of claims is not allowed in the event of insolvency (with certain limited exceptions).

Additionally, the buyer could also have insufficient financial resources to pay the full sum at closing. Therefore, it is not uncommon for the seller to demand a bank guarantee from the buyer for the deferred payment.

A deferred payment mechanism can also be combined with a vendor loan (subordinated or not) and corresponding security as collateral. In other words, it can be used as a financing mechanism whereby the parties agree on methods to secure repayment, which will essentially comprise a set-off possibility and the granting of pledges.

5.2.5 Representations and warranties

As stated above, buyers, especially in share deals, have limited protection under Belgian law. Therefore, buyers would usually have the acquisition agreement, especially SPAs, stipulate tailored and specific contractual representations and warranties (R&Ws). Sellers must state that the R&Ws are true, complete, accurate and not misleading. Belgian law offers a significant level of flexibility in this respect, and there are various ways available to the seller that can limit its liability.

General considerations

Typical R&Ws relate to the following, which are by no means exhaustive: the target's business, its shares, financial statements, real estate and movable assets, litigations, personnel, tax issues, environmental issues, permits and subsidies, intellectual property rights, key contracts, intragroup arrangements, arrangements with shareholders and directors, and so on. How these clauses are drafted and the words and language used are very important, as courts usually interpret them restrictively.

In two-step transactions, the buyer should demand the seller to repeat the R&Ws at closing and thus confirm that they are again true, complete, accurate and not misleading – not only at the time of signing but also up to and including closing. The pandemic has caused parties to rethink the bringing down of the R&W at closing.

For some specific transactions, such as secondary buy-outs and management buy-outs, it is not uncommon in Belgium to have a very limited set of R&Ws. This is because the buyer (which is the management members) has sufficient and thorough knowledge of the target and its business.

For transactions involving the subscription of new shares, the company concerned is the party giving the R&Ws. This is a somewhat ambiguous situation because the buyer, who is the shareholder of the company, will have to financially contribute to indemnifying itself.

R&W limitations

The format and scope of the disclosures against R&Ws can vary. This causes parties to have diametrically opposed preferences and undergo tough negotiations. Parties can agree to have the entire data room disclosed, which contains due diligence information made available to the potential buyer. Unlike in the United States, this type of disclosure is rather common – especially in the current landscape of the seller's market. Parties can also choose to sign a separate disclosure letter in which the seller declares that it is aware of specific issues.

In any event, the seller should carefully analyse the target and provide the buyer with essential information that enables it to make a well-considered decision. Sellers often try to have the buyer acknowledge that it has undertaken a due diligence investigation. Although the actual effect of this acknowledgement is limited, it could still be used in court or arbitration proceedings. On the other hand, buyers should try to have the seller acknowledge that the R&Ws have had a conclusive effect on the buyer's decision to purchase the shares or assets.

R&Ws play an essential role in indemnifying the buyer. They therefore act as an incentive for the seller whereby the more potential risks that it discloses, the more it is covered before closing because the liability will shift to the buyer, subject to the extent these disclosures are accepted by the buyer.

Disclosures against R&Ws certainly have an impact on price discussions. They are even grounds for a price reduction at times. If the seller does not agree to reduce the price and the buyer refuses to accept any liability, the seller remains obliged to indemnify the buyer for any harm or loss it would incur if any of the R&Ws is incomplete, inaccurate, or misleading. If this occurs, the disclosure concerned can be neutralised by adding a specific indemnity to cover the particular risk in question.

R&Ws can be qualified at the level of 'the best knowledge of the seller', or a similar expression. This allows for the R&Ws to exclude facts and circumstances that the seller, acting in good faith, could not have known from the scope of the R&Ws. The extent of this limitation depends mainly on how this phrase is defined, which is usually a point of discussion during negotiations. From a seller-side perspective, it should make the R&Ws only based on the facts that certain identifiable people have actual knowledge of on or before the date of the agreement. From the buyer's side, it should try to set the scope of the R&Ws to be as wide as possible, and include the knowledge of not only the seller but also that of any director, executive or even employee of the target. In addition, the buyer should include a reference to reasonable knowledge. This kind of knowledge implies that those particular individuals are considered to have knowledge of any fact that a reasonably diligent person who is placed in the same circumstances could be expected to discover during a reasonably comprehensive investigation concerning the existence of such fact. In practice, this often leads to disputes between parties and an onerous burden of proof on the one relying on it.

5.2.6 Indemnification

General

A clearly worded indemnification clause is necessary in agreements governed by Belgian law. This type of clause essentially stipulates that the seller agrees to indemnify the buyer to restore the latter's position to what it would have been had it not incurred any harm or loss. When it comes to defining the notion of harm and loss and to restricting payment of indemnification, this will depend mainly on the parties' negotiating positions and on the outcome of the due diligence.

In principle, only the buyer can seek indemnification for harm or loss suffered. However, the parties can agree that the indemnification mechanism can also benefit the company itself, whereby the company could also be entitled to seek indemnification. This could be useful in relation to taxation considerations.

Limits to indemnification

A seller's liability under an acquisition agreement can be subject to the following limitations. They do not apply if the seller is guilty of fraud.

De minimis

- Limit to each individual claim: there will be no warranty for claims below a certain value; or
- Limit to an aggregate of claims: the claimant is allowed to make a claim if a certain value (ie, a 'basket' of claims) has been reached. If so, and depending on the negotiation position of the seller, the buyer will usually be indemnified for the entire claim and not only for the threshold excess.

Cap

The seller's liability can be capped at a certain value, which is the total sum of the claims. The seller will not be liable for claim values exceeding the cap. Parties usually set the cap as a certain percentage of the purchase price. The cap can also decrease through time to the extent there have been no claims.

Duration

Acquisition agreements should set a time limit for claims, after which the claims are inadmissible. The time limit in practice is usually between 18 months and three years. For certain types of liabilities, such as tax and social security and sometimes environmental liabilities, the duration usually coincides with the statute of limitations, after which the respective public authorities would no longer be able to claim the sums for events before the transaction. Regarding indemnification pertaining to share ownership, parties usually stipulate a 30-year period, which corresponds to what is set in the statute of limitations for such type of claim.

Seller protections

Acquisition agreements can provide for a range of different mechanisms that protect the seller. It is common for Belgian acquisition agreements to include provisions that neutralise any potential effects of taxation. Similarly, parties can also contractually set out the details on how to manage third-party claims and defence conduct. Parties can also agree that a seller cannot be held liable for any harm or loss that has been caused by a change of law.

Finally, despite the fact that R&W insurance was rare in the Belgian M&A market for many years, there has been an increase in R&W insurance, especially in auctions in which the seller imposes R&W insurance as a condition to the bidding process.

5.2.7 Conditions of closing

See section 6.1.

5.2.8 Closing

See section 7.1.

5.2.9 Buyer and seller covenants

Pre-closing

During the period between signing and closing, parties will generally agree on a standstill clause. This requires the seller to conduct the company's business only in the ordinary course and to preserve it as a going concern. The seller is therefore prohibited from performing certain acts: these typically include declaring dividends, amending the articles of association, granting securities and incurring more debt (other than those that are required for the ordinary course of business).

Furthermore, the seller must fully pay off before closing all the debt that it owes to the company.

The pandemic and related uncertainties have caused buyers to want more control over the business between the time of signing and closing. In view of competition law compliance, parties should manage gun-jumping risks and reassure buyers through other ways during this interim period.

Post-closing

In many deals, the directors of the target company are also its shareholders, or they at least have some connection with them. The acquisition agreement should include a clause on the discharge of directors' liabilities. This discharge could be granted at first at the time of the closing. Subsequently, the shareholders will have to discharge the directors from their liability at the next annual shareholders' meeting. Usually, the directors concerned would resign on closing. The seller should require that the buyer undertake to discharge these directors from performing their mandate until closing.

Parties can include certain covenants regarding earn-out payments whereby the buyer in essence agrees to conduct the business in the same manner as before the transaction. In addition, the acquisition agreement can provide for some mechanisms to ensure that the seller continues to monitor certain developments, for example, by having an observer on the board of directors, and by having the buyer fulfil reporting obligations.

It is typical in practice to stipulate in the acquisition agreement that the seller undertakes to:

(a) not compete with the company or the business sold;
(b) not disclose or use confidential information concerning the business acquired;
(c) not solicit employees, suppliers, or customers, and
(d) not interfere with the business or impair its goodwill in any other way.

A valid non-competition restriction under Belgian law must be limited in time, territory and scope of activities. This clause should be tailored to ensure that the buyer can effectively benefit from the goodwill of the business it has purchased. For example, the validity period must be limited to the time necessary to bind the transferred clients.

If one of the above limitations is not stipulated, a court will hold the restriction invalid. A court will thus not simply reduce the clause to what is reasonably acceptable and permitted under Belgian law unless the agreement contains a severability provision. Given the rather heavy burden in proving actual harm or loss from a contractual breach, it is common practice to provide for a lump sum indemnification in the event of breach. A clause providing for this could be qualified as a penalty clause. A court will then assess whether the harm or loss suffered corresponds to the harm or loss that was actually foreseeable at the time of signing the contract. Belgian law confers power on the court to reduce the contractually stipulated penalty if the sum is considered to be obviously unjustified. Specific language could be used to reduce the risk of qualifying the clause as a penalty clause.

Finally, and for transactions involving a seller who is a natural person, appropriate language should be used in drafting the acquisition agreement to avoid the 16.5 per cent capital gains tax on a sale of shares belonging to a substantial shareholding in a Belgian company. Acquisition agreements often impose an obligation on the buyer to not sell or transfer the shares to any company outside the EU for 12 months after closing.

5.2.10 Boiler-plate provisions

Most agreements have standard clauses (eg, clauses on severability, entire agreement, confidentiality, notices, assignment, costs, governing law, etc.). Just because they typically appear does not mean they are any less important.

5.2.11 Signature

See section 1.2.5.

5.3 Dispute resolution mechanism

Parties can resort to the ordinary courts and arbitration if disputes arise between them. The most common arbitral institution designated to settle disputes from Belgian sale and purchase agreements is either the Brussels-based CEPANI (*Belgisch centrum voor arbitrage en mediatie – Centre belge d'Arbitrage et Médiation*) or the Paris-based International Chamber of Commerce, which is part of the International Court of Arbitration. According to the findings from a recent M&A survey, 78 per cent of the parties who decide to resort to arbitration choose CEPANI as the arbitration institution that has jurisdiction over their disputes.

The dispute resolution or forum clause must be carefully drafted so that it will not give rise to a dispute. The choice of forum chosen (ie, whether a court or arbitration tribunal) will depend on several factors, which are explained below.

5.3.1 Length of the proceedings

The average duration of arbitration proceedings at CEPANI is between nine and ten months. For disputes concerning a small financial value (eg, less than €12,500), proceedings last less than four months. The duration of the proceedings starts at the time the application for arbitration is launched (ie, when the arbitrators are appointed) and lasts until the time a final arbitral award is rendered. The preliminary stage regarding the appointment of the arbitrators can take some time, however, given that the disputants should agree on the appointments. Choosing three arbitrators can reduce disagreements since each party will appoint one arbitrator of its own choice, and those two arbitrators will jointly appoint the third arbitrator.

The rapid pace of arbitration proceedings can be explained by the fact that an arbitral award is final and not subject to appeal (unless one party petitions an ordinary court to have an arbitral award set aside, which is only possible in limited circumstances), among other reasons. An arbitration clause does not prevent the parties from being able to seek urgent interim measures in summary proceedings before the ordinary courts.

Because the Belgian courts are severely backlogged, ordinary court proceedings take much longer before a final judgment is rendered. In addition, a party can appeal against a judgment, which prolongs the litigation even more. In Brussels, for example, the waiting period between requesting a hearing date for appeal proceedings and the hearing itself can be up to two years.

5.3.2 Costs

The costs for arbitration proceedings at CEPANI include the fees and expenses of the arbitrators and the tribunal's administrative expenses. The costs are set according to a scale, which is based on the value in dispute. The arbitrators pronounce in the final award the arbitration costs, and it decides which party (claimant or respondent) must bear them or in what proportion they should be paid by the parties. The final nature of an arbitral award also enables parties to save some costs (including additional lawyers' fees).

Court proceedings are free of charge, but the losing party is usually ordered to pay specific legal costs to the other party. This sum also depends on the value in dispute, which is laid down in the Belgian Judicial Code.

5.3.3 Expertise of the arbitrators

Because the parties in an arbitration appoint the sole arbitrator (or three arbitrators) by themselves, this allows them to select certain arbitrators with sector-specific expertise.

In a lawsuit, the case could be allocated to a judge who does not have any expertise in the target's sector (or even in cross-border acquisitions). When this occurs, experts have to be appointed to give their opinion.

5.3.4 Confidentiality

Contrary to lawsuits, which are conducted in a hearing that is open to the public, arbitration is in principle confidential. The arbitral award is published only if the parties allow it, whereas any third party with standing can request a copy of a judgment from the court's clerk.

5.3.5 International aspect

In international transactions with parties from different jurisdictions, it is customary for them to elect for arbitration instead of bringing the dispute before court. This maintains the balance between the parties and eliminates the advantage that one of the parties has if it originates from the same place as the selected forum.

Arbitration clauses are being featured increasingly in acquisition agreements because of their deterrent nature because of the high costs involved.

6. TYPICAL CLOSING CONDITIONS AND RELEVANT REGULATORY SYSTEM

6.1 Typical closing conditions

6.1.1 General

Although it is in theory possible to have signing and closing take place at the same time, most transactions follow a two-step approach whereby they sign first and then several CPs must be fulfilled after signing. Only after these are fulfilled will the buyer pay the purchase price and ownership be transferred. When this is completed, it becomes the closing of the transaction.

If any of the CPs are not fulfilled, and if none of the parties exercises its right to waive fulfilment of the CPs, which is granted in the agreement closing will not occur.[12] It is common to stipulate that, in these circumstances, the agreement terminates or that one of the parties is entitled to terminate the agreement. Furthermore, it is very common to provide in the acquisition agreement that the fulfilment of the CPs does not have retroactive effect.

Parties should pay particular attention to the validity of the CPs. Belgian law requires that CPs relate to a future and uncertain event, and this event must be incidental and external. Incidental means that the condition cannot relate to the elements required for the formation of a valid agreement. For example, a director of a company must not sign an agreement that is conditional on the approval of it by the board of directors of the same company. External means that the condition must lie outside the contractual obligations or undertakings of the purchaser and the seller. An example of a non-external condition is a clause that states that the seller will sell the shares under the condition that the purchaser pays the price of those shares. Furthermore, under Belgian law, CPs whose realisation depends entirely on the will of the party that has bound itself conditionally are null (*louter potestatieve voorwaarde/condition purement potestative*).

6.1.2 Examples from practice

A textbook example of a CP is the obtaining of the necessary antitrust approvals from the European Commission or the Belgian Competition Authority. The period between signing and closing usually corresponds to the time needed by the authorities to adopt a decision (whereby the parties must perform the obligations imposed therein) or to not object to the transaction. Another common CP is the obtaining of financing.

For asset transfers, it is common to require the seller to provide, at closing, certificates from the authorities attesting that it has no outstanding tax liabilities, that it is not subject to any tax audit, and that it owes no social security contributions. These certificates will be filed with the respective authorities to avoid joint and several liability for the relevant tax liabilities.

6.2 Regulatory approvals, notifications, and the duty to inform and consult employees

Belgian M&A transactions are in theory not subject to any governmental approval or public interest screening, but there are certain exceptions (see section 1.4).

6.2.1 Merger control and antitrust clearance

Belgian competition law has a merger control clearance system that strongly resembles the EU competition law system.

Merger control rules apply to operations that result in a lasting change of control in an undertaking because another company or person gains the possibility of exercising decisive influence over strategic decisions of this undertaking (ie, a concentration). Such situations occur particularly when two independent undertakings decide to integrate (ie, a merger), when one undertaking or one person having control over an undertaking acquires another undertaking or part of its activities

[12] Provided that the CP can indeed be waived.

(ie, an acquisition via a share deal or asset deal), or when two undertakings create a lasting common undertaking between them (joint venture). The concept of concentration used in Belgian law is the same as the concept under the European Merger Regulation, with some exceptions (for example, operations that lead to a change of control in non-full-function joint ventures, which could constitute a concentration under Belgian law but not under EU law).

The buyer must notify a concentration to the Belgian Competition Authority if the transaction meets the following thresholds:

(a) the combined turnover of the undertakings concerned in Belgium exceeds €100m;
(b) at least two of the undertakings concerned each generate a turnover of more than €40m in Belgium; and
(c) the concentration does not satisfy the European Union's merger control thresholds – this will trigger the one-stop-shop system of notification with the European Commission.

All transactions that fall within the scope of Belgian merger control rules must be notified to the Belgian Competition Authority before the parties are allowed to implement or proceed with the concentration. In principle, the parties are prohibited from 'jumping the gun' (see section 6.1.1).

Concentrations must be notified to the Prosecution Service of the Belgian Competition Authority. This is done by completing and filing an official notification form. The information requested in this form is the same as those required in the CO form used by the European Commission. The only difference is that the information relates to the Belgian market and not the European internal market.

A peculiarity of the Belgian merger control system is that the Belgian Competition Authority strongly relies on pre-notification talks. These are informal meetings with the Authority for the purpose of preparing the official notification form. They last up to an average of three to four months. The reason for these meetings is to gather the extensive information required in the notification form, even for transactions that qualify to be done via the simplified procedure.

Once the Authority concludes that the notification form is complete, it will formally accept the notification and, in the first phase, decide within one to two months if it is a simplified procedure (and three to five months more if a second phase decision is needed). In Belgium, most concentrations are approved via the simplified procedure.

Consequently, companies planning a transaction that must be notified to the Belgian Competition Authority should be aware that the overall procedure will take around four to six months. During this time, they will need to cooperate with the Authority by providing extensive data, and they are prohibited from implementing the transaction.

6.2.2 Foreign direct investment screening

See section 1.2.6.

6.2.3 Specific governmental authorisations and notifications

See section 1.4.

6.2.4 Duty to inform and consult employees

This section contains an overview of the obligation to inform and consult employees under an asset deal and share deal, including the timing and the information that should be provided to the employees.

Asset deals

If an asset deal (either a *transfer ut singuli* or a transfer under a BCCA procedure) qualifies as a transfer of undertaking within the meaning of CBA No. 32bis, then the employees must be informed and consulted about it. Whether an asset transfer qualifies as a transfer of undertaking within the meaning of CBA No. 32bis must always be assessed on a case-by-case basis.

Share deals

Not every share transfer will trigger the duty to inform and consult employees. A case-by-case analysis is required in each case.

A duty to inform and consult employees, among other obligations, arises if a share transfer results in a concentration or implies an important structural change that the company is negotiating on. A concentration is considered to exist if the share transfer will cause the buyer of shares to acquire control over a company that was autonomous before the sale. In such scenario, both the buyer (the company acquiring control) and the target (the company over which the control is being obtained) will have to fulfil the obligation to inform and consult.

Who should be informed

Who should be informed and/or consulted depends on the presence of employee representation bodies in the company concerned.

The employee representation bodies at national level are the Works Council (*Ondernemingsraad/Conseil d'entreprise*), the trade union delegation (*syndicale afvaardiging/délégation syndicale*), and the Committee for Prevention and Protection at Work (*Comité voor Preventie en Bescherming op het Werk/Comité pour la Prévention et la Protection au Travail*). Ifthere is no Works Council, social dialogue takes place at the level of the trade union delegation. If neither of these exist at the company, the Committee for Prevention and Protection at Work is the employee representation body that must be informed and consulted regarding the transaction.[13]

If there are no employee representation bodies at the company (or companies), there is no obligation to inform and consult the individual employees about the (contemplated) transaction unless the transaction qualifies as a transfer of undertaking within the meaning of CBA No. 32bis.

Procedure and timing

Employees have the right to be informed. This right to information means that the employer must communicate certain information about the transaction in such a way that the employees can grasp the socio-economic situation of the company.

The aim of consulting is to have the employee representatives and the employer engage in a dialogue about the contemplated transaction. It is debated whether the obligation to consult applies only if the transaction has an impact on employment or if it applies in all cases regardless of such impact.

[13] In some cases, the trade union delegation (together with the Committee for Prevention and Protection at Work) must be informed.

For transfers of undertakings, CBA No. 32bis states that, if there are no employee representative bodies at the company, the employees must be informed individually about:

(a) the date or intended date of the transfer;
(b) the reason for the transfer;
(c) the legal, economic, and social consequences of the transfer; and
(d) the measures envisaged in relation to the employees.

For company transactions with a cross-border element, the European Works Council must be informed and consulted in some circumstances (see section 6.2.4).

When employees should be informed and consulted

Regarding timing, the employee representative bodies must be informed before any public announcement of a sufficiently concrete proposal for a decision on the transaction. Usually, this is right before the parties sign the acquisition agreement. In any event, providing them with information and consulting them must be completed before the final decision is made on the transaction.

7. CLOSING ACTIONS

7.1 Typical steps to consummate the proposed transaction

At closing, the buyer pays the price for the shares or the assets.

In most transactions, parties sign ancillary documents or agreements at closing, such as resignation letters of the directors, management agreements, transitional services agreements, licence agreements, vendor loans and shareholders' agreements.

In a share deal, the share transfer will have to be recorded in the shareholders' register at closing. Other documents that are common in a share deal include resolutions on the appointment of new directors, on granting temporary discharge to the exiting directors, and on the management body's granting of daily management powers and/or specific powers to designated persons.

In an asset deal, the seller will provide a copy of the certificates confirming that the company has no outstanding tax and social security debt (see section 6.1). For real estate transactions, the transfer of rights in rem must be recorded in a notarial deed.

If, at closing, parties decide to undergo a capital increase, or if a BCCA corporate restructuring procedure is carried out, they will need to appear before a notary to have these processes witnessed and confirmed.

If there are many obligations that need to be performed at closing, parties usually sign a closing memorandum to set out those obligations.

7.2 Points of attention in cross-border M&A deals

Regarding applicable laws, the BCCA has a legal framework for cross-border mergers (*fusie/fusion*), demergers (*splitsing/scission*) and assimilated transactions (*gelijkgestelde verrichtingen/operations assimilées*) only. It does not address other types of cross-border M&A transactions defined by law, such as cross-border transfers or cross-border contributions of a branch of activity or a universality of goods. The latter types of transactions can be performed if they comply with private international law principles. In practice, this means that company law (*lex societas*) applies to the rules on decision-making and legal consequences of those decisions, and the place where the assets are located (*lex rei sitae*) governs the binding effect of the transfer.

In addition, the following aspects have an impact on the transaction closing process:

(a) Each company must comply with the provisions and formalities that its national law imposes on the transaction.
(b) Consent from each participating shareholder or partner of the Belgian company is needed if the shareholder/partner is or could become liable without limit as a result of the transaction. Consent from them would not be required for domestic mergers and demergers.
(c) Contrary to a domestic merger or demerger, which becomes complete as soon as all the companies involved have taken corresponding decisions, cross-border demergers and mergers must fulfil additional formalities. A cross-border demerger requires a Belgian civil notary to issue a premerger certificate in which they confirm that the company concerned has fulfilled the required formalities under Belgian law. A similar certificate is also needed for a cross-border merger.

Regarding employment in cross-border M&A transactions, the European Works Council will have to be informed and consulted under certain circumstances if the transaction in question has a transactional aspect.

8. POST-CLOSING

8.1 General post-closing actions

An excerpt of the resolutions regarding the appointment and the dismissal of directors must be published in the Annexes to the Belgian Official State Gazette. The company's information in the records of the Crossroads Bank for Enterprises will have to be updated as well.

Changes often take place after closing concerning the articles of association, the registered office or the statutory auditor of the companies involved. Decisions on all these changes will need to be filed and published in the Belgian Official State Gazette.

8.2 Regulatory filings

8.2.1 Share deal

Generally, a transfer of existing shares does not need to be registered or filed, but there are certain deal-specific exceptions:

(a) When the shares of a limited liability company (BV/SRL) and a public limited liability company (NV/SA) are gathered in one hand. This gathering must be filed with the Court of Enterprises and published in the Belgian Official State Gazette.
(b) When there are changes to the ultimate beneficial ownership of the target company. This must also be filed, and the management body of the target company must do this within one month.
(c) If the transaction concerns a subscription of new shares. In such a scenario, the notarial deed affirming the subscription must be filed with the Court of Enterprises, and an

excerpt of the deed must be published in the Annexes to the Belgian Official State Gazette.

8.2.2 Asset deal

Whether the transfer of a particular asset triggers the need to conduct a regulatory filing depends on an asset-per-asset analysis. The transfer of rights *in rem* and leases can be subject to filing requirements. Applying for a new permit may be required.

All asset deals that are carried out under a BCCA procedure (merger, demerger, carve-out of a branch of activity, contribution of a branch of activity or contribution of a universality of goods) require a notary to be involved and various filings to be made. The different reports and minutes that are needed to complete a hybrid statutory M&A procedure must be filed with the clerk's office of the Court of Enterprises, and an excerpt of such documents will likely have to be published in the Belgian Official State Gazette.

Again, as elaborated upon above, certain assets (such as real estate and IP) will still require a separate regulatory filing.

8.3 Regulatory requirements and ongoing statutory compliance

Various ongoing regulatory requirements must be fulfilled. The most important ones are described below.

8.3.1 General corporate

The management body must prepare the annual financial statements, inventory, and the annual report every year. The approved financial statements must be filed with the National Bank of Belgium 30 days after the general meeting has approved them, and in any event no later than seven months after the end of the company's financial year. A company's accountant usually does this.

The UBO register must be updated within one month if there is any change to the ultimate beneficiary owners and their information. All UBO information must be confirmed or updated every year.

If a company's net asset value (*actif net/nettoactief*) falls below 50 per cent of the amount of its capital (*capital/kapitaal*), then the management body must convene an extraordinary general meeting within two months from the time the management body had or should have had knowledge of the financial state of the company. The extraordinary general meeting will decide on the continuation of the company's activities. The management body must draft a special report containing proposed remediation measures, and it must submit this report to the extraordinary general meeting.

8.3.2 Employment

If the company has a Works Council, this Works Council must receive certain economic and financial information on the company every year. Further, when decisions that could have an important impact on the company are made, information must be provided to the Works Council from time to time without the need to wait for a meeting that is dedicated to the providing of periodic information. This information must be given as soon as possible.