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STRUCTURES AND APPLICABLE LAW

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How may publicly listed businesses combine?

Public companies in the Netherlands are usually acquired by way of a public takeover offer to their shareholders. This process is highly regulated, with certain milestones and related timelines, from the moment the bid is, or is considered to have been, announced. Announcement of the offer starts the timelines of the Dutch Decree on Public Takeover Bids.

Dutch public offers come in four types:

- a regular public offer for all shares in the same category or class, which is by far the most common;
- a mandatory offer, triggered by an offeror if it (together with any concert parties) gains predominant control, which exists on passing the 30 per cent shareholding threshold with only limited exceptions, and which must be for all shares issued, at the 'fair price' (highest price paid by offeror in the past 12 months or if irrelevant, the average stock price) and without offer conditions;
- a partial offer, for no more than 30 per cent of the shares; or
- a tender offer (not to be confused with a US tender offer), in which situation shareholders can respond to a guide price by making an offer to sell at their price, effectively creating a reverse book-build, which must also be for no more than 30 per cent of the shares.

Alternatively, a publicly listed business may combine by way of, for example, a legal merger or an asset sale, but these are not very common in practice as a first step, although they are used following settlement to arrive at a cleaner corporate structure or own the entire business. A legal merger can be a domestic merger or cross-border merger with another company in the European Economic Area and includes a waiting period for creditor opposition, financial reporting and other requirements. There are other means to arrive at a similar result for combinations with a company outside of the European Economic Area.

Law stated - 20 March 2024

Statutes and regulations
What are the main laws and regulations governing business combinations and acquisitions of publicly listed companies?

A publicly listed company is typically acquired by way of a public offer to all shareholders. A public offer is governed by the Dutch Civil Code but more importantly by the bidding rules, which are mainly set forth in the Financial Supervision Act and the Decree Public Offers, as well as interpretations of and guidance by the Dutch securities regulator, the Authority for the Financial Markets (AFM). The Decree Public Offers includes many procedural rules and timelines for the offer process. The extent to which such rules and timelines apply partly depends on whether the target is Dutch, and if a listing on Euronext Amsterdam is the only

or first admission to trading (or if the AFM was selected as competent authority) in the European Economic Area.

In addition, the Dutch Civil Code applies to the offer made to shareholders, and other parts of the Civil Code are relevant (eg, due to shareholder approval being required for certain material board decisions including a sale of the entire or substantially the entire business). Also, target boards of Dutch listed companies should take into account the Dutch Corporate Governance Code 2022, even if that is on a comply-or-explain basis. The EU Market Abuse Regulation applies throughout the process.

In the case of a domestic legal merger or cross-border merger, corporate law on the domestic or cross-border legal merger applies (in the latter case of both relevant jurisdictions).

Apart from corporate law and public offer regulations, as in any transaction, merger control may be required under the EU Merger Regulation, the Dutch competition act or any other national merger control regime. The works council of the target may have a right of advice under the Works Councils Act and the trade unions may have consultation rights under the Social-Economic Council's Merger Code 2015.

Further, the Netherlands has implemented a foreign direct investment (FDI) screening mechanism, which may require a review process with the Dutch government depending on the location and the nature of the target's business. The EU Foreign Subsidies Regulation provides for new notification obligations with the European Commission in the event of transactions that meet certain thresholds.

Finally, sector-specific merger supervision applies in, for example, the telecommunications, financial services, energy and healthcare sectors.

Law stated - 20 March 2024

Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

A cross-border transaction is typically structured as a regular public offer, although sometimes followed by a cross-border legal merger. A public offer by a foreign bidder is treated in the same way, from a bidding rules perspective, as a public offer by a Dutch bidder.

Law stated - 20 March 2024

Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Certain industries have specific limitations on acquisitions. For example, an investor in financial institutions like banks and insurers needs a declaration of no objection from the Dutch Central Bank for any investment exceeding 10 per cent. In the energy sector, an acquiror needs approval from the Minister for Economic Affairs for an asset exceeding 250 megawatts in electric power or that includes a liquified natural gas installation. Regulated

industries like mail and telecoms have their own regime and there is a special regulator for the healthcare sector.

In addition, the Netherlands has adopted an FDI screening for national security purposes. The screening covers the acquisition of or stakebuilding in excess of certain thresholds in a Dutch target by any buyer relating to:

- certain vital sectors (such as energy, air transport, harbours, banking, financial infrastructure);
- certain sensitive or highly sensitive technology (dual use or military-grade products and certain other sensitive or highly sensitive technologies); and
- certain business campuses where the government and businesses work together.

Law stated - 20 March 2024

Transaction agreements

Are transaction agreements typically concluded when publicly listed companies are acquired? What law typically governs the agreements?

The typical way to acquire a public company is a public offer made to shareholders for all outstanding shares. In a friendly deal or a deal that has become sufficiently friendly, the offeror concludes a merger protocol with the target. Despite the reference in the name to a merger, no legal merger is usually involved (at least as a first step) and the agreement regulates the public offer to be made by the offeror as well as arrangements between offeror and target. A standard merger protocol will include:

- the obligation on the offeror to make the offer (subject to launch conditions) and complete the offer (subject to offer conditions);
- deal protection: exclusivity, superior offer arrangements and break fees;
- non-financial covenants, by which the offeror makes certain acknowledgements, intentions or commitments for the protection of the employees, other stakeholders or the business in general;
- the obligation for the target to recommend the offer and cooperate with the offeror in various ways; and
- methods to accommodate the offeror in acquiring 100 per cent of the business or shares.

Often it is agreed that the current shareholders will be requested, at the extraordinary general meeting to be held during the acceptance period, to approve a backend restructuring by which the offeror will gain ownership and control of 100 per cent of the business even if the acceptance rate was below 95 per cent (the statutory squeeze-out threshold) but above a certain lower threshold. That lower threshold is often 80 per cent, but is dependant on the specific circumstances at hand.

A merger protocol is usually subject to Dutch law.

Law stated - 20 March 2024

FILINGS AND DISCLOSURE

Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination or acquisition of a public company? Are there stamp taxes or other government fees in connection with completing these transactions?

In a public offer (namely, for all shares of the same category or class) an offer memorandum must be made available, which contains a plethora of information for shareholders about the offeror, the offer and the target. The offer memorandum is subject to review and approval by the Authority for the Financial Markets (AFM). A first draft must be filed within 12 weeks of announcing the offer.

A legal merger requires among other things a filing of the merger proposal with the trade register and a publication in a nationwide newspaper.

Other governmental filings that may need to be made if relevant are anti-trust filings, which do trigger fees, foreign direct investment filings and an EU Foreign Subsidies Regulation filing, among certain others, as well as the application of a declaration of no objection with the Dutch Central Bank. No stamp taxes are due, but real estate transfer tax may arise in the case of an offer for a real estate investment trust-like target. No governmental fees are due in connection with completion or settlement of the offer.

Law stated - 20 March 2024

Information to be disclosed

What information needs to be made public in a business combination or an acquisition of a public company? Does this depend on what type of structure is used?

In the event of a regular public offer (namely, for all shares of the same category or class) the following must be published in any event:

- the announcement of the offer, including all launch and offer conditions;
- throughout the offer process, both offeror and target must disclose any transactions in securities of the class that can be tendered into the offer;
- a four-week-long press release to confirm whether an offer will be launched;
- a 'certain funds' statement;
- the offer memorandum, which contains a plethora of information for shareholders, including information on the offeror and the offer, as well as certain financial information with a review statement depending on the circumstances;
- the position statement by the target, explaining the rationale for the transaction; and
- the acceptance rate and whether or not the offeror declares the offer unconditional.

A legal merger requires less information disclosure. The merger proposal must include mostly technical information about the merger.

An asset sale followed by the dissolution and liquidation of the target also requires less information than a regular public offer, although target boards should seriously consider making similar documents available to shareholders for transparency and to reduce the risk of litigation.

In all situations, disclosure of inside information must be made under the EU Market Abuse Regulation unless a delay of such a disclosure is allowed.

Law stated - 20 March 2024

Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a public company? Are the requirements affected if the company is a party to a business combination?

Any shareholder reaching, or crossing in either direction, the following thresholds in terms of votes or capital percentage must in principle publicly disclose the same to the AFM: 3, 5, 10, 15, 20, 25, 30, 40, 50, 60, 75 and 95 per cent. The AFM maintains an online registry where anyone can inspect the relevant disclosures. This is no different if the company is a party to a business combination. In the event of stakebuilding, the offeror, or a competing offeror, will need to adhere to the same disclosure thresholds.

In the event of a friendly deal, the offeror will be a party to a merger protocol and in that case, the offeror needs to make a public disclosure once every day the offeror has acquired any additional shares.

Law stated - 20 March 2024

DIRECTORS' AND SHAREHOLDERS' DUTIES AND RIGHTS

Duties of directors and controlling shareholders

What duties do the directors or managers of a publicly traded company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination or sale? Do controlling shareholders have similar duties?

Duties of target boards

The duty of members of the management board and, by extension, of the supervisory board is to act in the corporate interest. The corporate interest lies in principle mainly in promoting the continued success of the company's business. In addition, the Dutch Corporate Governance Code has a focus on sustainable long-term value creation and stipulates that in the performance of its duties, the management board must consider the relevant interests of all stakeholders (eg, shareholders, employees, creditors, suppliers, and customers).

Determining the policy and strategy of the company and its business is the responsibility of the management board under the supervision of and advised by the supervisory board, which will have to act very closely with the management board in a public offer process.

When considering a potential public offer, they should set a robust process, carefully weigh the interests of all stakeholders and protect against unnecessary or disproportionate disadvantages for certain stakeholder groups, including when deciding on or proposing a back-end restructuring to acquire 100 per cent (pre-wired structures). When a particular stakeholder group would be disadvantaged unnecessarily or disproportionately, Dutch boards use non-financial covenants to protect against and balance those disadvantages. In line with the foregoing, target boards are not under a general obligation to treat an interloping bidder on a level playing field with the first bidder (***TMG***), nor do target boards have a general obligation to negotiate with any interested bidder making an unsolicited offer (***Akzo Nobel***), but certain circumstances can dictate otherwise.

For the purpose of adequate transparency a Dutch target company must hold an informative shareholders' meeting during the acceptance period to explain its position on the offer. The target must make its position on the offer public before the meeting and in a friendly deal the position statement is usually made public simultaneously with the offer document. Further, it is important that the boards share adequate information with the general meeting so that the general meeting can exercise its authority on an informed basis if it is asked to pass a resolution (eg, pre-wired resolutions to allow the offeror to reach 100 per cent ownership of the business).

Duties of controlling shareholders

In principle shareholders are not obliged to act in the corporate interest. They can act in their own interest within the limits of reasonableness and fairness. However, a controlling shareholder of a target company has a special position in a potential offer process, if only because of its negative control to thwart the bid. Depending on the various circumstances at hand in the specific process, the principles of reasonableness and fairness may require a controlling shareholder to take into account the corporate interest as well as other stakeholders' interests.

Law stated - 20 March 2024

Approval and appraisal rights

What approval rights do shareholders have over business combinations or sales of a public company? Do shareholders have appraisal or similar rights in these transactions?

A public offer does not need shareholder approval as such, but in practice needs 95 per cent of the shares to be tendered, which is often lowered to about 80 per cent if certain resolutions for the backend restructuring are passed at the extraordinary general meeting held during the acceptance period. The 95 per cent threshold relates to the minimum percentage of shares owned for the offeror to commence squeeze-out proceedings. In those proceedings, or conversely, if no squeeze-out proceedings are commenced and a minority shareholder

commences exit-and-appraisal proceedings, dissenting shareholders can claim a higher price.

Resolutions of a Dutch public company's board about an important change in the identity or nature of the company or its business need the approval of the general meeting. This is also relevant for alternative structures.

There are appraisal-like rights in the Netherlands, but they are hardly used. The reason is that shareholders either end up with cash instead of shares following implementation of the pre-wired backend restructuring or are squeezed out by the offeror after a successful offer and in that legal procedure can claim what they deem to be a fair price.

In the case of a legal merger or an asset sale, the shareholders' meeting has an approval right. In the case of a cross-border legal merger, dissenting shareholders can vote against the merger and if they do, and if the merger nonetheless proceeds, they have appraisal rights for their shares (payable in cash).

Law stated - 20 March 2024

COMPLETING THE TRANSACTION

Hostile transactions

What are the special considerations for unsolicited transactions for public companies?

In hostile transactions, the offeror is limited in various ways. First, the offeror cannot carry out due diligence on the basis of information provided by the target. The limited availability of information may also make it more difficult to receive the financial details required for merger control clearance, foreign direct investment (FDI) and especially the EU Foreign Subsidies Regulation (FSR). As a result, it will likely be more difficult to obtain merger clearance. Also, given that an unsolicited offer will not have a merger protocol (ie, transaction agreement), the offeror has no deal protection as is typically granted by the target. Absent a merger protocol, the target is also not committed to assisting in acquiring 100 per cent of the business although that assistance is market practice in friendly deals.

The upside for the offeror is that the offeror will not be asked by the target to sign a non-disclosure agreement with standstill provision. This will allow the offeror to continue with stakebuilding, provided the offeror has not received any inside information.

Hostile offerors must keep in mind the put-up or shut-up rule, which allows targets under certain circumstances to request the Authority for the Financial Markets (AFM) to force potential offerors to make clear whether or not they will announce a public offer.

Also, in the event of a hostile offer, a target may invoke the statutory 'cooling-off period' or the response time under the Corporate Governance Code. However, both should be used carefully as they also have drawbacks in a public offer situation and they are therefore rarely used as a hostile takeover defence tool.

Finally, potential offerors need to be aware that various Euronext Amsterdam listed Dutch publicly listed companies have a protective foundation (a Dutch ***stichting***) that, typically, has the right to exercise a call option right, although sometimes the protective device is structured differently.

Law stated - 20 March 2024

Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a public company's ability to protect deals from third-party bidders?

In Dutch practice, it is typical to have a breakup fee due by the target if the merger protocol is terminated in connection with the revocation of the target boards' support. Reverse break fees occur, for example, after failure by the offeror to complete despite all offer conditions being satisfied or for termination due to non-satisfaction of offer conditions for which the offeror bears responsibility (eg, anti-trust clearance).

As to the level of the break fee, the break fee for the target must pass the test of fitting the corporate purpose. In practice, 1 per cent of the implied equity value is common. In a situation where there is a specific burden on the offeror, whereby, for example, a hell-or-high-water has been agreed, a higher break fee can be agreed for that situation.

This is significantly lower than, for example, in US practice, but one should take note that Dutch targets typically grant the first offeror deal protection in the form of a competing offer threshold, which must be exceeded before the boards can revoke their recommendation. In one instance, the offer for Gemalto by Thales, the superior offer arrangement was backed up not only by a break fee but also by the obligation for the target, if it chose an interloper's competing offer, to issue such number of additional shares as needed to force the offeror to pay the superior offer threshold. In effect, this serves as an additional, structural, enforcement mechanism of the same superior offer arrangement. Deal protection should not be so stringent that it is impossible for the target boards to choose a different, superior, deal.

Law stated - 20 March 2024

Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations or acquisitions are regulated, may government agencies influence or restrict the completion of such transactions, including for reasons of national security?

In addition to merger control and sector-specific supervision, a foreign direct investment screening for national security purposes has recently come into force. The screening covers M&A relating to:

- certain vital sectors (such as energy, nuclear power, air transport, harbours, banking, financial services, liquified natural gas);
- certain sensitive technology (dual-use or military-grade products and certain other sensitive or highly sensitive technologies); and
- certain business campuses where the government and businesses work together.

On a European level, the FSR may (highly) impact transactions that require a notification with the European Commission. Under the FSR, a transaction with (1) a target having in excess of €500 million in revenue in the European Union and (2) the target or the offeror receiving financial contributions from non-EU governments exceeding in aggregate €50 million over the prior three years may need to be filed. The construct of 'financial contribution' is defined very broadly and includes a commercial contract with a non-EU government or entity linked to a non-EU government.

Law stated - 20 March 2024

Conditional offers

What conditions to a tender offer, exchange offer, merger, plan or scheme of arrangement or other form of business combination are allowed? In a cash transaction, may the financing be conditional? Can the commencement of a tender offer or exchange offer for a public company be subject to conditions?

Conditions are allowed both for the launch (launch conditions) of the offer (which starts the acceptance period) and for the offer itself (offer conditions), provided that they are not in the control of the offeror.

In a cash transaction, from a regulatory perspective, the financing can be conditional until the draft offer memorandum is sent to the AFM for the first time (when the offeror has to confirm it has certain funds available). However, the target will likely require that, if any debt financing is required, it must be committed at the time of signing of the merger protocol.

In terms of equity financing, financial sponsors will typically be required by the target boards to share equity commitment letters before signing the merger protocol.

If a strategic offeror needs its own general meeting to approve a share issuance, then the convocation of that general meeting before the first draft offer memorandum is sent to the AFM is sufficient to meet the requirement of certain funds. The offeror's general meeting must be held at least seven business days prior to the final day of the acceptance period.

Law stated - 20 March 2024

Financing

If a buyer needs to obtain financing for a transaction involving a public company, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

For debt financing the target boards will typically require committed debt papers no later than signing of the merger protocol. The seller will usually be under an obligation to assist where it reasonably can to obtain long-form debt financing.

For equity financing, if the offeror is a financial sponsor it is expected to deliver equity commitment letters no later than signing of the merger protocol. If the offeror is, for example,

a strategic player with its own listing, it is acceptable from a regulatory perspective for it to need shareholder approval for an equity issuance.

The offeror must publicly announce that it has certain funds available at the latest when it submits the first draft of the offer memorandum with the AFM, explaining how the offeror will fund the offer price and the measures it has taken in that context. If the offeror needs to hold an extraordinary general meeting (EGM) itself to secure the funding, it suffices to publicly announce at the same time the offeror submits the first draft of the offer memorandum with the AFM that the offeror will hold such an EGM. The offeror's EGM must be held at least seven business days prior to the final day of the acceptance period.

Law stated - 20 March 2024

Minority squeeze-out

May minority stockholders of a public company be squeezed out? If so, what steps must be taken and what is the time frame for the process?

In addition to the standard statutory squeeze-out, which is also available outside a public offer context, on the basis of EU law implemented in the Netherlands, the offeror can make use of a special post-offer statutory squeeze-out procedure. The requirements are that:

- a public offer has been made;
- the offeror owns at least 95 per cent of the issued capital and has at least 95 per cent of the voting rights;
- the proceedings must be commenced within three months following the acceptance period; and
- the proceedings must be against all dissenting shareholders together.

This procedure has a few benefits compared to the regular statutory squeeze-out proceedings.

Due to the high bar in terms of the 95 per cent ownership threshold, it is common in Dutch practice for the target and the offeror to agree on a pre-wired backend restructuring. It is pre-wired in the sense that the current shareholders are requested at the EGM (ie, during the acceptance period) to approve the back-end restructuring. Back-end restructuring effectively transfers 100 per cent of the business to the offeror and the dissenting minority will either get cash immediately or be squeezed out under statute. In the latter case, they will be shareholders of a cash box holding exactly the amount that they would have received had they accepted the public offer. There are also other means available.

For the alternatives to a statutory squeeze-out, the test is whether the resolutions are passed solely aimed at the squeeze out of the dissenters (in practice, a business rationale will virtually always be present) and whether the dissenters are disproportionately or unnecessarily prejudiced.

Law stated - 20 March 2024

Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations or acquisitions involving public companies?

The offeror must prepare the offer memorandum (shareholder circular), the first draft of which must be submitted to the AFM no later than 12 weeks after announcement of the offer. It takes a few weeks for the AFM to approve the draft offer memorandum, which is an iterative process. After launch of the offer by release of the AFM-approved offer memorandum, the acceptance period must be open for at least eight weeks. Other waiting or notification periods are derived from special approval procedures in certain sectors, FDI (national security) screenings, or FSR procedures.

A domestic legal merger process includes a one-month waiting period to allow opposition by creditors. In a cross-border merger, the notary who executes the deed may prefer to allow a longer three-month opposition period.

Law stated - 20 March 2024

OTHER CONSIDERATIONS

Tax issues

What are the basic tax issues involved in business combinations or acquisitions involving public companies?

General

Share transfers are, in principle, not subject to value added tax in the Netherlands. There are no Dutch transfer duties or stamp taxes payable on the sale of shares in a Dutch company listed in the Netherlands, with the exception of real estate transfer tax for certain transactions involving listed real estate entities.

Real estate

Real estate transfer tax at a rate of 10.4 per cent (the rate for 2024) is levied in respect of the acquisition of real estate assets, which include the shares or similar rights in (listed) real estate entities in the case of a direct or indirect interest of at least one-third in the real estate entity is acquired (including interest already owned, if any). For this transfer tax, real estate entities are defined as entities with a capital divided into shares, and more than 50 per cent of its assets comprise real estate, and at least 30 per cent of its assets are real estate located in the Netherlands. Exceptions apply for real estate used in the business of the company.

Public offer

Company

Depending on the acquiring company (***Bidco***), it may be possible to form a fiscal unity for corporate income tax purposes between the acquiring company and the target company. To form a fiscal unity, among other conditions, the parent company and the subsidiary must both be resident in the Netherlands, and the parent company must hold both full legal and economic ownership of at least 95 per cent of the subsidiary's nominal issued and paid-up share capital, such shareholding representing at least 95 per cent of the statutory voting rights and giving right to at least 95 per cent of the profits and the capital of the subsidiary.

As a general rule, interest expenses incurred are deductible for corporate income tax purposes, provided that they meet the arm's length criteria. A general interest limitation rule limits the deduction of net interest expenses to an amount of 20 per cent of the taxpayer's earnings before net interest, tax, depreciation and amortisation. Further anti-base erosion provisions may apply, denying interest deduction in related-party structures (with a business motive and effective tax exception). The Netherlands has also implemented anti-hybrid mismatch rules, which aim to neutralise hybrid mismatches through denying any deduction of payments or including payments in the taxable base. Taxpayers are required to include documentation on the presence of any hybrid mismatches within the group under their administration.

In respect of a substantial – 30 per cent or more – change in ownership, as a result of a public transaction, where such a change in ownership is thought to be predominantly driven by business reasons, existing loss carry-forwards or carry-backs, and interest carried forward, should survive that transaction. Particular anti-abuse rules have been implemented to restrict such use in abusive structures.

For certain business reorganisations – including legal mergers, demergers, share exchanges and business mergers – tax rollover facilities are available under which it is not required to recognise as profit the difference between, on the one hand, the tax book value of the assets and liabilities transferred and, on the other hand, the fair market value of such assets and liabilities. These tax facilities are each subject to specific conditions and, as a general concept, it is required to continue tax book values of assets and liabilities that are transferred so that any gain derived from the transfer in principle is deferred.

Shareholders

All benefits, positive as well as negative, derived by a Dutch corporate shareholder from a shareholding of 5 per cent or more of the nominal paid-up share capital of a listed company are exempt from corporate income tax, further to the participation exemption rules. This includes a possible gain, or loss, from a transfer of listed shares as part of a public offer.

As an anti-abuse rule, non-resident taxpayers are subject to corporate income tax (at rates up to 25.8 per cent for 2024) to the extent they enjoy Dutch income, including dividend and capital gains, derived from an interest of at least 5 per cent of the shares in a company that is a resident of the Netherlands, provided that it is held with the main goal or one of the main goals being to avoid personal income tax of another party, and the arrangement or series of arrangements is wholly artificial. For many active investments, this anti-abuse rule does not apply. Further, if a tax treaty applies, the Netherlands may be barred from levying corporate income tax on the basis of this anti-abuse rule.

Law stated - 20 March 2024

Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination or acquisition involving a public company?

Works council

Depending on the structure of the target's employee representation, the works council of the target may have the right to advise on the recommendation of the transaction by the management board. In public deals, this can be done after announcement. Consummation of the works council advice procedure is often a launch condition (ie, before the publication of the offer memorandum and the start of the acceptance period). The target will have to explain the rationale behind the transaction and in particular any potential impact on the employees. If the advice is negative or has conditions that are unacceptable to the target or offeror, the target has to wait one month with implementation during which time the works council has the right to appeal to the specialised Enterprise Chamber of the Amsterdam Court of Appeal.

Trade unions

Depending on the circumstances, under the Socio-Economic Council's Merger Code 2015, a notification must be made to the relevant trade unions and the Dutch Socio-Economic Council. If so, the trade unions could request a meeting to discuss the transaction. In most situations, this does not result in delay of the transaction.

Law stated - 20 March 2024

Restructuring, bankruptcy or receivership

What are the special considerations for business combinations or acquisitions involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Dutch bankruptcy and insolvency laws do not have specific provisions for mergers or acquisitions. The normal course of events in the event of a bankruptcy is that the appointed receiver liquidates (portions of) the business in parts. This provides opportunities for parties interested in distressed M&A.

The Netherlands has opted for insolvency exception of the EU Directive on Transfers of Undertakings for the Protection of Employees (TUPE). In the event of a bankruptcy transaction, the TUPE rules do not apply. As a result, the employees do not automatically transfer to the acquiror, as opposed to the situation where there is no bankruptcy.

A novelty in Dutch insolvency law is the Dutch scheme of arrangement, which grants the court the authority to approve a composition plan that the debtor presented to its stakeholders, who voted in majority in favour of this composition plan. This new pre-insolvency restructuring tool could also be used to pursue an acquisition.

Law stated - 20 March 2024

Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations with, or acquisitions of, a public company?

A public offer or a legal merger as such does not in and of itself trigger any particular Dutch anti-corruption, anti-bribery or economic sanctions rules.

Law stated - 20 March 2024

UPDATE AND TRENDS

Key developments

What are the current trends in public mergers and acquisitions in your jurisdiction? What can we expect in the near future? Are there current proposals to change the regulatory or statutory framework governing M&A or the financial sector in a way that could affect business combinations with, or acquisitions of, a public company?

As part of the pre-wired back-end restructuring arrangements, there have been a few recent offers where if the offer reaches an acceptance threshold of at least 95 per cent, back-end restructuring is implemented to allow the offeror to acquire and take control of the entire business shortly after settlement, but the offeror is also under an obligation to pursue statutory squeeze-out proceedings (unlike when the acceptance threshold is below 95 per cent) against the dissenting minority shareholders who own a share in what is then effectively a cash box.

Separately, there is an ongoing trend for public companies with large shareholders, in which the latter play a pivotal role in initiating or supporting the offer, sometimes including by agreeing to a large roll-over.

In addition to merger control and sector-specific supervision, a foreign direct investment screening for national security purposes has entered into force. The screening covers M&A relating to:

- certain vital sectors (such as the energy, nuclear power, air transport, harbours, banking, financial services, liquified natural gas);
- certain sensitive technology (dual-use or military-grade products and certain other sensitive or highly sensitive technologies); and
- certain business campuses where government and businesses work together.

On a European level, the EU Foreign Subsidies Regulation (FSR) may (highly) impact transactions that require a notification with the European Commission. Under the FSR, a transaction (1) with a target having in excess of €500 million in revenue in the European Union and (2) the target or the offeror receiving financial contributions from non-EU governments

exceeding in aggregate €50 million over the prior three years may need to be filed. The construct of 'financial contribution' is defined very broadly and includes a commercial contract with a non-EU government or entity linked to a non-EU government.

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