Financial Law Institute

Working Paper Series

WP 2008-04

Eddy WYMEERSCH

The New Belgian Law on Takeover Bids

February 2008

WP 2008-04

Eddy WYMEERSCH

The New Belgian Law on Takeover Bids

Abstract

The present paper gives a systematic overview of the takeover regulation as applicable in Belgium after the implementation of the Takeover directive. It contains a high level description of the main provisions of the new law of April 1, 2007, and the Royal Decree of 27 April 2007[1], implementing the EU Directive on Takeover Bids

Instituut FINANCIEEL RECHT FINANCIAL LAW Institute

© Financial Law Institute, Universiteit Gent, 2008

UNIVERSITEIT GENT

[1] Moniteur belge of 26 April 2007(L) and 23 May 2007 (RD)

The New Belgian Law on Takeover Bids

Literature (relating to the new law)

BRUYNEEL, A., "Le droit des O.P.A. en 2007", *J.T.* 2007, afl. 6277, 569-583.

CALLENS, P., "Openbaar bod: de aanpassing van de Belgische regelgeving aan de 13de Richtlijn", *T. Fin. R.* 2007, afl. 3, 132-195.

FYON, M., "La réforme du droit des offres publiques d'acquisition (Première partie)", *Bank Fin. R.* 2007, afl. 4, 242-280.

FYON, M., "La réforme du droit des offres publiques d'acquisition (Deuxième partie)", *Bank Fin. R.* 2007, afl. 5, 295-333.

PARREIN, F., "De nieuwe wetgeving 'openbaar bod': een overzicht", *TVW* 2007, afl. 3, 318-326.

PEETERS, J., "Mogen aandeelhouders nog met elkaar overleggen na de wet van 1 april 2007 op de openbare overnamebiedingen", in HOUBEN, R. en RUTTEN, S. (eds.), *Actuele problemen van fiancieel- vennootschaps en fiscaal recht*, Antwerpen, Intersentia, 83-116.

VAN ACKER, C. Het verplichte bod (art 5, L and art. 49-57, RD, and art 74, L) in: Artikelsgewijze Commentaar Financieel Recht, Kluwer, Commentary, Loose leaf

Reports of Symposia

DE BAUW, F. Les offres publiques obligatoires, un système radicalement différent, Séminaire Van Ham & Van Ham, 22 May 2007

UCL, CENTRE D'ÉTUDES JEAN RENAULD, *La réforme de la réglementation sur les offres publiques d'acquisition*, 30 November 2007, to be published, Kluwer.

UGENT, IFR-dagen 2007, *De nieuwe overnamewetgeving*, 26 april 2007, to be published, Intersentia, Antwerp.

KUL, Jan Ronse Instituut voor vennootschapsrecht, *Openbaar bod*, 1 juni 2007, to be published, Biblo, Kalmthout.

-© 2008 • Financial Law Institute • University of Ghent

A. Applicability

The law applies to public offers to acquire securities.
Most of the time these securities will be listed on a regulated market within the EEE. However, **any public offer** to acquire securities is viewed, including those that are held by a limited number of holders[2]. It contains specific rules relating to offers for **debt instruments** and **real estate certificates**[3].
The law applies to **voluntary public bids** aimed at the acquisition of all types of securities irrespective of whether these securities have voting rights, to **mandatory bids**, to **squeeze-outs** and **sell-outs** and to public offers by the issuer aimed at **buying back its own shares** as well.

Partial bids ♦ Partial bids are not allowed. Both voluntary and mandatory bids must relate to all securities carrying voting rights of the target company.

Securities ♦ The definition of securities is a very extensive one, copied on the Belgian law implementing the prospectus directive. This would mean that certain parts of the Belgian law also apply to public offers to acquire bonds, warrants, options and so on. It includes shares in investment funds[4], but not in open ended investment companies[5].
The requirement to launch a **mandatory bid** only relates to the acquisition of securities with voting rights, including the securities that give access to securities with voting rights, in clear: convertibles bonds, warrants, options issued by the target company, …

Public offer ♦ The law applies only to public bids to acquire securities. Hence it contains a list of criteria rendering the transaction public: advertisements, messages of different kinds, circulars announcing the transaction.
The Belgian law pays ample attention to **defining** when a transaction becomes public. A number of **elements** are listed in the law that would result in considering the transaction public such as the distribution of information about a forthcoming bid, any advertisement, or any form of communication. Further for making a regular bid only authorized intermediaries may be called upon such as bank and investment firms, established in Belgium or offering their services there. Hence an offer by other intermediaries would be illegal and result in the transaction being considered public.
However, and in parallel with the prospectus directive, **voluntary**[6] **bids** will not be considered public if they **relate to less than 100 persons in Belgium**; if they are addressed solely to qualified[7] (in fact: knowledgeable investors) as defined in the prospectus law[8], or relate to securities with a face value of 50.000 Euro or more. In these cases, even a public offer to acquire will not trigger the application of the law, and will be governed by general principles of law, especially contract law.

> **Note:** In order to combat destabilizing rumours, the RD contains the rule according to which **a person having made declaration that may raise questions with the public about his intention to launch a bid**, may be invited by the CBFA to publish a declaration about his intentions. If that person has the intention to launch a bid, and does not confirm this intention within the delay determined by the CBFA, he will be barred from launching a bid for a six months period. In case of changed circumstances, the ban will be lifted[9].

[2] See further of what constitutes a "public offer", as a consequence of which offer for closely held securities would normally be excluded.
[3] Art 46 e.s RD.
[4] Art 3, 8°, i, L. referring only to investment trusts and contractual investment formulae.
[5] Implementing art. 1 § 2 of the directive.
[6] But not a mandatory offer, art 6 § 3, in fine.
[7] Defined in art 10 L. 16 June 2006 on the public offering prospectus.
[8] L. 16 June 2006
[9] Art 8, § 1, RD. This rule is known as "put up or shut up"

B. Competent authorities and applicable law

Authority designated by national law ♦ The *Commission bancaire, financière et des assurances- Commissie voor het Bank-, Financie- en Assurantiewezen* (CBFA) has been designated as the sole[10] competent authority for all matters relating to securities, including take-over matters[11]. The CBFA is in charge of policing the transaction and could impose fines to the parties that violate any of the provisions of the law.

Competency and applicable law ♦ The law contains a number of quite complicated conflicts of laws issues.
In principle, the law applies to all public bids aimed at acquiring securities of Belgian issuers, whether listed or not. The mandatory bid rules apply only to bids relating to voting securities listed on Belgian exchanges or MTFs.

Voluntary bids ♦ If the **issuer is established outside Belgium and has no listing in Belgium**, the law is not applicable with the exception for the rules relating to mutual recognition of the prospectus and the rules on local disclosures and advertising. The latter are of direct concern to the local market and therefore have to reviewed by the local supervisor.
If the **target has its registered office in another EU member state**, but a listing only in Belgium, Belgian law will determine the bid procedure and the way the bid price is established[12].
If the **target has its registered office** (statutory seat) **in Belgium**, but **no listing on a Belgian regulated market** being exclusively listed in another EU state, only the provisions apply dealing with company law matters and with the information to the employees and the enterprise council[13]. Also the rules relating to the calculation of the threshold for the application of the mandatory bid rules will apply (art 4, § 2, 2°).
Bids taking place on foreign markets should be opened to Belgian investors as soon as the shares have been admitted to trading on a Belgian regulated market[14]. This is especially important for securities with dual listing. MTFs that do not have the status of regulated markets are not included here.

In any case, Belgian scrutiny will apply to all advertisements published in Belgium, irrespective of the origin of the bid[15]

Mandatory bids[16] ♦ The Belgian rules are applicable to **Belgian companies with listing in Belgium**.
If the Belgian company has no listing in Belgium, but is **listed in another EEE state**, the Belgian rules apply with respect to mutual recognition of the prospectus, the rules on advertising and local disclosures, and also "company law"[17]. The threshold will be established according to Belgian law, but the pricing will be governed by the law applicable in the place of listing.
Foreign mandatory bids have to be extended to Belgium as soon as some form of advertising is made within the country[18].

---

[10] Art 53.1 L. The rule has been thus framed to clarify that subject to judicial review before the court of appeal, only the CBFA is entitled to take decisions in connection with a take-over bid.
[11] Art 35, § 1, L.
[12] Art 4, § 2, 3° L.
[13] Art 4, §3 L.
[14] Art 4, § 4 L.
[15] art. 31 to 34.
[16] Art 4 § 1, 2° and 3° and § 3. L.
[17] Art. 4, § 3, L. These circumstances have not been identified in the law. This probably refers to the other items mentioned in art 4, § 2, litt.e of the directive which have not been mentioned in the Belgian law. The directive mentions "in particular the percentage of voting rights which confers control and any derogation from the obligation to launch a bid, as well as the conditions under which the board of the offeree company may undertake any action which might result in the frustration of the bid, the applicable rules and the competent authority shall be those of the Member State in which the offeree company has its registered office"
[18] Art 4, § 4, L

The supervisory process ♦ Role of CFBA and the courts ♦ The Belgian law pays ample attention to the supervisory process. It states that the CBFA is "in charge, on an exclusive basis, of the supervision of the implementation of the law and its implementing decrees"[19].

Derogation power of the CBFA ♦
In specific circumstances[20] the CBFA can grant a motivated derogation from the provisions of the law[21], allowing to deal with the many unexpected and unregulated application issues in any take-over regime. In this case, its decision should refer to the criteria set out in the law, art. 9, that are largely identical to those mentioned in art 3 of the Directive. According to these provisions[22], the decision should aim at equal or at least equivalent treatment, at full information of the addressees of the offer, while ensuring that the board of the target acts in the interest of all shareholders. These criteria are aimed at restricting the powers of the CBFA. The derogation power relates to all aspects of a takeover bid. If however private rights of parties are involved (especially in case of a mandatory bid), an administrative agency cannot deprive these parties of their rights.

> **Comment:** In the **previous law**, the CBFA already had a derogation power and has used in cases for which the law contained no express answer.

This means that a court of law could not substitute itself to the determinations made by the CBFA on matters relating to a take-over bid. However, on appeal, he court of appeal may revise the decisions of the CBFA in all aspects. The CBFA is normally not competent for the application of the company law rules: these should be determined by the courts. With respect to some company law provisions, the law sets this principle aside: in certain matters dealing with anti-take-over protections, the CBFA can determine whether the company has acted in accordance with the law, and in case it opposes the company's position, it can publish its opinion. The validity of the company decision however, has to be determined by the regular courts.

Enforcement by CBFA ♦ As the supervisor of take-overs and financial markets in general, the CBFA has a host of instruments to police parties to the transaction. These powers **comprise** injunctions, it can oblige parties to submit a mandatory bid, suspend or even forbid an impending bid, prohibit advertisements, publish itself or have published certain supplementary information, etc.

Sanctions ♦ These orders can be supported by a **penalty** of 50.000 euro per day, up to 2,5 million per refusal to abide by the CBFA's orders. In addition, those violating the law or its implementing decrees may be liable for a **administrative fine** of 2500 to 2,5 million euro, to be imposed by the CBFA, more specifically by its sanctions commission.. Parties violating certain provisions of the law may be exposing themselves to **criminal sanctions**, including imprisonment.
The **mandatory bid rule** is not supported by criminal sanctions, but administrative fines may be imposed for not bidding for the remaining shares after having crossed the 30% threshold.

Judicial review ♦ All decisions of the CBFA are subject to judicial review by the Court of Appeal in Brussels. A fast track procedure has to be followed[23]. Decisions to approve a prospectus cannot be appealed except by the applicants themselves[24]. There is no appeal against the recognition of foreign prospectuses as decided by the CBFA.
Litigation between the parties involved in a take-over, such as company law disputes, would be dealt with according to the normal judicial procedures.

[19] Art 35 § 1, L.
[20] See art 4, § 5 of the Directive.
[21] Art 35, §1, 2, L.
[22] These criteria are largely identical to the criteria mentioned in art 3, Directive.
[23] See RD 15 May 2003 for the procedure before the Council of state; art 121, § 2 for the appeal before the Court of Appeal.
[24] See art 19, § 5, L and art 20, § 6, L. for mutual recognition decisions,

C. Disclosure requirements

The law contains elaborate disclosure requirements both in case of a mandatory bid, as in other bid situations. Special attention is drawn to issues of valuation of the target securities, requiring in same circumstances the intervention of independent directors and independent experts. See further nrs. and for details.

Under the Belgian legislation implementing the Transparency Directive, **all holdings of 3% or more** have to be disclosed to the company, to the CBFA and to the public. The information is kept up to date, and a summary of the disclosures must be published annually by the company in its annual report.
These disclosures must also relate to **agreements among shareholders** and whether shareholders **act in concert**.
According to the Royal decree on “the obligations of issuers of financial instruments admitted to trading on a regulated markets”[25] the annual reports of listed companies should contain the **information mentioned in art 10 of the Directive**. The wording of the Belgian regulation is identical to that of the Directive, except for art 10, point c (significant holdings) that is regulated under the general transparency regime.

D. Mandatory bid

General overview ♦ Belgium has a more than thirty year old experience with mandatory bids. After a shareholder has acquired a controlling block in a listed company, the acquirer has to make a bid for all outstanding shares, a frequent occurrence as most Belgian companies have controlling shareholders. In the present take-over law, Belgium has adopted a 30% threshold, based on the acquisition of securities with effective voting rights.

> **Comment:** Under the **previous legislation** however, the acquirer had to launch a bid upon acquiring a controlling block in the target at a price exceeding the market price. That rule has now been changed: a fixed percentage applies to all companies, while the price requirement has been removed from the statute book. This change is by far the most important change in the present take-over law.

According to the new rule, the requirement to launch a bid only relates to the acquisition of **securities** with voting rights, above the 30% threshold, in which case the acquirer is obliged to bid for all remaining securities with voting rights including the securities that give access to securities with voting rights, in clear: convertibles bonds, warrants, options issued by the target company, …

> **Note:** Although the calculation basis only relates to securities with voting rights, the bid obligation includes securities entitling the holder to acquire voting securities (convertibles, warrants, options issued by the company, etc.). In principle the price should be based on a proportional calculation. In any case these have to be included in the bid. This may create considerable difficulties e.g. for calculating the price of employee options.

The rules apply only to companies with **statutory seat in Belgium**, and provided securities with voting rights have been admitted whether to the regulated **market**, or to the unregulated market segments designated by royal decree (“Alternext” and “Marché libre” or “free market” segment). This rule does not apply to companies or to securities that are widely held, although not listed on a regulated market[26].

> **Note:** It should be mentioned that the obligation to launch a bid is considered by case law as giving a **private right of action to all shareholders to be bought over** at the price as

[25] Art 34, RD 14 November 2007
[26] This was the case under the previous legislation.

determined in accordance with the law. This private law enforcement mechanism entitles shareholders to sue the 30% shareholder for taking over their shares, or to claim damages based on the same amount[27].

1. Threshold

Belgium has adopted a 30% threshold, based on the acquisition of securities with effective voting rights. The calculation of the 30% threshold is quite elaborate. It relates to the securities owned by the bidder, its controlled entities[28], and persons acting in concert with the bidder (for the determination of persons acting in concert see **No [2.]).**

Exemptions ⬩ Under the present more inflexible mandatory bid rule, there have to be a number of exceptions where the acquisition of shares crossing the 30% threshold will not trigger the mandatory bid requirement. These cases have been spelled out in the RD and the list is exhaustive[29]. Apart from the case that the threshold was crossed as part of a **voluntary bid**, the **main cases** relate to:

- the transfer of shares between **group** entities, the latter being defined as companies among which there exist control relations.
- the acquirer can prove that **another shareholder** exercises control or owns a larger block exceeding thirty percent,
- the acquisition of additional shares as part of a **capital increase** with preference rights,
- to **salvage** an ailing company, the latter defined as a company with losses exceeding 50% of the capital,
- in case of an acquisition of shares as part of a **merger**, provided that the future 30% plus shareholder has not cast the majority of the votes in the agm deciding upon the capital increase,
- **temporary** crossing of the threshold with no more than 2% and provided the excess shares are sold within 12 months,
- transfers within **families** to the fourth degree: mainly transfer for free are exempted (gifts, heritage, marriage settlement),
- transfers for free to **non profit organizations** with a purpose defined according to the law (public interest foundations),
- transfers to a **foundation** or other organisation in exchange for certificates, provided the latter can at any time be exchanged for the underlying shares; after three years, this restriction is no longer applicable.

Indirect acquisitions ⬩ The acquisition of a controlling block in a company that owns a substantial number of shares in the target company may be a way to circumvent the mandatory bid obligation. Therefore the law extents the bid obligation to the person who acquires control over a holding company[30] that owns more than 30% of a listed company, provided these assets stand for 50% or more of that holding company net assets, or more than half its net results. The price at which the offer has to be launched will take into account the price calculation method as determined in the law (see further nr.) .

Grandfathering clause ⬩ As in many Belgian companies, there are shareholders owning 30% or more, whether individually or acting in concert, it was deemed necessary to introduce **transitional measures**[31].
The bid obligation upon a later acquisition is waived for all shareholders owning 30% or more, provided they declare their holding to the CBFA within six months of the entering into

[27] Based on Cass., 10 March 1994, Tijdschrift Belgisch Handelsrecht, 1995, 15, nt. Glansdorff
[28] Control is defined in art 5 Companies Code as" the right to exercise decisive influence on the appointment of the majority of the directors or to decide about the policy orientation of the company".
[29] For the list see art 52, RD. The CBFA could not grant a derogation from the mandatory bid requirement, as crossing the threshold gives all shareholders the individual right to receive a bid proposal.
[30] As defined in art 1, 6°, RD.
[31] See Preamble to the Directive, § 10.

force of the law[32]. Later acquisitions of shares beyond the 30% level would not trigger the mandatory bid obligation, even upon crossing 50%. This mere strengthening of existing control was not considered a cause for imposing a mandatory bid.
The same waiver has been granted to shareholders that acted in concert (for a definition see **No [2.])** and held together 30% or more: additional acquisitions will not lead to a mandatory bid.
The exemption extends to the controlling shareholders of companies that hold 30% and to companies that were part of a concert action, provided they have also have notified to the CBFA.
The exemption has been further extended to acquisitions by the spouses and family members to the fourth degree of exempted shareholders.

Notification/declaration to the CBFA. In each case the beneficiaries of this grandfathering clause should notify the CBFA and their holding will have to be published by the company. However, the names of physical persons holding less than 3% in the target, will not be disclosed.

2. Persons acting in concert

Especially critical is the determination of the persons acting in concert.

Definition ⬩ The law contains an elaborate definition of "acting in concert" that copies the provision in the Directive (art 2 para. 1 d) except that it also relates to the "action aimed at frustrating a bid and at maintaining of control over the target company"[33]. Agreements may be explicit or implicit, written or even oral. In addition, shareholder agreements aimed at the concerted exercise of their voting rights with a view of following a common, consistent and sustainable policy v.a.v. the company will also constitute concert action. It means that the blockholders that are present in many listed companies would be generally considered to act in concert.

Consequence ⬩ Acquisition of a 30% block by parties acting in concert would trigger the mandatory bid provision: if one of the concert parties acquires shares as a consequence of which the group exceeds the 30% threshold, they will all be held severally and jointly[34] to launch a bid for all outstanding securities. Of course, if one of the parties acting in concert on its own crosses the 30% threshold, that party only will be held to launch the bid.

3. Equitable Price

The price formula closely follows the Directive: it will be the highest price paid for the securities over the 12 months period preceding the bid, whether by the bidder of by a person acting in concert; or: the weighed average of the prices at which the securities have been traded on the market during the last thirty calendar days before the obligation to bid has come into being (art 53 of the RD). Only in exceptional circumstances will the second hypothesis apply.
In certain cases the CBFA can **accept another price** if additional covenants have been agreed between seller and buyer of the controlling block, in which case the price can be adapted in plus or in minus; also: in case the market prices can be considered as not meaningful or if the prices have been based on rumours that may have given incorrect or misleading signals to the market (art 55 RD). Except in these extraordinary circumstances however, the price will be determined according to the main rule, as laid down in art 53.

[32] Art 74, L.
[33] Art 3, §1, 5°
[34] Art 50, § 1, RD.

Alternative consideration ♦ According to the law, the bidder has to present a cash alternative if the securities offered in exchange do not have a liquid market, or if the bidder has acquired target securities for cash within the last 12 months preceding the announcement of the bid, or during the bid period[35].

E. Bid procedure

Information of the supervisory authority

Notification to the CBFA ♦ Normally the procedure starts with a notification by the bidder to the CBFA.

This notification should **contain** the essential elements of the bid, such as the proof that the funds have been blocked with a bank with offices in Belgium, or in case of a share for share exchange that the bidder has the securities at hand, or has, at law or in fact, the power to have the securities issued or have them in exchange issued[36].

The CBFA will not review the **price** except for mandatory bids where it will establish whether the price has been determined according to the calculation method established by the law. In general, the RD states that the price should allow the bid to proceed to its end, meaning that if a manifestly too low a price was proposed, the CBFA could refuse the bid to proceed, as being manipulative.

This notification should also **include** the draft prospectus.

Conditions of the bid ♦ The bid may be made conditional upon certain circumstances including Material Adverse Change clauses. Conditions **relating to competition law** are frequently included: these are valid if they are limited to the condition that the bid will not start until the competition authorities have decided whether or not to start a phase 2 inquiry[37]. This is one of the rare cases in which the bidder may withdraw its offer[38]. But nothing prevents the bidder to pursue his bid without any reference to the competition rules and incur the risk of a negative competition decision.

Publication of the notification ♦ The notification is published by the CBFA the next day at the latest, and at the same time the target is informed by the CBFA. The filing will be summarily reviewed by the CBFA on the basis of the formal conditions of art 3 RD. The law intends to avoid the CBFA postponing the bid on the basis e.g. that the prospectus is not satisfactory. No one except the CBFA is entitled to formally announce a bid.

Withdrawal of the bid ♦ Once the bid has been made public, the bidder will not be allowed to withdraw it, except in the competition case mentioned above. In addition however, the bidder may withdraw in case of a competing bid or in case the bidder does not obtain the administrative authorization to acquire the target (e.g. in banking or insurance supervision, allowed on prudential grounds only).

The offer document or "prospectus" ♦ The new law makes a clear distinction between the take-over prospectus and the reply memorandum, drawn up by the target (see below No [3.]).

The prospectus should enable securities holders to make a reasoned decision about the transaction taking into account the characteristics of the bidder, the target, the securities and the transaction as a whole.

Approval by the CBFA ♦ Upon filing his application, the bidder should also transmit to the CBFA the draft prospectus, which the CBFA will then immediately transfer to the target company. The prospectus cannot be published except after having been approved by the CBFA.

---

[35] Art 54, RD.
[36] Art 3, RD.
[37] Art 4, RD referring to a decision as mentioned in art. 6, § 1, litt. a or b, of the concentration regulation, or a similar national provision. .
[38] See art 17, RD.

The prospectus is processed by the CBFA, with a view of its completeness and clarity. Very often the CBFA requires additional information, or invites the bidder to clarify items that are of importance for assessing the bid, especially as to the valuation methods that have led to the bid price[39].
The approved prospectus should bear the mention of its approval, stating that by approving the CBFA has not passed on the merits of the transaction. It would be forbidden to refer to the intervention of the CBFA in any other form. A modification of the approved prospectus after its approval is a serious offence.

Parent-subsidiary bids. When a parent bids for the shares of its subsidiary, there is an evident risk of conflict of interest. In order to protect the minority shareholders, the RD. provides that the independent directors of the target company, that have to be designated pursuant to a company law provision[40] will have to appoint a professional independent expert, who will be requested to draw up an extensive report about the valuation of the securities under offer. The report also analyses the valuation methods adopted by the parent bidder. The expert report is published in the prospectus. The independence of the expert is a crucial element: therefore the decree mentions the criteria which will render the expert not independent. Apart from these cases, a not fully independent expert may accept this mission if he describes the circumstances and motivates why his independence is not menaced[41].

Content ♦ The content of the prospectus is detailed in an annex to the Royal decree, that by and large conforms to art 6 para. 3 of the Directive. If necessary, an update will have to be circulated.
The prospectus contains a **summary** retracing in non-technical terms the main characteristic of the offer. The prospectus may contain **publications by reference**, relaying the reader to other previously published documents.

Language ♦ The offer document must be drawn up in one of the national languages (French – Dutch) although it is allowed to use an "internationally usual language"[42]. The summary however should be in one of the two mentioned national languages.

Publication ♦ There are detailed rules in the law about publication: this should take place whether by publication in a newspaper, under the form of a brochure, or on the website of the bidder, the latter form being mandatory. All prospectuses are also published on the CBFA's website.
The prospectus must also be available for the representatives of the employees of the firm, at least in cases where the company is not listed on a Belgian market.

Mutual recognition of prospectuses ♦ Since the Take-over Directive, the prospectuses also benefit from a mutual recognition regime[43]. The law, pursuant to the Directive, contains a system of recognition of prospectuses approved by other EU member states' supervisors. The host state has no right to require additional information, except with respect to client related or advertising information. The first one relates to information about the local formalities to accept the bid, and the applicable tax regime, the second one refers to the advertisements that bidder or target may publish during the bid period[44]. A foreign prospectus submitted for mutual recognition, must be recognized with ten days, and if no such recognition is forthcoming, it will be deemed to be recognized[45].

[39] Art.28, § 2, L.
[40] Art 524, Company L. Or by independent directors designated to that purpose if the company has not yet appointed independent directors.
[41] Art 22, RD.
[42] Art 16, for issuers that usually publish their financial information in one national, or a third language. A similar rule applies to prospectuses proposed for mutual recognition (art 20, § 2, L).
[43] Art 20, L.
[44] Art 20 § 3, L.
[45] Art. 20 § 5, L.

Judicial review ♦ Judicial review is strictly limited: in case of refusal for non conformity with the local requirements, only the bidder can apply to the court of appeal, and in case of approval or recognition, no recourse is allowed[46].

Report of the board of the offeree company – the reply memorandum ♦ The target should be allowed to take a position with respect to the bid: if it is a friendly bid, his answer will be included in the offering prospectus. If it is not so friendly, a separate document will have to be drawn up by the target that is subject to the same rules as the prospectus, and is **approved** by the CBFA in the same way.

Content ♦ This memorandum should contain the reasoned position of the board of the target, its remarks on the prospectus, and the identification of the clauses in the charter that may restrict or even forbid the transfer of the securities, and as far as the board has knowledge of these the contractual preferential acquisition rights that may exist[47]. In that document members of the board should indicate the number of shares they own in the target and whether or not they intend to tender their shares. They are obliged to act according to the intention they have indicated[48].

Applicable rules ♦ The reply memorandum is dealt with along identical rules as those applicable to the offer document, including rules on liability of the signatories (see below).

Advertisements ♦ The law contains a special chapter dealing with advertisements. These have to be approved in advance by the CBFA. The CBFA checks whether the conditions of the law have been respected especially whether the information is not untrue or misleading, and not in contradiction with the published prospectus.

The liability regime[49] ♦ The bidder and the target are liable for the information each of them circulate with respect to the offer: this also applies to the advertisements which they have circulated.
The prospectus should state who is **responsible** for the document, along with a declaration that to the best of their knowledge, the prospectus corresponds to the truth and contains no material omissions. If applicable the prospectus can identify the persons who are responsible for certain parts of it (e.g. auditors).
The persons who have signed the prospectus are liable for the **damage** caused by the untrue or misleading nature of the information in the prospectus. The damage is presumed to be the consequence of the untrue or misleading character, hence introducing a rebuttable presumption of causation[50]. The same liability rules apply to the reply memorandum and to the advertisements.

Time allowed for acceptances ♦ The acceptance period runs from 2 weeks to 10 weeks at most. It starts at the earliest 5 days after the approval of the prospectus or of the reply memorandum.

Higher bids or counterbids ♦ In case of a higher bid, or a counterbid, the previous acceptances are held non binding and shareholders that have already accepted are free to accept the higher or counter proposition. Both higher bid or counterbid trigger a new procedure, and are subject to the same conditions as the original bid. They require a price increase of at least 5%.

Post-bid acquisitions ♦ In order to avoid parties to a public bid making secret price deals by promising to transfer their shares at a better price after the bid has become final, the law henceforth forbids the bidder to acquire additional shares of the target during a one year

[46] See art 19, § 5 and art 20, § 5, L..
[47] ART 28, 6 3, RD.
[48] Art 28, RD. An administrative fine may be imposed in case of violation of this rule.
[49] Art 21, L.
[50] Art 21, § 2, L.

period at a price above the bid price, except by offering the better conditions to all parties that have accepted the initial bid[51].

F. Anti-takeover defences

The new law on take-over contains no new provisions on anti-takeover defences. These belong to general company law and were considerably reformed after the 1988 takeover on Société générale de Belgique. Since then they have been left largely untouched. Obviously the government wanted to refrain from reopening the discussion and upsetting the balance that was achieved over these years. By not modifying the existing provisions, the Belgian legislator has availed himself of the opt-out provided by art 12 of the Directive.

1. Barriers to takeovers

General overview ♦ It is important to note that Belgian company law adheres to the "**One share, one vote" principle**[52]. Multiple voting shares are forbidden, and voting caps, although allowed by charter provision, are not used[53]. A 75% supermajority requirement[54] applies for charter amendments, conferring considerable powers to holders of a 25+ % blockholder.
Belgian law further contains a rather strict **neutrality rule**, see below No [2.].
A limited number of **defences** are available to Belgian companies: the main ones relate to the issue of additional shares by the board, the repurchase of shares, and the refusal to authorize the transfer of shares.
Among the **pre-emptive techniques** one should mention the issue of protective warrants, the validity of voting agreements, the issue by another entity of non voting certificates representing voting shares. Multiple voting rights shares are not allowed, but the issue of shares not representing the capital might have similar effects[55]. However, most companies have relied on the holding of substantial blocks of shares by large shareholders or concert parties, to avoid bids to be launched The most frequently used **alternative techniques** rely whether on pyramids, or on non-voting certificates, issued by foundations to former shareholders in exchange for their voting shares.

> **Comment:** It is noteworthy that these defensive techniques are not specific to listed companies but may be used by closely held companies as well.

Issue of additional shares ♦
The **issue of additional shares by the board of directors (authorized capital)** must be authorised by the general meeting for a period of not more than five years, renewable. The issued shares can be allotted to individual shareholders, if the decision so provides. But in this case the authorisation cannot be used to issue shares in exchange for a contribution in kind, to one significant shareholder, i.e. a shareholder owning more than 10% of the shares[56]. Hence cash transactions would be allowed even below the market price, while contributions in kind by several smaller shareholders would equally be permitted. In any case is the increase limited to the amount of the pre-existing capital[57]. The use of this authorisation is however limited in case a takeover bid has been notified by the CBFA, i.a. once the bid has been made public and the share issue views at **frustrating the bid. This technique** has been put into practice a certain number of times: here the law provides that the general meeting by a 3/4th

[51] Art 45, RD.
[52] Art 483, 542, Companies Code.
[53] See art. 542, Companies Code.
[54] Art 558, Companies Code.
[55] See art 544, Companies Code.
[56] Art 606, § 1 Companies Code.
[57] Art 603, Companies Code

supermajority, can authorize the board for up to three years to issue additional shares provided the shares are fully paid up, the price is at least equal to the bid price and the number of shares does not exceed ten percent of the shares previously issued[58]. The rule is formulated as an exception to the neutrality rule.
A similar prohibition has been provided for the use of the authorized capital for the **issue of share warrants** to one of several identified persons, as this is considered an indirect way of securing control[59].

Share buy backs ♦ Share buy backs are subject to the rules of the 2nd Company law Directive: the authorisation is limited to 18 months, meaning in practice that every year the subject has to be put on the agenda. The acquisition can take place on the stock exchange in which case equal treatment will be deemed to have been respected. The laws allow the company to buy back in case a "serious and imminent harm to the company"[60] in which case the board can itself decide but the authorization has to be renewed every three years by 3/4th supermajority[61]. The buy back authorisation is limited to 10% of the issued capital, and the amount affected should not exceed the free distributable reserves of the company. Many companies have introduced this device.

Refusal to authorize the transfer of shares ♦ The charter could provide that the transfer of shares is subject to the board's approval. The clauses can be invoked towards non signatories, provided the CBFA has been informed in advance[62]. In case of refusal or the use of pre-emptive rights, the board has to provide for an alternative acquirer ("a white knight"), who will buy the shares at least at the same price as offered by the refused bidder[63]. In cases where this was used, white knights appeared to be less than white.

Pyramid structures and issue of depositary receipts ♦ Among the most favoured protection techniques are the formation of pyramids and the issue of depositary receipts. This preference is due to the fact that Belgian adheres to the "one share, one vote" principle, obliging companies to look for protection outside the company.
The issue of depositary receipts very often takes place by creating a foundation, under Dutch law (for tax reasons) and issuing certificates to the original shareholders in exchange of their shares contributed to the foundation. The certificates would often not be exchangeable, and bear no voting rights, or only limited voting rights. The control of the company would be exercised by the board of the foundation, often closely linked to the board of the target company. The transfer of shares to the foundation might trigger a mandatory bid unless the certificates remain fully exchangeable against the underlying shares for an initial three year period[64].

2. Optional arrangements of the Directive

Neutrality rule ♦ Opt-in by Belgium ♦ The companies code contains a double neutrality rule. The Code would prevent the board to **dispose of the target's assets (crown jewels)**[65]. Once a bid has been published, the board of directors is restricted in its action: it is not entitled to engage in any agreements likely to significantly change the assets or liabilities of the target, or transactions that are conditional upon the success or failure of the bid or upon a change of control[66]. The board can only manage the company on a day to day basis. Previously

[58] Art 607, § 2 Companies Code.
[59] Art 603, Companies Code.
[60] See art 19(2) of the second directive.
[61] Art 620, Companies Code.
[62] Art 512, Companies Code; the refusal has moreover to be based on constant and non-discriminatory practice, e.g. refusing acccess to legal persons..
[63] Art.511, Companies Code.
[64] Art 50, § 1, 12°, RD.
[65] See art. 9.3 directive
[66] Art 556, Companies Code. But the general meeting could decide otherwise.

subscribed engagements have however to be honored. The board may also buy back own shares. Disclosure of these decisions will be required[67].
The companies act[68] further states that from the moment the CBFA has informed the target about the impending bid, the board is not entitled to **increase the capital** except with recognition of the shareholders preferential subscription rights. The same would apply to the issue of securities that confer the right to acquire voting shares (convertibles, share warrants, etc). However the prohibition does not apply to issues pursuant to preexisting commitments of the company, i.e. previously issued options, warrants, etc. The main exception relates to the 10% issue of shares by the board at the bid price (see supra).

Breakthrough ♦ No opt-in by Belgium ♦ Article 11 para. 2 of the Directive allows member states to provide that certain restrictions to the transfer of the shares will not apply in case of a take-over bid, or as provided in art 11 para. 3 that voting restrictions will be suspended. The Belgian law has not implemented these prohibitions, but allows companies to state in their charter that they may provide that said protections will not provide.
The meaning of the rule is not very clear in practice as in any case companies are not obliged to protect themselves[69]. However, if the restrictions are invoked, an equitable **indemnification** has to be provided for[70]. How this indemnity will have to be determined or paid is not detailed in the law, and remains an open question.
The 75% breakthrough rule[71] was not introduced in Belgian law.

Reciprocity rule ♦ As to the reciprocity rule[72] the law provides that if, according to its charter provision, the company would be limited in terms of defences, it will be entitled to use these defences if it is attacked by a company that does not follow the rules provided in art 9 para 2 and 3 or art 11 of the Directive. In this case the company law rules with respect to a defence decision and the restrictions on voting rights or on transfer of shares will be determined by the company law as a default option or by the charter provisions.
However the reciprocity rule should be part of the **charter** and is **valid** only for an 18 months period.

> **Note:** The law has added that the reciprocity principle would also apply to a bid by a **subsidiary** of a parent that does not apply art 9, para. 2 or 3 and art 11 of the Directive. Hence a European subsidiary of a non-EU company could also be fended off under this provision.
>
> The precise meaning of this provision will have to be illustrated by practice.

G. Minority shareholders

a. Squeeze-outs

Belgian law has been familiar with squeeze-outs since the 1990s, when this remedy was introduced in company law, both for listed and unlisted companies. In the case of unlisted companies, the squeeze-out rules have been used very rarely as opposing shareholders are entitled to block the transaction. This is not the case of a squeeze-out in listed companies. The detailed rules have been spelled out in a royal decree on squeeze-outs[73].

Threshold ♦ The transaction takes place more or less as a regular take-over bid. This includes the rule that all voting shares or with potential voting rights should be included in the

[67] Art 557, Companies Code.
[68] Art 607, alinea 1, Companies Code.
[69] See art 46, L. containing an optional regime.
[70] Art 46, §2, L.
[71] Art 11 para. 4 of the Directive.
[72] Art.49, L.
[73] See RD of 27 April 2007 on squeeze-outs.

transaction[74]. Specific are the requirements that the bidder should, for its own account or with concert parties, hold at least 95% of the shares.

Compensation ♦ The offer should be made in **cash** only[75]. To mitigate conflicts of interest, the bidder must designate an **independent expert** to evaluate the shares. The independence requirement has been detailed in the decree itself: it should not be the auditor of the bidder, of the target , nor of any of their related group entities, nor should it be a partner of the auditor in its office. Other experts whose lack of independence may be based on other factors, can act as an independent expert provided they explain extensively the circumstances that may reduce his lack of independence and motivate why he can be considered independent[76]. The decree lists a certain number of circumstances in which independence can be deemed to be endangered[77].

> **Comment:** In fact this approach has been rendered necessary because in certain transactions it has appeared to be extremely difficult to find experts, especially banks that had not dealt with any of the parties involved. Therefore it was better to have an expert that was perhaps formally not strictly independent, but should take on public responsibility for his substantive independence.

Procedure ♦ The independent expert will have to make a **report** on his valuation of the shares.

> **Note:** The decree provides that the **valuation** should be based on a detailed analysis of the target's shares, using valuation methods that are adapted to the nature and the activity of the target, explaining the methods used and the parameters on which the valuation has been based. The report should also contain an analysis of the valuation activities, the resources used, and the fee paid. After having compared with the valuation made by the bidder, the expert should conclude whether the price offered is "likely to protect the interest of the shareholders".

As in a regular take-over procedure, a **prospectus** has to be drawn up by the bidder, in accordance with the detailed rules annexed to the royal decree, and similar as in case of a regular take-over bid, there is a reply memorandum requested from the target as well.
The target board will then be invited, on the basis of the approved prospectus to take a stand in a **reply memorandum**, in which it will state its opinion about the report of the expert and whether the interest of the shareholders have been adequately addressed. In case of disagreement within the board, the opinion of each of the board members will be made publicly available.
The squeeze-out procedure contains a **consultation procedure** according to which the shareholders will be entitled to formulate their criticism with respect to the proposed transaction, especially as to the valuation of the shares and the price offered. These complaints are submitted to the CBFA, and along with the CBFA's own remarks transmitted to the bidder, requesting his answers. Most of the points will call for additional explanations by the bidder about the valuation methods, e.g. expanding the information to other valuation methods, or extending the information to other data. The CBFA can publish these observations.
Ultimately the **CBFA can enjoin the bidder to take the necessary measures** to safeguard the interests of the shareholders. If the bidder continues to refuse to take this injunction into account, the approval of the prospectus and hence the bid may be postponed[78].

> **Note: Judicial review** against a squeeze-out would be limited to the price, as the shares will automatically and "ex lege" be transferred to the bidder at the end of the procedure.

[74] Art 2, RD on squeeze-outs.
[75] Art 2, 3° RD on squeeze-outs.
[76] Art 22, esp. § 2, RD. on squeeze-outs
[77] E.g. art 5, §2, RD on squeeze-outs.
[78] See art 11 and 12, RD on squeeze-outs.

b. Simplified squeeze-out after a take-over bid[79]

Threshold ♦ In case the bidder in a public take-over bid has obtained 95% of the shares of the target, he will be entitled to launch a simplified squeeze-out on all remaining shares within three months after the end of the public bid[80]. The bidder should prove that he has been able to collect 90% of the tendered shares, other than the ones he or his allies owned before the public bid, thereby evidencing that the public bid has been accepted by a substantial number of parties[81], others than himself.

Compensation ♦ The price or other conditions – and this is the main advantage – will be the same as the public bid price and therefore this simplified procedure can only be followed if the bidder can thus prove that he had ample success in his public bid.

Procedure ♦ The procedure would also be simplified as the information has already been circulated to the shareholders within the framework of the original bid. There will be no need to appoint independent experts.

c. The sell-out[82]

Implementing the Directive, the Belgian law has now introduced a limited sell-out right: it **applies** when the bidder has acquired a 95% stake in a public take-over, and has been able to reach 90% of the outstanding pre-bid shares[83]. Any shareholder can oblige the 95% shareholder to acquire his shares at the original bid price.
The same **conditions** apply as for a post-bid squeeze-out. The bidder should **inform** the CBFA of the shareholder's request for a sell-out within 90 days of the end of the original public bid.
One expects that this remedy will often trigger a squeeze-out.

---

[79] Art 42 and 43, RD on Takeover bids.
[80] In fact there is a double condition: 95% of the voting rights and 95 % of the voting shares representing the capital.
[81] Art 42, RD. on squeeze-outs This especially refers to takeovers on companies with a small free float.
[82] Art 44, RD. on squeeze-outs
[83] See for the same requirement, the post bid squeeze-out.

Financial Law Institute

The **Financial Law Institute** is a research and teaching unit within the Law School of the University of Ghent, Belgium. The research activities undertaken within the Institute focus on various issues of company and financial law, including private and public law of banking, capital markets regulation, company law and corporate governance.

The **Working Paper Series**, launched in 1999, aims at promoting the dissemination of the research output of the Financial Law Institute's researchers to the broader academic community. The use and further distribution of the Working Papers is allowed for scientific purposes only. Working papers are published in their original language (Dutch, French, English or German) and are provisional.

© Financial Law Institute
Universiteit Gent, 2008

More information about the Financial Law Institute and a full list of working papers are available at:
http://www.law.UGent.be/fli