The Real Estate M&A and Private Equity Review

Seventh Edition

Editors
Adam Emmerich and Robin Panovka

The LawReviews

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PREFACE

For real estate investment trusts (REITs), the covid-19 pandemic was a tale of two cities, of boom and bust, with the seismic changes in the world leading to strength in some sectors of commercial real estate and huge market dislocations and disruptions in others. In general, companies with assets that service the digital economy – cell towers, logistics and industrial properties, and data centres – benefited from the pandemic's acceleration of the digital economy. However, several traditional sectors confronted difficult issues involving liquidity, rent collection, dividend payouts, disclosure and guidance, as well as having to navigate the uncertain and sometimes shifting guidance from regulatory authorities regarding the timeline of reopening. While the distribution of the vaccine to many individuals in the United States and certain other countries has blunted the pandemic in some areas, inequitable distribution has yielded an uneven economic recovery internationally. Still, even with hopefully the worst of the pandemic behind us, we are unlikely to see a return to a pre-pandemic world, as the pandemic has changed the way that we interact with real estate, and compressed a decade or more of digitisation into a matter of months, with the new normal involving fewer, or at least different, in-person work or shopping. While vaccine rollouts have enabled many regions to fully reopen stores, offices and restaurants, we still have longer to wait to find out how many of the pandemic shifts (work from home and hybrid work arrangements, massive growth in online retail) are permanent, and which will fade with time. The eventual new normal that emerges will likely have rippling effects throughout the REIT industry for years to come. As always, strategic planning and risk management will be critical to adjust to changing times. Covid-19 aside, 2022 has brought some storm clouds, with war in Europe, rising interest rates and inflation running hot. While opportunities within real estate are unlikely to dry up, there may be increased volatility in the near term, and the complex macroeconomic backdrop will likely have disparate impacts on different subsectors and different geographies within the industry.

Stepping back from recent global events and market dislocations, publicly traded real estate companies and REITs, with help from real estate private equity, have steadily transformed the global real estate markets over the past 25 years. Their principal innovation, and 'secret sauce', has been liquid real estate. Unlike traditional property ownership, equity in publicly traded real estate vehicles is highly liquid, and can be bought and sold in large volumes, literally in minutes, on numerous global exchanges. Indeed, during the pandemic, REITs issued more than US$10 billion in public equity, taking advantage of the massive amounts of liquidity washing over financial markets beginning in the spring of 2020. In 2021, public REITs raised approximately US$27 billion in follow-on equity offerings.

Publicly traded real estate vehicles have an aggregate market capitalisation of over US$1.6 trillion globally, including over US$1 trillion in the United States and approximately

US$200 to US$280 billion in each of Europe and Asia. As public REITs and other vehicles have aggregated these properties and grown in scale and sophistication, so too have real estate-focused private equity funds, playing an important role catalysing hundreds of billions of dollars of REIT and real estate merger and acquisition (M&A) transactions and initial public offerings.

However, despite that massive growth and despite the pandemic, potential growth is far larger both in long-standing REIT markets and in newer REIT jurisdictions, where the trend is more nascent. With increasing development and urbanisation, the world is producing more and more institutional-grade properties, and a growing percentage of this expanding pool – an estimated US$5 trillion and counting – will inevitably seek the advantages of liquidity by migrating to the publicly traded markets. The growth is expected to be both local and cross-border, with nearly 40 countries already boasting REIT regimes. Despite this potential for growth, it remains to be seen whether Russia's invasion of Ukraine and the associated energy and supply chain disruptions will spur a wider backlash against globalisation and cross-border investment.

REITs and other publicly traded vehicles for liquid real estate have grown because they are often a superior vehicle for stabilised assets. Greater liquidity and transparency – and often superior governance – are attractive to investors, resulting in a lower cost of capital and superior access to vast amounts and varieties of capital in the public markets. In addition to cheaper capital, REITs and other public vehicles benefit from efficiencies of scale, sophisticated management and efficient deal structures, to name just a few advantages. With these advantages, the global march of real estate to the public markets seems unstoppable.

This publication is a multinational guide for understanding and navigating the increasingly complex and dynamic world of liquid real estate and the transactions that mostly produce it. The sea change in the markets, sometimes called the 'REIT revolution', has meant that major real estate transactions have migrated from 'Main Street' to 'Wall Street'. They now often take the form of mergers, acquisitions, takeovers, spin-offs and other corporate transactions conducted in the public markets for both equity and debt. They have grown exponentially in complexity and sophistication, and increasingly represent cross-border multinational transactions fuelled by the now-global real estate capital markets and M&A deal professionals. And they are often intermediated by international investment banks rather than local brokers, and financed with unsecured bonds or commercial mortgage-backed securities. In a fair number of cases, they are catalysed by private equity firms or similar actors, sometimes building portfolios to be taken public or sold to public real estate companies, and sometimes through buyouts of public real estate companies for repositioning or sale.

To create this publication, we have invited leading practitioners from around the globe to offer practical insights into what is going on around the conference tables and in the markets in their jurisdiction, with an eye to cross-border trends and transactions. As will quickly become evident, the process of liquefying real estate and transactions involving public real estate companies requires a melding of the legal principles, deal structures, cultures and financial models of traditional real estate, public company M&A and private equity. None of this, of course, happens in a vacuum, and transactions often require expertise in tax, corporate and real estate law, not to mention securities laws and global capital markets. Each of our distinguished authors touches on these disciplines.

We hope this compilation of insight from our remarkable multinational authors produces clarity and transparency in this exciting world of liquid real estate and helps to further fuel the growth of the sector.

Adam Emmerich and Robin Panovka
Wachtell, Lipton, Rosen & Katz
New York
July 2022

Chapter 3

BELGIUM

Ariane Brohez and Vanessa Marquette[1]

I OVERVIEW OF THE MARKET

The main highlights of the Belgian capital market for the period from 2019 to 2021 are as follows:

a Investment volume: €5.1 billion (2019); €5.8 billion (2020); €3.7 billion (2021). The year 2020 is still the record year to date, boosted by the sale of the Finance Tower.

b In 2021, this investment volume was dominated by core investments (75 per cent), followed by value-added (23 per cent) and opportunistic (2 per cent) investments.

c In terms of asset classes, the investment volume for 2021 was divided as follows: 51 per cent for offices, 20 per cent for residential (spread between care, multifamily and student housing), 14 per cent for industrial, 13 per cent for retail and 2 per cent for hotel and leisure. In terms of location, Brussels takes the lion's share for offices (43 per cent of the total investment volume).

d In terms of investment volume and looking at the investor side, 83 per cent of the buyers in 2021 were institutional investors, which demonstrates an even greater professionalisation of the market. Although still dominated by a diverse group of Belgian players, the market in 2021 saw a comeback of German investors (being the second-most prolific group with a share in investment volume of 18.5 per cent) and the stable involvement of French investors (being the third-most prolific group with a share in investment volume of 12 per cent). Compared to previous years, Asian investors (especially from South Korea) were absent from the market in 2021, presumably due to the covid-19 pandemic and the related travel bans, but are expected to return in 2022.

The Belgian capital market is dominated by (local and foreign) institutional investors, being REITs or private equity real estate (PERE) funds. They are also the most involved in large-ticket transactions when it comes to offices. One specific asset class deserves to be mentioned: logistics. For a long time, Belgian REITs took the lion's share on this market, but 2021 saw a trend emerging of the teaming up of local developers and PERE funds to guarantee first deal certainty on their pipelines and their continued involvement in their relationship with their customers; and to grant second access to a pipeline for pre-agreed terms outside an auction process.

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II RECENT MARKET ACTIVITY

i M&A transactions

2020 notably saw the IPO of Inclusio. At the end of 2020, the real estate portfolio, made up of 58 buildings (703 housing units, three social infrastructure buildings, 13 commercial units and two office buildings) and spread over 69,287 metres squared, amounted, in terms of market value, to €129.2 million. Inclusio is the first Belgian REIT specialised in social housing.

In 2021, the Belgian REIT Leasinvest merged with developer Extensa to become a mixed real estate investor and developer, acting under the new name Nextensa. The merger consisted in the contribution of Extensa's shares to Leasinvest's capital in exchange for new issued shares, followed by the admission to trading of these new issued shares. The total value of the investment portfolio is approximately €1.4 billion, distributed among Luxembourg (45 per cent), Belgium (42 per cent) and Austria (13 per cent). The total value of the development portfolio is approximately €0.3 billion. This merger was not a public-to-private transaction since Nextensa remains stock-listed, but it abandoned its REIT status in Belgium.

On 25 February 2022, the Belgian REIT Befimmo announced a voluntary public tender offer on all its shares by a subsidiary of PERE fund Brookfield at a price of €47.50 per share, which represents a premium of 51.8 per cent over the closing share price. Subject to review of the final offer, the board of Befimmo has expressed its support for the transaction, and the two largest shareholders have each entered into a soft irrevocable undertaking to tender their shares. The transaction obtained clearance from the Belgian merger control authority on 6 May 2022.

In terms of transactions executed by Belgian REITs, the trend towards a further specialisation per asset class and internationalisation remains. The largest transactions of 2021 to be reported are:

a the acquisition of a student housing portfolio by Xior (€155.8 million);
b the acquisition of a care portfolio by Cofinimmo (€103 million); and
c the acquisition of a multifamily complex by Home Invest (€50 million).

In terms of international presence, the most active Belgian REIT is Aedifica, with investments in Finland, Sweden, Germany and the Netherlands and, in recent years, expansion through new acquisitions in Ireland, Spain and the United Kingdom. This internationalisation is a trend we have noticed with regard to all major Belgian REITs.

ii Private equity transactions

Belgium is not a country of establishment of PERE funds. However, it is nevertheless an attractive investment country for foreign institutional investors.

The most significant transactions reported in recent past years are summarised below. We have chosen to mention the transactions executed by South Korean investors in this section considering their structure on closing: these transactions were completed and funded by securities firms that, post-completion, place securities on the market, either with (Korean) individuals or (Korean) institutional investors.

2020 saw the largest single asset transaction ever on the market, with the purchase of Finance Tower by Meritz Securities (South Korea) for a reported investment value of

€1.2 billion. The Finance Tower is let to the state. The seller was the Dutch developer Breevast. In addition to the investment volume, this transaction was also remarkable as it was structured as (multiple) asset deals, with the unwinding of a leasing structure.

The largest transaction of 2021 was the acquisition of the office building Astro Tower by Union Investment (Germany), signalling their return as a purchaser on the Belgian market. The Astor Tower is one of the tallest office towers in Brussels. Like many large-scale transactions, the acquisition was structured as a share deal.

As previously mentioned, 2022 should see the return of South Korean investors on the purchaser side, and started with the acquisition by KB Securities of the North Galaxy, an office building located in Brussels and currently let to the Belgian Ministry of Finance. The sellers were AXA Belgium and ATP, a Danish pension fund. With a reported investment value of over €600 million, this transaction was the second-largest single asset transaction in Belgian market history and was most probably the largest transaction of 2022. The transaction was structured as a share deal, with a 'double FIIS structure', being the incorporation of a Belgian specialised real estate investment fund (FIIS) by the purchaser (BidCo), followed by the purchase of the shares in the target company, the conversion of the target into a FIIS and the merger of the target into the BidCo. This type of acquisition structure allows for an optional financing structure and cash repatriation to the ultimate investor.

III REAL ESTATE COMPANIES AND FIRMS

i Publicly traded REITs and REOCs – structure and role in the market

Overview

Belgium counts 17 REITs (*société immobilière réglementée* (SIR)). The top-five REITs, in terms of fair value of the portfolio, are:

a Cofinimmo, the largest Belgian REIT currently investing in healthcare and offices but which tends to specialise in care housing, active in Belgium, the Netherlands, France, Spain, Italy, Germany, Finland and the United Kingdom (fair value portfolio: €5.9 billion).

b Warehouse De Pauw (WDP), specialised in logistics properties, active in Belgium, the Netherlands, France, Romania, Luxembourg and Germany (fair value portfolio: €5.8 billion).

c Aedifica, specialised in care housing, active in Belgium, the Netherlands, Finland, Sweden, Germany, Ireland, Spain and the United Kingdom (fair value portfolio: €5 billion).

d Xior Student Housing, specialised in student housing, active in Belgium, the Netherlands, Portugal and Spain (fair value portfolio: €2 billion).

e Montea, specialised in logistics properties, active in Belgium, the Netherlands, France and Germany (fair value portfolio: €1.7 billion).

Legal structure

As an alternative to maintaining the attractiveness and competitiveness of Belgium, the possibility to take the form of a SIR commonly named BE-REIT has been introduced to allow undertakings investing in real estate that wish to opt for a regulated status (and thus benefit from a preferential tax regime) to avoid the burden of compliance with the Belgian Act on Alternative Investment Fund Managers (AIFM Law).

The activities of a BE-REIT may only consist of:

a placing, directly or through a company in which it participates in accordance with the law and its implementing regulations, immovable property at the disposal of users;

b if applicable, possessing immovable property; and

c participate in infrastructure projects as further defined by the legislation.

The BE-REIT must thus mainly engage in an operational activity with a long-term strategy instead of an investment activity. The BE-REIT does not, therefore, follow a defined investment policy but has a business strategy based on creating long-term value (instead of engaging in buying to sell within the framework of a defined investment policy). To that extent, the BE-REIT Law requires the BE-REIT to exercise its activities itself, maintain direct relationships with its clients and suppliers and have, for the purpose of exercising its activities as described above, operational teams at its disposal that make up an important part of its workforce.

In terms of capital and listing requirements, the BE-REIT must have a minimum share capital of €1.2 million and all shares must be listed on a stock exchange, with a minimum 30 per cent free float. Listing can only occur after registration on the BE-REIT list and after the publication of a prospectus.

BE-REITs are under the supervision of the Financial Services and Markets Authority (FSMA).

Tax aspects

BE-REITs are formally subject to income tax, but their investment proceeds (including capital gains) are not included in their taxable base. Taxation of the investment occurs at two different moments:

a upon entry into the regime (e.g., conversion or merger of an existing company), an exit tax of 15 per cent applies on the net latent gain. The same exit tax applies upon contribution of a real estate asset to a BE-REIT in exchange for shares; and

b upon yearly dividend distributions, a 30 per cent withholding tax applies, such rate being subject to reduction or exemption by virtue of a tax treaty. A specific withholding tax exemption applies for foreign pension funds.

It is important to note that the basis on which the dividend withholding tax applies is different depending on the investors and the underlying investments.

Distributions made to Belgian residents are subject to the withholding tax for the entire amount of the dividend distributed.

Distributions made to foreign residents are subject to withholding tax only for the part of the dividend stemming from Belgian-source profits; foreign-source profits are exempt from Belgian withholding tax.

Restrictions on activities and investments

The principal activity must be the active management of real estate assets, subject, however, to diversification requirements and leverage restrictions:

a a maximum of 20 per cent of the total assets can be invested in one real estate project; this risk diversification requirement does not apply when the tenant, user or beneficiary is an EEA Member State; and *b* the loan-to-value ratio is limited to 65 per cent of the (consolidated) assets (under specific conditions limited to 33 per cent) and the (consolidated) interest expenses are limited to 80 per cent of the total income. Mortgage (or other collateral) is limited to 50 per cent of the global fair value of the immovable property and to 75 per cent of the value of each immovable property mortgaged, subject to exceptions when it concerns the participation in public–private partnerships.

Developments are allowed but cannot be sold before, during or within five years of completion (no promotion). The BE-REIT is also allowed to hold shares in subsidiaries investing in real estate, including institutional BE-REITs, but specific requirements, including minimum participation thresholds, apply in the case of public–private partnerships or joint ventures.

In terms of returns to investors, the BE-REIT is obliged to distribute annually 80 per cent of its net profits (as determined by royal decree) less the net decrease of its indebtedness. Capital gains realised are not included in this distribution obligation provided that they are reinvested within a four-year period.

Challenges

The trend within Belgian REITs is specialisation in terms of the asset class and internationalisation, which bring their own challenges.

Specialisation in terms of asset classes is challenging when considering the risk diversification requirement. The FSMA has indeed confirmed that this risk diversification requirement is not only assessed considering the value of a property but also the exposure to the tenant. Tenants of the same group are considered as one single tenant for the purposes of this assessment. Under certain conditions, a derogation is still possible, but it then means that the leverage limit of the REIT cannot exceed 33 per cent of its consolidated asset value.

The absence of a harmonised REIT regime in Europe, certainly combined with the fact that Belgian REITs are operating companies, brings its own regulatory and tax challenges. A notable example is whether Belgian REITs can opt for the FBI regime for their Dutch subsidiaries, which, based on the shareholders' test, requires the Belgian REIT to be similar to an FBI while the activities allowed are not exactly the same. The same is true in terms of taxation and profit repatriation: it is not always possible for a Belgian REIT to apply for a similar regime in the country of investment and, in such a case, the Belgian REIT faces investments in foreign countries subject to local income taxation and to withholding tax when profits are repatriated.

ii Real estate PE firms – footprint and structure

Overview

Although a legal and tax regime is available, Belgium is not a country of establishment of PERE funds. Most of the parties active in the Belgian market are foreign investors, mainly from France, Germany and Luxembourg (with SICAV-SIFs and RAIFs most of the time serving as fund platforms for foreign institutional investors).

Belgium counts 231 PERE funds or FIIS, a dedicated fund structure available for institutional investors. The funds already formed to date can, however, be described as 'captive funds', holding local real estate investments of local players (e.g., banks or insurance companies) or of foreign institutional investors.

Legal structure

The FIIS aims at providing asset managers and institutional investors with a flexible and efficient fund vehicle for their real estate investments, in Belgium and abroad. It is a closed-end real estate fund whose main characteristics are:

a the FIIS benefits from a flexible regulatory regime (see below under (e));
b the FIIS must take the form of a Belgian limited liability company (*société anonyme*) or of a Belgian ordinary partnership (*société en commandite*); this last corporate form has a separate legal personality in Belgium and is therefore treated as a corporation, but might be seen as transparent in other jurisdictions. The FIIS can be incorporated by one single eligible investor;
c the shares or partnership interests in a FIIS can only be subscribed by or offered to institutional investors;
d the FIIS duration is limited to 10 years with an extension possibility if this is decided via the unanimity of the investors;
e the FIIS can only invest in real estate, broadly defined, but without a compulsory diversification requirement or leverage limits (see above under (d));
f the FIIS' accounts are mandatory under IFRS and are subject to a yearly distribution obligation; and
g the FIIS enjoys a specific tax regime.

Tax aspects

The FIIS tax regime and the BE-REIT tax regime are the same.

Restrictions on activities and investments

The FIIS can only invest in real estate, defined as follows:

a Belgian and foreign real estate assets, as well as rights *in rem* on these assets;
b shares of foreign real estate companies holding foreign real estate assets;
c shares of Belgian BE-REIT;
d shares of Belgian FIIS;
e shares of Belgian or foreign AIF investing in real estate;
f shares of EEA REITs (as further defined by royal decree);
g options on real estate assets;
h real estate certificates;
i rights under real estate leasing; note, however, that the activity of a lessor under a leasing with a purchase option can only be ancillary (with an exception for real estate assets dedicated to public interests, including social housing and teaching);
j concession rights granted by a public body; and
k loans to subsidiaries and guarantees or security to the benefit of subsidiaries.

With respect to shares in a Belgian real estate company, the FIIS can acquire those shares but is obliged either to merge this company, or to convert this company into a FIIS within 24 months.

The FIIS is subject to a minimum investment volume of at least €10 million at the end of the second financial year following its inscription on the FIIS list. This is a one-off assessment based on the acquisition value or the appraised value used to compute the exit tax.

Promotion, understood as a main or ancillary activity implying a forward sale or a sale within five years after construction, is strictly prohibited.

No compulsory diversification requirement or leverage limits apply to the SREIF.

The FIIS is also subject to the same annual distribution obligation as the BE-REIT.

Challenges

On the regulatory side, it should be determined in which category the FIIS shall fall:

a First category: the fund raises capital from a certain number of investors, without public issue, with a view to invest it in real estate in accordance with an investment policy in the interest of the investors. The fund is an AIF in the sense of the AIFM Directive and has opted for investment in real estate. In such a case, the AIFM Law fully applies to the FIIS and its manager, it being understood that a 'light' regulatory regime is available when the assets under management do not exceed €100 million (with leverage) or €500 million (without leverage and without right to reimbursement within five years as from the initial investment).

b Second category: the fund is not an AIF in the sense of the AIFM Directive because it is incorporated by one single investor, or it constitutes a joint venture (i.e., an entity being used as an investment vehicle in which the shareholders, as a collective group, are granted day-to-day discretion or control). With respect to the exemption because of one single investor, it must be noted that the incorporation documents must especially mention that the fund will only have one single eligible investor as per the relevant ESMA guidelines, and this investor is not itself an AIF. In this case, the fund may opt voluntarily for an AIF status and limit its investments to real estate. This option and the registration on the list of FIIS held by the Ministry of Finance is required to benefit from the specific tax regime. As a consequence, the regulatory obligations are extremely light and basically limited to compliance with the corporate law and with the FIIS Decree.

IV TRANSACTIONS

i Legal frameworks and deal structures

In deals involving Belgian PERE funds (FIIS), the regulations are extremely limited and are meant to protect the institutional character of the FIIS:

a the articles of association of the FIIS and all documents related to the issue or transfer of its shares or partnership interests must provide that only eligible investors can acquire such shares or partnership interests;

b each investor that acquires or subscribes shares or partnership interests confirms in writing its quality to the FIIS and commits to only transfer to an eligible investor who shall undertake the same commitment;

c the FIIS shall suspend the payment of any dividend to a non-eligible investor; and

d note that in cases where the FIIS is self-managed and is subject to the full set of provisions of the AIFM Law, then any transfer of a holding of 10 per cent or more must be approved by the FSMA prior to completion.

In public M&A, two typical deal structures can be envisaged: a share purchase and a merger. Relevant regulations and constraints are described below.

Share purchase

A potential buyer can purchase shares of Belgian REITs either on the market or through private sales. Two compulsory requirements will then apply:

a disclosure of important participations (see 'Disclosure requirements and duties of the board' below); and

b a mandatory public takeover. As from the crossing of the 30 per cent threshold, on a stand-alone, group or consortium basis, the shareholder is obliged to launch a public takeover on all the shares issued by the REIT.

A mandatory public takeover requires a prospectus approved by the FSMA.

Voluntary public takeover

A public takeover is subject to the observance of a strict (disclosure) procedure and requires the involvement of the FSMA and of the target.

The bidder must file its announcement and a draft prospectus with the FSMA, which shall announce the bid and notify the target one business day after receipt. This is merely an announcement, and is not yet an approval of the prospectus.

The period of review of the prospectus by the parties starts with the comments of the board of the target filed with the FSMA and the FSMA approving the prospectus. After formal approval of the prospectus, the board of the target must file a draft response memorandum, also to be approved by the FSMA.

As from this last approval, the acceptance period starts, during which the board of the target shall also inform the works council. The acceptance period often lasts for two to 10 weeks.

Parties wishing to launch a counter bid have until two calendar days before the end of the acceptance period to announce their intent. It must, however, be noted that a counter bid shall only be accepted provided that the price per share offered is 5 per cent higher than the price of the initial offer.

The results of the offer are published five business days after the closure of the acceptance period, with the price being paid 10 business days after this publication, followed by a five to 10 business day period for the potential reopening of the takeover bid.

In practice, shareholders owning an important participation often enter into (soft) undertakings to tender their shares to the offer.

There are two important aspects to note within this process:

a the bidder must provide certainty to the FSMA with respect to the availability of funds (and therefore its capacity to close). The full price (i.e., for the purchase of all shares) of the offer must be guaranteed, most of the time by a bank guarantee; and

b in cases where the bidder expects a de-listing, he or she must reach the squeeze-out threshold of 95 per cent, which will allow a reopening of the takeover bid and the compulsory tendering of the remaining shares to the offer.

Merger or other type of contribution

Belgian mandatory takeover legislation provides for certain exemptions, of which the following are the most relevant. No mandatory bid will have to be launched in cases where the 30 per cent threshold is exceeded:

a as a result of a merger, to the extent the person (on a stand-alone, group or consortium basis) exceeding the threshold did not cast the majority of the votes in the merger resolutions at the REIT's general meeting; or *b* as a result of a capital increase in cash resolved by the general meeting respecting the legal preference right of existing shareholders. It is important to note only contributions in cash might be exempted from a mandatory public takeover, not a contribution in kind.

Both transactions are subject to mandatory rules provided in Belgian corporate law, including quorum and majority requirements:

a quorum: at least 50 per cent of the capital should be present or represented at the first shareholders' meeting. A second meeting can validly decide irrespective of the portion of the capital being represented; and

b majority: the transaction must obtain the positive vote of at least 75 per cent of the votes cast, abstentions not being included in either the numerator or the denominator.

In terms of pricing and the exchange ratio, the Belgian REIT legislation also contains strict requirements in the context of a merger:

a in the case of a merger, the fair value of the REIT's portfolio must be valued by the independent real estate expert of the REIT. No such valuation is required if the merger proposal is filed within four months of the latest valuation and to the extent that the expert confirms that, considering the general economic status and the state of such assets, no new valuation is required. This new valuation is not binding, but the issue price must be justified based on this valuation; and

b the issue price of the shares of the REIT should not be less than the lower of:
- the last published net asset value per share dating back to up to four months prior to the date of the filing of the merger proposal or, if the REIT so decides, the date of the merger deed; and
- the average stock price of the 30 calendar days preceding that same date.

Except in cases where the subsisting entity intends to go public or one of the restricted exemptions applies, a prospectus approved by the FSMA is required to issue or list the new shares, or both.

Disclosure requirements and duties of the board

As from the crossing of a 5 per cent threshold, on a stand-alone, group or consortium basis, the shareholder is obliged to disclose its participation to the REIT, with such disclosure being published. The threshold is often lowered to 3 per cent in the articles of association of most REITs.

The law implementing the Shareholders' Rights Directive II allows listed Belgian companies to request certain information from intermediaries to identify their shareholders.

Assuming that there is no hostile bid, the board shall most probably collaborate on a regular due diligence exercise over the REIT. The board decides which information will be disclosed taking into account various factors such as the corporate interest of the target, confidentiality duties, equal treatment of shareholders, as well as EU Market Abuse Regulation (MAR) and competition aspects. The Belgian takeover legislation requires that the same information is provided to any competing bidder. Confidentiality agreements with the target or reference shareholders, or both, are common practice to ensure confidentiality of negotiations and information obtained within the context of the due diligence.

MAR and insider list

Since the REIT is listed on a regulated market, the information about a potential transaction and its financing may be inside information for the purposes of the MAR. The parties involved will usually acknowledge being familiar with the statutory prohibitions and restrictions for holders of inside information established under the MAR, and the supplemental rules enacted thereunder, as well as with the legal and regulatory consequences relating to the misuse or improper circulation of inside information, including sanctions and penalties associated with serious or very serious offences under the MAR, and with criminal offences regarding insider trading on the securities markets, and undertake to comply with said prohibitions and restrictions.

The parties involved will also have the obligation to maintain 'insider lists' The FSMA can request the communication of such list.

The FSMA may require the parties to a potential bid to make a public announcement, for example, if there are rumours in the market (the put up or shut up rule).

If the bidder receives inside information on the target, it must disclose such information in the prospectus, and it cannot acquire or sell target securities until this information is no longer sensitive.

ii Acquisition agreement terms

Public M&A

In public M&A, with a REIT as a target, the consideration depends on the type of deal structure: in a share purchase and (mandatory) public takeover, the consideration will consist in cash, while the consideration in a merger will consist in shares.

In the case of a voluntary public takeover, the bidder can subject its bid to conditions, most of the time referring to the level of participation he or she wants to acquire. Mandatory public takeovers cannot be conditional.

Because of the high level of transparency that is imposed on REITs, the practice shows that representations and warranties, indemnification and covenants are not usual, and any risk is usually factored into the offered price.

The situation is quite different when the REIT acts as seller or purchaser. In such a case, the deal terms are quite similar to any other real estate transactions, with usual conditions precedent, representations and warranties, indemnification clauses and covenants. One specific deal structure to mention when a REIT acts as purchaser: in practice we often see that such deal is structured as a contribution in kind in the capital of the REIT and remunerated in shares (subject to the 30 per cent threshold not being exceeded). The 'seller' then places the REIT's shares on the market shortly after the acquisition, subject to a lock-up period applicable to 5 to 10 per cent of those new issued shares. This type of deal guarantees an acquisition without cash contribution for the REIT concerned.

If the public M&A takes the form of a voluntary public takeover, the bid must relate to all securities issued by the target. The bid may be conditional on the approval of competition authorities, or any other regulatory approvals, and is often subject to conditions, such as an acceptance threshold, or the non-occurrence of a material adverse event beyond the bidder's control. In practice the FSMA refuses to approve any condition that is likely to limit the success of the bid.

PERE transactions

PERE transactions are similar to other real estate transactions, with usual conditions precedent, representations and warranties, indemnification clauses and covenants. When being a target or a party to a transaction, PERE funds are used to take out insurance to limit, or even reduce to zero, their own exposure.

The most widely used insurance, imported from the UK market, is warranty & indemnity (W&I) insurance, which covers undisclosed risks for the period prior to closing. Parties usually negotiate their terms of acquisition and then provide the purchase agreement to an insurance broker. The insurance company usually reviews the agreed representations and warranties to, as the case may be, exclude some from the insurance coverage. Usual exclusions concern the condition of properties, certain environmental matters and transfer pricing.

On a few occasions, we have seen purchasers also buying title insurance to guarantee title to the underlying real estate asset. Indeed, Belgian mortgage registers have a 'negative' value: they will only mention disputes over the ownership when such litigation has started. The absence of such mention therefore does not mean that the ownership is not disputable.

The market is currently experiencing the development of tax insurance to guarantee identified risks – most of the time at the exclusion of transfer pricing. In such process, (at least) the purchaser must provide the insurance with a robust defence memorandum stating the arguments in favour of the taxpayer and the likelihood of success in a case of litigation.

iii Hostile transactions

No hostile transaction is to be reported on the public M&A side. The current public bid of Brookfield on Befimmo has been supported by the management. This is partly due to the fact that most Belgian public companies are owned by a controlling shareholder or group of shareholders. In addition, Belgian law allows the target's board of directors to implement measures to safeguard the corporate interest and frustrate a hostile bid.

iv Financing considerations

There are two layers of financing: acquisition financing, typically to acquire the shares of the target (whether the latter is listed or not); and real estate financing or refinancing with the target as borrower.

Acquisition financing is characterised by the legal prohibition of financial assistance, meaning that the target cannot grant security interests over its assets in order to guarantee or facilitate the acquisition of its own shares. Acquisition finance is therefore most of the time an unsecured financing with the following notable exceptions:

a the investor or shareholder shall pledge the shares they hold in the borrower, and strict subordination agreements and waterfall provisions shall bind the parties;

b the target company might be converted into an ordinary partnership. Under Belgian law, this type of partnership has legal personality, but it is not subject to capital protection rules. Consequently, the prohibition of financial assistance does not apply; and

c in a 'double FIIS structure', the acquisition financing and the real estate financing are consolidated after the merger, with the assets of the target being also used as collateral. Usually, the acquisition financing takes the form of a bridge loan, refinanced after merger.

Real estate financing will first depend on the leverage capacity of the target company; for both corporate law and tax law reasons, it is indeed not possibly to over-leverage a company, or to grant security interests (in a portfolio refinancing scenario) in excess of the company's own benefits of the transaction unless appropriate justification exists considering the company's own corporate interest. Up to this leverage capacity, the company acts as borrower and grants a market standard collateral package that includes a mortgage, pledge of receivables (e.g., rent receivables, insurance receivables) and pledge of bank accounts. The shareholder usually pledges the shares of the target company and subordinates any intragroup loans. A few points must be kept in mind:

a a mortgage is subject to 1 per cent transfer tax and 0.3 per cent inscription duty computed on the amount for which it is inscribed;

b general banking terms and conditions usually include a right of pledge and set-off provisions in favour of the account bank that could interfere with the pledge of bank accounts in favour of the lender. Therefore, it is common practice to require from the account bank a waiver of these rights and provisions. This should be disclosed and discussed with the account bank ahead of the closing; and

c subordination of intragroup loans is most of the time only partial in the sense that the target company can still use excess cash to reimburse the intragroup loan.

v Tax considerations

The typical deal structure described above does not, as such, have adverse tax consequences for the REIT or the FIIS concerned:

a share transactions are not subject to transfer tax or other types of stamp duties; and

b a merger between two REITs or two FIIS, or a FIIS and a REIT, is realised through tax neutrality.

The situation is, however, quite different for the investor that will acquire shares in the REIT or the FIIS. Dividends distributed are indeed subject to 30 per cent withholding tax subject to an exemption or reduction based on an applicable tax treaty. The withholding tax exemption as provided for by the EU Parent-Subsidiary Directive is indeed not available. Important to note is the dividend withholding tax exemption provided by domestic law when the foreign investor is a pension fund. To benefit from this exemption, the pension fund must:

a be a non-resident legal person with the sole purpose to manage and invest funds collected for the purposes of paying statutory or supplementary pensions;

b engage in these management and investment activities without the aim of making profit and in the framework of its statutory purpose;

c be exempt from income taxes in its country of residence;

d be the owner of usufructuary of the income generating assets; and

e not be obliged to transfer the income of such assets to the beneficial owner by virtue of a contractual obligation.

The pension fund must deliver a certificate to the Belgian payor confirming the fulfilment of the above conditions to benefit from the Belgian withholding tax exemption.

In deal structures where the REIT or the FIIS acts as purchaser, a specific tax regime should be mentioned. In the case of a merger in a REIT or a FIIS, or in the case of a contribution of a real estate asset to the REIT or the FIIS, the latent gain is not subject to the ordinary corporate income tax at 25 per cent, but to the exit tax at 15 per cent.

vi Cross-border complications and solutions

Besides the EU AML requirements and EU sanctions, Belgium does not have entry barriers for foreign investors in real estate, except because of the implementation of Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investment in the European Union in the case of operations in a highly sensitive sector or in a sector likely to affect security or public order, like critical infrastructure.

Investors should pay specific attention to EU and local merger control regulations, as practice shows that the group and market definitions can be quite broad (certainly for PERE funds where the asset manager has the control and is part of a large international group), and the Belgian thresholds are quite low.

V CORPORATE REAL ESTATE

The trend in the Belgian market is based on asset classes, and not on the type of investor. For hotel, leisure and (care) housing, the trend is to separate opcos and propcos, the investor keeping the propco and the opco being carved out, most of the time via a regular sale of the business. A standard (long-term) lease agreement is then concluded between the opco and the propco. Specific to the hotel sector, it is nevertheless frequent to see one single structure, with the operation being taken care of via a hotel management agreement.

VI OUTLOOK

The current market challenges for both public and institutional actors are the increase in the interest rate, the increase in construction costs and the increase of the indexation. It remains to be seen to what extent these will influence market activity, but the current feverishness in the market suggests that a slowdown in activity will occur after the summer.

The public takeover of Befimmo should, if completed, be the major highlight in the sector and, in terms of trends, it remains to be seen how Belgian REITs will further internationalise, as the case may be, via public M&A transactions such as cross-border mergers.

Appendix 1

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