

Chapter 6

Information and consultation rights of employee representatives in Belgium in public takeovers

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1. Introduction

In Belgium, trade unions play a strong role in collective bargaining and workers enjoy relatively strong rights of information and consultation through local works councils. Works councils have specific rights to information and consultation, dating back to the 1970s, which include the right to be consulted before final decisions are made by management. In the case of takeovers, the Belgian works council in the target company also has a right to meet with the bidder management. This goes above and beyond what is required by the EU Takeover Bids Directive.

The case examined here – the takeover of the Belgian telecommunications company Telenet by a foreign firm – nevertheless illustrates that substantial problems exist regarding the protection of workers during takeovers. First, even though the works council was concerned about the possible impact of the takeover bid on employment, its options for defending workers' interests were limited because the bidder firm already controlled a majority of shares in the company. Second, the case shows the need for additional trade union expertise to better advise workers' representatives on how to act in such situations.

2. Key elements of the takeover legislation

The Law of 1 April 2007 (M.B. /B.S. 23 May 2007) and the complementary Royal Decree of 27 April 2007 implemented the EU Directive on Takeover Bids (Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids). On 1 September 2007 the new law on takeover bids took effect. The public takeovers legislation constitutes Belgium's first new legislation on public takeovers in 18 years. The main objectives of the legislator were to implement the Directive and to modernise the takeover procedure.

The previous legislation from 1989 was adopted in response to the limitations of the ‘soft’ regulations that were previously in place. The legislative activity in 1989 was triggered by a ‘hostile’ attempt by the Italian Benedetti to take over Generale Holding. The 1989 rules already included an information and consultation procedure for employees. The 2007 Act adds important and stronger information and consultation mechanisms for the workforces of the ‘bidder’ and ‘target’ companies.

In comparison with the 1989 legislation the information and consultation rights are no longer restricted to an (existing) works council and to the employees of the target company. Combined with information and consultation rights contained in other acts it is obligatory to inform the workforce before a decision is taken.

In this section we briefly introduce the key elements of the Belgian takeover legislation after the changes related to the Takeover Directive (van Gerven 2007; De Cordt *et al.* 2007).

2.1 The control authority

In the aftermath of the banking crisis, the financial regulatory authority was restructured and split up. Regulatory authority in relation to the Belgian takeover law went to the newly created FSMA (Financial Services and Markets Authority), established on 1 April 2011. The FSMA’s status is that of an autonomous public institution. This means that it was established by law and that it carries out independently the tasks in the general interest entrusted to it by Parliament. The FSMA is solely responsible for monitoring the application of the new law and its implementing decrees. The powers given to the FSMA are far-reaching: it can impose fines, non-compliance penalties and even prison sentences when it establishes that there have been infringements of the new law and its implementing decrees.

In 2012 the FSMA handled five takeover cases (all voluntary); three of them resulted in a squeeze-out. To monitor compliance, the FSMA can also demand that it be given all information, documents or papers that it considers necessary to carry out its supervisory task. Its particular features include the following:

- *Broader scope.* Only listed companies are subject to the rules relating to mandatory bids under the Public Takeovers Legislation. But it is worth noting that the voluntary takeover legislation also applies to public non-listed companies, which are subject to a takeover bid of a public nature.
- *Jurisdiction.* Under the previous legal regime, any offer initiated in Belgium was subject to Belgian law, without prejudice to the nationality of the target or to similar offers launched in other countries. This proved to be very difficult to implement in practice, with different regulators controlling simultaneous offers made in different jurisdictions. Pursuant to the Directive, public takeovers are regulated by the supervisor of the jurisdiction in which the target company has its registered office if its shares are admitted to trading on a regulated market in that country. The Public Takeovers Legislation incorporates this principle.

2.2 Mandatory or voluntary bids

In contrast with the previous law, the new law defines the term ‘public takeover bid’ as ‘a bid addressed to the shareholders of the target company in order to acquire all or some of their securities, regardless of whether the bid is voluntary or mandatory’ (Article 3§1.1°).

As of 1 September 2007, a person or a company that, either alone or in conjunction with third parties, directly or indirectly acquires more than 30 per cent of the voting securities issued by a target company admitted to a regulated market must make a bid for all securities giving access to voting rights. An indirect acquisition of control can also give rise to a mandatory takeover bid.

There are exceptions to the obligatory takeover bid:

- in the context of a voluntary takeover bid;
- in case of a transfer between affiliates;
- if there is another larger shareholder, or if a third party has control of the company;
- in case of a capital increase of a company in financial difficulty (Article 633, Companies Code);

- in the context of a capital increase with preferential rights, decided by the shareholders' meeting;
- in case of a merger decided by a majority that does not include the entity holding more than 30 per cent of the securities;
- if the limit is exceeded by no more than 2 per cent, on condition that the securities above the threshold are transferred within 12 months and that the voting rights linked to the securities above the threshold are not exercised;
- in case of a gift or transfer of securities as a consequence of inheritance law or matrimonial property law;
- if the acquisition is made at no cost by a public foundation that falls under Law of 27 June 1921;
- in the context of a fixed takeover of shares or a sale of a bond to the extent that the securities above the threshold will be transferred within 12 months and the voting rights linked to the securities above the threshold will not be exercised;
- if the offeror intends to carry out a certification, to the extent that this occurs with the cooperation of the target company and that the certificates can, under all circumstances and without restriction, be traded for a period of three years after the acquisition (Article 52 of the Royal Decree). Certification is, briefly explained, a legal procedure by which somebody transfer the profits and incomes of the company assets he or she holds to somebody else, but keeps all other property rights of the assets (Belgian law of 15 July 1998).

2.3 Information requirements

All shareholders of the target company must be sufficiently informed and have enough time to consider the bid. The first formal step related to a (voluntary) public takeover is to inform the FSMA. A bidder must notify the regulator of its intention to launch a public takeover bid before it is launched by providing the FSMA with a takeover notice and a file that contains a draft prospectus, draft press releases and other relevant documents for the examination of the prospectus. The file will also include an independent expert valuation report in case of a (voluntary) takeover launched by a controlling shareholder on the securities of the target it does not yet own. The FSMA will then, according to the law, make this notification public on the day following the filing; however, it can suspend the publication for ten working days when it suspects regulatory violations. This notification does not already mean that the FSMA accepts

that the public bid can proceed. On the same day, it will also inform the target, the relevant stock exchange and the bidder itself.

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

A ‘put up or shut up’ principle introduces the possibility for the FSMA to ask any party intending to launch a public takeover bid to make its intentions public. If it appears from these declared intentions that the party is not planning to make a bid, then it may not do so for the following six months, unless a change can be justified by extraordinary circumstances. These circumstances will be evaluated by the FSMA.

The offeror must draw up in advance a prospectus in either Dutch or French and submit it for approval to the FSMA. The prospectus must state the conditions of the bid and all information so the affected shareholders can come to a ‘grounded’ judgement. In this regard the law stipulates some minimal data requirements. The prospectus will be published only after approval by the FSMA.

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

The prospectus itself is to be announced in Belgian newspapers or, more generally, available to the public in selected financial institutions or in an electronic form on the website of the bidder and of the investment banks involved. However, if requested by a holder of the securities, a hard copy should be provided.

2.4 Statement of the board of the target company

In line with the French case, in the context of a public takeover bid, the board of directors of the target company should draw up a response after receiving the bid expressing its comments and opinion. This company response must be published in the same way as the prospectus and must be supplemented if any important new developments occur. The regulations resulting from implementation of the Directive represent a considerable increase in the duties of the board of directors of the target company. The board of directors of the target company intervenes twice during the drafting of the prospectus:

- (i) after having received the draft prospectus from the FSMA, the board of directors of the target company must indicate within five business days whether it is of the opinion that the prospectus contains gaps or misleading information;
- (ii) within five business days following receipt of the prospectus approved by the FSMA, the target's board has to submit to the FSMA a draft response document to the prospectus for approval.

The response document prepared by the target must contain the following information:

- comments on the prospectus;
- disclosure of any statutory clauses that limit the transfer or acquisition of shares in the target, as well as preference rights granted to certain persons in case of sale of shares; and
- a nuanced opinion on the offer. This opinion concerns, in particular, the impact of the offer on the interests in the company, including its shareholders, its contractual parties and its personnel; it also details the board's opinion on the strategic plans of the bidder and any implications for the results of the company, as well as the employment and the locations of the target. The opinion shall also mention the number of securities held by the board members and the persons whom they represent, together with the position they will take on the offer.

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

The language rules mentioned above that are applicable to the prospectus also apply to the response document (French/Dutch, with exceptions possible). The final version of the response document, duly approved by the FSMA, must be released by the target; alternatively, it can be appended to the prospectus prepared by the bidder.

2.5 Prohibition of attempts to prevent takeovers and obligation of neutrality

The principle of ‘neutrality’ stated in the Takeover Directive implies that the board of the target company is required not to take any defensive measures upon being notified of the takeover bid. Belgium has, however, used the opt-out option not to apply the mandatory provisions provided by the Takeover Directive on board neutrality (Article 9) and the breakthrough rule (Article 11). Protective measures are thus still possible, unless the company itself decides to integrate the rules of the Directive in its articles of association (‘opt-in’).

3. The role of employee representatives

As soon as a takeover bid has been disclosed to the public, the boards of directors of the target company and the bidder shall inform the employee representatives (or the employees, if there are no representatives) (De Schryver 2008; Van Kerrebroeck 2010). Moreover, the employee representatives shall be informed when the prospectus is made public. The board of directors of the target company shall inform the employee representatives of its opinion regarding the bid. The works council of the target can add its view of the bid to the opinion of the board of directors.

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

Besides the articles in the Belgian public takeover law, the provisions of Collective Labour Agreement No. 9 of 9 March 1972 and especially the Royal Decree of 27 November 1973 act as a kind of background/framework legislation. Among the different types of economic and financial informa-

tion employers have to provide, occasionally information is needed to permit workers to keep abreast of new events. Takeovers are explicitly mentioned in the regulation. When the information is related to a management decision, the works council has to be informed before the decision is taken.

New in the revised legislation of 2007 is the special provision that information (notification and prospectus) has to be provided not only to the employee representation of the target company, but also to the employee representation of the bidder company. When there is no official representation, it has to be communicated to the employees.

In Belgian social law a kind of hierarchical rule is recognised in this respect. When one of the 'higher' bodies of employee representation is absent, the authority goes to a 'lower' body. The hierarchy is as follows: works council, committee for prevention and protection at work which has assigned works council duties, union delegation, committee for prevention and protection at work without works council duties and, finally, employees.

It is not clear whether European works councils (EWCs) have to be informed and consulted. Legal opinion states that they should be involved when a multi-country element is part of the case (for example, a Belgian target with an EWC). A second question is, who has to be informed first? Some experts give preference to the Belgian works council. Others are more nuanced and again stress the international character of the case.

Workers' representatives are informed of the moment of notification to the FSMA and the publication of the prospectus. The representatives of the target are also informed about the (possible) reply by the board of the target company. For the rest, the Act also provides that the works council must also receive a copy of the prospectus when the document is released. The board of the target company shall also send its own opinion on the terms of the bid to its own employee representation (works council).

On one hand, Article 8 of the Royal Decree on Takeovers prohibits any announcement of a public offer before the publication of the notice of takeover by the control agency the FSMA. Should the bidder – prior to this publication – already inform his employee representation that they will launch a public offer (thereby asking for confidentiality from the representation)? Doctrine answers this question affirmatively referring to the (general) Royal Decree on the economic-financial information and

consultation rights of works councils. It states that ad hoc information on economic and financial matters should be communicated to the works council if possible before the execution of the decision ‘on which it is reporting’ (De Schryver 2008).

3.1 Any form of consultation?

Unless otherwise adopted unanimously by its members, the works council of the target company invites the governing body of the bidder to a hearing, so that they get detailed information on the strategic plans of the bidder (‘information on the industrial and financial policy of the bidder’) and its impact on employment and the establishments of the company. The governing body of the bidder may designate to this end an internal or external representative. It is not required that a director of the company appear in person at this hearing.

However, in the event of non-appearance of representatives of the governing body of the bidder before the works council, the bidder cannot exercise the voting rights attached to shares acquired in the context of the bid at a general shareholders’ meeting of the target company. The bidder has to be invited at least three days before the hearing. The hearing has to be organised within ten days after the start of the acceptance procedure (introduced at the controlling agency the FSMA). Prospectus bids are published and archived by the FSMA. The opinion of the works council is provided in an annex.

When the board of directors of the target company receives in good time an opinion from the works council about the bid and in particular about the employment consequences, this point of view will be annexed to the board’s reply to the prospectus. If no unanimity can be reached within the works council between the different factions of the employee side (for example, between the representatives of the white-collar and blue-collar unions or between the trade unions ACV-CSC and ABVV-FGTB), the points of view of the different factions will be annexed to the document.

3.2 Sanctioning

General sanctions and possibilities for claims exist for ‘misleading’ information in the prospectus, but this is focused on persons selling

shares. There has been no example to date of sanctions in court cases related to non-compliance with the information and consultation rights of works councils.

Sanctions also exist in relation to general information duties with regard to ad hoc economic restructuring (including takeovers). In the literature they are considered 'weak', especially for multinationals. Existing cases of claims are related to plant closures and not to informing or consulting in good time (*cf.* Renault case at the end of the 1990s).

4. Case study: Telenet

Telenet is a Belgian telecommunications company and the biggest cable service provider in Belgium. It specialises in the network supply of broadband internet, fixed and mobile telephony services and cable television to customers in Flanders and Brussels. With the Yelo application, Telenet is venturing into the supply of convergent mobile services. It also provides professional communication services to businesses in Belgium and Luxembourg. Telenet is based in Mechelen, with contact centres in Herentals, St Truiden and Aalst, and regional sites across Flanders to provide technical support. The US company Liberty Global (LGI) is the main shareholder of Telenet; at the end of 2012 LGI owned 50.1 per cent of Telenet shares. By the end of 2012 Telenet's workforce comprised 2,133 employees, with a total turnover of 1.48 billion euros. Telenet is listed on Euronext Brussels and included in the Bel 20 index.

Trade unions – the white-collar sector federations LBC-NVK and BBTK – represent employees at the company, especially in the works council. In the works council a local list of professional and managerial staff is also represented. Unions or employees do not have a seat on the management boards. However, employees – especially higher management – of Telenet own 0.02 per cent of the shares, and when including the warrants they own 1.7 per cent of total share capital.

4.1 The takeover

Liberty Global, which is controlled by telecommunications billionaire John Malone, already owned just over 50 per cent of Telenet at the

beginning of the process. In September 2012 the US company announced that it was preparing a bid of 35 euros a share for the Telenet shares it did not already own. Public announcement of the main terms and conditions of the offer was done by the regulator the FSMA on 6 November of that year. The regulator approved the bid on 11 December 2012. Liberty Global set the condition that it receive offers for delivery of a total of at least 95 per cent of the company for the bid to proceed; at that level the buyer could force out any remaining shareholders through a squeeze-out and delist Telenet.

The bid – a voluntary and conditional offer in cash pursuant to the Law of 1 April 2007 on public takeover bids – was officially done by Binan Investments. The Dutch company is, indirectly, a wholly-owned subsidiary of LGI. The bidder did not own any other assets than 56,844,400 shares (including 94,827 Liquidation Dispreference Shares) of Telenet. Holding these shares is its only ‘activity’. LGI, a US company, is the largest international cable company, with television, broadband internet and telephony services in 14 countries, primarily in Europe and Chile. As of mid-2013, LGI’s consumer brands include Virgin Media, UPC, Unitymedia, Kabel BW, Telenet and VTR.

For years Liberty Global aspired to full ownership of Telenet, but it had been put off by the price of such a deal, which would be more than 2 billion euros. Because the deal would be financed mainly through debt, more favourable credit markets, which made the deal more affordable, convinced the company that the time was right to finally make its move. On the one hand, it wanted a bigger part of the dividends Telenet pay every year to the shareholders (partly financed through borrowing). On the other hand, the major shareholder declared that it wanted a bigger say in how the free cash flow (and profits) of the company was used (not only by paying a dividend). Furthermore, it claimed there would be efficiency and economy-of-scale opportunities if Telenet was a full part of LGI’s developing European platform, for example by investing in future infrastructure innovations or buying network hardware (for example, set-top boxes). LGI’s focus is on growth of share value, to be used, among other things, to obtain more capital to finance investment and new takeovers.

At the time of the announcement, it was expected that the bid would be a fairly simple takeover deal. However, the bid quickly encountered opposition. The disputes focused on financial issues, mainly on how much

the cable company was worth. From a business strategy perspective the discussion centred on bidder's plans for a local company that was doing well.

It is important in this regard to know the origins of the company. The story of Telenet began in October 1994. The Flemish government, led by Minister-President Luc Van den Brande, wanted to develop a second telecommunications network alongside the historical incumbent Belgacom. To this end, an existing (foreign) operator was approached to develop and manage the network in partnership with Flemish groups and the Regional Investment Company of Flanders (GIMV). Local municipalities were also involved in establishing the company; at that time 35 per cent of the shares were held by a consortium of municipalities and today 30 per cent are still publicly owned (including 30 golden shares by the financing municipalities). These institutional investors/shareholders came to expect this recurrent stream of dividends every year.

At the foreground of these debates were the rising tensions between the local management, the other minority shareholders and the bidder. The announcement of the bid came as a surprise to the Telenet management, as they were engaged in share buy-back activities. As required by the Royal Decree, Telenet's board of directors appointed an independent expert to value its securities subject to the intended offer and to comment on LGI's bid. This independent appraisal – done by Lazard – came up with a valuation of the company of between 37 and 42 euros a share. Liberty Global quickly followed with a sharply worded release of its own, saying it disagreed with the Lazard valuation and was sticking with its original offer. It brought in another independent expert – the Boston Consulting Group – to contradict the value claims. Publicity about these reports interfered with the preparations to make the bid official. Trading of Telenet shares on the Stock Exchange was suspended for a couple of days by the regulator.

In the end, LGI obtained 58 per cent of the shares at the mid-term evaluation date in January 2013 and dropped the 95 per cent minimum acceptance condition. For this reason, the offer was not followed by a squeeze-out. In the following months, the top management of the Telenet company resigned or was replaced. In particular, the resignation of the Dutch CEO Duco Sieckinghe, who had just been granted the prestigious 'Manager of the Year' title in Belgium in 2011, received attention in the Belgian media.

4.2 Information and consultation of employees

As soon as a takeover bid has been disclosed to the public, the board of directors of the target and the bidder shall inform the employee representatives of their respective companies (or the employees if there are no representatives). The employee representatives shall be informed when the prospectus is made public. There is legal debate about the proper timing of information disclosure, specifically whether it should be before or after the bid has been disclosed to the public, as the (general) Royal Decree on economic-financial information and consultation rights of works councils states that ad hoc information on economic and financial matters should be communicated to works councils 'if possible before the execution of the decision'.

This 'theoretical' question has not played a role in the Telenet case. Plans about the bid were already made public informally by the media in September, although the official bid started later. At any rate, the works council was already informed about the whole issue in September. The consulted body was the national works council (there was no EWC at the company). The union representative who was interviewed, however, seriously questioned whether employee representatives of the bidder company were informed (as required by Belgian law). No clear view existed on the presence or absence of union and/or employee representation in the American parent company of the bidder (LGI). Furthermore, the case could also involve a discussion of who constitute the relevant employee representation in this case (as also in many others), as the financial relationships are based on a series of mainly financial companies, holdings or structures that do not always employ people and/or have employee representation. In theory the bid was made by a Dutch holding company (Binan Investments) for a Belgian holding company (Telenet Group Holding).

In practice, the process was organised in accordance with the approach embodied in the law: the works council of the 'subsidiary' Telenet was the informed and consulted employee representative body and the consultation was organised with a representative of LGI. 'As planned' means:

- a representative of LGI came to the works council to explain the public bid;
- there were no breaches of confidentiality;

- the works council formulated an opinion and this opinion was included in the official public bid document.

The opinion concluded with a reference to the valuation dispute, specifically that the works council was surprised by the different share valuations and even more so because the numbers were interpreted differently by the many specialists and analysts. It also stated that ‘as the works council we do not wish to give an opinion on the offer itself’. This neutral or non-positive opinion was argued and amended with a series of questions and comments regarding:

- the absence of any guarantee with respect to local ownership, social responsibility, employment in Belgium and the consequences for the current employees;
- the fact that the bidder completely failed to take into account the remarks from the Telenet management’s October long-range plan;
- the lack of clarity on planned investments in the network, products and customer service; and
- the lack of clarity on future intentions with regard to maintaining Telenet’s position as a market leader in innovation.

In this regard reference was made to the bidder’s approach of opting for a rather standard formulation of the impact on personnel: ‘The Bidder recognises the contributions made by the management team and employees of Telenet to the company’s success. The Bidder does not currently anticipate any material change in the working conditions or employment policies of Telenet.’

5. Conclusions from a trade union perspective

Procedurally, everything regarding the takeover bid was organised and implemented as prescribed by law. One has to take into account also that the bidder was already the majority shareholder of the company. Further evaluation of the case from the workers’ perspective contains four main elements:

- (i) Even basic legal knowledge and expertise on this type of case is missing in the trade union. The usual practice in the event of restructuring is to consult other trade union officials for orientation, but for this type of case this knowledge is not available, even in the

- well-structured and well-developed organisational structures of a Belgian trade union. Hiring of external guidance seems almost inevitable (certainly with the more complicated cases).
- (ii) This is all the more necessary because, on one hand, employees have shares (and are looking for advice) and on the other hand trade unions are consulted by the media to give their opinion on the public bid. It is, in other words, also important for the image of the union to have an expert opinion on such cases.
 - (iii) The whole process is perceived as something of a higher-level playing field of financial markets and strategies. An opinion on possible dangers could clearly be made, for example, concerning the manner in which LGI would use debt leveraging and its possible effects on the financial liability and investment capacities of Telenet; or the greater integration of Telenet in the multinational's activities with possible outsourcing or delocalisation of certain activities, services and jobs. One could not, however, imagine or strategically envision how the proposed financial transaction could be influenced or used to encounter the formulated dangers.
 - (iv) The whole story taught the union that it needed a more proactive strategy to develop a transnational union representation for Telenet within the LGI multinational. This was probably the biggest effect on union representation work in the company.

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