Belgium

Negotiated M&A Guide

Corporate and M&A Law Committee

Contacts

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1. Introduction

The negotiated sale of private companies constitutes the core activity of mergers and acquisitions in Belgium.

1.1 Background of negotiated M&A transactions

While 2016 was marked by a slight decrease in the number of large M&A deals, the Belgian medium-sized M&A market continued to grow steadily. Foreign investment in Belgium increased gradually. Belgium's strategic location in the heart of Western Europe and its open economy characterised by a large number of small and medium-sized companies, mainly family-owned, make it indeed an attractive market for foreign M&A players. Asian private equity funds seem to be particularly interested in Belgian M&A deals. This surge in Belgian M&A activity is driven by both strategic and financial buyers.

During the first half of 2017, there was an increase in the number of deals completed by Belgian bidders, and there have been some large transactions involving foreign bidders for Belgian targets. The regulatory and political uncertainty resulting form Brexit and the new US administration might affect the number of cross-border transactions.

The Belgian Companies Code will be substantially reformed to further facilitate and incite entrepreneurship and foreign investment (see item 6 below).

A major reform of the Belgian corporate tax system was announced on July 26, 2017, and this will have a significant impact on M&A transactions (see item 7 below) also.

Some notable Belgian M&A transactions in the course of 2016 and the first half of 2017 include:

- The merger of Bekaert Textiles and DesleeClama;
- The acquisition of Base by Telenet;
- The acquisition of Lampiris by Total;
- The acquisition of Tom & Co by PetSerCo;
- The acquisition of Quick by Groupe Bertrand;
- The acquisition of VCST by BMT;
- The acquisistion of Acetow by Blackstone;
- The acquisition of Heijmans Bouw by Besix Group; and
- The acquisition of United Bulgarian Bank and Interlease by KBC.

1.2 Legal framework of negotiated M&A transactions

Unlike public takeover bids[1], negotiated M&A transactions are in general not regulated by specific legal provisions.

[1] For more information on public take-over bids in Belgium, see G. Rosselle, L. Verhavert and J. Devenyn, "Public Takeover Bids in Belgium" in *IBA Takeover Guide 2013*.

Belgian law does not contain a specific regulation encompassing all aspects relating to share and asset transfers. Acquisitions are mostly regulated by the Belgian Civil Code, which contains the provisions on contracts. The Belgian Companies Code applies in particular to those transactions where the formal procedure is embedded in the Code, such as for mergers. Further, some specific regulations (including labour law, tax law, etc.) will be relevant: for example, the protection of employment regulations following a transfer of undertaking ("TUPE" - based on EC legislation and the national implementation measures).

2. Structure of the Transaction

In Belgium, a negotiated M&A transaction is generally structured as (i) a share deal (a purchase of shares of the target in exchange for a cash consideration or shares) or (ii) an asset deal (a purchase of assets of the target in exchange for a cash consideration or shares). There exist, however, more hybrid transaction structures, such as partial demergers, which have components that point to a share as well as an asset deal, so that they cannot be properly allocated to either one of those types of deals. These hybrid structures will not form the main focus of this general introduction to private M&A in Belgium.

A private M&A transaction can take place in one or two steps. In the first hypothesis, the signing and closing take place at the same day. In the second hypothesis, a transfer agreement will be signed and will include conditions precedent ("CPs"), such as obtaining certain consents, permits and licenses. The closing will then occur upon fulfilment (or waiver, as the case may be) of these CPs.[2]

2.1 Share deal

Through a share deal, the buyer acquires the shares of, and possibly control over, the target which will remain the owner of its assets and liabilities. The shareholders, in principle, decide on such a transfer without interference from the company's board of directors.

Overall, we find two different types of share deals, namely (i) the acquisition of existing shares of the target, and (ii) the acquisition of new shares of the target. In addition, mergers as well as demergers can also be considered to fall within the category of the share deals as they have an influence on the share structure of the target.

2.2 Asset deal

As will be discussed below, it might in some cases be more advantageous for a buyer (and a seller) not to acquire the shares of the target, but to acquire the assets and liabilities instead. In principle, the shareholders of the seller of assets and liabilities do not have to approve the transfer unless (i) it is otherwise stipulated in the articles of association or (ii) if both parties elect to follow the procedure prescribed by the Belgian Companies Code with regard to a transfer *ut universali* of the assets that are considered a branch of activities or a universality of goods. Save for these two exceptions, it is the board of directors which, in principle, has the power to decide on a transfer of assets through an asset deal.

Which formalities will apply to this transfer of assets will depend on the characterization of the assets and liabilities to be transferred. In principle, there exist two different types of asset deals, namely:

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[2] See also point 3.9 below.

(i) the transfer *ut singuli* of each asset subject to the sale, *i.e.* the transfer of individual assets which could be "cherry picked" by the buyer (or even constitute a branch of activities or a universality), and which are transferred in accordance with civil law provisions, and

(ii) the transfer *ut universali* of the assets that are considered a branch of activities or a universality of goods through a detailed procedure prescribed by the Belgian Companies Code. This procedure is not mandatory; the parties can decide to transfer a branch of activities in accordance with civil law provisions.

A branch of activities under Belgian law is by law defined as "*a unit which conducts a business activity autonomously from a technical and operational perspective and which is capable of functioning by itself*"[3], while a universality of goods is "*the entirety of the assets and liabilities of the company*"[4]. The question whether the assets characterize a branch of activities or a mere collection of assets depends mainly on whether the entity is technically and administratively independent and can function on a stand-alone basis.

As indicated above, if the assets of a target are legally characterized as a branch of activities or a universality of assets, the parties have the possibility to choose between the above indicated different types of asset deals: (i) transfer under Article 760 *et seq.* of the Belgian Companies Code, or (ii) transfer under general Belgian civil law concerning the transfer of assets.

If the Belgian Companies Code is applied by the parties, the branch of activities or the universality of assets will be automatically transferred as a whole in accordance with a specific procedure described in the Belgian Companies Code. Unknown debt could therefore be transferred according to this procedure. The procedure consists of two main phases and takes at least six weeks. In a first phase, the board of directors of both the seller and buyer must draft, by way of authentic or private deed, a contribution proposal, which must be filed with the Clerk's office of the competent Commercial Court at least six weeks prior to the contribution and, as the case may be, prior to the seller's shareholders meeting to decide on the contribution.[5] In addition, the seller's board of directors must draft a written report that sets out the state of the assets and contains an explanation and justification of (i) the desirability of the contribution from legal and economical points of view, (ii) the conditions and manner of the contribution and (iii) its consequences.[6] An excerpt of this report must be sent to the registered shareholders at least one month prior to the general meeting. In a second phase, the seller's shareholders meeting will decide on the contribution.[7] The contribution of assets on the buyer's side will be dealt with as a capital increase, in which case the applicable provisions of the Belgian Companies Code apply. These provisions entail additional reporting obligations as well as a decision of the buyer's general meeting of shareholders.

On the other hand, when the parties decide not to apply the rules set out in the Belgian Companies Code, the transfer of assets will take place under Belgian civil law *ut singuli*. Belgian civil law then requires that each and every asset is transferred individually, so that it is necessary to draft an exhaustive list of all assets, rights, and obligations that are to be transferred. This list is

[3] Article 680 of the Belgian Companies Code.

[4] Article 678 of the Belgian Companies Code.

[5] Article 760 of the Belgian Companies Code.

[6] Article 761 of the Belgian Companies Code.

[7] Article 761 of the Belgian Companies Code.

generally included in the transfer agreement. Unless the parties agree otherwise, the buyer of certain assets will thus not be liable to pay the seller's debt; neither will the buyer acquire the seller's claims. An item that is not mentioned in the list is in principle considered not to be transferred.

Another important distinction in relation to asset deals is the method of transfer of the assets. Assets, *ut singuli*, as a branch of activities or as a universality of goods, may be (i) transferred to a buyer or (ii) may be the object of a contribution. The procedure under the Belgian Companies Code for a transfer of individual assets, a branch of activities or a universality of assets is similar to the procedure for the contribution in kind thereof. Note in this respect that the contribution in kind of a business, contrary to a transfer thereof, has an influence on the share structure of the parties, so that it can be considered a mix of a share deal and an asset deal.

2.3 Buyer and seller preferences

The decision on the transaction structure is one of the most, if not the most, important decision to be made at the beginning of an M&A transaction. As explained above, this generally will be a choice between a share or asset deal. This decision can be influenced by a wide variety of factors. The list below sets out some of the most common influencing factors:

- Complexity: a share deal facilitates the transaction as all the assets and liabilities remain owned by the target itself, while only the control over the target changes. The buyer acquires all the assets, rights and obligations of the target by merely acquiring the shares of the company. A share deal is therefore less complex than an asset deal.

- Transfer formalities: in principle, there are fewer formalities involved in a share deal than an asset deal. In an asset deal the legal rules governing the transfer of an asset are in principle applicable to every *ut singuli* transferred asset. The transfer *ut singuli* takes the form of a transfer of each individual asset pursuant to its own transfer rules. In addition, the opposability requirements for the transfer of all those different individual assets towards third parties must be complied with.

- Protection under Belgian civil law against (i) hidden defects and (ii) the right to undisturbed possession of its property (Article 1625 *et seq.* of the Belgian Civil Code): under Belgian civil law a buyer of assets is protected against hidden defects and has a right to unhindered enjoyment of the assets transferred to him. This means that a buyer automatically has a remedy against the seller in case the assets transferred contain any hidden defects. To be admissible, the defect must prevent or limit the buyer's use of the object of the sale in such a way that, except for those defects, the buyer would not have purchased this object or would have paid less for it. It is not required that the seller was aware of these hidden defects. Secondly, as a consequence of the right to unhindered enjoyment of his property, the seller may not do anything that would cause a depreciation of the assets transferred. The seller is therefore, according to several legal authors, bound by a *de facto* non-compete clause, as competition from the seller would prejudice the buyer's right to undisturbed possession of the asset purchased by him.

  In a share deal, only the shares of a company are transferred, while the assets do not (in theory) change owner. Therefore, the assets of the company in a share deal do not benefit from the protection under Belgian civil law and the rights granted by it. Consequently, in a share deal it is necessary to carefully draft the representations and warranties to ensure the good condition of the transferred business and to insert a non-compete clause in the share transfer agreement to ensure peaceful enjoyment of the business by the buyer.

In an asset deal, on the other hand, the buyer is safe in the knowledge that he can rely on the protection offered under Belgian civil law. Nevertheless, as the sanction provided by the Belgian Civil Code is often inadequate (e.g. dissolution of the transfer), it has in practice become more and more common in an asset deal to contractually specify representations and warranties and to include a non-compete clause in the asset transfer agreement.

- Liabilities: if significant liabilities exist in respect of an asset of the target (e.g. a building with no building permit), the buyer may not want to purchase the asset and may, instead, divert its focus on the assets that are necessary for the economic purpose of his business. Further, if a business has serious liabilities on its balance sheet, the buyer may not be willing to take over the entirety of the balance sheet. In such cases, an asset deal would be preferable to a share deal

- Cherry picking of assets and liabilities: in some cases a buyer is not interested in all the activities of the target. While a share deal implies the purchase of all the assets and liabilities, and thus all the activities of the target, an asset deal can provide the buyer with the possibility to select the activities or the asset and liabilities it prefers.

- Transfer restrictions on shares: in Belgium, the transfer of shares of certain specific types of limited liability companies is restricted by law. The shares of a company limited by shares ("*Naamloze vennootschap/Société anonyme*") are, however, in principle freely transferable. Nevertheless, it is quite common to, contractually (e.g. in a shareholders agreement) or through the articles of association of a company, restrict the transfer of shares. Stand-still provisions, pre-emptive right clauses and tag-along rights are good examples. However, the Belgian Companies Code lays down several restrictions to these clauses, such as time limitation and corporate interest. For the sake of completeness, it should also be noted that Belgian company law itself also contains several restrictions in relation to the transfer of shares in specific circumstances (e.g. the acquisition of own shares, certain cross shareholdings, etc.). As a consequence, a buyer might sometimes opt for an asset deal instead of a share deal to avoid any problems with transfer restrictions on shares.

- Acquisition finance: in case of a share deal, the Belgian rules on financial assistance impose important limitations in relation to the financing of the transfer of the shares (see below). Assets of the target may in principle not be used as a pledge for securities. As these financial assistance rules do not apply to asset deals, this might be a consideration which a buyer will take into account when it decides whether to engage in an asset or a share deal.

- Non-assignment clauses: contracts that contain a non-assignment clause cannot be transferred to the buyer without the consent of the contracting parties, which could be an obstacle in an asset deal. In a share deal, however, the contract will not legally be transferred to a third party, as the target continues to be the contracting party. Therefore, a non-assignment clause in contracts does not affect the legality of the transfer of the contract to the buyer of the shares of the target.

- Change of control clauses: contracts that contain a change of control clause could be an obstacle in a share deal. In an asset deal, there will be no change of control over the target, so that a change of control clause in contracts does not affect the legality of the transfer of that contract as a specific asset.

- Minority shareholders: a buyer contemplating the purchase of the entire business of the target may be confronted with the refusal of certain minority shareholders to sell their shares. In such a case, the buyer may opt for an asset deal, as this, in principle, only requires a decision of the board of directors (generally controlled by the majority shareholders). However, there exists a risk that these minority shareholders will commence legal proceedings for an abuse of majority.

- Registration rights: there is no registration duty payable in respect of a transfer of shares, while the transfer of certain assets, such as real property, is subject to a (significant) registration duty. These financial considerations may also affect the choice between an asset and a share deal.

- Depreciation: contrary to a share deal, a stepped-up basis for a tax deductible depreciation of the transferred assets is available for the buyer in an asset deal.

- Carrying-over tax losses: if there is a change of control over the company (resulting from a share deal), tax losses will only remain tax deductible if the change of control relates to legitimate financial or economical needs (which will be the case for, e.g. where the activities of the company will be continued with a similar level of employment). If there is a transfer or contribution-in-kind of a branch of activities, specific rules are applicable in relation to carrying over tax losses.

- Income tax: upon the sale of the shares, the seller may realize a capital gain on shares. If the shares have been held in full ownership during an uninterrupted one year period, this capital gain will normally be subject to a lower corporate income tax at a rate of 0.412% (crisis surcharges included) or, if the seller qualifies as an SME, it will be fully exempt from corporate income tax. If the one-year holding period is not reached, the capital gain will normally be taxed at the rate of 25.75%, including for SMEs. Capital gain on shares which is realized by individuals who held them as a private investment is normally exempt from income tax unless it is realized outside the normal management of such private estate or unless—if the individual is considered to be holding a significant stake at any moment during the past five years—the shares are purchased by (or resold within twelve months afterwards to) a buyer established outside the European Economic Area. Capital losses realized by the seller on shares are in general not tax-deductible. Unlike in a share deal, any capital gains realized, through an asset deal, on the assets and goodwill will be considered a taxable profit subject to the normal corporate income tax rate (currently, 33.99%). On the other hand, capital losses realized on the assets are in general tax-deductible.

- Joint liability: in an asset deal, the transfer will not be effective and enforceable for the purpose of income tax, VAT and social security liabilities before the end of the month following the month in which a certified copy of the asset purchase agreement is duly notified to the relevant authorities. In addition, the purchaser will be jointly liable for outstanding income tax, VAT and social security liabilities, the sum of which could amount up to the purchase price that would be paid by (or debt that would be transferred to) the purchaser before the end of the above period. An exception to these rules is when valid certificates stating that the seller does not have any such outstanding income tax, VAT and social security liabilities are obtained from the relevant authorities, and these certificates are attached to the notified asset purchase agreement. The certificates may not be older than 30 days from the date of the notification.[8]

- VAT: The transfer of the shares will not be subject to VAT. The transfer of a totality of assets (or part thereof) is not subject to VAT either.[9] However, the transfer of assets that is considered *ut singuli* is in principle subject to VAT.

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[8] See: Article 442*bis* Belgian Income Tax Code; Article 93*undecies*B, of Belgian VAT Code; Article 16*ter*, of the Royal Decree n°38 of 27 July 1967 organizing the social security status of self-employed persons; and Article 41*quinquies* of the Act of 27 June 1969 modifying the Decree Law of 28 December 1944 regarding the social security of employees.

[9] Article 11 and 18 §3 of the Belgian VAT Code.

3. Pre-Agreement stage

3.1 Letter of Intent

3.1.1 Notion

Although it is not mandatory, parties often wish to put their mutual positions on paper when the preliminary negotiations reach a certain stage. This document, which sets out the basic principles of the envisaged transaction and the way to move forward, is often referred to as the 'letter of intent'. This type of document also goes by the name of term sheet, memorandum of understanding, pre-offer, indicative offer, heads of agreement, etc. The form of these documents is very diverse, with some letters of intent being remarkably short and simple, while others can run to a significant number of pages.

Under Belgian law, a letter of intent can be binding as well as non-binding, but is in practice often a mixture of both binding and non-binding provisions. As a general civil law rule, an agreement between parties (even only on basic principles) constitutes a binding commitment if the parties agree on the essential and substantial elements of the transaction. These elements differ from transaction to transaction based on:

(i) the type of transaction or contract (objectively): e.g. for a purchase of a good, the accord between parties is considered binding if the parties thereto agree on the subject matter of the transaction and on its price, whereas in relation to a subscription agreement, the essential elements are considered to be the number of shares and the amount of the investment; and

(ii) what the parties themselves consider to be a substantial element of the specific transaction, *i.e.* what the parties consider to be the determining factor which will influence whether or not they consent to the transaction (subjectively), even though this would not be essential from an objective point of view. As these essential elements are subjective by nature, they can only be considered to be substantial to the extent they are clearly communicated as such within the framework of the negotiations.

When it comes to deciding on the binding or non-binding character of a letter of intent, the contents of the letter will prevail over the form of the document, irrespective of disclaimers to the contrary, its name, or its characterization by the parties. To ensure that a letter of intent in relation to an acquisition is not binding, it should not give a clear indication of the price or the object as the addressee could simply accept the terms of the letter and force the other party to enter into a binding agreement. Typically, non-binding letters of intent indicate only a price range instead of a fixed price, and make the transaction subject to several assumptions and conditions.

The above demonstrates that a letter of intent has to be drafted with care, so that it reflects the correct intention of the parties, in particular in respect of the legal binding nature thereof. Ultimately, it will be up to a judge to determine the binding or non-binding character of a letter of intent, based on the wording of the letter as well as other communications between the parties and even their subsequent behaviour.

3.1.2 Contents

In practice, a letter of intent summarizes several general principles in relation to the transaction (with respect to the transfer agreement, as well as management agreements, shareholders agreements, etc.). The following clauses are most commonly found in a letter of intent:

(i) the introduction of a letter of intent often contains a clause indicating which clauses of the letter of intent are binding and those which are not. In practice, certain clauses on confidentiality, costs, exclusivity, and applicable law are in principle declared legally binding from the outset, despite the non-binding effect of the other sections of the letter of intent;

(ii) a clause setting out the particulars of the contemplated transaction, including information in relation to the price. Generally, this clause will be indicated as "non-binding";

(iii) a clause containing the CPs (conditions precedent) for the transaction. Note that Belgian law does not permit a purely potestative condition precedent, *i.e.* a condition precedent that depends solely on the will of the debtor. An obligation entered into under a condition precedent, the fulfilment of which is fully controlled by the debtor of such obligation, is indeed considered null[10];

(iv) a clause setting out the due diligence process. There is no formal requirement in Belgian law which allows or prohibits a potential buyer from carrying out due diligence on the business and affairs of a company. The final decision on whether or not to authorize a company to carry out due diligence lies with the target's board of directors. Moreover, Belgian law does not provide for a general set of rules on the right to obtain, or obligation to provide, information within the framework of contract negotiation;

(v) a clause requiring the seller to conduct its business in the ordinary course of business and to preserve it as a going concern, from the signing of the letter of intent up to the closing of the transaction[11];

(vi) an exclusivity clause forbidding the seller from soliciting or negotiating with other possible buyers;

(vii) a confidentiality clause relating to the contemplated transaction and the disclosed information within the framework of negotiations and the due diligence process. A breach of confidentiality, as well as exclusivity, may result in compensatory damages. Given the difficulty of proving damages resulting from such a breach, lump-sum indemnities are often provided for; and

(viii) boiler plate provisions.

3.2 Pre-contractual liability

3.2.1 Diligent parties

Although a party may only be involved in negotiations which do not create any legally binding obligation on its behalf, Belgian law requires such party to act in a diligent manner, *i.e.* as a normal and reasonable person would do in the same circumstances. Even if a party is engaged in non-binding discussions, a negotiating party must consider the interests of the other parties.

By way of example, a diligent seller will not omit to inform a candidate buyer about the existence of a material debt contract, a diligent party will not omit to inform the other party about any new elements that may arise during negotiations, a diligent negotiating party will not suddenly and for no reason interrupt negotiations after having created the impression in the eyes of the other party

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[10] Article 1174 of the Belgian Civil Code – see also point 3.9 below.

[11] See also point 3.11.1 below.

that it would enter into the transaction, etc. This does not, however, prohibit the seller from negotiating with other possible buyers, unless the parties signed an exclusivity agreement.

Depending on whether or not the parties enter into a contract, the litigious party can be held liable for having committed a *culpa in contrahendo* or a *culpa in non contrahendo* on the basis of general tort law[12]. As a general rule, such liability will be sanctioned by the obligation to indemnify the injured party so that the latter's position is restored as if such wrongful act would not have occurred.

It is generally accepted that the indemnification should include the so-called *negative interest of contract*, such as the costs that were spent for negotiating, the time lost, the impossibility to seize other opportunities, etc. Whether the injured party is authorised to claim any (additional) compensation for having lost the *positive interest of contract – i.e.* the compensation for profits that have not been generated because of the lack or absence of contract – is contested.

For the sake of completeness, it should be noted that, during the negotiations, parties sometimes make break fee arrangements. According to some legal scholars, this might be problematic under Belgian law as all actions of the company must be in the best interest of the company. Moreover, the amount of a break fee should not exceed the reasonable cost in the event of a withdrawal from the negotiations, as clauses with a penalty element can be moderated by the courts.

3.2.2 The right to information

As indicated above, under Belgian law the seller is not under a general obligation to disclose information during the pre-agreement phase of an M&A transaction.[13] Therefore, it is common practice for the letter of intent to include a clause obligating the target company, its shareholders and/or its directors to disclose the information set forth in one or more due diligence document requests.

The absence of a general right to information should, however, be nuanced on three different levels:

(i) The behavioural standard to act as a diligent party, described under point 3.2.1 above, implies, *inter alia*, that a party in the course of negotiating a contract has the obligation to provide the other party with certain substantial information. To request compensation before a court based on this behavioural standard is, however, very difficult (e.g. because of problems in relation to proving the damage done), and consequently has a very low success rate.

(ii) The parties are required to provide information to each other so that their consent to enter into the agreement is not vitiated (e.g. through error, fraud, violence, etc.). Under Belgian civil law, a transfer of goods can be annulled because of a defective consent on the part of one of the parties. The two most common forms of such vitiated consent are error and fraud.

Error can be defined as a misrepresentation of the reality, at the moment of entering into an agreement. A contract can be declared null and void for reason of error by one of the parties at the moment of entering into the agreement to the extent:

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[12] Articles 1382 and 1383 of the Belgian Civil Code.

[13] In a limited number of specific areas, however, mainly to protect consumers in the business-to-consumers markets, Belgian law imposes specific information obligations.

a. the error relates to one or more elements in the absence of which the erring party would not have entered into the contract,

b. the importance of such element(s) was known to the other party, and

c. any other normal, diligent and reasonable person in the same circumstances would also have erred.

If one of the abovementioned conditions is not present, the error will not result in an annulment of the agreement.

Fraud can be defined as a misrepresentation of the reality, at the moment of entering into an agreement, which was caused by a trick or calculated actions by the other party. A contract can be declared null and void for reason of fraud by one of the parties at the moment of entering into the agreement to the extent:

a. tricks or calculated actions were used by the party causing the fraud with the intention of misleading the other party and encouraging the other party to enter into the agreement, and

b. the fraud relates to one or more elements in the absence of which the deceived party would not have entered into the contract.

If one of the abovementioned conditions is not present, the fraud will not result in an annulment of the agreement.

(iii) Articles X.26 to X.34 of the Belgian Code of Economic Law have a broad scope of application, and as such, they may be applicable in the framework of certain asset deals, in particular in relation to the transfer of know-how or commercial and technical assistance in relation to the sale of products or the provision of services. These provisions require that at least one month prior to the closing of the "commercial partnership agreement", certain specific information is provided to the party obtaining the product or the services. If the seller does not comply with these provisions, the other party has the right to seek annulment of the agreement within two years from the date the agreement was entered into. This is often remedied by requiring the party, who has in principle the right to seek annulment of the agreement, to sign a letter whereby that party waives its rights to do so. The right to seek annulment of the agreement can only be validly waived after the expiry of one month after the conclusion of the agreement, and the waiver must explicitly mention the reasons for the waiver.

(iv) Acquisition agreement

(v) The format and content of the acquisition agreement will vary depending on the selected transaction structure and on the transaction-specific circumstances: a share transfer will be governed by a share purchase agreement (SPA) for existing shares and by a subscription agreement for new shares; an asset transfer by an asset purchase agreement (APA); a merger necessitates a merger proposal drawn up by the company's board of directors and approved in an authentic deed by the shareholders, sometimes supplemented by a separate agreement, and a transfer *ut universali* also requires a transfer proposal drawn up by the company's board of directors and approved in an authentic deed by the shareholders, usually supplemented by a separate agreement. The following overview focuses on typical SPAs and APAs and does not cover the merger and transfer proposal, the format and content of which are largely regulated in the Belgian Companies Code.

Contractual practice largely resembles that of most other continental jurisdictions. Given the fact that the Belgian legal landscape comprises many family-owned companies, agreements will usually be less detailed than is common in the Anglo-Saxon practice. However, the practice developed in common law jurisdictions continues to impact the Belgian M&A practice graduallly.

For a contract to be valid under Belgian civil law, four constitutive elements are required: the consent of the parties, the capacity of the parties to enter into the contract, an object and a cause. This also applies to acquisition contracts. It should be noted that it is not strictly necessary to have a written agreement (theory of *consensualism*); therefore, a cautious approach is warranted during negotiations. Similarly, parties should refrain from explicitly agreeing to a price and a purchase object as this may constitute a binding agreement.[14] Further, the parties' consent may not be vitiated through error, fraud, simulation, violence and detriment.[15]

A typical acquisition agreement will consist of the following provisions:

3.3 Preambles

Preambles are traditionally used in acquisition agreements, essentially to provide some further background on the transaction, to identify the target and to explain the interconnection with other transaction agreements. From a sell-side perspective, a preamble can also indicate that a due diligence has been performed by the buyer and its advisers.

3.4 Definitions

The typical first clause in acquisition agreements is a list of the defined terms used throughout the agreement.

3.5 Object clause

As stated above, it is crucial to clearly define the object of the sale/purchase. There is no object, and subsequently no sale, when the parties have not reached an agreement on the object of the transfer.

For a share deal, this will be a straightforward exercise: the seller's shares will be transferred including all the related rights. It is advisable to explicitly arrange how the dividend distributions for the ongoing financial year and/or any outstanding dividend payments for previous financial years shall be allocated between the seller and the buyer. It should also be indicated whether the shares are transferred free of any liens and encumbrances. As stated above, the Belgian Companies Code, the articles of association or a shareholders' agreement sometimes contain provisions limiting the transferability of the shares (such as a pre-emptive right) or require the prior consent of the share transfer by the company itself. Although it may justify an action on the basis of the legal warranty for latent defects, it is wise to include a specific disposition in the agreement where the transaction is not approved.

For an asset deal, this is a more complex exercise. Generally, a separate schedule shall be annexed to the acquisition agreement which details the assets and liabilities to be transferred and/or the assets and liabilities which are explicitly excluded from the scope of the transaction. Similarly, it should be indicated whether the assets are transferred free of any liens and encumbrances.

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[14] See also point 3.1.1 above.

[15] See also point 3.2.2 above.

3.6 Purchase price

For a purchase price to be valid under Belgian law, it should be determined or, at least, determinable on the basis of objective elements, outside the scope of the parties' will. Therefore, all components of the purchase price should be clearly defined: for example, in case of an earn-out mechanism, the determination procedure should be rigorously described and fixed, in particular in light of the potential future conflicts of interests between the parties following the transfer of ownership. Similarly, the payment conditions (including the terms, conditions, amount, account to be used, who pays and the beneficiary of the payment) should be clearly stated.

In two-step transactions (*i.e.* signing and closing (payment of the purchase price and transfer of ownership) do not coincide in time), it is common practice to include a price adjustment mechanism, following which the purchase price shall be adjusted upwards or downwards based on certain financial data (net debt, cash, etc.) at closing. It is crucial to clearly define the procedure and different components of such mechanism. The exact definitions will usually be subject to tough negotiation.

It is common to include a clause requiring a third party expert to prepare the final calculation in case of continuing disputes between the parties. This is valid provided that the third party expert accepts its assignment and that the agreement contains a sufficient number of objective calculation components enabling the third party to complete its assignment.

Depending on the seller's financial situation and thus, the likelihood that a seller will be able to indemnify the buyer in the event of breach, a buyer can require the seller to agree to certain protection mechanisms by using part of the purchase price to this effect. In practice, this shall only be required when, following the due diligence exercise, certain risks have been identified. Contrary to the French system of '*garantie de garantie*', it is not standard practice.

There are a number of different mechanisms, each with their own advantages and drawbacks:

3.6.1 Escrow account

An escrow account is a special purpose account in which a part of the purchase price will be blocked for a certain period of time, and which is contractually agreed (for example, the time period in which the buyer can claim for breaches on the representations and warranties). It is possible to agree that the amount decreases in time, for example on each anniversary of the transfer.

The escrow account can be held in the name of the seller, the buyer or jointly. More importantly, parties should clearly stipulate that the interest will be for the benefit of the party who is entitled to receive the escrow amount and how the discharge procedure should be handled. This procedure should be detailed in an escrow agreement, which is also executed by the escrow bank, and which will closely follow the provisions of the agreement. In this respect, it is crucial that the escrow agreement explicitly provides that it prevails over any conflicting provisions in the bank's general terms and conditions.

Contrary to the Anglo-Saxon system, where this concept was developed, under Belgian law an escrow may not be enforced against other creditors in case of concurrent rights, when the account holder is in a state of insolvency.

An alternative 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.

3.6.2 Bank guarantee

A bank guarantee entails a similar technique: the seller, however, receives the entire purchase price at closing and a bank provides security for the buyer. In other words, the bank, and not the seller, pays a potential indemnification to the buyer up to a specified maximum amount.

The bank guarantee may be subject to a number of conditions. It is possible that the bank will require the seller to block a certain amount on a bank account with the bank (which, in a way, reduces the greatest advantage of this mechanism). Depending on the agreement, the guarantee can be payable either on first demand, or upon presentation of certain documents by the buyer.

Alternatively, a third party (for example, the seller's parent company) could guarantee the fulfillment of the seller's obligations, including with respect to the representations and warranties and breaches thereof. From a buyer-side perspective, it is advisable to include that the seller and guarantor are jointly and severally liable for these obligations.

3.6.3 Deferred payment

When parties agree to a deferred payment, the buyer shall, only at a later point in time, pay a certain amount of the purchase price. Until that date it has the right to withhold this amount and to off-set this payment against any potential indemnification payments payable by the seller under the acquisition agreement.

The main difference between the above mechanisms is that the buyer withholds this amount, which decreases its risk exposure in case of insolvency of the seller. It should be noted, however, that any set-off of claims is, in principle, not allowed in the event of insolvency, save for certain limited exceptions.

Additionally, it is possible that the buyer does not have sufficient financial resources to pay this amount at closing. Therefore, it is not uncommon for the seller to require the buyer to issue a solid bank guarantee for the deferred payment.

Further, it is possible to combine this deferred payment mechanism with a (subordinated) vendor loan and corresponding security protection. In other words, it corresponds to a financing technique. In this respect, a mechanism shall be agreed upon to secure repayment, which will essentially comprise of a set-off possibility and the granting of pledges.

3.7 Representations and warranties

As stated above, a buyer has only limited protection under Belgian law: in particular for share deals, as Belgian civil law does not cover or provide any protection for the underlying assets of the target company in a share deal. Therefore, acquisition agreements, and SPAs in particular, generally provide tailored and specific contractual representations and warranties. A seller shall issue a set of representations and warranties and explicitly state that these are true, complete, accurate and not misleading. Belgian law offers significant flexibility in this respect, and there are various options available to limit the responsibility of the seller.

3.7.1 General considerations

Typical representations and warranties relate to the existence of the target, the shares, the accounts, real estate and movable assets, litigations, personnel, tax issues, environmental issues, permits and subsidies, intellectual property rights, key contracts, intra-group arrangements, arrangements with shareholders and directors, etc. The specific wording of these clauses is very important as they are usually interpreted restrictively by the courts.

For two-step transactions, it is essential from a buyer-side perspective to require the seller to repeat this statement at the time of closing and thus confirm that the representations and warranties are not only true, complete, accurate and not misleading at the time of signing, but also up to and including closing.

For certain specific transactions, such as management buy-outs, it is not uncommon in Belgium to have a very limited set of representations and warranties. This is due to the fact that the buyer has sufficient and deep knowledge of the target and its business.

For transactions involving subscription to new shares, the representations and warranties shall be given by the company itself. This creates an ambiguous situation, as the buyer, as shareholder of the company, shall contribute to its own indemnification.

3.7.2 Limitations to the representations and warranties

In general, there are two kinds of limitation on the seller's representations and warranties.

(i) The representations and warranties reflect an ideal situation, against which the seller can *disclose* in the course of the negotiations.

The format and scope of these disclosures can vary, resulting in diametrically opposed preferred options for each side of the negotiation table, and are thus subject to tough negotiations.

Firstly, parties can accept to limit disclosure to the publicly available information. Alternatively, parties can agree to disclose the entire data room of due diligence information made available to the potential buyer or the due diligence report prepared by the potential buyer's counsel. This option is less common, as it is limited to those cases where the seller benefits from a very strong negotiation position (for example in an auction process). Thirdly, parties can opt for a separate disclosure or confession letter, in which the seller 'confesses' the specific issues it is aware of.

In any event, the seller is obliged to carefully analyze the target and to provide the buyer with the information essential for making a well-considered decision. Often a seller shall attempt to include an acknowledgement by the buyer that it has undertaken a due diligence exercise. The actual impact of this acknowledgement is limited; it could, however, be used in court/arbitration proceedings. On the other hand, a buyer shall attempt to include an acknowledgement by the seller that the representations and warranties have had a conclusive effect on the buyer's decision to purchase the shares.

Secondly, the representations and warranties play an essential role for the indemnification of the buyer. This provides an incentive for the seller to disclose as many potential risks as possible before closing.

These disclosures can then impact price discussions (and necessitate a price reduction), following which the liability will shift from the seller to the buyer, which can then no longer rely on these to claim damages from the seller. If a reduction is not agreed upon and the buyer refuses to accept any liability, the seller shall remain under the obligation to indemnify the buyer for any damages incurred if one of the representations is not complete, accurate or is misleading. In that case, the disclosure shall be neutralised by inserting a specific indemnity for this risk.

(ii) The representations and warranties can be qualified to '*the best knowledge of the seller*' or a similar expression.

This excludes facts and circumstances which the seller, acting in good faith, could not have known from the scope of the representations and warranties. The scope of this limitation largely depends on the definition of this expression, which will self-evidently be subject to negotiations.

From a seller-side perspective, it is preferable to agree that a representation is made by the seller only on the basis of the facts of which certain clearly identifiable people have actual knowledge on the date of the acquisition agreement.

On the other hand, a buyer shall attempt (i) to set the scope as broad as possible and not only include the knowledge of the seller, but also that of any director, executive or even employee of the target; and, in addition, (ii) to include a reference to reasonable knowledge, implying that the above persons shall be deemed to have knowledge of any fact that a reasonably diligent person 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 gives rise to disputes between parties and an onerous burden of proof.

In Belgium, it is common practice to use specific indemnities for two reasons: first, to deviate from the limitations imposed on the general representations and warranties and secondly, with respect to specific risk, to determine explicitly which risk is to be covered, for which period of time, for which amount, etc.

3.8 Indemnification

Under Belgian law, an explicit indemnification clause is necessary: 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 damages. Unless explicitly stated otherwise in the acquisition agreement, the buyer shall also be entitled to receive indemnification for those misrepresentations it was aware of following due diligence at the time of execution.

Parties have great flexibility to define the notion of damages and to restrict or limit payment of indemnification. The content, procedure and type of indemnification will depend largely on the parties' negotiating positions and on the outcome of due diligence.

In principle, only the buyer can claim damages. However, the parties may agree that the indemnification mechanism will also benefit the company itself, following which the company shall also be entitled to claim damages. This could be useful in light of taxation considerations.

3.8.1 Limitations to the indemnification obligation

The liability of the seller under an acquisition agreement may be subject to the following limitations. Note that these limitations do not apply if the seller commits fraud.

(i) De minimis

- Limitation per individual claim: there will be no warranty for claims below a determined amount; and/or

- Limitation for aggregate of claims: claims can only be made as soon as a certain amount, a 'basket' of claims, has been reached.

(ii) Cap

The warranty will be valid for a total of claims up to a certain amount. Above this amount, the seller will no longer be held liable. Usually, parties will agree upon a certain percentage of the purchase price. It is also possible that the cap varies in time.

(iii) Duration

Acquisition contracts shall provide for a time limit, beyond which all claims will no longer be admissible. In practice, the warranties are usually valid for 18 months up to three years. For certain specific types of liabilities, such as tax and social security, the duration shall generally coincide with the statute of limitations, beyond which the public institutions shall be barred from claiming amounts for events prior to the transaction. With respect to title to shares, parties generally opt for the inclusion of a 30-year period, which corresponds to the civil statute of limitations.

(iv) Seller protections

A range of different seller protections can be included. It is common in Belgian acquisition agreements to include provisions which neutralize any potential effects of taxation. Similarly, parties can include in their agreement details on how to manage third party claims and the defence conduct: it can be stipulated that the seller keeps a certain level of control over third party claims after closing by, for example, requiring the seller's prior written consent before a settlement can be reached. Parties can acknowledge that a seller cannot be held liable for any damages arising from a change of law. Further, parties often include a similar protection for damages which are covered by insurance. A seller can attempt to link certain consequences to the fact that the buyer had knowledge of the actions, facts or events giving rise to the claim.

3.9 Conditions of closing

As stated above, although in theory it is possible to have signing and closing coincide in time, most agreements follow a two-step approach: after signing, a number of CPs are to be fulfilled before the purchase price is paid and the transfer of ownership takes place, which constitutes the closing of the transaction.

If any of the CPs are not fulfilled, and none of the parties exercises its waiver right granted in the agreement, closing will not occur. It is common to provide that in these circumstances, the agreement shall terminate or that one of the parties has the option right to terminate the agreement.

It is recommended to insert a short provision stating that, notwithstanding Article 1179 of the Belgian Civil Code, the CPs do not have retroactive effect. This Article sets out that, in principle, once a CP is fulfilled, the contract and the parties' obligations therein have retroactive effect up to the date of the conclusion. The neutralization of this effect (which is allowed under Belgian law) brings the implication of a completed CP in line with the fact that the sale/purchase (and transfer/payment) will only become effective as from the closing date of the transaction (and not on the date when the obligations were undertaken, *i.e.* the signing date).

Under Belgian law, CPs whose realization entirely depends on the will of the party that benefits from such CP are null. In principle, the law provides that such CP renders the entire agreement invalid. If it is the intention to use such clause as a loophole to avoid having to complete the transaction, note that this may achieve the desired result, but there is case law stating that the court may decide that the invalid CP should not affect the validity of the entire contract.

The text book example of a CP is the obtaining of the necessary competition approvals from the European Commission or any national competition authorities. The period between signing and closing usually corresponds to the time granted to the authorities to adopt a decision or to not object with respect to the transaction. Implementing a transaction before these competition approvals have been obtained, also referred to as '*jumping the gun*', is prohibited and subject to penalties. In principle, such concentration notifications are the responsibility of the buyer, but will necessitate the assistance of the seller as well.

Other common CPs include the obtaining of market conform bank financing and the execution of other transaction-related documents such as management agreements.

For asset transfers, it is usual practice to require the seller to provide a number of certificates:

- a copy of the tax certificate from the tax authorities in accordance with Article 442bis of the Belgian Income Tax Code, stating that no taxes are due by the seller and that the seller is not subject to any tax audit;

- a copy of the VAT certificate from the VAT authorities in accordance with Article 93undecies B of the Belgian VAT Code, issued by the seller's VAT collector's office, stating that no VAT debt is due by the seller;

- a copy of the certificate from the social security authorities in accordance with Article 41quinquies of the Law of 27 June 1969 modifying the Decree Law of 28 December 1944 regarding the social security of employees, issued by the relevant social security authorities (RSZ), stating that no social security contributions are due by the seller;

- a copy of the certificate from the social security authorities in accordance with Article 16ter of the Royal Decree no. 38 of 27 July 1967, issued by the relevant social security authorities (RSVZ), stating that no social security contributions are due by the seller.

These certificates shall be filed by the buyer to avoid joint and several liability with the seller for the above debts and obligations.

Material adverse change ("MAC") clauses are acceptable and valid under Belgian law to the extent the contract as a whole is valid. The clause will be enforceable if the intention of the parties is determinable. It is recommended that the specific circumstances triggering a MAC should be described in as much detail as possible.

It should be noted that since the financial crisis and the lessons learned from it, more and more parties opt to incorporate a MAC clause in their acquisition agreement, whilst such provision was rather exceptional in the past.

3.10 Closing

As stated above, in two-step transactions, following the completion or waiver of all CPs, the transaction closes once the purchase price is paid and the ownership is transferred.

With respect to a share transfer, there are no specific transfer requirements or formalities. The transfer of ownership must be recorded by both parties in the company's share register. Such register does not exclusively provide evidence of ownership, but it is one way (and the most common way) to prove ownership.

It is common to have an extraordinary general meeting of the company on the closing date. At this meeting, the following matters must be discussed and decided upon: (i) acknowledgement of the resignation of the directors, (ii) release of liability of the resigning directors (which has to be confirmed by the annual shareholders' meeting, cfr. 3.11.2 *infra*) and (iii) appointment of the new directors.

3.11 Covenants of the buyer and seller

3.11.1 Pre-closing

For the interim period between signing and closing, parties will generally agree on a standstill clause implying that in this period the seller is only allowed to conduct the company's business in the ordinary course. The seller shall be required to preserve the business as a going concern. Certain actions shall be explicitly prohibited such as dividend declarations, amendments to the articles of association, granting of securities, incurring of indebtedness other than in the ordinary course of business, etc.

Further, the seller shall be required to pay all indebtedness owed to the company in full before the closing.

3.11.2 Post-closing

In many cases, the directors of the target company are also shareholders or at least linked with them. To avoid that a buyer would use the regulations on directors' liability to claim for indemnity outside the acquisition agreement (and thus to possibly circumvent some of the limitations), the acquisition agreement must include a provision with respect to the discharge of the directors' liabilities. This discharge will be granted at first at the occasion of the closing. Subsequently, the shareholders must discharge the directors from their liability at the occasion of the next annual shareholders' meeting. Usually, these directors then resign upon closing. The seller must require the buyer to commit to discharging these directors from executing their mandate until closing.

It is possible to include certain covenants regarding earn-out payments by which the buyer in essence agrees to conduct the business in the same manner as before. In addition, some mechanisms can be put in place to ensure the seller keeps means to monitor certain developments, for example through a board observer, through reporting obligations of the buyer.

It is market practice to incorporate an agreement from the seller not to (a) compete with the company or the business sold; (b) disclose or use confidential information concerning the business acquired; (c) solicit employees, suppliers or customers and (d) otherwise interfere with the business or impair its good will. As stated above, a purchaser in an asset deal shall benefit from the civil law protection.

For a *non-compete restriction* to be valid under Belgian law it should be limited in terms of duration, geographical area and scope of activities. This clause should be tailored to ensure that the buyer can effectively obtain the benefit of the goodwill of the business it has purchased. For example, the duration 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. Unless a severability provision is inserted in the agreement, a court will thus not simply reduce the clause to what is reasonably acceptable and permitted under Belgian law.

In light of the difficulties involved in proving damages resulting from such a breach, it is common practice to foresee a lump sum indemnification in case of breach. Please note that such a clause could be qualified as a penalty clause. A court will then analyze whether the damage corresponds to the actually foreseeable damage at the time of the execution of the contract. Under Belgian law, the court has the power to reduce the contractual penalty if this amount is deemed to be manifestly unjustified. It is possible to include language which would reduce the risk of qualification as a penalty clause by stating that the parties agree that this amount equals the actually foreseeable damage.

In transactions where the seller is an individual, additional language should be included to avoid the 16.5% capital gains tax on a sale of shares belonging to a substantial shareholding in a Belgian company. Acquisition agreements often include the undertaking of the buyer not to sell or otherwise transfer the shares to any company outside the European Union for a twelve-month period as of closing.

3.12 Boiler plate provisions

A number of standard clauses (severability, entire agreement, confidentiality, notices, assignment, costs, governing law, etc.) are included in most agreements. Their importance, however, should not be minimized.

3.12.1 Dispute resolution mechanism

Parties have a number of options concerning this, including mainly resorting to the ordinary courts and to arbitration. The most common arbitral institution referred to for disputes arising out of Belgian acquisition agreements is either Brussels-based CEPANI (*Belgisch centrum voor arbitrage en mediatie – Centre belge d'Arbitrage et Médiation*) or the Paris-based International Chamber of Commerce.

It is essential to carefully craft the clause so as not to give rise itself to a dispute. The choice between the different mechanisms will depend on a number of factors.

(i) Length of the procedure

The average duration of an arbitral CEPANI procedure is between 9 and 10 months. For disputes of limited financial importance (less than EUR 12,500), the duration is slightly less than 4 months. Duration of the procedure refers to the period of time between launching of the procedure for arbitration *(i.e.* appointment of the arbitrators) until the time a final arbitral award is rendered. Note that the preliminary stage with respect to the appointment of the arbitrators can take some time, given the fact that the disputing parties should agree on the appointments. Choosing three arbitrators may reduce problems since each party will appoint one arbitrator of its own choice and those arbitrators will jointly appoint a third arbitrator.

The rapidity of the procedure can, *inter alia*, be explained by the fact that an arbitral award is final and not subject to appeal (except for the possibility to file for a motion to set an award aside before an ordinary court, which is only possible in limited circumstances).

Due to the judicial backlog in Belgium, ordinary court proceedings take much longer before a final judgment is rendered. In addition, a court judgment can be appealed, which further extends the procedure. In Brussels, for example, the waiting period between the request for a court of appeal hearing date and the hearing itself can be up to 2 years.

(ii) Costs

CEPANI's arbitration costs shall include the fees and expenses of the arbitrators as well as the administrative expenses. The costs are determined by a scale based on the amount in dispute. The final award shall mention the arbitration costs and decide which of the parties shall bear them or in what proportion they shall be borne by the parties. The lack of appeal also enables savings to be made on some costs (including lawyers' fees).

Proceedings before ordinary courts are free of charge. However, the losing party will be required to pay the legal costs of the other party. This amount is also calculated based on the amount in dispute, in accordance with the Belgian Judicial Code. Lawyers' costs will, however, typically be higher in view of the complexity of the procedure and its duration.

(iii) Expertise of the arbitrators

In an arbitral procedure, the parties themselves appoint the sole arbitrator (or three arbitrators) which enables the parties to select arbitrators with expertise in the sector. This typically saves on expert costs.

Before ordinary courts, it is possible that the case will be allocated to a judge who does not have any particular expertise in the target's sector (or even with cross-border acquisitions). In such case, experts shall have to be appointed, which decreases the costs and the duration of the process.

(iv) Confidentiality

Contrary to the proceedings in ordinary courts, arbitration is in principle confidential. The hearings are not public and the arbitral award, as opposed to a court judgment which is readily accessible, is only published with the permission of the parties.

(v) International aspect

In international transactions with parties of different jurisdictions, it is customary to elect arbitration instead of proceedings before ordinary courts, so as to restore the balance between the parties (and eliminate the advantage of the party of the selected forum).

Please note that an arbitration clause does not prevent the parties from being able to request interim measures, in cases of urgency, before the ordinary courts in summary proceedings.

4. Acquisition finance

4.1 Financial assistance

Pursuant to Article 629 of the Belgian Companies Code, financial assistance by a company to a third party for the acquisition of its own securities is only permitted under very stringent conditions. Providing funds, granting loans or providing security with a view to the acquisition of its own shares or profit certificates by a third party is subject to the following conditions:

(i) the transaction must take place under the responsibility of the company's board of directors at fair market conditions (*i.e.* taking into account the usual market interest rate and the usual collaterals for similar types of financing as well as the credit standing of the third party);

(ii) the transaction is subject to prior approval by the general meeting of shareholders (with the same quorum and majority requirements as for an amendment to the articles of association);

(iii) the board of directors must draft a special report explaining (a) the reasons for such transaction, (b) the interest of the company to enter into such transaction, (c) the conditions of the transaction, (d) the liquidity and solvency risks involved for the company, and (e) the price at which the shares are sold. In addition, if a director of the parent company or the parent company itself benefits from the transaction, the report of the board of directors must explicitly justify such a decision taking into account the capacity of the beneficiary and the consequences for the assets of the company;

(iv) the assistance must be paid out of and cannot exceed the amount of distributable profits (within the meaning of Article 617 of the Belgian Companies Code); the company must set up a non-distributable reserve on the liabilities' side of its balance sheet equal to the total amount of the financial assistance.

Article 629 of the Belgian Companies Code further provides that where the shares are acquired directly from the assisting company (*i.e.* not from a selling shareholder), either through the sale of its own shares or through a subscription by the beneficiary to a capital increase, the acquisition of the company's shares must occur at a fair price.

The provisions on financial assistance aim to protect the creditors of the Belgian target company by preserving its main assets and the integrity of its corporate capital. It is unanimously agreed that "security" means all forms of *in rem* security, as well as personal security, *i.e.* guarantees.

Any violations of this Article 629 of the Belgian Companies Code are subject to both civil and criminal penalties. A transaction which violates the financial assistance prohibition will be retroactively annulled. Moreover, the directors of the Belgian target company can be held liable for any injury that the Belgian target company or third parties may have suffered. In addition to these civil sanctions, a violation of the financial assistance regulations can also entail criminal penalties.

4.2 Thin cap rule

Interest paid by the buyer on the loan taken out to finance the acquisition of shares is normally tax-deductible if the interest rate of the interest-bearing loans is not higher than the general market interest rate.

However, an anti-thin capitalization rule exists in respect of (i) intra-group loans (referring to the concept of affiliated companies under Art. 11 of the Companies Code) and (ii) interest payment made to entities subject to a substantially favorable tax regime. Under the current regime, interest on these kinds of debts are not tax- deductible if it exceeds the debt-to-equity ratio of 5:1. Equity is defined as the sum of the taxed reserves at the beginning of the taxable period and the paid-in capital at the end of the taxable period. But this rule does not aim at publicly offered bonds and loans granted by banks and certain other financial institutions. In addition, a specific anti-abuse provision disregards back-to-back mechanisms that would be used for circumventing this rule unless it is justified by acceptable economic or financing motives.

4.3 Intra-group guarantees

4.3.1 Financial assistance

As mentioned under point 4.1 above, intra-group guarantees must comply with the rules of financial assistance, as they are considered to fall within the definition of a "security" used in the provision of financial assistance. Aside from financial assistance limitation, two additional requirements determine the validity of an intra-group guarantee: (i) the corporate purpose, and (ii) the corporate interest.

4.3.2 Corporate purpose

An intra-group guarantee or security interest will only be valid if the granting of such a guarantee falls within the corporate purpose of the company as set out in its articles of association. If the articles of association do not mention the granting of (intra-group) guarantees, they should at least permit the company to engage in a broad range of (financial) transactions related to or in line with its corporate purpose.

4.3.3 Corporate interest

As with any other act performed by a Belgian company, a guarantee issued by a Belgian company must be in its corporate interest.

Firstly, this means that the guarantor must derive a (direct or indirect) benefit from such act. Although the general benefit to the group as a whole will be taken into account when assessing whether or not the guarantee is in the company's corporate interest, this alone is not sufficient to justify the granting of the guarantee. There must also be an individual benefit for the guarantor. Downstream guarantees are normally considered as the origin from which a benefit in favour of the guarantor is derived. It is more difficult to demonstrate the benefit in favour of the guarantor in the cases of sidestream or upstream guarantees.

Secondly, this benefit must be reasonably proportionate to the risks assumed by the guarantor, meaning that the amount guaranteed cannot be disproportionate to the benefit derived or the financial means available to the guarantor.

The assessment of the corporate interest itself is essentially a cost/benefit analysis that is influenced by several relevant factors.

In case a court finds that the guarantee was not granted in the guarantor's corporate interest, the granting of the guarantee may be declared null and void. In addition to the annulment, the directors of the guarantor may be held liable for acting against the guarantor's interest.

5. Management and employees

5.1 Participation

Under Belgian law, certain provisions exist to facilitate the acquisition of shares by employees. In general, employees are considered to be persons who have entered into an employment contract with the company, *i.e.* a contract whereby one party (the employee) agrees, upon payment of a remuneration, to work for the other party (the employer), under the authority of the latter. The existence of a subordinate relationship between the employer and the employee is what distinguishes an employment contract from other types of contracts which can determine a working relationship, such as contracts with higher management and directors, who are in principle not subordinate to the authority of the company.

The Belgian Companies Code contains several specific rules in relation to employees. For example, except for the requirement of sufficient distributable profits, the abovementioned conditions in relation to financial assistance[16] do not apply where financial assistance is granted to members of the personnel or to affiliate companies controlled by the personnel. Further, different rules apply for an issuance of shares (even at a discount price) for the benefit of employees, which make it more attractive for companies to issue shares for the benefit of their employees.

[16] See also point 4.1 above.

The Law of 26 March 1999 concerning the Belgian action plan for employment 1998 and various provisions contains a specific tax regime for stock options granted to employees, directors (individuals) and any other individual, by reason of or on the occasion of a professional relationship.

Finally, the Law of 22 May 2001 concerning the participation of employees in the capital and profit of companies made it possible for company employees to participate in their profits through a detailed participation plan. Nevertheless, few employers have put up such a participation plan.

5.2 Information and consultation

In the context of negotiated M&A transactions in Belgium, seller and buyer carry specific information and consultation obligations towards employees (and their representatives).

Generally, most if not all M&A transactions (share or asset deal) would attract an obligation to inform and/or consult with the works council, both for the seller as for the buyer. In the absence of a work council, there is an obligation to at least inform in writing all involved employees prior to the consummation of the transaction.

As to the exact nature, scope, content and timing of these obligations, some controversy has arisen over the past years. The more lenient school of thought maintains its traditional position that the works council should only consulted (ie engage in a dialogue with questions and answers, not resulting in any formal advice or opinion) to the extent that the planned transaction may have an adverse impact on employment and employment conditions. To the extent such impact is not envisaged, the obligation would merely be one of information. The subject matter of the (information/consultation) obligation would be the consequences of the planned transaction, not the transaction itself, and the timing would be situated between signing and closing, but in any event prior to any public announcement. In this line of thought, there is no obligation to involve the works council at any time prior to the actual signing of the agreement. The stricter school of thought (inspired by a recent change in regulation) holds that the works council needs to informed and consulted in any event, on the transaction itself and prior to any agreement being signed by the parties. So, in all relevant respects, the stricter school of thought holds a position which is far more cumbersome for the parties and far less business friendly. This position appears to be very close to French law, with all ensuing difficulties for corporate practice.

Absent any clarification in the relevant regulations, nor case-law nor thorough legal analysis of both positions, it is unclear which one should prevail.

6. Reform Belgian Companies Code

A recent bill regarding the reform of the Belgian Companies Code is expected to be adopted by the end of this year or in the beginning of 2018.

The bill aims to modernize the Belgian Companies Code in order to make Belgium more competitive and attractive.

The most important changes proposed by the bill are the reduction of the number of a company's legal forms, the abolishing of capital requirements for private limited liability companies, and the introduction of the possibility to issue multiple-voting shares.

7. Major corporate tax reform announced

On July 26, 2017, the Belgian Federal government announced a major reform of the Belgian corporate tax system, which will undoubtedly have a significant impact on M&A transactions.

The flagship measures concern a gradual reduction of the corporate income tax rate to 25% in 2020 and the introduction of a tax consolidation in 2020, a measure that has often been announced but never achieved.

Other contemplated changes could significantly impact deal structuring such as abolishment of the current 0.412% capital gains tax on shares that are held longer than 1 year, the effective taxation on tax audit adjustment, etc.

*   *   *   *   *