Public Mergers and Acquisitions in the Netherlands: Overview

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A Q&A guide to public mergers and acquisitions law in the Netherlands.

The country-specific Q&A looks at current market activity; the regulation of recommended and hostile bids; pre-bid formalities, including due diligence, stakebuilding and agreements; procedures for announcing and making an offer (including documentation and mandatory offers); consideration; post-bid considerations (including squeeze-out and de-listing procedures); defending hostile bids; tax issues; other regulatory requirements and restrictions; as well as any proposals for reform.

M&A Activity

1. What is the current status of the M&A market in your jurisdiction?

The Dutch public M&A market has been relatively active over the past 18 months with ten announced offers, showing a general continuance in the level of activity with the previous years. In relation to these, five involved financial/private equity bidders and five involved strategic bidders. One of the announced offers involved a mandatory public offer by EssilorLuxottica on GrandVision, which was the consequence of the completion of the block trade transaction between EssilorLuxottica and HAL in 2019. Two of the announced offers, the offer by VDL Groep for Neways and by NPRM for GeoJunxion, were withdrawn shortly after announcement. The most recent announced offer involves the "merger of equals" between Koninklijke DSM NV and Firmenich International SA, with a transaction structure that involves a public offer for all DSM's shares in exchange for shares in a new Swiss company to be listed on Euronext Amsterdam (*see also Question 2, DSM/Firmenich (Merger of Equals)*).

2. What have been the largest or most noteworthy sector-specific public M&A transactions in the past 12 months?

DSM/Firmenich (Merger of Equals)

On 31 May 2022, Koninklijke DSM NV and Firmenich International SA announced that they reached agreement on a "merger of equals", creating DSM-Firmenich. As part of this transaction structure, a new Swiss-domiciled company will launch a public offer for all of DSM's shares in exchange for shares (1:1). Following completion of the public offer, the Firmenich shareholders will contribute their Firmenich shares against the issuance of shares and a cash consideration of EUR3.5 billion. DSM's shareholders will own, in aggregate, 65.5% of DSM-Firmenich and the Firmenich shareholders will own, in aggregate, 34.5% of DSM-Firmenich.

EssilorLuxottica/GrandVision (Mandatory Public Offer)

On 1 July 2021, the block trade transaction between EssilorLuxottica and HAL was completed. Following completion, EssilorLuxottica held 76.72% of GrandVision's shares and became subject to the obligation to make a mandatory tender offer on the remaining shares of GrandVision. The block trade transaction and subsequent offer value for GrandVision was in excess of EUR7 billion.

Infestos/Neways Electronics International NV (Hostile Takeover Attempt)

Neways Electronics International was initially approached and in discussions regarding a potential offer by VDL Groep. Despite almost 70% of the target's shareholders having indicated that they would be willing to offer their shares at the proposed price by VDL Groep, Neways was not willing to support the offer. Subsequently, VDL Groep announced on 21 June 2021 that it would make a public offer for Neways. Several weeks later, Neways and Infestos announced that they had entered into a conditional agreement regarding a public offer and VDL Groep then decided to abandon its attempt.

3. How were the largest or most noteworthy public M&A transactions financed?

For the "merger of equals" between DSM and Firmenich (*see Question 2*), the consideration in the public offer solely consists of shares. The EUR3.5 billion cash consideration for the Firmenich shareholders will be paid from DSM's available cash resources. For this purpose, DSM entered into a bridge financing facility of EUR3 billion.

For the public offer on Neways Electronics International, Infestos announced that it has readily-available liquid assets and cash to fund the offer consideration.

For the public offer on GrandVision, EssilorLuxottica announced that it has readily available cash resources to finance the offer and that it may also use existing committed credit lines that are available for general corporate purposes.

Obtaining Control

4. What are the main means of obtaining control of a public company?

The main route to obtaining control of a Dutch public company is by way of a public offer. Alternatively, control of the business of a Dutch public company can be obtained through:

- An asset sale.
- A legal merger.
- An acquisition of a significant stake in the company through share purchases (subject to mandatory offer rules).

Public Offer

A bidder can obtain control of a Dutch public company listed in the Netherlands by making a public offer, either as a voluntary public offer or a mandatory public offer. Both voluntary and mandatory public offers are subject to specific statutory procedural and other rules.

Voluntary public offer. A voluntary public offer is the most common way of obtaining control of a Dutch public company. Under a voluntary public offer, the bidder is dealing with the target company, but it is ultimately down to the shareholders to decide whether they want to sell their shares at the offer price. The offer is normally subject to certain conditions, such as a minimum acceptance threshold and competition clearance.

Mandatory public offer. A bidder must make a mandatory public offer if the bidder (alone or acting in concert with other parties) can exercise 30% or more of the voting rights in the listed company (predominant control). Specific requirements apply to mandatory public offers as opposed to voluntary public offers, for example a:

- Mandatory public offer cannot be subject to any conditions.
- Fair price must be offered (*see Question 20*).

There are several exceptions to the requirement to make a mandatory public offer. For example, if after a voluntary public offer has been accepted and the purchase price paid, the bidder has acquired more than 50% of the voting rights in the target company.

In addition to offers for all shares in a category or class of a listed company, a bidder can make a partial offer or a tender offer. Both are aimed at obtaining less than 30% of the voting rights in the general meeting of the listed company and will generally not result in control of the company.

A bidder can make a public offer without support from the boards of the target company, but this is rare in the Dutch market.

Alternative Means of Obtaining Control

A bidder can also acquire a Dutch public company by way of legal merger or an asset sale. For both transaction structures, the co-operation of the target's boards is required. A legal merger is generally feasible only if the bidder is also a listed company and offers its securities as consideration (as cash out mergers are not possible under Dutch law). Under Dutch law, cross-border mergers are only allowed with companies incorporated in a jurisdiction within the EEA. Examples of a cross-border merger include the:

- Cross-border merger between Ahold and Delhaize in 2016.

- Cross-border merger between Peugeot and Fiat Chrysler Automobiles in 2021.

It is uncommon to use an asset sale as a primary means to obtain control over a Dutch listed company. Examples of an asset sale include:

- The acquisition by Jumbo of all assets and liabilities of Super de Boer in 2009.
- The acquisition by certain large shareholders of all assets and liabilities of Roto Smeets in 2015.

It is also possible to acquire a significant stake in a public company through share purchases, provided that a mandatory offer must be made when the 30% threshold is crossed. An example of this is the acquisition by EssilorLuxottica of a 76.72% stake in GrandVision from HAL. Upon closing, EssilorLuxottica became subject to the obligation to make a mandatory offer for the remaining shares in GrandVision.

Trends in Deal Structures

The most common structure continues to be a voluntary public offer.

The trend for the bidder and the target agreeing to "second-step transactions" (or "back-end transactions") in public offers has also continued in recent transactions. Second-step transactions usually consist of a legal merger, an asset sale or a combination of these structures. The second step transactions allow the bidder to obtain full control of the target's business even if it does not hold 95% or more of the target's shares following settlement of the public offer and no statutory buy-out is available. If a second-step transaction is approved by the target's general meeting prior to settlement of the public offer, such measures are referred to as "pre-wired" second-step transactions.

Pre-wired second-step transactions were, for instance, agreed upon and approved by the relevant general meeting in the public offer by Next Private for Altice Europe, Sanofi for Kiadis Pharma, NPM Capital for ICT Group and Gilde Equity Management for DPA Group. The pre-wired second-step transactions agreed and approved in the Altice Europe transaction (consisting of a legal triangular merger, share sale and liquidation) and in the DPA transaction (consisting of an asset sale and liquidation) have also been implemented.

Hostile Bids

5. Are hostile bids allowed? If so, are they common?

Making a public offer without the target's support is not prohibited under Dutch law. However, hostile bids are rare in the Dutch market. In most situations the bidder desires to secure the co-operation of the target boards, also because this facilitates the due diligence investigation and the co-operation of the target company in respect of anti-trust clearance procedures. It also helps to avoid the possibility that the target company seeks to take defensive measures.

Examples where the target company's board was unwilling to support a bidder's intention to acquire the target company and where the intended takeover was subsequently abandoned include:

- The intention by KraftHeinz to acquire Unilever in 2017.
- The intention by PPG to acquire AkzoNobel also in 2017.
- The intention by VDL Groep to acquire Neways Electronics International in 2021.

Regulation and Regulatory Bodies

6. How are public takeovers and mergers regulated, and by whom?

Regulations

The Financial Supervision Act and the Public Takeover Bid Decree set out specific rules for bidders on Dutch listed companies and for such companies that are the subject of a public offer. If a Dutch company is only listed outside the Netherlands, not all of those bidding rules apply.

Certain rules in the Civil Code may also be important in relation to a transaction with a Dutch public company, for example:

- Shareholder approval is required for certain significant transactions.
- There are rules regarding (cross-border) legal (de)mergers.
- There are general corporate governance rules.

In relation to Dutch public companies, the Corporate Governance Code also applies on a "comply or explain" basis. The Corporate Governance Code sets out rules and best practices on governance, and also more specifically in relation to takeovers.

Other regulations that may be relevant in the context of a public offer for a Dutch public company are the:

- Competition Act.
- Works Council Act.
- Merger Code.

EU regulations may also be relevant in the context of a tender offer on a Dutch listed company. In particular, the following are important when making a public offer:

- Market Abuse Regulation (*596/2014/EU*).
- Merger Regulation (*139/2004/EC*).

Regulatory Bodies

The main regulatory body in the Netherlands regarding the public offer process is the Authority for the Financial Markets (AFM).

In addition to regulating the public offer process, the AFM may also be involved if the target company is regulated by the AFM because of the sector it operates in (for example, offering certain financial products). Other potentially relevant regulators include the:

- Netherlands Authority for Consumers and Markets, and the European Commission (competition authorities).
- Dutch Central Bank (financial sector).
- Minister of Economic Affairs and Climate (energy and telecom sector).
- Healthcare Authority (healthcare sector).

A legislative proposal in relation to investment screening on grounds of national security has been published in 2021, although this has, so far, not been adopted (*see Question 31*).

Pre-bid

Due Diligence

> 7. What due diligence enquiries does a bidder generally make before making a recommended bid and a hostile bid? What information is in the public domain?

Recommended Bid

Usually, before the terms of the public offer are agreed with the target company, the potential bidder will want to carry out a due diligence investigation on the basis of public and non-public information of the target company.

In case of a friendly bid, it is common that the target's management board allows the bidder to conduct a due diligence investigation on the company. In view of the requirement to maintain confidentiality (*see Question 8*), the scope of the due diligence investigation is more limited than in a non-public setting.

Hostile Bid

The due diligence enquiries available to a hostile bidder are usually limited to publicly available information. There is no specific obligation for the target company to allow a bidder due diligence access. The target company's board must determine on a case-by-case basis whether providing the requested information is in the best corporate interest of the company and its stakeholders.

Public Domain

Information available in the public domain generally includes:

- Information published on the website of the target company and the AFM, including:
    - semi-annual and annual financial reports;
    - press releases;
    - details about all persons holding an interest of 3% or more in the target company;
    - publication of price-sensitive information;
    - transactions by managers in instruments of the target company; and
    - relevant documents in relation to the public offer process.

- Information in the Trade Register of the Dutch Chamber of Commerce, such as:
    - the articles of association;
    - details about the members of the management board and the supervisory board; and
    - details about the representative powers of board members and wholly owned subsidiaries.

- Other information published on the target company's website, including:
    - board rules;
    - committee charters;
    - codes of conduct;
    - remuneration reports;
    - explanatory notes to agenda the general meeting;
    - policy on bilateral contacts with shareholders; and
    - presentations given to analysts and investors.

Secrecy

8. Are there any rules on maintaining secrecy until the bid is made?

Under the Market Abuse Regulation, a listed company must make public any inside information as soon as possible. The negotiations regarding a public offer are generally inside information, depending on the phase of the negotiations (that is, information must be sufficiently specific to qualify as inside information). Therefore, public offer negotiations must generally be made public as soon as possible. However, the listed company can delay disclosure if all of the following conditions are met:

- Immediate disclosure is likely to prejudice the legitimate interests of the listed company.
- The delay of disclosure is not likely to mislead the public.
- Confidentiality of the information is safeguarded.

Negotiations regarding a public offer can therefore generally be kept secret, subject to compliance with the three conditions above.

The Dutch bidding rules require public disclosure in any event no later than when the bidder and the target company have reached an agreement (whether conditional or unconditional) on the public offer.

Agreements with Shareholders

9. Is it common to obtain a memorandum of understanding or undertaking from key shareholders to sell their shares? If so, are there any disclosure requirements or other restrictions on the nature or terms of the agreement?

In the context of a public offer, it is not unusual for a bidder to approach, and subsequently enter into an irrevocable undertaking with, one or more shareholders that hold a substantial interest in the target company. Irrevocable undertakings generally require the shareholder to offer its shares in the offer and to vote in favour of certain resolutions that will be put on the agenda during the informative general meeting of the target company. The irrevocable undertaking is used to make a successful offer more likely. A shareholder committing itself to an irrevocable undertaking will generally agree to the irrevocable undertaking only if it can step away in the event of a substantially more beneficial competing offer.

To ensure that solely entering into an irrevocable undertaking will not qualify as acting in concert (which may trigger the obligation to launch a mandatory offer) the Dutch bidding rules provide for a safe harbour, subject to certain conditions. To rely on the safe harbor, the parties to the irrevocable undertaking must limit their agreement in the irrevocable undertaking to the public offer, and not agree on arrangements that apply outside the public offer.

The Market Abuse Regulation also sets out detailed arrangements on market sounding, which includes approaching shareholders in the context of a public takeover.

Recent transactions where irrevocable undertakings were entered into include the public offers by:

- KKR and Teslin for all shares in Accell in 2022.
- Infestos for all shares in Neways Electronics International in 2021.
- NPM Capital for all shares in ICT Group in 2021.
- Sanofi for all shares in Kiadis Pharma in 2021.

Stakebuilding

10.If the bidder decides to build a stake in the target (either through a direct shareholding or by using derivatives) before announcing the bid, what disclosure requirements, restrictions or timetables apply?

If a bidder intends to make an offer on a listed company, it is not prohibited from buying shares as long as it is not aware of any price sensitive information other than its own intention to make a public offer. The bidder must disclose its holding to the AFM (and this information will be publicly available on the AFM's website) if the bidder's holding crosses each of the following thresholds (whether up, or down) of the target's share capital:

- 3%.
- 5%.
- 10%.
- 15%.
- 20%.
- 25%.
- 30%.
- 40%.
- 50%.
- 60%.
- 75%.

- 95%.

Once the bidder is engaged in discussions with the target company and receives price sensitive information by the target (for example, responses to its offer), it cannot (continue to) build its stake in the target until the relevant price sensitive information is made public, or otherwise ceases to be price-sensitive.

Once the contemplated public offer is announced, the Dutch bidding rules do not specifically prohibit a bidder from continuing to acquire shares in the target company (subject to the insider trading rules). After announcing the public offer, the bidder must publish the relevant details of any transaction in the shares of the target (such as the number of shares and their price).

If between announcing the offer and declaring it unconditional the bidder acquires shares on the market at a higher price than the offer price, the offer price must be increased to such higher price (unless the transaction was a regular trade on a regulated market). This is known as the best price rule. Further acquisition of shares after a public offer has been declared unconditional is also allowed, but the bidder must not buy instruments on more beneficial terms than the terms of the public offer (unless it is a regular trade on a regulated market) for one year from the date of publication of the offer memorandum (subject to limited exceptions).

Agreements in Recommended Bids

11. If the board of the target company recommends a bid, is it common to have a formal agreement between the bidder and target? If so, what are the main issues that are likely to be covered in the agreement? To what extent can a target board agree not to solicit or recommend other offers?

If a target company's board is approached in the context of a public offer and is willing to allow the bidder to undertake a due diligence investigation, the target company and the bidder will generally enter into a confidentiality agreement.

The deal terms agreed between the bidder and the target company are usually reflected in a merger protocol. In this agreement, the target company's boards agree to support and recommend the public offer, and to co-operate with the public offer, and the bidder agrees to make the public offer. Important specific arrangements commonly agreed include:

- Conditions for making the offer.
- Conditions for declaring the offer unconditional.
- Interim operating covenants.
- Regulatory approvals.
- Future governance and any non-financial covenants.
- Second-step transactions.
- Break fees and a fiduciary out for the boards of the target (*see Question 12*).

Under the Dutch bidding rules, the board of the target company must share its position on the public offer in a position statement. This statement must be published at least four days before the informative extraordinary general meeting of the target company, which must be held no later than six days before the end of the offer period.

Break Fees

12.Is it common on a recommended bid for the target, or the bidder, to agree to pay a break fee if the bid is not successful?

It is customary that a merger protocol contains break fee arrangements. The target is usually under the obligation to pay a break fee to the bidder if it terminates the merger protocol to support a superior offer by a competing bidder. In order for the directors of the target to comply with their fiduciary duties, it is generally assumed that a target company's boards should in principle not bind the target company to a public offer without a "fiduciary out" (*see Question 11*). A fiduciary out creates a right for the boards of the target company to revoke their support and recommendation for the public offer, and to terminate the merger protocol. This right is generally linked to a third party making a superior offer. It is commonly agreed that the competing offer price must be at least a specified percentage higher than the initial offer, and generally more favourable to the target company, in order for it to qualify as a superior offer. It is also common that the initial bidder has a corresponding right when a superior offer is announced.

There is no specific statutory rule providing for limitations regarding a break fee agreed by the target company, but it is generally assumed that the board can only agree to a break fee that is a reasonable compensation for costs and loss of opportunity. A break fee for the target company is usually around 1% of the equity value of the target company.

Reverse break fees (that is, where the bidder pays a break fee to the target company) can also be agreed in a merger protocol. A reverse break fee is often linked to the bidder's obligation to obtain regulatory approvals. The amount of the reverse break fee is more deal-specific than the break fee payable by the target company, and can be a fraction of the target company's break fee, but also a multiple.

Committed Funding

13. Is committed funding required before announcing an offer?

The Dutch bidding rules require that a bidder has "certainty of funds" no later than the moment of submitting the request for approval of the offer memorandum to the AFM. Certainty of funds means that the bidder has or is able to have funding available to settle the public offer, or has taken reasonable measures to ensure that it has other forms of consideration available to settle the public offer. The bidder must make a public announcement when it has certainty of funds.

Announcing and Making the Offer

Making the Bid Public

14. How (and when) is a bid made public? Is the timetable altered if there is a competing bid?

On entering into an agreement on the public offer, the bidder and the target must publicly announce the public offer. The target and the bidder issue a joint press release.

From the moment the public offer is announced, the statutory timelines start to run. If an agreement has not (yet) been reached between the target company and the bidder, and specific information regarding the public offer has been made public by the bidder, the public offer is also deemed to have been announced. The statutory timelines therefore start running before a potential agreement is reached between the bidder and the target company. To avoid this, the target may immediately issue a statement confirming that it is discussing the public offer with the bidder. In that case, the timelines do not yet start running.

A mandatory public offer must be announced within 30 days of acquiring (either alone or acting in concert with others) 30% or more of the voting interests in the target company.

The statutory timeline for the public offer announced by a bidder is not altered by a competing offer, provided that the initial bidder is allowed to extend the acceptance period for its offer until the end of the acceptance period of the competing offer.

Offer Conditions

15. What conditions are usually attached to a takeover offer? Can an offer be made subject to the satisfaction of pre-conditions (and, if so, are there any restrictions on the content of these pre-conditions)?

A public offer is usually subject to "commencement conditions" and "offer conditions". The commencement conditions are the conditions that must be satisfied or waived in order for the bidder to be under the obligation to make the offer. The offer conditions are the conditions that must be satisfied or waived in order to declare the offer unconditional.

The commencement conditions that are commonly agreed include:

- No breach of the merger protocol.

- No material adverse change.
- No change in recommendation.
- Approval of the offer memorandum by the AFM.
- Compliance with employee consultation procedures.
- No protective measures initiated against the public offer.
- No governmental actions prohibiting the public offer.
- No suspension of trading of the target company's shares.

Similar conditions commonly apply as offer conditions. Two important additional conditions are that all regulatory approvals have been obtained and that a certain minimum acceptance threshold has been met. The minimum acceptance threshold is usually set at 95%, as that way the bidder can initiate the statutory buyout proceedings. When a 95% minimum threshold is agreed, it is usually also agreed that the threshold will be reduced if the general meeting of the target passes resolutions regarding second-step transactions. Those measures aim to allow the bidder to acquire full control of the target company after settlement of the offer, even if the bidder acquires less than the 95% that is needed to initiate statutory buyout proceedings.

In addition, the adoption of certain governance resolutions (for example, appointing directors) that will apply on settlement of the public offer are sometimes included as an offer condition.

Bid Documents

16. What documents do the target's shareholders receive on a recommended and hostile bid?

Offer Memorandum

The bidder must submit an offer memorandum to the AFM within 12 weeks of announcement of the public offer. The offer memorandum will be made publicly available after approval by the AFM. It must contain all relevant information for the shareholders regarding the public offer, including the:

- Offer price, its premium above the market price and the valuation methods used.
- Rules for acceptance by shareholders.
- Offer period and an indicative timetable.
- Applicable rules in case the shares are tendered.
- Strategic rationale for the offer.
- Other conditions relating to the offer.

Position Statement and Related Information

The target company must make publicly available to its shareholders a position statement no later than four business days before its informative extraordinary general meeting. The meeting itself must be held no later than six business days before the end of the offer period. The position statement must address at least the following:

- Consideration offered by the bidder.
- Considerations and projections used in determining the offered consideration.
- Consequences of the public offer on employees, employment conditions and the locations of the target company.

The target company must also publish certain financial results and an auditor's statement. Managing directors and supervisory directors must publish any transactions and agreements they (or any of their spouses, children or controlled entities) have entered into regarding the instruments of the target company and the instruments of the bidder in the year before the offer memorandum is published.

The target company must also publish the position of the employee representative body regarding the public offer (if received). Any third-party advice (such as a fairness opinion) in relation to the reasonableness of the public offer must also be published. A fairness opinion is not a statutory requirement, but it is common for the target company's boards to obtain one or more fairness opinions.

Other

Other information that the public and the target company's shareholders receive is information by means of a press release when certain milestones are achieved in relation to the public offer (for example, certainty of funds, satisfaction of one or more conditions and declaring the offer unconditional).

Employee Consultation

17. Are there any requirements for a target's board to inform or consult its employees about the offer?

The Dutch bidding rules require that the target company must make the offer memorandum and position statement available to its employee representative body or (if it does not have one) to the target company's employees immediately after publication. The position of an employee representative body (if received) must also be made public together with the target company's position statement.

If the target company has a Dutch works council and that works council has a right of advice in relation to the public offer, the target company must request advice after the public offer is announced.

A public offer involving a Dutch company with activities in the Netherlands must generally also be notified to the relevant labour unions under the Merger Code. The notification must contain information regarding the public offer and provide relevant information in relation to expected social, economic and legal consequences.

Mandatory Offers

18. Is there a requirement to make a mandatory offer?

Under the Dutch bidding rules, a person must make a mandatory public offer if it acquires, alone or acting in concert with others, directly or indirectly, a controlling interest in an EU listed company with a registered office in the Netherlands (*see Question 4, Public Offer*). A "controlling interest" is the ability to exercise 30% or more of the voting rights in the general meeting of the company. "Acting in concert" means a person co-operating under an agreement with the purpose of acquiring a controlling interest in the company.

There is very limited guidance on when persons are acting in concert. Contrary to all other EU jurisdictions where similar mandatory offer rules apply, there is no possibility to obtain guidance from any regulatory authority. This is because a Dutch court will ensure compliance with the mandatory offer rules, and not the AFM.

Consideration

19. What form of consideration is commonly offered on a public takeover?

In the vast majority of Dutch public offers, the consideration is solely cash. However, it is also possible to offer other consideration, such as:

- A mix of cash and shares in the bidder.
- Exclusively shares in the bidder.

20. Are there any regulations that provide for a minimum level of consideration?

Unless a bidder makes a mandatory offer, the Dutch bidding rules do not provide for a minimum level of consideration (but the best price rule applies, see *Question 10*).

When making a mandatory offer for the target company, the bidder must offer a fair price, which is either the:

- Highest price paid by it or by a person with whom it acts in concert for shares of the target company in the 12 months before the announcement of the mandatory offer.
- Highest price paid in the period between announcement of the mandatory offer and settlement (if higher than the price referred to above).
- Average stock exchange price of such shares during that one-year period (if the bidder or a person with whom it acts in concert has not acquired any shares in such period).

The fair price consideration can be in cash, listed instruments or a combination of the two. In certain circumstances, the court can be requested to adjust the "fair price".

21. Are there additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders?

There are no specific additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders.

Post-bid

Compulsory Purchase of Minority Shareholdings

22. Can a bidder compulsorily purchase the shares of remaining minority shareholders?

Statutory Buyout Proceedings

A bidder can initiate a statutory buyout proceeding if it holds 95% or more of the share capital in the target company. In addition to the general statutory buyout proceeding, a bidder can also start a specific public offer-related statutory buyout proceeding if it holds 95% or more of the share capital and voting rights in relation to one or more classes of shares in the target company.

The statutory buyout proceedings are initiated before the Dutch Enterprise Chamber. The Dutch Enterprise Chamber determines the price for the remaining shares, which must be in cash.

In practice, in nearly all Dutch public offers, the bidder has met the 95% threshold, and has therefore been able to initiate a statutory buyout proceeding and to subsequently acquire 100% of the target company's shares.

Pre-wired/ Second-step Transactions

It is not uncommon for the bidder and the target to agree that if the bidder fails to reach the acceptance level of 95% (meaning that the bidder is unable to initiate a statutory buyout) but exceeds a certain lower acceptance level (for example, 80%), the target will co-operate with "second-step transactions", such as:

- An asset sale.
- (Triangular) legal merger.
- A combination of an asset sale and a (triangular) legal merger.

In each case, the second-step transaction is subject to approval from the target's general meeting, and will result in the bidder obtaining full control over the target company's business.

By way of example, "second-step transactions" were agreed in the following transactions:

- Public offer by KKR and Teslin for all shares in Accell in 2022.
- Public offer by CSC for all shares in Intertrust in 2021.

Restrictions on New Offers

23. If a bidder fails to obtain control of the target, are there any restrictions on it launching a new offer or buying shares in the target?

A bidder cannot acquire shares in the target company at more beneficial terms than offered in its public offer during the first year following the publication of its offer memorandum (unless an exemption from the AFM is obtained) (*see Question 10*).

The Dutch bidding rules also provide that if the bidder initiates a public offer but does not proceed in accordance with the statutory requirements, it must not announce or make a new offer for six months or more (unless prior approval is obtained from the AFM).

De-listing

24. What action is required to de-list a company?

To de-list the target company from Euronext Amsterdam, the bidder must hold at least 95% of the target company's shares, and the target company must agree to de-list. A request to de-list must be submitted to Euronext Amsterdam. If Euronext Amsterdam approves the request, de-listing will generally take place 20 trading days after the decision is published.

Target's Response

25. What actions can a target's board take to defend a hostile bid (pre- and post-bid)?

The board of a Dutch listed company can take several actions to defend a hostile bid.

The target's board can refuse to provide information if it does not deem it to be in the best corporate interest of the company and its stakeholders. This will generally make it harder for the hostile bidder to carry out a proper due diligence investigation.

The bidder may aim to put the boards under pressure to co-operate with the offer by a public campaign and (either through its own shareholding or through activist shareholders in the target company) initiate a general meeting or propose resolutions to dismiss certain non-co-operative directors. If a shareholder takes such actions, the target's management board can set either:

- A response time of up to 180 days.
- A reflection period of up to 250 days.

Either scenario will delay the actions put in motion by the hostile bidder. The main differences between the two actions are that:

- The response time is limited to a maximum of 180 days while the reflection period is limited to a maximum of 250 days.
- The response time can be invoked in relation to all resolutions, which can lead to a change in the target's strategy, while the reflection period can only be invoked if a proposal has been made by a shareholder to the appointment, suspension or dismissal of the target's management board member(s) or if a public offer has been announced or made without an agreement having been reached between the bidder and the target.
- During the response time, the relevant items cannot be added as a discussion item to the company's agenda for its general meeting, while this is possible during the reflection period.

If a bidder proceeds with a hostile public offer, it may be confronted with other protective measures. One common protective measure in place at a substantial number of Dutch listed companies is the anti-takeover foundation (about half of the companies listed on the AEX and AMX have such a foundation in place). This means that a foundation (*stichting*) has been incorporated to protect the listed company's interests in the event of a hostile public offer. The anti-takeover foundation is independent from the listed company and cannot be forced by the listed company to actively protect the listed company's interests. Under an option agreement the foundation has entered into with the target company, the foundation can call for newly issued shares in the capital of the company, diluting any share interest the hostile bidder has acquired or intends to acquire. This may prevent the hostile bidder from being able to obtain control over the listed company for a certain period of time.

An anti-takeover foundation may deter a potential hostile bidder from proceeding with a bid without the co-operation of the target company's boards.

Regarding the implementation of anti-takeover measures, Dutch case law indicates that protective measures must be proportional, adequate and generally temporary. In addition, if an anti-takeover foundation exercises its call option and holds the issued shares for a period longer than two years, the exception to the requirement to make a mandatory offer ceases to apply.

Other (more permanent) protective measures that can be in place at a Dutch listed company include priority shares with special rights for the holders of such shares (for example, to appoint directors) or a foundation that holds all shares and has issued depositary receipts that are listed.

The board neutrality rule under Article 9(2) of the Directive 2004/25/EC on takeover bids (Takeover Directive) has been implemented in Dutch law but is optional for Dutch companies. Each company can set out how it applies the board neutrality rule in its articles of association. The rule prohibits the board of the target company from initiating any actions to frustrate the public offer without a prior mandate granted by the general meeting.

Tax

26. Are any transfer duties payable on the sale of shares in a company that is incorporated and/or listed in the jurisdiction? Can payment of transfer duties be avoided?

There are no Dutch transfer duties payable on the sale of shares in a Dutch company listed in the Netherlands.

Other Regulatory Restrictions

27. Are any other regulatory approvals required, such as in relation to merger control, foreign ownership or specific industries? If so, what is the effect of obtaining these approvals on the public offer timetable?

Sector Specific Approvals

Depending on the sector the target company is operating in, specific regulatory approvals or notifications may be required. This is the case for acquisitions of target companies operating in the financial, telecom, healthcare or energy sectors.

In addition, a legislative proposal in relation to investment screening on grounds of national security was adopted by the Dutch senate on 17 May 2022, but has not yet entered into force (which is expected by the end of 2022) (*see Question 31*).

Merger Clearance

In addition, merger clearance in relation to the public offer may be required.

A concentration is subject to notification to and prior approval by the Dutch competition authority if both:

- The combined worldwide turnover of all undertakings concerned is over EUR150 million.
- At least two of the undertakings concerned each have a turnover in the Netherlands of EUR30 million (in the preceding calendar year). Different turnover thresholds apply for concentrations in the Dutch healthcare sector and for pension funds.

A concentration is subject to notification to and prior approval by the European Commission if it has an EU dimension. There are two alternative ways to reach turnover thresholds for the EU dimension (which both relate to turnover generated in the preceding financial year):

- The first alternative requires:
    - a combined worldwide turnover of all the undertakings concerned of over EUR5,000 million; and
    - an EU-wide turnover for each of at least two of the undertakings concerned of over EUR250 million.
- The second alternative requires:
    - a worldwide turnover of all the undertakings concerned of over EUR2.5 billion;
    - a combined turnover of all the undertakings concerned of over EUR100 million in each of at least three EU member states;
    - a turnover of over EUR25 million for each of at least two of the undertakings concerned in each of the three EU member states; and
    - EU-wide turnover of each of at least two undertakings concerned of more than EUR100 million.

In both alternatives, there is no EU dimension if each of the undertakings concerned generated more than two-thirds of their EU-wide turnover within the same member state.

Merger clearance may also be required in other jurisdictions, depending on the business activities of the involved companies.

Impact on Public Offer Timetable

Duration of both sector specific approvals and merger clearance may exceed the ultimate timelines applying to public offers. If one or more relevant clearances have not been obtained before the end of the offer period, the bidder can extend the offer period once by at least two weeks and no more than ten weeks. If the relevant regulatory clearances still have not been obtained within such extended timeframe, the bidder may seek to obtain an exemption from the AFM until such clearances have been obtained. Examples where such exemptions were obtained, include:

- SHV for Nutreco in 2015.
- FedEx for TNT Express in 2016.

28. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies?

There are no general restrictions on the repatriation of profits or exchange control rules for foreign companies.

29. Following the announcement of the offer, are there any restrictions or disclosure requirements imposed on persons (whether or not parties to the bid or their associates) who deal in securities of the parties to the bid?

Specifically in relation to a public offer, from the moment a public offer is announced each of the bidder and target company must immediately make a public announcement of each transaction by it in shares of the target company and, if the offered consideration consists (partly) of shares, in shares in the relevant company.

Also, general disclosure obligations apply to a shareholder in listed companies when it crosses certain thresholds (starting at 3%) and disclosure obligations apply to directors of the target company regarding transactions by such directors in the target company's instruments.

In addition, the offer memorandum must contain information on all transactions executed by the bidder, its managing directors and supervisory directors, and the managing directors and supervisory directors of the target.

A person must not deal in securities when it has price sensitive information (*see Question 10*).

Future Developments

30. What do you think will be the main factors affecting the public M&A market over the next 12 months, and how do you expect the market to develop?

Despite the COVID-19 pandemic, the Netherlands M&A market has been very active over the last 18 months. The current expectation is that the recent geopolitical developments, the rising energy prices and inflation may result in a slowdown of M&A activity, although the current M&A activity is still high. One of the drivers of market activity remains to be the low interest rate, which further increases the availability of cash for corporates and for private equity funds to continue to be able to raise large funds.

Reform

31. Are there any proposals for the reform of takeover regulation in your jurisdiction?

On 17 May 2022, the Dutch senate adopted a proposal for a new national security investment screening regime. The proposal introduces a before (*ex-ante*) and after (*ex-post*) screening mechanism of investment activities for vital providers (for example, companies active in heat transport, nuclear power, air transport, the port area, banking, financial market infrastructure, extractable energy and gas storage), business campuses or companies active in sensitive technology (including military and dual-use products and further specification to be included in governmental decrees which are currently in preparation) in the Netherlands. Although the regime has not yet come into effect (which expected by the end of 2022), parties to a potential transaction should already account for the potential effects of the regime, particularly the fact that its proposed retroactive effect goes back to 8 September 2020. Transactions closed between that date and the entry into force of the regime may therefore be called for screening if there is a reasonable suspicion that they pose a threat to national security.

In the context of M&A, any investments leading to an acquisition of control (including takeovers, mergers, joint ventures, demergers and asset deals) may be captured under the regime. For companies active in sensitive technology, acquisitions of minority shareholdings of 10%, 20% and 25%, the right to appoint one or more board members, or any agreement between shareholders that a shareholder can exercise significant influence, may also already trigger a notification obligation. The rules apply equally to both EU and non-EU investors, including Dutch investors.

If a transaction falls within the scope of the proposed regime:

- The transaction must be notified to the Investment Screening Desk of the Ministry of Economic Affairs and Climate Policy.
- Clearance must be provided before the transaction can be implemented.

Failure to notify (in a timely manner) or providing an incorrect or incomplete notification may result in an administrative fine of 10% of the turnover of the undertaking concerned. Failure to notify will also result in the suspension of all or any rights acquired.

The review period may take up to eight weeks, with a possible extension of six months for further investigation to determine if a decision is required (Phase I). If a decision is required (Phase II) this will take an additional eight weeks with again a possible extension of six months for further investigation, provided that an additional period used in Phase I will be deducted from a possible extension in Phase II. However, the review period may be longer due to "stop the clock" provisions applying to information requests and/or if the EU mechanism under the FDI Screening Regulation (*(EU) 2019/452*) is activated.

Under the proposed regime, the Minister of Economic Affairs and Climate Policy can either:

- Clear the intended activity.
- Impose measures to its clearance decision to safeguard national security.
- Completely prohibit the activity.

Implementing an investment activity in spite of a prohibition decision renders the legal acts null and void.

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Recent transactions

- Firmenich on its merger of equals with Koninklijke DSM NV.
- FL Entertainment on its business combination with a SPAC listed on Euronext Amsterdam.
- Peugeot SA on its cross-border merger with Fiat-Chrysler Automobiles NV.
- Athora on its acquisition of Vivat NV from Anbang and the related on-sale of Vivat Schadeverzekeringen NV to NN Group.
- EssilorLuxottica on the acquisition of a 76.7% stake in GrandVision NV from HAL Holding and its mandatory tender offer for all remaining shares in GrandVision.
- Heineken on several transactions, including its strategic long-term partnership with Sligro Food Group and the acquisition of a minority stake in the craft brewery Oedipus.

- KAS Bank on the recommended all-cash public offer by CACEIS for KAS Bank.
- APG and a joint venture partner on their EUR433 million acquisition of Host Hotels & Resorts' 33% interest in their joint venture, HHR Euro CV and the formation of a new joint venture.
- A consortium led by Joh A Benckiser on its EUR7.5 billion public takeover bid for the shares of DE Master Blenders 1753 NV.
- NN Group on several transactions including the spin outs of Parcom Deutsche Private Equity, Parcom France and Parcom Capital Management and sale of its Bulgarian pension and insurance business.
- Providence Strategic Growth on several transactions, including the acquisitions of VisualFabriq and Recruitee.

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