

Strelia M&A Series

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M&A – The Road Ahead

As we kick off 2023, this Strelia M&A Series paves the way for you by pointing out some of the key legal and regulatory developments that will shape the M&A landscape this year and beyond.

Tools for Distressed Investors

There would likely be more distressed M&A this year. Belgian reorganization proceedings are debtor in possession proceedings whereby the management remains in the driver seat without loss of control to an insolvency administrator. Restructuring tools such as acquiring shares as part of reorganization proceedings, purchasing distressed debt, swapping debt for equity, or providing a loan for the restructuring process are all attractive business opportunities for investors. To optimize them, investors must consider the forthcoming changes in insolvency legislation that emphasize the role and contribution of an investor as a shareholder of distressed companies. Investors should know how to use these tools to identify a suitable target, to devise an appropriate legal strategy, and to find the best and, if possible, exclusive access to the target.

Private Equity Outlook and Headwinds

Private equity players have good reasons to be opportunistic about deal-making in 2023. They still have large amounts of dry powder to deploy. PE investors who previously remained on the sidelines because of extremely high valuations and tough competition could reconsider their approach. There might be more bilateral opportunities as sellers tend to focus on attaining transaction certainty. Some clients are adjusting deal structures by acquiring minority stakes with meaningful veto and board appointment rights while retaining the potential to acquire a majority through refinancing later. Furthermore, companies might seek to sell off non-core assets in the more challenging economic environment, thereby increasing the number of available targets for PE players. On the other hand, PE should carefully consider the challenges that increased regulatory scrutiny will bring and the limited availability and cost of leveraged financing.

Creative Acquisition Financing

Securing suitable acquisition financing will indeed continue to be a major challenge. Buyers should be more creative when pursuing new deals. For example, they should consider turning to direct lenders, accepting seller financing, executing all-equity deals to swap them for debt once financing terms improve, settling for minority stakes, or allocating risk financing with the sellers.

Taxation of MIPs and Longer Time for Tax Assessments and Investigations

The Belgian Government will roll out an ambitious tax reform this year that will impact how MIPs (among other things) are taxed: Excess return under carried interest schemes would be taxed as professional income. To counter alleged excessive use of stock options, the legislature intends to limit the beneficial tax treatment under the Act of 26 March 1999 to options issued by a company (or parent) with which a professional activity exists. Compensation granted for upfront taxes if options run out of the money would be considered a “certain” taxable advantage. The reform also features a new scheme for shares that have been acquired at a discount. We’ll have to wait and see what the actual new tax rules will look like, but given the uncertainty so far, wording in term sheets and transaction documents should provide for flexibility to achieve the desired outcome.

There will also be longer assessment and investigation time as from tax assessment year 2023. These time extensions will affect due diligence review as well as the indemnification mechanism stipulated in the transaction documentation.

Increased FDI Scrutiny

Bearing in mind the geopolitical context and the EC’s recommendations, the Belgian legislature will likely adopt a new FDI screening mechanism this year. A non-EU investor that ends up obtaining a specified percentage of the voting rights in a Belgian entity would need to notify an inter-federal screening committee (ISC) before the transaction’s completion. Greenfield investments are outside the scope of the FDI screening. The ISC will assess the envisaged investment and start an in-depth screening phase if the control acquired could potentially affect Belgium’s public order, national security or strategic interests. The screening could result in a positive, a conditional, or a negative decision if irreparable impact was identified. Non-EU investors should proactively assess whether their envisaged investments fall within the scope of the screening, check if it can affect Belgian national security interest, and consider the potential impact on timing. The transaction documents should provide appropriate FDI-related CPs.

ESG Influencing M&A

Despite becoming more politicized, ESG is expected to remain a priority, as they affect many M&A aspects and parties throughout the transaction lifecycle. ESG due diligence is making its entry. Risks should be identified including climate risk, greenwashing claims, human rights litigation, all of which depend on the industry, jurisdiction, and nature of the deal. On the target side, management should be prepared to share and explain their ESG framework and standards and make supporting information readily available. At board level for both buyers and targets, ESG concerns may factor into board decisions on whether to support or reject a proposed transaction. We see more tailored ESG-related references in transaction documentation, like representations and warranties, indemnities, and interim covenants.



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