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Alan M Klein

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GETTING THE DEAL THROUGH

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Netherlands

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Stibbe

1 Types of transaction

How may businesses combine?

The most common ways for businesses to combine are:
- share transfer (acquisition of shares);
- public offer;
- asset transfer (acquisition of a business);
- merger;
- demerger; and
- joint venture.

As in most other jurisdictions, the benefit of an asset transfer is that it allows for the transfer of specific assets and the exclusion of unwanted or unknown liabilities. This form is particularly popular in case of insolvent sellers (eg, when a business is sold out of a bankruptcy by the bankruptcy trustee).

The benefit of a share transfer is that it is easy to effectuate, since a transfer of shares avoids the transfer of individual assets and liabilities and generally reduces the need of third-party cooperation or consent.

Another form for combining businesses is through a legal merger or demerger.

In case of a merger, one entity by operation of law acquires all assets and liabilities of another entity ceasing to exist. Alternatively, a new entity may be incorporated that similarly acquires all assets and liabilities of at least two other entities ceasing to exist.

Within the European Union limited liability companies may also enter into a cross-border legal merger, effectively amalgamating the business of a company in one EU jurisdiction with the business of a company in another EU jurisdiction (see question 15).

In case of a demerger, all assets and liabilities of one entity – which entity ceases to exist – transfer by operation of law to several other entities. In case of a partial demerger, a part of the assets of one entity – which continues to exist – transfers by operation of law to one or several other entities, either existing or newly incorporated.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

Business combinations are mainly governed by the Civil Code. There are no formal procedures that regulate the acquisition of a business as such. Public offers, however, are governed by the Financial Supervision Act, the Public Takeover Bid Decree and various ancillary regulations.

Other Dutch laws and regulations governing business combinations are:
- the Competition Act;
- the Works Council Act;
- the Merger Code; and
- the Corporate Governance Code.

European Union law and regulations (eg, on merger control) are also relevant.

3 Governing law

What law typically governs the transaction agreements?

Transaction agreements relating to a Dutch target legal entity are generally governed by Dutch law. However, this is not mandatory and parties are free to choose the law applying to the transaction documents except for the share transfer deed, which must be executed before a Dutch civil law notary.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

In the Netherlands, there are no stamp taxes or other government fees that need to be paid in connection with completing a business transaction as such. See question 18 for tax issues relating to business combinations involving real estate. Some business combinations need to be filed with the relevant authorities. Such authorities may charge filing fees. The most noteworthy filings are the following:

Mergers and demerger
In case of a merger or a demerger, the management boards of the merging or demerging entities have to prepare a merger or demerger proposal. This proposal needs to be filed with the trade register of the chamber of commerce and at the company's offices. The relevant entities also need to publish a notice of such filing in a daily newspaper with national circulation.

Competition filing
Under the Competition Act, certain transactions have to be notified to the Netherlands Authority for Consumers and Markets (ACM). A transaction has to be notified to the ACM if it qualifies as a concentration' and the turnover of the businesses concerned exceeds the ACM's jurisdictional thresholds. A concentration is defined as: (i) a merger of two previously independent businesses, (ii) the direct or indirect acquisition of control over a business, or (iii) the establishment of a joint venture that performs all the functions of an autonomous economic entity on a long-term basis. The ACM's thresholds are the following: the combined worldwide turnover of the businesses concerned exceeded €150 million in the calendar year preceding the transaction and at least two businesses concerned each realised a turnover of €30 million or more in the Netherlands. A transaction that has to be notified to the ACM may not be implemented prior to obtaining clearance from the ACM. If a transaction needs to be notified to the European Commission, no separate notification to the ACM is required.

Public offer
In case of a public offer the bidder needs to prepare an offer memorandum that must be filed with and approved by the Netherlands Authority for the Financial Markets (AFM). See question 5 regarding the information that needs to be disclosed in an offer memorandum.

5 Information to be disclosed

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

There are no general disclosure or publication requirements for business combinations by means of a private transaction.

In case of a public offer, the offer memorandum must include information on, among other things:

- the names of the bidder and target company;
- whether the bidder and target company are party to an agreement regarding the public offer (eg, a merger protocol);
- the proposed price or exchange ratio of the shares;
- a statement on the way the bid is financed;
- the (pre-)offer conditions;
- whether the bidder has acquired any irrevocable undertakings from shareholders;
- any price-sensitive information related to the bid that might be relevant to a reasonably acting investor;
- a statement on the consequences for current employees of the target company regarding the business combination;
- the total costs related to the transaction, and a statement which party bears these costs; and
- a Dutch summary of the offer memorandum in case the original version is drafted in English.

Ongoing disclosure requirements for listed companies

Companies listed on a regulated market in the Netherlands have an ongoing obligation to disclose any information which, if made public, would be likely to have a significant effect on the prices of its shares. This includes, for example, plans regarding acquisitions and divestments by listed companies. Pursuant to the Markets Abuse Directive such disclosure of information may, however, be delayed if: (i) immediate disclosure is likely to prejudice the legitimate interests of the company, (ii) the delay is not likely to mislead the public, and (iii) the company is able to ensure the confidentiality of the information.

6 Disclosure of substantial shareholdings

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

The Financial Supervision Act includes certain ownership thresholds for shareholders of listed companies (3, 5, 10, 15, 20, 25, 30, 40, 50, 60, 75 and 95 per cent). A shareholder must notify the AFM if he obtains 3 per cent or more of the shares – or voting rights – in a listed company. Following such notification, the shareholder has to notify the regulator if his shareholding reaches, exceeds or drops below one of the aforementioned thresholds. This disclosure obligation also applies to economic interests in shares (through, for example, derivatives). Short positions also need to be notified to the AFM.

7 Duties of directors and controlling shareholders

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

The management board and each of its members must perform their duties in the best interests of the company and its business. The interest of the company consists of the combination of the interests of all stakeholders of the company, including shareholders, employees, suppliers and customers. In case of an acquisition, the management board of the purchaser is, among other things, obliged to conduct proper due diligence on the target company.

The supervisory board of a company consists of the non-executive directors of a company. It is only mandatory for certain large companies. The supervisory board advises and supervises the management board.

The Dutch Corporate Governance Code contains several governance principles and best practices. The Corporate Governance Code only applies to listed companies, but many other (large) companies in the Netherlands also comply with the Corporate Governance Code. The focus of the Corporate Governance Code is on the continuity of the business and long-term value creation, bearing the interests of all stakeholders in mind.

Shareholders are, within the boundaries of reasonableness and fairness, free to pursue their own interests.

Public offers

The management board and supervisory board of a target company have a central role during a public offer. If the offer is friendly, the management board of the target company negotiates the financial and non-financial terms of the offer with the bidder. After the bidder has published the offer memorandum the boards of the target company have to inform the shareholders whether they support the public offer by publishing a position statement. Such position statement has to include a substantiated explanation of the position of the management board, stating, among other things, its opinion on the offer price and the considerations on which the offer price is based and the consequences of the offer for jobs and employment conditions. In the case of a friendly offer the position statement is usually published together with the offer memorandum.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Share and asset transfers

Shareholders of public limited liability companies have a statutory right to approve decisions of the management board relating to an important change in the identity or character of the company or its business. Such decisions include the transfer of all or substantially all of the business of the company and the acquisition or divestment of an interest in another company with a value of at least one-third of the company's assets. Although no similar provision exists for private limited liability companies, a transaction by which all of its assets are sold (ie, a factual liquidation) is generally held to be subject to shareholder approval. Moreover, further-reaching approval rights can be set out in the articles of association of a company.

Legal merger

In case of a legal merger or demerger, the decision to merge is subject to approval of the shareholders of the entity that ceases to exist.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Although most successful public offers are friendly, an increasing number of offers start out hostile or unsolicited but evolve into friendly offers at a later stage. The rules and regulations relating to public offers do not make any distinction between hostile and friendly offers. There are, however, certain ways for target companies to discourage hostile bidders.

Put up or shut up rule

Pursuant to the 'put up or shut up rule', the AFM can – following request by a potential target company – oblige a potential bidder to confirm whether or not he intends to launch an offer, if the potential bidder has disclosed information from which the target legitimately may deduce that an offer may be on its way. If the potential bidder does not confirm it intends to launch an offer, the potential bidder cannot make an offer for the target during the next six months.

Anti-takeover foundation

The most common defence mechanism against hostile takeovers is the so-called anti-takeover foundation. In short, a foundation is incorporated and enters into an option agreement with the relevant company pursuant to which the foundation has the right to call for newly issued shares in the capital of the company. As a consequence, the potential shareholdings and voting rights of a hostile bidder will be greatly diluted if the foundation exercises its option. Usually special preference shares are used in this mechanism, which may be issued against their nominal value. The anti-takeover foundation can therefore

acquire a high number of voting rights against minimal costs. Typically the anti-takeover foundation has ongoing credit arrangements in place with banks or other institutions for the financing of its subscription to preference shares. This anti-takeover mechanism can therefore be utilised on short notice.

10 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 company's ability to protect deals from third-party bidders?

Break-up fees are accepted as long as they are intended as reimbursement of the bidder's realistic expenses. They are often set as a percentage of the deal value. The fee may not serve as a de facto protection measure by substantially reducing the post-acquisition value of the target. The board of the target company should be able to consider and possibly support offers that are deemed superior. The definition of 'superior' can be negotiated between the bidder and the target board as it is not provided by law, although the threshold may not be set too high so as to ensure that the board can comply with its fiduciary duty to act in the best interest of the company and its stakeholders by supporting a competing offer that the board deems superior from an overall perspective. Provisions in confidentiality or standstill agreements, however, which prevent the target company form actively soliciting competing offers, are allowed. Reverse break-up fees are uncommon in the Netherlands. Financial assistance by the target company is restricted for public limited liability companies but allowed for private limited liability companies.

11 Government influence

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

Other than the situations as stated in question 17, there is no formal government influence over business combinations.

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Conditional offers are allowed under Dutch law and there are generally no restrictions on the types of conditions attached to an offer, provided that the satisfaction of a condition is not controlled by the bidder (ie, potestative conditions are not allowed). Examples of frequently used conditions are:

- acceptance of the offer by a minimum percentage (usually 70–95 per cent) of shares;
- no material adverse change;
- no default by a party during the offer process;
- no competing offer by a third party;
- waiver by anti-takeover foundation of share option;
- no withdrawal of irrevocables;
- approval of post-completion restructuring and changes to the board; and
- approval of the competition authorities has been obtained.

The financing in a cash acquisition may not be conditional as the bidder must provide a certainty of funds statement prior to launching the offer.

In private acquisitions, completion of the transaction can be made subject to the condition precedent that the purchaser has obtained adequate financing.

13 Financing

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

As mentioned above under question 12, the bidder in a public offer has to provide a certainty of funds statement. In this statement the bidder has to elaborate on the financing of the offer and provide information on how the payment for the shares is ensured.

In private transactions, the parties are free to arrange the financing obligations of the purchaser and the assistance of the seller therein. The transaction documentation may, for example, include a condition precedent that the purchaser has obtained adequate financing or an obligation for management of the target company to sign any necessary financing and security documents. In controlled auctions it is common that the purchaser has to provide the seller with debt or equity commitment letters at signing.

14 Minority squeeze-out

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

The Civil Code provides two squeeze-out mechanisms for shareholders of Dutch companies. The first is a general mechanism that enables a shareholder who holds at least 95 per cent of the shares of a company to institute proceedings against the other shareholders jointly for the transfer of their shares to the claimant. The proceedings must be brought before the Enterprise Chamber of the Amsterdam Court of Appeal. The Enterprise Chamber will reject the claim against all defendants if, notwithstanding compensation, one of the defendants would suffer serious tangible loss by such transfer. The procedure cannot be started if shares with special voting rights are outstanding (eg, golden share or priority shares). The price for the shares is set by the court, usually – but not necessarily – on the basis of the offer price.

The second provision is only available to parties who hold at least 95 per cent of the shares of a company as a consequence of a public offer. This provision follows from the implementation of the EC Takeover Directive. The squeeze out claim must be filed with the Enterprise Chamber of the Amsterdam Court of Appeal within three months from the expiry of the term for acceptance of the offer. The court will set the price for the shares at the offer price unless less than 90 per cent of the shares were acquired in the offer.

If the 95 per cent threshold is not satisfied, bidders will typically explore alternative options to acquire full control over the business. Such control can be achieved, for example, by transferring the business of the target company to a special purpose vehicle owned by the bidder after completion of the offer. In recent years it has become increasingly common to pre-wire these alternative options as much as possible, amongst others by negotiating the relevant agreements between the bidder and the board of the target company in advance and acquiring shareholder approval for the business transfer before completion of the offer.

This could save valuable time following completion of the offer and increases deal certainty.

15 Cross-border transactions

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

Cross-border asset transfers and cross-border share transfers are structured no differently from regular (ie, domestic) asset and share transfers. In a share purchase, a foreign purchaser will usually incorporate a Dutch special purpose vehicle, usually a private limited liability company. Tax considerations (notably the mitigation of Dutch dividend withholding tax) are relevant for the acquisition structure (which may include, for example, a Dutch cooperative or a Luxembourg holding company).

Specific rules apply for a cross-border merger, yet this is not a popular type of business combination. The rules for the cross-border merger apply when a Dutch public or private limited liability company merges with a limited liability company formed under the laws of another EU member state. The shareholders of a Dutch entity ceasing to exist who

Update and trends

In recent years there has been a strong increase in the use of warranty and indemnity insurances (W&I insurance), in particular in competitive sale processes and where the selling shareholders are looking for a 'clean' exit. By taking out W&I insurance, the exposure of the sellers under the warranties and indemnities included in the share purchase agreement is transferred to the insurer.

Furthermore, there is an increasing debate whether the government should have influence over the creation of business combinations, among other things, by means of formal government approval rights. Recently the Minister of Economic Affairs presented a draft legislative proposal to prevent undesirable acquisitions of Dutch telecom service providers. The proposal grants the Minister of Economic Affairs the authority to prohibit acquisitions in the telecoms sector if they lead to a degree of influence in the Dutch telecom sector that could compromise national security or the public order.

voted against the merger as well as holders of shares without voting rights may request to be compensated in cash rather than shares. An independent expert will determine the amount of the compensation.

16 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?

Apart from legal mergers, there are no general waiting or notification periods for completing business combinations.

In case of a merger, a merger proposal must be filed with the trade register of the chamber of commerce and the company's office. Subsequently, the merging entities must publish a notice of the filing in a daily newspaper with national circulation. After the filing and announcement by all the merging companies, there is a mandatory one-month waiting period. During this period, each creditor of the merging companies may object to the merger in the event none of the companies has provided the creditor with sufficient safeguards for payment of its receivable. The court will reject the objection in the event the creditor fails to demonstrate that the financial position of the acquiring company after the merger provides less certainty of payment of the receivable of the creditor. Once an objection to the merger has been made, the deed of merger may only be executed after the objection has been withdrawn or lifted.

17 Sector-specific rules

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

Companies operating in certain specific industries are subject to notification and approval procedures with regard to business combinations.

In the energy sector, the Minister of Economic Affairs must be notified of any change of control over a power station with a production capacity above 250 megawatts. The business combination can be prohibited for reasons of national security or supply security.

In the healthcare sector, approval of the Dutch Healthcare Authority is required for a business combination involving a healthcare provider, if the healthcare provider involved has more than 50 employees.

In the financial institutions sector, a declaration of no-objection from the Dutch Central Bank is required before acquiring an equity or voting interest of 10 per cent in a financial institution. In the event the financial institution is a bank, a declaration of no-objection from the European Central Bank is required. The decision to grant a declaration of no-objection is based on, among other things, the integrity, suitability and financial soundness of the prospective purchaser. Changes in the interest held by the purchaser above certain thresholds and drops below those thresholds must be notified to the Dutch Central Bank.

18 Tax issues

What are the basic tax issues involved in business combinations?

The tax issues involved depend on the type of business combination involved.

Share deal

An acquisition of shares in a Dutch corporate entity is generally done by a foreign entity directly, or indirectly through a wholly owned Dutch acquisition corporate entity. A cooperative is often used as a shareholder of the acquisition corporate entity. Dutch cooperatives are in principle not subject to Dutch dividend withholding tax as they are not a company with a capital divided into shares (subject to certain anti-abuse rules). If the shares are acquired through a Dutch acquisition corporate entity, a fiscal unity is often formed by the acquiring entity together with the Dutch target entities, provided that certain criteria are met (notably the acquiring entity holds at least 95 per cent of the legal and economic ownership). If a fiscal unity is formed, the interest expenses on acquisition debt at the level of the acquisition entity can in principle be offset against the profits of the Dutch target entities (generally subject to specific interest deduction limitations in respect of, inter alia, excessive acquisition loans).

A point of attention is the corporate income tax anti-abuse rules in respect of foreign shareholders (or – if applicable – members in a Dutch cooperative). Pursuant to these anti-abuse rules, a foreign shareholder with a substantial interest (ie, generally a shareholding of 5 per cent or more) in a Dutch resident company, may under certain circumstances be subject to Dutch corporate income tax (statutory rate of 25 per cent) as a non-resident taxpayer in respect of dividends received or capital gains realised. Generally, these anti-abuse rules do not apply in case of active investment in Dutch targets. A tax treaty may shelter shareholders from these anti-abuse rules.

Share deals are in principle not subject to value added tax in the Netherlands. Real estate transfer tax at a rate of 6 per cent is levied on the acquisition of shares or similar rights in real estate companies if the buyer obtains, directly or indirectly, an interest of at least a third in such company (including shares and rights already in possession). A real estate company is a resident or non-resident company the assets of which consist of more than 50 per cent of real estate assets and at least 30 per cent of real estate situated in the Netherlands provided such real estate, as a whole, is or was mainly used at that time for the acquisition, sale or exploitation of such real estate. There are certain exemptions available.

Asset deal

An asset deal can generally be done directly by a foreign entity or through a Dutch corporate entity. Income realised upon the transfer of the assets is in principle taxable at the level of the Dutch corporate entity (or permanent establishment) transferring the assets. Subject to certain criteria, the Dutch tax due could be deferred by using a 'reinvestment reserve'.

Value added tax (21 per cent or 6 per cent for certain designated supplies) may be due upon the acquisition of assets. The acquisition of a business going concern is not subject to value added tax. Acquisitions of real estate are in principle subject to 6 per cent real estate transfer tax, provided that no exemptions apply.

Reorganisation

Subject to certain conditions, there are rollover provisions available for certain business reorganisations (including business enterprise mergers, legal mergers, demergers and spin-offs). Pursuant to these rollover provisions the transfer of assets or shares takes place on a non-recognition basis to the extent that the transferee records those items for the same value in its tax books.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

Works Council Act

Employees of Dutch companies are represented within the company through the works council. Companies with more than 50 employees are obliged to establish a works council. The rights of the works council are determined in the Works Council Act.

The works council must be given the opportunity to advise on intended economical, organisational and financial decisions of the company (among others, on the divestment of an important part of the business or a change of control over the business – also in the event a change of control is effectuated by a transfer of shares). The advice must be requested at such point in time that the works council's advice can (still) influence the actual decision. This means that the advice is to be requested when the contents of the contemplated decision are sufficiently determined, but before such decision is actually taken (ie, generally before a binding agreement is signed). When seeking advice, the reasons for the intended decision will have to be explained, as well as any consequences for the employees.

If the advice of the works council is neutral or positive, the company may start implementing the decision. If the advice of the works council is negative, the company is obliged to postpone the implementation of the decision for one month.

During the aforementioned one-month waiting period, the works council may file an appeal with the Enterprise Chamber of the Amsterdam Court of Appeal. During the postponement period and as long as the proceeding continues, the company may not implement its decision. The works council may also appeal to the Enterprise Chamber if the company implements its decision without seeking advice.

There is no specific time frame for completion of the advice process. The entire process generally takes a few weeks (four to eight), but may take longer if the transaction has serious consequences for the employees.

Merger Code

Under the Merger Code, the Dutch Social and Economic Council and the relevant trade unions may need to be notified of a transaction and the trade unions may need to be given the opportunity to share their views on the transaction.

20 Restructuring, bankruptcy or receivership

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

In the Netherlands, bankruptcy and insolvency proceedings are governed by the Bankruptcy Act. The Bankruptcy Act does not contain any special considerations for business combinations involving a bankrupt target company. If a company is in financial difficulties and heading towards insolvency, it is possible to pre-wire a restart of the company through a pre-pack transaction. There are currently no regulations on pre-packs, but proposals are pending to regulate pre-pack transactions through special legislation.

If a company is declared bankrupt, the court will appoint a bankruptcy trustee. The bankruptcy trustee is charged with the administration and liquidation of the bankruptcy estate and has power of disposal over the assets of the company. As a consequence transactions, including a transfer of assets or shares in a subsidiary of the bankrupt company, require the agreement of the bankruptcy trustee. Furthermore, several actions of the bankruptcy trustee require the prior approval of the bankruptcy judge – who supervises the bankruptcy trustee – or a special creditors' committee.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

There are no specific rules on anti-corruption, anti-bribery and economic sanctions in connection with business combinations. The Criminal Code prohibits corruption and bribery of both government officials (public sector bribery) and non-government officials (private sector bribery). Under the Criminal Code, both the giver and the receiver of a bribe can be held criminally liable. In addition, both individuals and companies can be held criminally liable in certain situations. If a company is prosecuted, individuals, for example, its directors or managers, can also be held criminally liable with regard to the offences that have been attributed to the company.

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