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Private Equity 2021

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1. TRANSACTION ACTIVITY

1.1 M&A Transactions and Deals

Following the sharp decrease in deal activity by the end of the first quarter of 2020 due to the COVID-19 pandemic, the Belgian M&A market recovered well in the second half of 2020, followed by soaring deal activity in the first half of 2021. As in other jurisdictions, the steep V-pattern in the recovery of the M&A market seems to be driven by increased certainty in light of the waning of the pandemic due to the ongoing vaccination efforts, combined with the liquidity that remained in the market and continued low-interest rates.

Deal activity, fundraising and exits by private equity (PE) funds have been high during the first half of 2021 and are expected to remain at this level. Market participants might however exercise a degree of caution in the upcoming months, as the impact of COVID-19 virus variants and the long-term effects of the stimulus measures implemented by the Belgian governments are difficult to foresee.

The following trends for PE M&A transactions have been identified in Belgium during the first half of 2021.

- Market participants seem to be catching up on deals that were put on hold in 2020 and PE players are eager to further diversify their portfolio, with PE funds either identifying opportunities outside their usual core industries or exhibiting moves towards risk deduction due to the uncertainty caused by the pandemic.
- Valuations and multiples for potential target companies, especially for mid-sized and large transactions, remain high, serving as an indicator for the highly competitive environment PE players find themselves in.
- With competition soaring in the PE market, there is an increased appetite for more complex deals and carve-outs as PE players seek to distinguish themselves in their search for interesting targets.
- Warranty and indemnity (W&I) insurance becomes increasingly important in PE transactions, especially in mid-market and large deals, as detailed in **6.10 Other Protections in Acquisition Documentation.**
- As a result of the pandemic, the use of Material Adverse Change clauses in acquisition documentation has become more prevalent, as outlined in item **6.4 Conditionally in Acquisition Documentation.**
- Environmental, social and governance (ESG) standards play an increasingly important role in the conduct and focus of PE players and will continue to do so, especially in light of the entry into force of the Sustainable Finance Disclosure Regulation (**2.1 Impact on Funds and Transactions**) and the general demand for more sustainable, socially conscious behaviour by corporations. Impact funds continue to be launched, including funds aimed at supporting companies which are facing significant challenges due to the pandemic.
- So far, only a limited amount of distressed deals involving PE players has taken place. This may be explained by the government stimulus measures put in place during the pandemic and could change once such measures are being faded out.
- Due to mandatory working-from-home policies and parties being unable to meet in person, the manner in which M&A transactions are conducted changed significantly. This has in certain cases led to a slowdown of the transaction process but has also further accelerated digital change within the Belgian M&A market.
- The Belgian PE market is characterised by a significant amount of wealthy individuals and

entrepreneurs managing their wealth through family offices.

1.2 Market Activity

The PE industry had a strong focus on sectors that were more resilient to the pandemic in the first half of 2021, such as the technology sector (Odoo, Deliverect and Digiteal) and the healthcare and life sciences sectors. Young Belgian tech and biotech companies are doing particularly well, with international PE players continuing to find their way into the Belgian market.

In 2021, the Belgian government introduced a capacity remuneration mechanism (CRM) in order to secure the provision of electricity after the foreseen closure of all nuclear power plants in Belgium, as well as to support the transition into renewable energy. Under the CRM and as part of the energy transition, certain energy players will be invited to participate in an auction by the autumn of 2021 to receive government support for the construction and operation of gas power plants. This shift in Belgian energy policy has also led to increased deal activity within the energy market.

As mentioned above, the number of distressed deals involving PE funds has been limited, with the acquisition of Neckermann by CIM Capital being the most notable transaction.

So far, no Special Purposes Acquisition Companies (SPACs) have been introduced on the Belgian market and attempts thereto have been met with scepticism from the regulator. A potential breakthrough of the SPAC market could however lead to additional competition for PE players active in Belgium.

2. PRIVATE EQUITY DEVELOPMENTS

2.1 Impact on Funds and Transactions

Belgian Companies and Associations Code

The Belgian Companies and Associations Code of 23 March 2019 (BCAC) has had a positive impact on PE transactions. It offers more flexibility to structure the acquisition vehicles, the shareholders' agreements and the management incentive or rollover plans. Among others, there is the possibility to shield the contribution of an investor from participating in the losses of the target company, to grant multiple voting rights to shareholders and to have a sole shareholder or director in a public limited liability company (NV/SA). The new private limited liability company (BV/SRL) offers interesting options to the investors (no minimum capital to contribute, tailor-made share transfer restrictions, share withdrawal, etc) even though the strengthened creditors' protection measures, and in particular the distribution rules, slightly decrease its attractiveness.

Law on Unfair Clauses in B2B Relations

Since 1 December 2020, the Belgian Law of 4 April 2019 amending the Belgian Code of Economic Law regarding unfair clauses between enterprises (the "B2B Law") is applicable to (nearly) all new, renewed or amended B2B agreements. The B2B Law prohibits any contractual clause which creates a significant imbalance between the rights and obligations of the parties and provides lists of clauses which are irrefutably or refutably presumed to be unfair. Despite the laudable intention of the legislator to protect enterprises in a weaker negotiation position against the abuses of dominant enterprises, the unclear provisions of the B2B Law regrettably create legal uncertainty for the market players and with regard to mechanisms commonly used in the PE practice (eg, earn-outs, warranties and

related indemnification mechanism (**6.8 Allocation of Risk**)).

Reinforced EU Regulatory Framework towards a Greener and More Sustainable Economy

Facing the global climate crisis, the EU is building a regulatory framework putting environmental and sustainable goals at the centre of the economic growth. This new framework has already and will increasingly have an impact on how companies must apply new standards to their investments and how to disclose non-financial information accordingly. By way of example, the EU Sustainable Finance Disclosure Regulation 2019/2088 (SFDR), in force since 10 March 2021, requires asset managers and investment advisors to provide information on how sustainability risks are integrated in their investment decision-making processes or advice. Further, market participants and advisers must disclose to investors the way in which sustainability risks are likely to negatively impact their investment.

Upcoming Screening Mechanism for Foreign Direct Investments

In line with the Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments (FDIs) into the Union, a federal bill setting up a Belgian mechanism for the screening of FDIs is currently expected in the second half of 2021. The exact form and scope of the screening mechanism are not yet known but the new legislation is likely to affect future FDIs that would be considered as potentially having a significant impact on national security or public order.

3. REGULATORY FRAMEWORK

3.1 Primary Regulators and Regulatory Issues

Regulatory Restrictions and Primary Regulators

PE players are in principle not curtailed by general regulatory restrictions, supervision or approval with respect to private M&A transactions in Belgium. However, when dealing with certain regulated sectors such as the banking and insurance sector or the energy sector, specific regulatory requirements might apply to the transaction and/or PE-backed buyers.

The primary regulators relevant to PE transactions in Belgium are the Financial Services and Markets Authority (FSMA), the National Bank of Belgium and the Belgian Competition Authority (BCA). Depending on the sector in which the target/portfolio company is active, sector specific regulators also come into play, such as the Commission for the Regulation of Electricity and Gas, the Belgian Institute for Postal Services and Telecommunications, the Federal Agency for the Safety of the Food Chain, etc.

Restrictions on FDIs

On a federal level, a screening mechanism on FDIs is expected to be set up in the second half of 2021 (**2.1 Impact on Funds and Transactions**). On a Flemish regional level, a safeguard mechanism on FDIs already entered into force on 1 January 2019.

The Flemish government can annul, suspend or declare inapplicable any legal act of certain public institutions and authorities under control of the Flemish government which would result in foreign persons acquiring control or decision-making power in that public institution or authority if such legal act would be capable of endangering Flemish strategic interests. The

Flemish government can only apply the mechanism after it has tried to realise the safeguarding of its strategic interests with the consent of the relevant public authority. Up until now, the Flemish government has not issued any decision to annul FDIs on this basis and application of the mechanism is only expected in exceptional circumstances. However, the Flemish Prime Minister has communicated his intention to expand the scope of the safeguard mechanism to private investments as a reaction to the expected federal screening mechanism.

Antitrust

Merger control requirements are set out in Council Regulation (EC) No 139/2004 (the EC Merger Regulation).

Transactions must be notified to the BCA when:

- the undertakings concerned have an aggregate total turnover in Belgium of more than EUR100 million; and
- at least two of the undertakings concerned each achieves a turnover of EUR40 million in Belgium.

Any concentration with an EU dimension must be notified to the European Commission when:

- (a) the combined aggregate worldwide turnover of all undertakings concerned exceeds EUR5 billion, and (b) the aggregate EU-wide turnover of each of at least two parties exceeds EUR250 million (unless all the undertakings concerned achieve more than two thirds of their EU-wide turnover in one and the same member state); or
- (a) the combined aggregate worldwide turnover of all undertakings concerned exceeds EUR2.5 billion, (b) in each of at least three member states, the combined aggregate turnover of all undertakings concerned exceeds EUR100 million, (c) in each of at least three member states included for the purpose of point (b), each of at least two undertakings concerned has an aggregate turnover exceeding EUR25 million, and (d) each of at least two undertakings concerned has an aggregate EU-wide turnover exceeding EUR100 million (unless all the undertakings concerned achieve more than two-thirds of their EU-wide turnover in one and the same member state).

Transactions that trigger merger control requirements in Belgium or the EU might also trigger merger control obligations in other jurisdictions. It is also possible that Belgian and EU merger control regulations still trigger notification requirements even if the transaction has no connection to the EU or Belgium. This often leads to a multi-jurisdictional merger analysis in case of large PE transactions.

4. DUE DILIGENCE

4.1 General Information

The level of due diligence that is conducted in PE M&A transactions in Belgium depends on the nature of the transaction and of the target company.

Legal due diligence exercises are usually conducted on an issues-only basis ("red flag") whereby only material issues above a certain financial threshold are reported. Key areas of focus for legal due diligence in PE transactions in Belgium include, among others, the target's corporate, finance, real estate, employment, pensions, IP/IT matters, as well as a legal review of its commercial agreements and an assessment of pending and threatened litigation. During the exercise, the target's GDPR and regulatory compliance is usually also assessed. More and more attention is being paid to compliance

with policies and laws on anti-bribery, anti-corruption, AML, etc.

Compliance of the target company with ESG matters is becoming an increasing important area of focus, which encompasses a broad range of matters. With the EU regulatory framework towards a greener and more sustainable economy (**2.1 Impact on Funds and Transactions**), including the SFDR and the EU Commission's planned proposal for an ESG due diligence directive, the importance of ESG due diligence will be further expanded.

In transactions with PE sellers, the buyer will usually attach more importance to the due diligence and its outcomes as PE sellers are generally not prepared to provide extensive warranties (**6.9 Warranty Protection**).

The due diligence itself is practically always organised via a virtual data room, with customary Q&A processes. Digitally aided due diligence, eg, through automated extraction and analysis of key contractual provisions, is becoming more common and part of the digital shift in the M&A market.

4.2 Vendor Due Diligence

In transactions for PE sellers, the sellers' advisors commonly prepare a vendor due diligence report in case of auction sales. Auction sales are an established element in large PE transactions but are also becoming increasingly common in the mid-size segment, which also intensified the use of vendor due diligence.

The increased use of vendor due diligence reports is further explained by the fact that it is more common for PE sellers to take out W&I insurance policies for transactions (**6.10 Other Protections in Acquisition Documentation**). In order to assess the risks related to the transaction, W&I insurers require a considerable amount of due diligence prior to providing the buyer or seller with the requested insurance.

Vendor due diligence reports are generally provided by the sellers' advisor(s) to the bidders on a non-reliance basis, with the buyer signing a release letter in this respect. Normally, the ultimate buyer will be given a final copy of the vendor due diligence report(s) at the time it enters into the definitive sale agreement with the seller's advisor(s) usually permitting the buyer to rely on the final report(s) at that stage.

The due diligence reports prepared by the buyer's advisors usually contain clauses providing that solely the buyer may rely on the contents of the report, unless prior written approval of the relevant advisor is granted for other parties to rely upon it.

5. STRUCTURE OF TRANSACTIONS

5.1 Structure of the Acquisition

PE transactions related to Belgian target companies or assets are generally structured by a private sale agreement. In PE transactions, share deals are more common than asset deals. Share transfers under Belgian law only require the agreement between the parties on the price and object, without the involvement of any authority (except in case of merger control or specific regulatory requirements) or notary public. Asset transactions tend to be more complex as specific formalities may apply depending on the asset type and specific successor liability rules relating to taxes and social security contributions come into play.

The terms of acquisition in privately negotiated transactions are more likely to include (more) extensive warranties and clauses providing for specific indemnities than acquisition terms of

(competitive) auction processes (**6.8 Allocation of Risk**).

5.2 Structure of the Buyer

The PE-backed buyer is typically structured via one or more special purpose vehicles (SPV(s)), which are specifically set up for the transaction. The preferred overall acquisition structure and the involvement of an intermediate SPV is primarily driven by tax considerations and the requirements of credit providers. This and the location of the PE fund will typically determine which jurisdiction governs the SPV(s), although in most PE driven transactions the buying SPV tends to be a Belgian company (especially in competitive auctions with (re)investment options for sellers or management, where this is often considered to be a competitive advantage).

Usually, only the acquisition SPV – and not the PE fund itself – will become a party to the acquisition documentation.

5.3 Funding Structure of Private Equity Transactions

PE deals are normally financed with a combination of debt and equity, with the debt financing usually taking the form of traditional secured term loan facilities. There has been an increase in the use of PE funds as sources of debt financing, next to the traditional banking financing. Leveraged finance continues to be an important factor in PE-backed deals.

Equity commitment letters are usually provided by PE funds upon signing the sale agreement in order to give the seller contractual certainty on the (unconditional) availability of the equity funds from the PE-backed buyer. Alternatively or additionally, parent guarantees or debt commitment letters from banks can also be furnished to give the seller comfort on the availability of the funds.

Most PE deals in Belgium are majority owned by the PE fund. It is not typical for PE funds to hold a minority stake, even though there are exceptions (eg, in case of specific investment strategies or of smaller PE funds).

5.4 Multiple Investors

PE transactions are usually not carried out by multiple investors and it is not common (but not unheard of either) for regular M&A deals to involve a consortium of PE sponsors. This is more seen in Series A, B and C (or further) investment rounds in venture capital backed transactions of growth companies.

Co-investors invest alongside the PE fund, depending on the nature and size of the relevant fund. Co-investors, either limited partners or external co-investors, will usually take a passive stake with no governance or controlling rights.

Globally, an increase in co-investments due to the increase in deal sizes is reported, with limited partners also requesting more control in the target companies. Belgium is not currently experiencing this trend but this might change in the future.

6. TERMS OF ACQUISITION DOCUMENTATION

6.1 Types of Consideration Mechanisms

The two predominant consideration mechanisms on the Belgian market are (i) the locked-box mechanism and (ii) the use of completion accounts with a post-completion adjustment. We notice a clear and increasing preference for the former in PE transactions, which is further reinforced by rising transaction values and competitive auctions. This can be explained by the fact that this method of price determination is simpler and avoids difficult discussions after completion. It also grants a quicker and cleaner

exit for PE sellers (immediate availability of the funds without the risk of downward adjustment) and provides clarity to the funds' investors. On the buy-side, it increases the importance of the financial due diligence upstream but reduces the post-completion actions. The application of an equity ticker up to the completion date is more frequent in PE transactions than in corporate transactions.

Last year has also seen a significant increase in the use of deferred payment mechanisms for a portion of the purchase price, in particular earn-outs based on the future performance of target companies. This was boosted by the COVID-19 pandemic, which made it difficult to assess the actual value and profit potential of a company. The deferred portion of the price is generally payable between one and three years after completion. The use of those deferred payment mechanisms remains inversely proportional to the transaction value.

In both PE and corporate transactions, the buyer is customarily protected by seller's warranties on the locked-box or completion accounts (oftentimes even audited). Only in a minority of transactions are additional mechanisms used to protect or provide comfort to the buyer (eg, blocking of part of the purchase price on an escrow account as guarantee for future claims or downward price adjustment) or to the seller (eg, equity or debt commitment letters, bank or parent guarantees proving the availability of the funds (**5.3 Funding Structure of Private Equity Transactions**)).

6.2 Locked-Box Consideration Structures

The increasing use of locked-box mechanisms is inseparable from a buyer protection mechanism to repay any leakage (eg, distribution of any kind, bonus payment, new indebtedness to the seller) by which the seller would have extracted value from the target company between the locked-box date and the completion date.

Interest can be charged on the leakage amount to be paid by the seller to the buyer but this remains exceptional in the Belgian PE practice.

6.3 Dispute Resolution for Consideration Structures

Having a dispute resolution mechanism in place is essential for all consideration structures (not only for locked-box and completion accounts but also in case of deferred payment). The disputes will be mostly limited to the leakage items in case of locked-box, whereas for completion accounts and earn-outs they can go much further and concern all purchase price elements (debt, cash, working capital, capex, KPI's, etc). Under Belgian law, the purchase price must be determined or determinable when signing the sale agreement. Failing that, the whole transaction is null and void.

The dispute resolution will in most cases take the form of the intervention of an independent expert, empowered to resolve the items in dispute and render a decision binding on the parties. This is considered a third-party purchase price determination in accordance with the Belgian Civil Code.

To mitigate the risk of disputes and frame the expert's room for manoeuvre, the parties often specify the (accounting) principles, rules and procedure to be applied when determining the amount of the price adjustment, the leakage or the earn-out.

6.4 Conditionality in Acquisition Documentation

PE transactions include a limited number of conditions as the PE parties want deal certainty. In competitive auctions, clearance from the competent competition authorities and approval/non-

objection from the relevant regulatory authorities (**3.1 Primary Regulators and Regulatory Issues**), when applicable, are commonly the only conditions precedent. Outside such auctions, the acquisition documentation sometimes provides for an external financing condition or the obligation to obtain the consent from the key contracting parties that the buyer wants to keep on board if their contract includes a change of control provision.

The insertion of material adverse change (MAC) clauses is subject to lively discussions between the parties, both as a matter of principle and in its scope. The seller will usually resist a definition of a material adverse event that is not made quantifiable and depends on the general economic or political context rather than on a risk specific to the target company's sector. MAC clauses are currently only accepted in a minority of transactions even though recent developments and circumstances creating uncertainty on the market (COVID-19 pandemic, Brexit, etc) revived their discussion.

When including conditions in their agreements, it is worth noting that the parties are constrained by Belgian legal restrictions on purely discretionary conditions (eg, board approval of a party). Under the B2B Law (**2.1 Impact on Funds and Transactions**), the clauses that aim to create an irrevocable obligation of a party while the performance of the other party's obligations is subject to a condition of which the achievement depends solely on its will are irrefutably deemed to be unfair and therefore prohibited.

6.5 "Hell or High Water" Undertakings

The allocation of risk is an important negotiation point in transactions where a merger clearance is required. A PE buyer will only exceptionally (mainly in competitive auctions) accept a "hell or high water" clause whereby it undertakes to make the divestitures required by the competition authorities to obtain clearance and – if accepted – the buyer will only agree on a softened version of the clause and carefully frame its undertaking.

6.6 Break Fees

Break fees and reverse break fees are exceptional in the Belgian PE practice. This may partially be explained by the fact that, as a matter of principle, in the event of a breach of a contractual obligation by one party, the other party may obtain the forced execution of the non- or mis-performed obligation in court.

If a (reverse) break fee is provided, the court may reduce its amount if it considers it to be manifestly excessive to compensate the damage resulting from the non-performance of the agreement. It may also set aside the break fee clause if it is found to be unfair and unlawful under the B2B Law (**2.1 Impact on Funds and Transactions**) – which is presumed when the amount clearly surpasses the extent of the damage suffered.

6.7 Termination Rights in Acquisition Documentation

A party cannot unilaterally terminate a sale agreement unless that agreement (or the law) expressly allows it. The main circumstances in which termination rights are granted are the non-fulfilment of a condition precedent by the agreed long stop date or non-compliance with a (material) completion obligation by the completion date.

Between the signing and completion of a transaction, termination rights may be granted in case of breach of the seller's warranties (usually conditional upon a certain materiality threshold of the breach), in case of occurrence of a material adverse event, or exceptionally if a confirmatory due diligence highlights issues that would lead to an adverse effect above a certain monetary threshold.

Apart from the termination rights specifically agreed upon, the parties commonly waive their right to annul, rescind or terminate the sale agreement for any reason, except in case of fraud or wilful misconduct.

6.8 Allocation of Risk

In (almost) all M&A transactions, whether or not the seller and/or the buyer is a PE fund, the allocation of risk between the parties primarily takes the form of warranties given by the seller, the breach of which is sanctioned by an obligation of the seller to indemnify the buyer subject to liability limitations (**6.9 Warranty Protection**). The scope of the warranties and the liability limitations depends on the bargaining powers of the parties. In secondary buyouts, it is not uncommon that clean exits are realised with virtually no residual risk for the selling PE fund. Furthermore, in PE-to-PE transactions, the use of W&I insurance is more common than compared to transactions with corporates.

In addition, in the majority of transactions outside a competitive auction context, specific indemnities are included in the acquisition documentation for specific matters that have been identified during the buyer's due diligence, most often for tax, labour, ongoing litigation or environmental issues. The specific indemnities are usually subject to different limitations on liability, less restrictive than those applicable to the warranties.

As at **6.4 Conditionality in Acquisition Documentation**, the allocation of risk between signing and completion by means of MAC clauses is not yet widespread.

Since 1 December 2020, the risk allocation clauses face unfortunate legal uncertainty. The B2B Law (**2.1 Impact on Funds and Transactions**) presumes unfair the clauses that aim to place without compensation the economic risk on one party when that risk is normally borne by the other party. This raises the questions of who should normally bear the (economic) risks that are allocated between the parties in the acquisition documentation (and therefore when is there a shift of those risks) and what type of compensation could justify shifting the risks. Until a repair legislation is adopted, the parties are advised to keep track of their negotiations to refute the presumption.

6.9 Warranty Protection

A PE seller generally provides warranties to the buyer in respect of title to shares, corporate status and activities of the target company and compliance with laws. Again, the scope will depend on the bargaining powers of the parties. Warranties are typically only provided by members of the management team if they are also sellers.

The indemnification obligation of the seller is in most of the Belgian transactions (on an average basis) subject to the following limitations.

- Time limitations, with a general time limitation period of approximately 24 months as of the completion date and customary exceptions for title, tax and labour/social security warranties for which the standard time limitation is closer to the relevant statute of limitations.
- Quantum limitations, in the form of, on the one hand, a de minimis threshold per individual claim (on average 0.1% of the purchase price) and an aggregate minimum threshold for all claims taken together (approximately 0.8% of the purchase price), generally without these thresholds being considered as deductible amounts. On the other hand, a maximum amount of liability (cap) is provided, ranging typically between 10% and 30% of the purchase price; this amount tends to decrease when the transaction value increases and in competitive auctions. A cap on liability is a

condition sine qua non for most PE players, as they will need to be able to defend to deal vis-à-vis their own investors, who are counting on the distribution of the proceeds.
- Disclosures made to the buyer – a full data room disclosure qualifying the indemnification obligation of the seller is largely accepted in the Belgian M&A practice (present in eight out of ten transactions). Approximately half of the deals also includes the disclosure of public information. The use of disclosure letters or schedules, on the other hand, seems to be decreasing. Interestingly, in the absence of any contractual clause, an important decision of the Court of Appeal of Liège (2015) ruled that a buyer could not claim indemnification based on facts that it knew or should have known.

6.10 Other Protections in Acquisition Documentation

Apart from the above-mentioned indemnification mechanisms (**6.8 Allocation of Risk**), the protection granted to the buyer is limited. Having an escrow in place to strengthen the effectiveness of these indemnification mechanisms is not the norm on the Belgian market. This increases the importance for the buyer to have an extensive due diligence carried out by its advisors (**4.1 General Information**) to assess the relevant transactional risks and to take them into account during the negotiations (in particular, the purchase price).

W&I insurance is still the exception in the Belgian practice, probably since small and medium-size transactions form a large part of the market whereas the insurers' appetite usually only kicks in for deals above a certain value (EUR30-40 million). Its use has however unquestionably increased in recent years, especially for larger deals and in case of PE sellers. Insurance companies, brokers and clients are starting to embrace the product. It is practically the only way to ensure a clean exit for the seller while giving some (credible and substantial) form of protection to the buyer. Certain (large) PE funds are known to use a W&I insurance in virtually all of their M&A transactions.

6.11 Commonly Litigated Provisions

As highlighted at **6.3 Dispute Resolution for Consideration Structures**, the purchase price-related disputes are generally resolved by an independent expert.

The other items disputed between the parties are usually submitted to the courts or, mainly for larger transactions, to arbitration (which allows the parties to conduct the proceedings in English and to preserve the confidentiality of their dispute).

At the heart of the disputes are the buyer's claims for indemnification based on alleged breach of the seller's warranties and the amount of damage suffered. Closely associated with this, the seller will frequently attempt to invoke the knowledge that the buyer had of the facts at stake in court to escape its indemnification obligation.

7. TAKEOVERS

7.1 Public-to-Private

Public-to-private takeover offers by traditional PE participants are not common in Belgium. Generally speaking, the public-to-privates carried out in the Belgium market are driven by majority shareholders such as the founders or strategic investors (potentially via family offices) who consider the disclosure requirements related to a listing burdensome and costly in view of their future strategies for the target company, eg, a restructuring or private sale of the company. The current low-interest rates make it easy for market participants to raise funds privately,

which might further persuade majority shareholders to consider public-to-privates.

7.2 Material Shareholding Thresholds

Shareholding disclosure thresholds and filing obligations relating to Belgian listed companies are predominantly regulated by the BCAC and the Law of 2 May 2007 and the Royal Decree of 14 February 2008 on the disclosure of important participations.

The legislative framework subjects the following threshold crossings to mandatory disclosure notifications:

- the direct or indirect acquisition by any (natural or legal) person of reportable participations (see below) in a Belgian listed company representing at least 5% or consecutive tranches of 5% (10%, 15%, 20%, etc) of the total voting rights;
- any direct or indirect transfer of reportable participations that result in a decrease of the voting rights below any reporting threshold;
- in case (natural or legal) persons enter into, modify or terminate an agreement to act in concert when, as a consequence thereof, the percentage of voting rights to which this agreement applies or the percentage of any party to the agreement to act in concert reaches, exceeds or decreases below any reporting threshold (even if no acquisition or transfer of reportable participations occurs); or
- in case of a crossing of any reportable threshold as a result of events amending the distribution of voting rights, even if no acquisition or transfer of reportable participations occurs (eg, in case of dilution as a result of a capital increase).

The Law of 2 May 2007 also allows Belgian listed companies to extend the mandatory notification disclosures to lower or intermediate thresholds, it being understood that only 1%, 3%, 4%, and 7.5% thresholds can be used. The majority of the Belgian listed companies included such alternative thresholds in their articles of association.

The mandatory disclosure obligations are required with respect to the following participations:

- securities with voting rights;
- voting rights or the right to exercise them (eg, on the basis of an agreement providing for the temporary transfer of voting rights against consideration or the right of the pledgee to exercise the voting rights attached to the pledged securities); and
- certain financial instruments that are considered equivalent to securities with voting rights.

In case of a reportable crossing of thresholds, the holder of the relevant participations must notify its shareholding to the FSMA and the target company. The disclosure notification must be filed as soon as possible and, in principle, within four trading days at Euronext Brussels following the date of the circumstance or event giving rise to the notification requirement. The listed company also has to publicly disclose the disclosure notification within three trading days following its receipt.

In case of non-compliance with the mandatory disclosure requirements, criminal, civil and administrative sanctions can be enforced, including the suspension of the voting rights attached to the relevant participations.

During the offer period of a public takeover bid, the (i) bidder, (ii) target company, (iii) directors of the bidder and of the listed company, (iv) persons acting in concert with any of them and (v) persons holding directly or indirectly at least 1% of the securities with voting rights in the target

company, must notify the FSMA of the acquisition or sale of the securities with voting rights or granting access to voting rights issued by the target company or, if applicable, issued by the company whose securities are offered as consideration for the takeover bid. This disclosure notification must take place on the business day on which the relevant transaction occurred.

7.3 Mandatory Offer Thresholds

Any person, as a result of its own acquisition or an acquisition by persons acting in concert with it, directly or indirectly holding more than 30% of the securities with voting rights in a listed company having its registered office in Belgium, is required to launch a mandatory public takeover bid on all securities with voting rights and securities granting access to voting rights in this company.

There are exceptions to this mandatory offer threshold, for example, when the threshold is exceeded within the context of (i) a voluntary takeover bid or (ii) a subscription to new shares as a result of a capital increase with preferential subscription rights for existing shareholders.

7.4 Consideration

Both cash and shares can be used as consideration in public takeover bids but cash considerations are more common.

7.5 Conditions in Takeovers

Public takeover bids can be made subject to certain conditions, especially voluntary takeover bids. Takeover bids can however never be conditional to the bidder obtaining financing, as all required funds for a cash offer must be available either (i) in a blocked bank account or (ii) on the basis of an irrevocable unconditional credit facility provided by a Belgian financial institution (or the Belgian branch of a foreign financial institution).

Voluntary takeover offers are often made subject to a minimum level of acceptance, whereby the bidder has the right to withdraw the bid when the relevant acceptance level is not reached. On the basis of the applicable legal provisions and depending on the amount of voting rights the bidder already holds in the target company, bidders commonly include either 50% +1 of the voting rights as minimum level of acceptance in order to obtain a certain level of control (eg, over the composition of the board of directors) over the target company, or acquisition of 75% of the voting rights in case the bidder wants to obtain control over, among others, amendments to the articles of association, modifying or cancelling preferential subscription rights or restructuring of the target company. If the bidder would want to proceed with a squeeze-out and delisting after a successful takeover bid, a minimum level of acceptance of 95% of the voting rights will be included in the takeover offer (**7.6 Acquiring Less than 100%**).

Voluntary takeover bids can also be made subject to the condition precedent of the absence of MAC, provided that this condition is solely based on financial criteria and is not discretionary. Such financial criteria include a significant negative impact on the net profits of the target company or a significant decrease of the Belgium stock market index, whereby the relevant impact is usually determined in absolute numbers in the offer.

If a takeover bid would fall within the scope of antitrust legislation regarding control on concentrations, the bid can be made subject to obtaining so-called "phase 1" regulatory approvals from the relevant authorities in the European Union (and other jurisdictions, if applicable). Takeover offers cannot be made conditional to satisfactory results in so-called "phase 2" proceedings, nor can they be made subject to the

condition subsequent to reverse the bid in case of negative decision by a competition authority.

If the conditions set in a takeover bid are not fulfilled and the bidder consequently has the right to withdraw the offer, the withdrawal does not occur automatically; the bidder should provide an explicit notification to the FSMA of its withdrawal decision.

7.6 Acquiring Less than 100%

Takeover offers must always be extended to all outstanding securities with voting rights of the target company, meaning that a bidder should always try to obtain 100% of the ownership of a target company. Bidders may however not always succeed in obtaining it, for example, in case the amount of securities with voting rights acquired at the end of the (reopened) offer does not meet the thresholds for a squeeze-out procedure.

If the bidder does not obtain 100% of the ownership of the target company, it could try and negotiate additional governance rights with other reference shareholder(s), such as the right to propose one or more persons as directors of the target company. Considering the specific framework of listed companies, it would be very difficult if not impossible for the bidder to obtain extensive protective rights such as veto rights or reserved matters.

In a squeeze out following a takeover bid or the reopening of one, a bidder may require all other holders of securities with voting rights or securities giving access to voting rights to transfer their securities to it at the offer price, on the following two cumulative conditions:

- the bidder must have obtained 95% of the securities with voting rights of the target company after the offer; and
- the obtained securities must represent 90% of the share capital carrying voting rights that was subject to the offer, meaning that securities acquired by the bidder outside of the takeover bid are excluded from this threshold.

In case the above-mentioned thresholds are met and the bidder wants to proceed with the squeeze-out, it has to reopen the offer within three months after the expiry of the acceptance period of the offer, with the reopening of the offer being subject to the same conditions as the initial offer. The acceptance period of the reopened offer in case of a squeeze-out should be at least 15 business days.

7.7 Irrevocable Commitments

In accordance with the applicable legislation, a holder of securities, who has accepted to transfer its securities in the takeover offer, can withdraw such acceptance at all times during the acceptance period. This means that the bidder should always exercise caution in case it would enter into an agreement with a (reference) shareholder whereby such (reference) shareholder irrevocably commits to accepting the takeover offer, as the validity of such irrevocable commitments is unclear under the current legal framework.

However, it can happen that one or more reference shareholders of a listed company agree to sell their relevant shares to another (reference) shareholder prior to the start of any takeover offer. Such commitments could trigger the relevant thresholds for a mandatory takeover offer, thereby leading to the start of a takeover bid. As these commitments are made prior to and not within the context of a takeover bid, the relevant shareholder(s) would not be allowed to withdraw their agreement during the course of the takeover offer.

7.8 Hostile Takeover Offers

Hostile takeover offers are permitted in Belgium but only occur exceptionally.

8. MANAGEMENT INCENTIVES

8.1 Equity Incentivisation and Ownership

In more than half of the Belgian M&A transactions, the (selling) key management team remains active in the target company post-completion. This trend is even more important for PE deals as the buyer will usually be dependent on the existing management team to run the business, at least in a first stage. This will typically result in a (re)investment by the management team on the completion date.

The level of equity ownership held by the management team after its (re)investment is highly variable. In our experience, in the first half of 2021, this level was generally below 10-20% of the equity but ultimately depends on the size of the transaction and the importance of management in the operations and success of the company. The key threshold to be negotiated between the parties is the holding of 25% +1 votes as this grants by law a blocking minority at the general meeting of shareholders for some important decisions.

8.2 Management Participation

To facilitate the relationship between the shareholders at the level of the target company post-completion, when there is a large number of reinvesting managers, a management pooling vehicle is generally put in place and becomes shareholder alongside the buyer.

A Dutch STAK (*stichting administratiekantoor*) is quite popular to pool the securities subscribed by the managers. The STAK becomes the legal owner of the securities in the target company and issues depositary receipts to the managers allowing them to benefit from the economic rights attached to the securities (including the payment of dividends). The voting rights are exercised by the STAK at the target company's general meeting.

The participation of the management team can take different forms. The BCAC is flexible in terms of types of securities and rights attached to them. The managers will commonly subscribe to shares of a certain class or profit certificates in NV/SA (the possibility to issue profit certificates in a BV/SRL is debated (mostly rejected) among legal scholars). Profit certificates are instruments issued in return for contributions that do not form part of the share capital and are (even) more flexible than shares in terms of rights attached thereto. Unless otherwise stated in the articles of association, they do not confer voting or information rights. Their economic rights can be freely determined. The advantage of the profit certificates over the creation of classes of shares is that they escape the application of certain mandatory rules relating to shares, in particular in case of modifications of the rights attached to the share classes or disproportionate issuance of shares.

The managers can also be issued subscription rights (former "warrants") or stock options exercisable after a certain period of time as an incentive. These instruments are more often used in a management or long-term incentive plan rather than as a form of co-investment structure.

8.3 Vesting/Leaver Provisions

The shareholders' agreements typically contain a call option to buy back the shares of a manager shareholder when he/she leaves the target company. The exercise price of the call option will depend on the reason for the manager's departure, namely if he/she is considered to be

a good leaver (eg, in case of retirement) or a bad leaver (eg, in case of resignation without cause or dismissal for serious reasons); in the latter case, a discount will be applied to the value of his/her shares.

The securities can be immediately granted to the managers but subject to a lock-up period or can vest over time (depending on the established exit strategy, often around four to five years in a linear vesting scheme with a one-year cliff, the vesting being – as the case may be – accelerated in case of IPO or change of control over the target company) provided that the managers remain active in the company. In the context of a PE investment, the vesting is sometimes also linked to the exit of the investor in order to keep the management team fully incentivised until the investor realises its exit with the assistance of the managers.

8.4 Restrictions on Manager Shareholders

In a clear majority of transactions, the manager shareholders accept non-compete and non-solicitation covenants. The inclusion of such restrictive covenants slightly decreases as the deal value increases. The non-disparagement is rather covered by a general confidentiality clause.

The common duration of a non-compete provision is three years in case of transfer of know-how and two years in the other cases. When a manager is a minority non-controlling shareholder, his/her non-compete obligation is preferably linked to his/her capacity as manager and not as shareholder and included in his/her management contract rather than (only) in the shareholders' agreement. Indeed, a non-compete obligation of a minority non-controlling shareholder will generally not be considered as necessary for the transaction and a court could therefore consider it unenforceable.

Except for largest deals, the failure to comply with these restrictive covenants is generally sanctioned by liquidated damages, the amount of which is agreed in advance. The court may reduce the amount of the liquidated damages if it considers it to be manifestly excessive or set aside the clause if it deems it unfair and unlawful. Furthermore, pursuant to the case law of the Belgian Court of Cassation, if the (temporal, geographical) scope of the non-compete obligation itself is deemed to be excessive, the court can reduce the scope to its fair part when the agreement contains a severability clause.

8.5 Minority Protection for Manager Shareholders

The manager shareholders benefit from a certain protection offered by law, such as a preferential subscription right in case of issuance of new shares to be subscribed in cash, reinforced majorities (which can de facto become vetoes of the managers when they hold the majority of the shares of a certain class) and reporting obligations in case of modification of the rights attached to the different share classes or veto rights for important decisions if the managers have a certain percentage of voting rights.

The shareholders' agreement may contractually reinforce this protection, for example, by giving the managers the possibility to participate in or veto transactions that may impact their rights or trigger their dilution. The issuance of anti-dilution instruments is possible but not market practice in these scenarios (eg, anti-dilution subscription rights allowing managers to maintain their equity level for a certain period of time, as the case may be without prejudice to certain permitted dilution events such as the implementation of a stock option plan).

The management team rarely has the right to control or influence the exit of the PE fund but its key members are sometimes entitled to be

informed or consulted in the preparation of an exit or other strategic decisions.

9. PORTFOLIO COMPANY OVERSIGHT

9.1 Shareholder Control

PE shareholders will usually try to ensure shareholder control over their portfolio companies and will negotiate different levels of rights to attain this, depending on the strategy and position of the PE fund within its portfolio company(ies).

The least far-reaching manner for PE players to obtain a certain level of control over portfolio companies would be to negotiate information rights. This grants the shareholder the right to be provided with specific (financial) information on the company at agreed intervals.

It is however more typical for PE shareholders to achieve more far-reaching shareholder control through board representation and/or veto rights over key decisions to be taken by the portfolio companies or their subsidiaries (so-called "reserved matters"). In case the PE investor does not have representation at the level of the company itself but, for example, only at the level of the acquisition SPV, it will usually negotiate so-called "waterfall provisions". This requires the board of directors of the portfolio companies and its subsidiaries to escalate all decisions on reserved matters to the board of directors of the acquisition SPV.

The reserved matters that are negotiated for PE shareholders typically include, among others, decisions on restructuring, asset transfers, partnerships or joint ventures, changes in the nature of the business, capital commitments or investment decisions (usually above a certain threshold), financing/indebtedness, material agreements and exit.

The provisions on shareholder control will be included in a shareholders' agreement or investment agreement, and they can also be reflected in the company's articles of association.

9.2 Shareholder Liability

A PE fund majority shareholder can in principle not be held liable for the actions of its limited liability portfolio company under Belgian law. In accordance with the principle of limited liability, shareholders of such companies are only liable up until the extent of their contributions to the equity of the company. However, in exceptional circumstances, the principle of separate corporate personality may be challenged and potentially lead to a so-called "piercing of the corporate veil".

Liability of Incorporating Shareholders

The incorporating shareholders could be held liable, without limitation, for the debts of the company in case of certain irregularities at the time of incorporation of the company or in case the company is declared bankrupt within three years following its incorporation, if a court establishes that the contributions made at the time of incorporation were manifestly insufficient to ensure the company's activities for at least two years.

Liability of De Facto Directors

Shareholders who are not formally appointed as director(s) in the relevant company could nonetheless be considered as so-called de facto directors in case they are actively involved in the management of the company, taking key decisions on matters effectively substituting the board of directors. In this case, the shareholder will be subject to the rules applicable to directors of Belgian companies, including director's liability. This risk weighs, for example, on the acquisition SPV that resolves on extensive reserved matters of its subsidiaries.

Exceptional Shareholder Liability in Case of Bankruptcy

Within the framework of insolvency, courts can exceptionally hold the shareholders or other group companies liable for all debts of the company if it can be established that the shareholders or a group company (usually a parent company) have abused a subsidiary's legal personality.

This highly exceptional instance of corporate veil piercing is very fact specific and will be determined on a case-by-case basis.

9.3 Shareholder Compliance Policy

PE investors' focus on compliance of portfolio companies during the due diligence phase is generally extended to the portfolio companies' conduct and policies after completion. PE investors usually require the portfolio company to implement the key recommendations that were made in the course of the due diligence. With the increased prevalence of ESG, compliance is increasingly becoming an important area of focus for investors.

10. EXITS

10.1 Types of Exit

PE exits have been flourishing during the first half of the year. Private sales are the most common forms of exits that have been seen so far in 2021. These are frequently secondary buyouts and often organised as competitive auctions. It is also worth noting that the IPO market seems to be gaining traction again after a hard couple of years with almost no activity.

IPO and private sale process running concurrently ("dual track") are rare.

The typical holding period is five years on average before an exit for PE transactions. The PE sellers seldomly reinvest after exit, contrary to the management team that often reinvests after selling alongside the new PE investor.

10.2 Drag Rights

Drag rights are included in most shareholders' agreements, allowing the (controlling) shareholder to obtain more attractive exit conditions as it is able to offer all the shares in the target company to the buyer.

They are generally exercisable when a controlling shareholder receives (and wishes to accept) an offer to acquire all shares in the target company and allow this shareholder to compel the other shareholders (whether institutional co-investors or others) to concomitantly sell their shares to the buyer.

Drag rights clauses are usually drafted in such a way as to avoid the need for active co-operation from the dragged shareholders (eg, by including a power of attorney to the board of directors of the target company to register the transfer of the shares in the share register upon exercise of the drag rights). However, in a PE context, all shareholders often co-operate in an exit so that the drag rights only need to be exercised in exceptional circumstances.

10.3 Tag Rights

When a controlling shareholder sells its entire participation to a third party, the shareholders' agreements often include tag rights in favour of the other shareholders, allowing them to sell their shares on the same terms (including price) as the controlling shareholder. Again, tag rights are granted regardless of the type of shareholder, including in case of institutional co-investors.

Some shareholders' agreements also provide for proportional or prorated tag rights allowing the other shareholders to sell the same percentage of shares as the controlling shareholder, even

if the controlling shareholder retains part of its shares. A minimum threshold of shares sold by the controlling shareholder is usually set for such proportional/prorated tag rights to be exercised, either in one transaction or in several transactions over a certain period. If the acquiring third party refuses to extend its offer to the shares of the other shareholders, the proportional/prorated tag right is usually accompanied by a put option allowing the other shareholders to sell their shares to the controlling shareholder on the same terms as those offered by the third party.

10.4 IPO

On an exit by way of IPO, the PE seller usually sells part of its participation and enters into a lock-up agreement with the target company. Lock-up arrangements customarily range between three months and 12 months.

It is possible for the PE seller to enter into a relationship agreement with the target company, but this is not market practice. The 2020 Belgian Code on Corporate Governance now recommends to the board of directors of listed target companies to assess whether it is appropriate to enter into relationship agreements.

Loyens & Loeff is a leading firm and the natural choice for a legal and tax partner in the Netherlands, Belgium, Luxembourg and Switzerland. Thanks to its full-service practice, specific sector experience and thorough understanding of the market, its advisers fully comprehend the clients' needs. Its private equity experts ensure investment success through personalised tax and legal advice to investors and entrepreneurs who have access to a growing number of investment opportunities in Europe and abroad. At the same time, they offer pragmatic and intelligent solutions to the increasing regulation of private equity investments.

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