Belgium
Takeover Guide

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INTRODUCTION

As in many other European jurisdictions, Belgium's takeover legal environment is characterized by a fundamental difference between voluntary takeover bids and mandatory takeover bids.

This distinction reflects the two main methods whereby a bidder can obtain full control over a Belgian public company:

- either through a voluntary public offer launched on the securities not yet owned by the bidder; this method is generally used where there is no controlling shareholder of the target, in a hostile context, or where the bidder is already controlling the target and wants to make it private;

- or through the acquisition of a controlling stake in the target. In this respect the acquisition of a 30% stake in the target company triggers the obligation for the bidder to launch a mandatory takeover on the remaining securities of the target.

Belgian law also regulates squeeze-outs (and sells-out), that can either follow a voluntary or a mandatory takeover bid, or be carried out on a subsequent and independent basis.

The main features of the Belgian legal environment surrounding public takeovers are described below.

In the context of the examination of the Belgian public takeover bids regulation, we examine:

- the main elementary concepts in the framework of public takeover bids;

- the lifecycle of a voluntary takeover bid;

- the legal regime applicable to mandatory takeover bids;

- the rules relating to squeeze-outs following a voluntary or mandatory takeover bid; and

- the defence measures to a hostile offer.

LEGAL FRAMEWORK

Belgium implemented the Thirteenth EU Directive (Directive 2004/25/EC) on Public Takeover Bids (the "Directive") by adopting (i) the 1 April 2007 law on public takeover bids (the "Public Takeovers Law") and (ii) the 27 April 2007 executing Royal Decree on public takeover bids (the "Public Takeovers Royal Decree") (together the "Public Takeovers Legislation")

Therefore, the Belgian regulatory framework at present relating to public takeovers consists of:

- the Public Takeovers Law;

- the Public Takeovers Royal Decree; and

- another specific Royal Decree of 27 April 2007 relating to stand-alone squeeze-outs (which falls outside the field of application of the Directive – see below).

Other regulatory aspects, ranging from general corporate law principles to specific financial legislation technicalities, also have to be taken into account when a bidder contemplates launching a public takeover of a Belgian (listed) company.

The main objectives of the Public Takeovers Legislation are to implement the Directive and to modernize the Belgian takeover procedure.

As of the time of writing this contribution, thirty-one public takeovers governed by this legal regime have taken place on the Brussels market.

In April 2011, the Financial Services and Markets Authority (the "FSMA") succeeded the former Banking, Financial and Insurance Commission (the "CBFA"). Since this succession, the financial services market supervision in Belgium has been organised according to the "Twin Peaks" model. This model has two autonomous supervisors, namely the National Bank of Belgium and the FSMA, and they share control and supervision competences.

The FSMA is primarily responsible for supervising the financial markets and listed companies, authorising and supervising certain categories of financial institutions, overseeing financial intermediaries' compliance by ensuring that they follow codes of conduct, supervising how investment products are marketed to the general public, and supervising takeovers.

SCOPE OF THE BELGIAN TAKEOVER LEGISLATION

A takeover shall be subject to Belgian law if the following conditions apply:

- it must consist of a public offer to acquire securities (public offer); and
- it must be effected in Belgium (jurisdiction).

Public offer

The Public Takeovers Legislation defines broadly what is meant by a public offer: it consists in an offer addressed to holders of securities of a target company and designed to acquire all or part of their securities, the offer being voluntary or mandatory.

It is worth noting that the voluntary takeover legislation applies not only to listed companies but also to public non-listed companies which are subject to a takeover bid of a public nature. However, only listed companies are subject to the rules relating to mandatory bids under the Public Takeovers Legislation.

The offer shall have a public character under Belgian law :

- where there is a communication, on the Belgian territory, in any way whatsoever and using any means whatsoever, which presents sufficient information on the conditions of an offer to allow holders of securities to transfer their securities and which is made by the bidder, or by someone acting in concert with such bidder, or by others acting for their account; or
- where the bidder, or someone acting in concert with such bidder, or others acting for their account, uses publicity measures to announce or recommend an offer.

This definition of the public character of a public offer is in line with the Belgian law of 16 June 2006 on the public offer of investment instruments and the admission to trading of investment instruments on a regulated market (the "Prospectus Law").

Two aspects should be emphasised when reading this definition:

- The public character of an offer, and in particular the concept of a communication presenting sufficient information on the conditions of an offer, has to be assessed on the basis of the actual content of the communication – and not on the basis of its qualification by the bidder; disclaimers whereby the bidder pretends that the communication is not to be considered as a public offer have no impact thereon;

- Publicity measures have to be broadly defined and cover any sort of communication tool, including verbal or written media advertisement.

For voluntary offers only, the legislation does however carve out offers which:

- are made to qualified investors only (e.g. banks, investment firms, insurance companies, collective investment undertakings, etc.);

- are directed, with identical conditions, at less than 150 persons on the Belgian territory (other than qualified investors)[1]; and

- relate to securities whose nominal value reaches at least EUR 100,000[2].

Pursuant to a law of 17 July 2013, the Public Takeovers Law was further modified to carve two additional situations out of the notion of public offer. These are*:*

- where a qualified intermediary established in Belgium communicates to its clients (who entrusted their securities to this intermediary) that a public offer on those entrusted securities is being made outside the territory of Belgium, and that the purpose of this communication to them, as the case may be, is to allow those clients to bring those securities into the offer;

- where the bidder accepts the securities that have been brought into the offer by Belgian residents after the communication mentioned above has been made.

Jurisdiction

In accordance with the Directive, the Belgian Public Takeovers Legislation incorporated the principle that public takeovers are regulated by the supervisor of the jurisdiction in which the target company has its registered office if its shares are admitted to trading on a regulated market in that country.

Voluntary offers

The basic principle is that any voluntary offer conducted on the Belgian territory must be governed by Belgian law. However, the following exceptions apply:

Location and listing abroad – Where the target company has its registered office in another Member State and its principal trading market in another Member State, the bid is no longer governed by Belgian law, but the following are governed by Belgian law:

[1] Pursuant to a law dated 17 July 2013, the previous threshold of 100 persons has been increased to 150 persons.

[2] The threshold of EUR 50,000 has been increased to EUR 100,000 pursuant to the law of 17 July 2013.

- the rules relating to the recognition of prospectuses; and

- the provisions regulating marketing and publicity of the offer.

Belgian target but listing abroad – Where the target company has its registered office in Belgium but the shares are not traded on a Belgian regulated market, the bid is no longer governed by Belgian law, except for:

- the rules relating to the recognition of prospectuses;

- the provisions regulating marketing and publicity of the offer;

- the rules relating to the information on employees; and

- the corporate law aspects of the bid (including aspects relating to potential defence measures that could be adopted by the target's board).

Foreign target but Belgian listing – Where the target company has its registered office in another Member State but its shares are not admitted to trading on a regulated market in such another Member State, and its principal trading market is located in Belgium, the bid is no longer governed by Belgian law, except for:

- the provisions regulating marketing and publicity of the offer;

- the rules relating to the consideration offered; and

- the bid procedure (including rules relating to the content of the prospectus, announcement aspects, lifecycle and duration of the bid).

The principal trading market is the market where the securities of the target are listed, or, in case of multiple listing, the market where the securities were first admitted to trading. In case of simultaneous admission to trading, the target will have to opt for its principal trading market.

Mandatory offers

The same principles apply to mandatory takeovers: the bid shall be governed by Belgian law if it relates to a company having its registered office in Belgium and having its securities (or a part) listed on a Belgian regulated market or a designated multilateral trading facility.

However, certain provisions of the Public Takeovers Law apply in specific circumstances:

Belgian target but listing abroad – Where the target company has its registered office in Belgium, is not admitted to trade on a Belgian regulated market, and its principal trading market is located in another Member State, the bid is no longer governed by Belgian law, except for:

- the rules relating to the recognition of prospectuses;

- the provisions regulating marketing and publicity of the offer;

- the rules relating to the information on employees;

- the corporate law aspects of the bid; and

- aspects relating to the calculation of the threshold to be taken into account for launching a mandatory takeover bid.

Foreign target but Belgian listing – Where the target company has its registered office in another member state but is not admitted to trade on a regulated market in such another Member State, and its principal trading market is located in Belgium, the bid is no longer governed by Belgian law, except for:

- the rules relating to the consideration offered; and
- the bid procedure.

STAKE BUILDING AND TRANSPARENCY NOTIFICATION REQUIREMENTS

Pursuant to the Belgian Law of 2 May 2007 on the disclosure of significant shareholdings in issuers whose securities are admitted to trade on a regulated market and containing various provisions (the "Transparency Law"), all natural or legal persons who possess or acquire, directly or indirectly, rights or other securities in a Belgian listed company must declare to such company and to the FSMA the number of rights or securities directly or indirectly owned – or owned in concert with one or more other persons – when these rights or securities confer voting rights amounting to 5% or more of the total voting rights in the company at the time when the situation giving rise to the declaration occurs. The Transparency Law provides for a possibility to foresee lower thresholds in the articles of association of the company and to set the thresholds at 1, 2, 3, 4 or 7.5%. There are a few exceptions to these reporting requirements set out in the Transparency Law.

All additional rights or securities acquired or transferred under the same conditions as those described above must also be declared to the target company and to the FSMA if, as a result of this operation, the voting rights in the target company attached to the rights or securities attain 5%, 10%, 15% etc, in each case per bracket of 5%, of the aggregate voting rights at the time when the operation giving rise to the declaration is implemented. This declaration is also required in the case of transferring rights or securities if, as a result thereof, the voting rights drop below one of the thresholds mentioned above.

These transparency declarations must be sent to the FSMA and, to the board of directors of the target company, no later than the fourth business day following the day on which the acquisition or transfer took place.

VOLUNTARY TAKEOVER BIDS

The Belgian corporate environment of listed companies is characterized by corporations which are often controlled by a group of (family) shareholders. Therefore, public takeovers are frequently preceded by a private – off-market – acquisition of a block of shares by the bidder. If the acquired stake relates to more than 30% of the voting rights in the target company, a mandatory takeover must be launched by the acquirer on all the remaining shares of the listed company. If the prior acquisition of the block of shares does not relate to securities representing more than 30% of the voting rights in the target, a voluntary takeover will have to be launched by the investor if it wants to gain full control over the target.

Note that prior stake building in a target has to be performed carefully, as transparency disclosure requirements apply (see above).

Lifecycle of a voluntary takeover bid

Informal talks and letter of intent

The first written document which is usually executed by the parties in a takeover context is a confidentiality agreement entered into with the (controlling) shareholder.

A letter of intent then generally follows. Letters of intent are frequently used when the preliminary negotiations have reached a certain stage. Under Belgian law, a letter of intent constitutes a binding commitment if the parties thereto agree on the subject matter of the transaction and on its price. The content 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 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. However, note that Belgian law does not permit a purely potestative condition, that is, a condition depending solely on the will of a party, such as the approval of the acquirer's board of directors. Particular clauses on confidentiality, costs, and applicable law should, nevertheless, be legally binding from the outset, despite the non-binding effect of the other sections of the letter of intent.

Informal notification to the FSMA

At some point after signature of the letter of intent, the bidder should establish informal preliminary contacts with the FSMA. The timing and content of the contacts should be discussed with the target and the controlling shareholder.

The Public Takeovers Royal Decree introduced the "put-up or shut-up" principle to investors and market participants. The objective is to bring clarity and certainty to a market confronted with rumours of a bid. The FSMA therefore has the power to require an investor to declare its intentions with respect to a given potential target. In such case, if the investor does not confirm its intention, it will be prevented from launching a bid on the target company for a period of six months, except in case of material change of the circumstances surrounding the target company. One of the consequences of this provision is that it might hinder "white horses" intervention in a hostile context, as parties usually wish to negotiate certain elementary terms before launching a bid. This provision does not apply to the obligation for the investor to launch a mandatory takeover bid if within the six month period it acquires a 30% stake in the target.

Due diligence

There is no formal requirement in Belgian law which allows or prohibits a potential purchaser from carrying out a due diligence on the business and affairs of a listed company. The final decision on whether or not to authorize a company to carry out a due diligence lies with the target's board of directors. It is however rather unusual to conduct a full legal and financial due diligence prior to the formal notification to the FSMA, except in the case of a private acquisition of a controlling stake followed by a public takeover bid.

Theoretically, the FSMA may order the information contained in the due diligence to be made publicly available during the offer, in order to guarantee that all the shareholders and bidders have access to the same information. On this basis, minority shareholders may request this information to be made publicly available.

Formal notification to the FSMA

The first formal step relating to a voluntary public takeover consists in informing the FSMA. A bidder must notify the regulator of its intention to launch a public takeover bid before it is launched, by providing the FSMA with a takeover notice and a file that contains a draft prospectus, draft press releases (see below), and a special report or a public solicitation to grant proxies. The file will also include an independent expert valuation report in case of a voluntary takeover launched by a controlling shareholder on the securities of the target it does not yet own. The FSMA will then make this notification public on the day following the filing. On the same day, it will also inform the target, the relevant stock exchange, and the bidder itself. For any document that has been modified after the submission of the file, both the marked-up and clean versions of it must be submitted to the FSMA.

The FSMA notification must include the terms and conditions of the bid (*inter alia* the offer price), and evidence that the bidder has complied with the following rules:

- the bidder must make a public takeover bid for all voting securities or securities giving entitlement to voting rights issued by the target which it does not yet hold (the latter includes *inter alia* warrants and convertible bonds);

- all the funds representing the full consideration must be blocked in an account with a financial institution registered in Belgium, or an irrevocable and unconditional credit facility must be available from such an institution; in both cases, the funds must be blocked to guarantee the payment in the framework of the bid or be used solely for such payment. In the case of an exchange offer, the bidder must hold the securities to be offered, be authorized to issue them in a sufficient number within the time prescribed, or have the means to procure their issuance;

- the terms of the bid must allow the bidder under normal circumstances to carry it through to the end;

- the conditions of the offer, and in particular its price, must be such that these allow the bidder to achieve the desired result;

- a credit institution or an investment bank must handle the acceptances of the bid and the payment of the price; and

- if the bid concerns different categories of securities, the consideration offered for each of the categories may only differentiate on the basis of the respective features of each category.

Consideration in a voluntary bid

Under Belgian voluntary takeover rules, the bidder freely sets the price of its offer. It is unanimously accepted that the FSMA has no power in this respect to request a higher price. Certain aspects should however be underlined:

- One of the legal requirements of the offer is that the conditions thereof, and in particular the price, must be such that these allow the bidder to achieve the desired result.

- Voluntary takeovers carried out by a bidder which already controls the target are subject to certain specific rules implying a price assessment. No minimum price is required but the Public Takeovers Legislation requires that three independent directors of the target appoint an independent expert to prepare a report valuing the company.

- If the bidder – or persons acting in concert with such bidder – acquire, or have agreed to acquire, securities at a price higher than the offer price, then such higher price shall apply to the offer. Similarly, during a period of one year as from the end of the offer period, a bidder – or persons acting in concert with such bidder – may not directly or indirectly acquire shares in the target at a price higher than the consideration used during the offer period. If this occurs, the price difference must be offered to all the shareholders who sold their securities in the course of the offer.

Obligations during the offer period

General obligations – Following the public announcement of an offer by the FSMA and throughout the offer period:

- The parties involved in the bid must not publish any documents or make any declarations or communications which contain incorrect or misleading information regarding the bid, a counter-bid or a higher bid. If this rule is not respected, the FSMA may require the information to be rectified.

- Upon request by the FSMA, the parties involved in a bid must transmit to the FSMA any agreement that might have a material impact on the bid; they must release all the relevant clauses of any such agreement.

Disclosure requirements – As from the announcement of the bid, important transaction disclosure requirements apply. The bidder, the target, members of the management organs of the target or of the bidder, persons acting in concert with the target or the bidder and persons holding directly or indirectly at least one percent of the voting rights in the target or in the bidder must notify the FSMA, upon closure of the stock exchange where the securities concerned are listed, of the acquisition, sale or stock lending of securities issued by the target, the bidder or the company whose securities are offered in exchange offer. The FSMA releases these notifications on a daily basis on its website.

Specific obligation of the bidder – If the securities of the target are listed in another Member State, the bidder must release in such Member State, in accordance with applicable legislation, the notification relating to the offer as well as the prospectus.

Withdrawal or modification of the offer by the bidder – During the offer period, provided the prior approval of the FSMA is obtained, the bidder may only modify or withdraw its bid within five days from the notification by the target of:

- a capital increase, except if such capital increase relates to less than 1% of the voting securities in the target and if such undertaking has been subscribed prior to the offer; or

- a decision or operation having a significant impact on the target’s assets, or an undertaking without actual counterpart for the target.

During the offer period, the bidder may only withdraw its offer in case of:

- counter-bid or higher bid;

- the absence of administrative approval;

- if one of the conditions set out in the offer is not fulfilled for reasons beyond the bidder’s control; or

- with the reasoned approval of the FSMA, in exceptional circumstances beyond the bidder’s control which hamper the completion of the bid on objective grounds.

Content of the Prospectus

The prospectus to be prepared by the bidder must comply with the document structure appended to the Public Takeovers Royal Decree. It shall at a minimum contain the conditions of the offer and the information which, having regard to the bidder, the target, the targeted securities and the nature of the consideration in case of exchange offer, are necessary for securities holders to assess the contemplated offer. This information must in principle be presented in a way that is easy for retail investors to analyze and understand.

The prospectus itself is to be released in Belgian newspapers or, more generally, available to the public in selected financial institutions or in an electronic form on the website of the bidder and of the intervening investment bankers (however, if requested by a security holder, a hard copy should be provided).

The prospectus must mention in particular that the respondent to an offer is entitled to withdraw his/her acceptance during the offer period and that any increase of the offer period shall benefit those who have already accepted the offer. It shall also indicate that it has been duly approved by the FSMA, it being understood that this approval does not relate to an assessment of the opportunity or the quality of the offer.

Without entering into too much detail, the following should be noted with respect to the content of the prospectus:

- The Public Takeovers Law imposes the drafting of a summary of the prospectus. This document must summarize – in a non-technical manner – the contemplated transaction and its main features.

- The FSMA may accept that reference is made in the prospectus to another document already published or published simultaneously and approved by the competent authority of the Member State of origin or by the FSMA in accordance with the Prospectus Law or the Directive 2003/71/CE. The summary cannot include information by reference. When information is included by reference, a correspondence table must be provided in the prospectus so that investors can easily locate the relevant information. The offer documentation can therefore be composed either of a unique prospectus or a reference document within the meaning of the Prospectus Law, completed by a note specifically relating to the offer.

- The language to be used in the prospectus is French and Dutch. However, if the bidder can demonstrate that the target usually publishes financial information in only one of the national languages or in another language used in the financial sector, such language may be solely used for drafting the prospectus. The summary must however be drafted in French and Dutch.

- In case of simultaneous offer in different Member States, the bidder may ask the FSMA to recognize a prospectus that was duly approved by the regulator in another Member State.

- The prospectus shall also clearly indicate who is responsible for its content; a declaration whereby the responsible person(s) confirm that, to their knowledge, the data contained therein conform to the reality and do not contain any omissions, must be included in the document.

In order to launch a voluntary takeover, the bidder must provide the FSMA with the following documents:

- offer notice;

- draft prospectus; and

- relevant documents for the examination of the prospectus.

The FSMA has ten business days following receipt of the draft prospectus and relevant documentation to request (if necessary and on reasonable grounds) additional information. The FSMA may also request the bidder to include additional information in the prospectus.

Response document to the prospectus from the target and prospectus approval period

Response document from the target

The board of directors of the target company intervenes twice during the drafting of the prospectus:

Firstly, and after having received the draft prospectus from the FSMA, the board of directors of the target company must indicate within five business days whether it is of the opinion that the prospectus contains gaps or misleading information.

Secondly, and within five business days following receipt of the prospectus approved by the FSMA, the target's board has to submit to the FSMA a draft response document to the prospectus (*mémoire en réponse / memorie van antwoord*) for approval. The response document prepared by the target must contain the following information:

- comments on the prospectus;

- statutory clauses which limit the transfer or the acquisition of shares in the target as well as preference rights granted to certain persons in case of sale of shares; and

- a nuanced opinion on the offer. This opinion relates in particular to the impact of the offer on the interests of the company, including its shareholders, its contractual parties and its personnel; it also details the board's opinion on the strategic plans of the bidder, and any implications for the results of the company as well as the employment and the locations of the target. The opinion shall also mention the number of securities held by the board members and the persons which they represent, together with the position these will take as to the offer.

As with the prospectus, the response document must contain an indication confirming that it has been duly approved by the FSMA and that this approval does not contain any opinion on or quality appraisal of the FSMA on the offer. It shall also clearly indicate who is responsible for its content.

The language rules mentioned above which are applicable to the prospectus also apply to the response document.

The final version of the response document, duly approved by the FSMA, must be released by the target; alternatively, it can be appended to the prospectus prepared by the bidder.

Prospectus approval period

As indicated above, a public takeover bid requires the prior publication of a prospectus. Once approved, the prospectus must be made public and be made available to securities holders at no charge by the receiving financial institution. A notice announcing where the public can obtain the prospectus must be published in one or more newspapers which are nationally or widely distributed in Belgium.

Once the content of the prospectus has been approved, any new element which may influence the decision of the holders of securities must be dealt with in a supplement to the prospectus, which must be approved by the FSMA within seven working days and announced publicly in the same way as the prospectus itself.

When the FSMA has accepted and publicly announced the notification of the takeover bid, it will examine the prospectus. The prospectus may not be published until the FSMA has approved it. It has ten working days from the date when the file is submitted in which to do this (this is generally but not necessarily the date when the contemplated public takeover bid was notified to the FSMA). If the FSMA has not taken a decision by the end of the ten day period, the bidder may urge it to do so. If the FSMA has still not taken a decision during the new ten working day period starting the day after the reminder, the prospectus is considered to have been approved. The FSMA may also explicitly not approve the prospectus, in which case the bidder may challenge this negative decision before the Court of Appeal.

Offer period and acceptance period

Two different periods must be carefully distinguished: the offer period and the acceptance period.

The offer period begins when notice of the takeover bid is published and ends with publication of the results of the offer, the counter-bid or the higher bid.

The acceptance period corresponds to the period within which the securities holders can accept the offer. This period must be a minimum of two and a maximum of ten weeks and starts five working days at the earliest after the approval of the prospectus or after the approval of the response document (if this approval is made before the approval of the prospectus). Under certain circumstances, the acceptance period may be extended.

Counter-bid or higher bid

While a public takeover bid is in progress, another bidder may make a counter-bid for the same securities, or the bidder may make a higher bid. The counter-bid or higher bid must be announced at least two days before the previous bid, counter-bid or higher bid. The price of the higher or counter-bid must be at least 5% higher than the bid price, and each subsequent higher or counter-bid must be at least 5% higher than the previous bid, counter-bid or higher bid. The terms and conditions of a counter-bid or a higher bid may not be more restrictive than the terms and conditions of the bid or the latest counter-bid or higher bid, except for terms and conditions relating to merger clearance. The procedure is similar to that for a takeover bid.

Results of the bid

Within five working days after the end of the acceptance period, the bidder must publicly announce the results of the bid. The Public Takeovers Legislation does not specify how this announcement is to be made. It is generally accepted that it should be announced in the same way as the prospectus. If the bid is conditional on the fulfilment of conditions, the bidder must publicly announce, also within five days after the end of the offer period, whether these conditions are fulfilled, and if not, whether or not it waives those conditions.

If the bid is successful, the bidder pays the price within ten working days from the publication of the results of the bid, or, in the case of an exchange offer, requests the authorization to be listed on the same market as the securities of the target, within one month following the end of the bid procedure.

Reopening of the bid

The bidder must reopen the bid if it decides before the end of the offer period to increase the offer price. The reopened bid must be at a higher price. The bidder must pay the difference to all securities holders who accepted the original offer. The new bid must be a full bid, which means that it must be made for all securities on the market.

If as a result of the bid the bidder holds 90% or more (alone or with the persons acting in concert with the bidder) of the voting securities of the target or if the bidder requests a withdrawal of the securities of the target from the regulated market or the designated multilateral trading facility within a period of three months after the end of the bid, it must reopen the bid under the same conditions.

The reopening of the bid must take place within ten working days after the announcement of the results of the bid or the realisation of the event leading to the reopening. The offer period must be at least five but not more than fifteen working days.

Marketing and publicity of the offer

All announcements relating to a specific public offer and aiming to influence the potential acceptance of the offer, as well as the other documents and opinions relating to a public offer, which are distributed on Belgian territory on the initiative of the bidder and/or the target, must comply with the following requirements:

- they must announce that a prospectus and response document are or will be published and indicate where the securities holders can obtain these documents;
- they cannot contain misleading or incorrect information;
- they cannot contain information incompatible with the information contained in the prospectus and response document.

Any information relating to the offer provided by the bidder or the target must comply with the prospectus and response document.

Information and consultation of employees

As soon as a takeover bid has been disclosed to the public, the board of directors of the target and the bidder shall inform the employees' representatives (or the employees if there are no representatives). Moreover, the employees' representatives shall be informed when the prospectus is made public.

The board of directors of the target company shall inform the employees' representatives of its opinion regarding the bid. The works council of the target can add its view of the bid to the opinion of the board of directors.

The works council of the target may consult the board of directors of the bidder, no later than ten days following the start of the acceptance period, regarding the financial and industrial background of the bidder as well as the repercussions the public offer may have on the employment and activities of the target.

MANDATORY TAKEOVER

Introduction

Unlike voluntary takeover bids, only listed companies are subject to the rules relating to mandatory bids under the Public Takeovers Legislation.

A mandatory bid must be launched if a person, as a result of its own acquisition, or the acquisition by persons acting in concert with it or by persons acting for their account, directly or indirectly, holds more than 30% of the voting securities in a company having its registered office in Belgium and whose securities are (in whole or in part) listed on a regulated market (Belgian regulated market and regulated market of a country located in the European Economic Area), including Alternext and the *Marché Libre* markets, both organised by Euronext Brussels.

The bidder must launch a bid for all voting securities or securities giving a right to such voting securities issued by the target which the bidder does not yet hold at a “fair” price (see below: Consideration).

The threshold of 30% is determined on the basis of the voting securities only, whether they represent capital or not. Potential voting rights such as warrants or bonds are thus not taken into account for calculating the 30% threshold. A controlling interest triggering a mandatory takeover offer is deemed to exist if the acquired shares provide more than 30% of the voting rights in the target. However, in spite of reaching the 30% voting rights threshold, the obligation to launch a mandatory takeover shall not apply if the bidder can prove that his/her shareholding does not confer the control or a dominant influence on the target, which are actually exercised by a third party. In such circumstances the bidder will nonetheless have to launch a mandatory takeover bid if he/she obtains control of the target within three years following the acquisition of the 30% threshold.

From a practical perspective, the Public Takeovers Legislation distinguishes three modes of crossing the 30% threshold:

- Directly and actively through the acquisition of securities in the target;
- Indirectly and actively through the:
  - direct acquisition by one person of the control over a company having a 30% stake in the target;
  - direct acquisition by persons acting in concert of 50% of the voting rights securities of a company having a 30% stake in the target; and
  - acquisition by persons acting in concert of more than 50% of the voting rights securities of a company controlling directly or indirectly the company which owns a 30% stake in the target; and
- Directly and indirectly, but passively, further to the cancellation of some of the target’s securities.

Actions in concert and implications on mandatory takeover bids

An action in concert occurs in the following situations:

- when legal persons or individuals co-operate with the bidder, with the target or with other persons, on the basis of an agreement, formal or tacit, verbal or written, with the aim of obtaining control over the target, avoiding an offer, or maintaining control over the target; or

- when legal persons or individuals have entered into an agreement relating to the concerted exercise of their voting rights in order to have a common long-lasting policy *vis-à-vis* the company.

The first definition covers situations where the parties have entered into an agreement relating to the control over the target. The key aspects to be underlined are the fact that it includes:

- persons acting in concert even if those are not one or several bidder(s); and

- agreements relating to the organisation of control over the company.

The second definition relates to situations where the parties have entered into an agreement with respect to the management of the company in the context of a common policy to be developed on a long-lasting basis. Control over the company shall generally be materialized in the agreement between the parties by a consultation relating to the designation of the board members of the company, as this constitutes the essential influence tool for such control over the company.

As mentioned above, these definitions constitute alternative possibilities. The fact that people act in concert within the meaning of one of those definitions and obtain together, further to an acquisition of securities in the target, more than 30% of the voting rights can trigger a mandatory takeover.

From the perspective of an action in concert, the following situations that could result in the threshold being crossed may lead to a mandatory takeover bid:

- where parties acting in concert cross the 30% threshold further to an acquisition of voting securities by one party to such action in concert, these are jointly liable to launch a public offer relating to all the securities of the target; however, if the 30% threshold is reached by only one of those parties, the obligation to launch an offer lies on this party only;

- where parties enter into an action in concert and hold together more than 30% of the voting rights in the company, without having reached the 30% threshold beforehand, these will be jointly liable to launch a mandatory takeover upon the first acquisition by one of these parties of shares in the company from a party which is not concerned by the action in concert within a three-year time period from the conclusion of the action in concert; if one of the parties to the action in concert crosses the 30% threshold, it shall have to launch the mandatory public offer alone;

- when several persons acting in concert hold more than 30% of the voting rights of a company and when one of these parties transfer – directly or through a market transaction – its securities to a third party which then adheres to the action in concert, the parties to the new action in concert are jointly liable to launch a mandatory takeover.

One of the striking aspects of the mandatory bid aspects of the Public Takeovers Legislation, already strongly stressed by legal scholars and by practitioners, is that the definition of action in concert is broad and relatively vague at this stage. The concept of action in concert will have to be assessed on a case-by-case basis, taking into account all the circumstances and elements of a given shareholding structure situation. In this respect, the FSMA might issue guidance as to the definition of action in concert.

Procedure

- Except as otherwise provided for in the Public Takeovers Royal Decree – in particular the difference that a voluntary takeover, unlike a mandatory takeover, can be conditional, for instance by the acquisition of a certain threshold – the overall procedure of a mandatory takeover bid is similar to the voluntary bid procedure.

- The crossing of the 30% threshold which triggers the obligation to launch a takeover bid must be notified to the FSMA within two business days and the launch of a mandatory takeover bid must be publicly announced within three business days.

- This implies the start of the offer period; the acceptance period (i.e. the time period during which the shareholders will be able to effectively bring their shares to the offer) must commence within forty business days following the crossing of the 30% threshold.

Consideration

The price of such mandatory offer must be equal to the highest of the following two amounts:

- the highest price paid by the bidder – or by a person acting in concert with the bidder – for the securities of the target over a period of twelve months before the announcement of the bid; or

- the weighted average of the trading prices of the securities of the target on the most liquid market of the securities over a period of thirty calendar days before the event triggering the mandatory offer.

The consideration may be in cash or in securities or may consist of a combination of both. However if the consideration does not consist of liquid securities listed on a regulated market or if the bidder, or a person acting in concert with him/her, has acquired securities of the target company against cash payment during the twelve month period prior to the announcement of the bid or during the offer period, there must be a consideration in cash as an alternative.

Exceptions

The obligation to launch a mandatory takeover bid does not apply in the case of an acquisition:

- made in the framework of a voluntary public offer;

- made between affiliated-companies;

- where a third party controls the target or holds a higher shareholding than the shareholding held by the person, who alone or with persons acting in concert, holds 30% of the voting rights securities;

- made in the framework of an increase of capital decided by the general assembly pursuant to Article 633 of the Belgian Companies' Code which specifies that the board of directors must convene a shareholders' meeting within two months from the date when it is established that the net assets of a company have dropped below one-half of the registered capital, as a result of sustained losses. The board of directors must then make a recommendation to either:

    - dissolve the company; or

    - undertake certain actions to restore the company's financial position. It is then for the shareholders' meeting to decide which recommendation to follow;

- made in the framework of an increase of capital with preferential rights decided by the general assembly;

- made in the framework of a merger, as far as the person acquiring, alone or with persons acting in concert, 30% of the voting rights securities of the absorbing company or new company, did not represent the majority votes at the shareholders' meeting of the company to be merged (to the extent its corporate seat is located in Belgium and its voting rights securities are, in whole or in part, listed on a regulated market, including the Alternext and the Marché Libre markets);

- where the threshold is temporarily exceeded by a maximum of 2%, provided the excess is sold within twelve months and those concerned do not exercise their voting powers relating to the excess;

- due to an acquisition as a result of death, a marriage contract or a legal marriage system as well as a division resulting from a succession or dissolution of a marriage;

- made in the framework of a donation inter vivos;

- made by a public foundation subject to the Belgian law of 27 June 1921, following an acquisition free of charge;

- made in the framework of a subscription of securities by a financial intermediary or in the framework of the enforcement of a security, provided the excess is sold within twelve months and those concerned do not exercise their voting powers relating to the excess;

- made by a legal person regarding the issuance, in collaboration with the company, of certificates relating to voting rights securities with the undertaking of the legal person to reserve all product or benefit to the holders of these certificates, as far as these certificates are exchangeable, in any circumstances and without any restrictions, against voting rights securities, and this during a period of three years after their acquisition.

The acquirer has to justify the non-application of the mandatory bid rule to the FSMA.

Rules on disclosure of existing shareholdings

Subject to certain disclosure conditions, there is an exemption from the obligation to initiate a bid where the 30% threshold is exceeded after a limited, temporary downward crossing. Such a downward crossing has to remain limited to 2% and must be terminated within 12 months.

An exemption will expire if the disclosing party no longer exceeds the threshold.

SQUEEZE-OUTS

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

General squeeze-out procedure

Provided certain conditions are satisfied, a natural person or legal entity may acquire all the voting securities of a Belgian public limited liability company if it holds, directly or indirectly, alone or in concert with another person, 95% of the voting securities of that company. Given the limited scope of this contribution, we will not further elaborate this procedure.

Squeeze-out following a (successful) takeover bid

The Public Takeovers Legislation contains two types of squeeze-out procedures following a takeover bid which should be clearly distinguished: follow-on squeeze-out and sell-out.

Follow-on squeeze-out – squeeze-out can be launched by the bidder if it holds, alone or in mutual agreement, further to the bid or a re-opening of the bid, 95% of the share capital conferring voting rights and 95% of the voting securities in the target. In such case, the bidder can re-open the bid and force the remaining minority shareholders to sell their voting rights securities or securities giving entitlement to voting rights under the same conditions applicable to the offer, provided it obtained 90% of the share capital conferring voting rights of the target in the course of the bid. A minimum stake of 5% is thus necessary to frustrate a squeeze-out launched by a bidder further to takeover and to prevent such bidder from acquiring 100% of the shares in the target.

The bidder must reopen the bid within three months as from the closing of the offer period. The offer period must be a minimum of fifteen working days. Securities which are not tendered after completion of this reopened bid are considered as being transferred to the bidder by law. The funds required for the payment of these securities will be kept by the official receiver for the previous owners.

Sell-out – a new feature of the Public Takeovers Legislation is that, if as a result of a public takeover bid or a re-opening, the bidder alone or in mutual agreement, holds 95% of the share capital conferring voting rights and 95% of the voting securities in the target, the securities holders are entitled to sell their securities to the bidder at the same price as the offer price, provided that the bidder obtained 90% of the share capital conferring voting rights of the target in the course of the bid. The securities holders must notify their intention to sell to the bidder within ninety days following the end of the offer period.

DEFENCES TO A HOSTILE OFFER

The issues most often debated in discussions relating to tender offer situations concern the role of the target during a hostile takeover bid and the measures that can be adopted to frustrate such a bid.

Two positions are traditionally opposed:

- The passivity rule – inspired by Anglo-Saxon legal regimes – where the target, and in particular its board, is not authorized to adopt or implement any measure that would frustrate the bid, unless it has been approved by the shareholders. In this situation, the shareholders are considered to be the ultimate decision makers during an offer period; and

- The business judgment rule, which assumes that the board of the target can at any time safeguard the corporate interest of the company and can consequently adopt, under its responsibility, certain measures to protect the target from an offer it would consider as being contrary to its corporate interest.

These discussions were echoed in the adoption of the Directive, and have ultimately led to a compromise position at the European level. Although the passivity system is acknowledged as being the rule, Member States are nonetheless entitled to include a clause in their national implementing legal provisions offering their companies the possibility to "*opt out*" of the passivity regime by allowing their companies not to follow this rule, it being understood that the companies also have the opportunity to "*opt in*" and to voluntary adopt in their articles of association passivity and neutrality provisions.

Belgium has decided not to follow the neutrality and passivity regime, and has consequently "*opted out*" of the rules. This is reflected in the Takeover Law, in particular Article 9, 3° which specifically stipulates that the board of the target company must act in the interest of the company as a whole. Nevertheless, in accordance with the Directive, Belgian companies have the possibility to include these *passivity* and *neutrality* principles in their articles of association (on the basis that the target can decide that these provisions will apply only to the extent the bidder – or the company which controls the bidder – is also subject to the same passivity and neutrality principles).

Passivity of the board

Under Belgian law, and subject to the passivity *opt in* principles described below, a distinction is made between measures which, on the one hand, were adopted prior to a public offer, *in tempore non suspecto*, and which can be fully implemented during the offer period and, on the other hand, new measures which are adopted during an offer period and which, generally (but subject to numerous conditions and restrictions), are to be decided by the shareholders only.

As a general matter, the principal measures that are usually contemplated to frustrate a bid are the following:

- **Capital increases** – Only the shareholders are entitled to increase the share capital of the company; the board of directors is however entitled to increase the share capital in certain circumstances (the so called "authorized capital" procedure). During an offer period the board cannot use the authorized capital procedure and restrict the preferential subscription right of the existing shareholders (in order to dilute one of these and to render the offer less attractive). However, this passivity rule is tempered by the fact that:

  - the board can execute undertakings previously entered into; and

  - the board can use the authorized capital as long as it has been specifically authorized to do so by the shareholders in the last three years, the shares so issued must be entirely paid in and cannot exceed 1/10th of the existing shares, and the subscription price must amount to at least the price of the offer.

- **Acquisition of own shares by the company** – In principle, during an offer period, the board of the target is not allowed to acquire shares in the company in order to frustrate the bid. However, it is entitled to do so in order to avoid the company facing serious and imminent damage; in such case, the board may decide to acquire shares in the target, without specific approval from the shareholders, it being understood that this must be specifically provided for in the articles of association of the company (for a period of three years) and the other general conditions of the acquisition of own shares apply (i.e. in particular maximum 10% of the shares issued by the company).

- **Poison pills** – As rule, the board cannot transfer assets of the company or of its subsidiaries, or incur liabilities, in order to render it less attractive. Passivity principles govern poison pills: during the offer period, only the shareholders of the target are entitled to perform transactions which would significantly alter the assets or liabilities of the company, or incur liabilities without effective compensation. This rule is however tempered by the fact that:

  - the board can finalise operations which are sufficiently advanced prior to the beginning of the offer period; and

  - poison pills can be adopted prior to an offer period and be conditional upon an offer being launched on the company, on the basis that only shareholders can adopt measures which affect the assets of the company or imply a liability or an undertaking where the exercise of these rights depends on a public takeover being launched or a change of control over the company.

Other measures can be adopted such as the issuance of convertible securities or of warrants which are only exercisable in case of public takeover, or the setting up of a pyramidal shareholding structure or of a certification mechanism through a *Stichting Administratie Kantoor* mechanism. Note that other offers can always be examined by the target's board without first obtaining a specific authorization from the shareholders (and is not covered by the passivity opt in regime that can be adopted by companies as described below).

As such, Belgian law does not generally apply the passivity rule, nor does it fully give effect to the business judgment rule. The outcome is a miscellany of legislation resulting from compromising views and positions, implying an erratic and inconsistent application of the passivity rule, subject to important restrictions in each case. The Takeover Law does go some way to counterbalancing this by stating that the FSMA is entitled to control the implementation of frustrating measures during the offer period and that the company is under an obligation to provide information *vis-à-vis* the regulator during the same period and will have to immediately inform the FSMA and the bidder of any frustrating measure being implemented.

In accordance with the Directive, Belgian companies can however *opt in* the passivity rule and adopt specific statutory provisions to that end.

If a Belgian company decides to adopt passivity provisions in its articles of association:

- its board would not be authorized to effect any action which is susceptible to frustrate the bid, unless it has been previously and specifically entitled to do so by the shareholders; and

- decisions which aim to frustrate the bid which were taken prior to the offer period by the board and which have not yet be implemented, or only partially implemented,

must be approved or confirmed by the shareholders. As mentioned above, these provisions can be affected by a reciprocity condition, which implies that their implementation can be subject to the same rules being applied by the bidder.

Neutralization of statutory or contractual undertakings restricting share transfers or the use of voting rights

Clauses restricting the transfer of shares or the use of voting rights are a traditional tool used by companies to frustrate a takeover bid but are nonetheless subject to certain general corporate law principles. Clauses that restrict the transfer of shares, for example, must be limited in time and justified at any time by the corporate interest of the company, and the unavailability of the shares of the company cannot exceed six months in case of application of a clause whereby the other shareholders have a right to consent to any transfer of shares.

These clauses are in principle neutralized during a takeover. Their existence, as well as their impact on the bidder, must however be mentioned in the response document to be prepared by the board of the target on the basis of the prospectus submitted by the bidder.

The second principle enunciated by the Directive – and which, once again, Belgium has decided not to follow – is the regime of the neutralization of statutory or contractual undertakings relating to restrictions on shares or voting rights.

In this respect, neutrality means that:

- restrictions on share transfers documented either in the articles of association of the company or in a shareholders' agreement shall not apply *vis-à-vis* the bidder during the acceptance period or after the bid, if the bidder holds at least 75% of the capital of the target;

- restrictions on voting rights documented either in the articles of association of the company or in a shareholders' agreement shall not apply during a shareholders' meeting convened during the offer period that has on its agenda the adoption of frustrating measures, or after the offer if, further to the offer, the bidder holds at least 75% of the capital of the target; and

- statutory rights whereby a shareholder is entitled to appoint or revoke a director shall not apply during the first shareholders' meeting convened by the bidder after the offer, as long as the bidder holds at least 75% of the capital of the target further to the offer.

Once again, since Belgium has decided not to follow the neutrality regime, the above-mentioned contractual arrangements are fully applicable during an offer period or at a subsequent shareholders' meeting, unless the target has *opted in* and has adopted statutory provisions whereby these undertakings would not be applicable as authorized by the Takeover Law. As mentioned above, these provisions can be affected by a reciprocity condition, which implies that their implementation can be subject to the same rules being applied by the bidder.