# PRIVATE M&A

## Netherlands

LEXOLOGY
Getting The Deal Through

Consulting editor
*Davis Polk & Wardwell LLP*

# Private M&A

Consulting editors

**Will Pearce, Louis L Goldberg**

*Davis Polk & Wardwell LLP*

Quick reference guide enabling side-by-side comparison of local insights, including structure and process, legal regulation, consents and filings; advisers, negotiation and documentation; due diligence and disclosure; pricing, consideration and financing; conditions, pre-closing covenants and termination rights; representations, warranties, indemnities and post-closing covenants; tax considerations; employees, pensions and benefits; and recent trends.

Generated 06 October 2022

# Table of contents

# Contributors

## Netherlands

**Hans Witteveen**
hans.witteveen@stibbe.com
*Stibbe*

**Jeroen Tjaden**
jeroen.tjaden@stibbe.com
*Stibbe*

## STRUCTURE AND PROCESS, LEGAL REGULATION AND CONSENTS

### Structure

How are acquisitions and disposals of privately owned companies, businesses or assets structured in your jurisdiction? What might a typical transaction process involve and how long does it usually take?

In the Netherlands, the most typical structure to acquire or dispose of private companies, businesses or assets is by means of the acquisition of the shares or all or part of the assets of a target company. The seller and the buyer will enter into a purchase agreement and ancillary documents governing the sale and purchase.

As for the typical private M&A transaction process, a distinction should be made between a bilateral process and an auction process. A bilateral process typically includes the following legal phases:

- signing of a non-disclosure agreement (NDA) and letter of intent or term sheet;
- due diligence and negotiations regarding the purchase agreement and ancillary documents;
- signing of the purchase agreement;
- if applicable, an interim period between signing and closing for the fulfilment of the closing conditions; and
- closing.

A bilateral process will often take somewhat longer than an auction process owing to the absence of competitiveness, set timelines and vendor due diligence, and assuming a staggered signing and closing may take between three and six months.

An auction process will involve certain additional legal documents and generally includes the following legal phases:

- preparations for the auction process, for example, a vendor due diligence report, information memorandum and data room;
- signing of an NDA;
- issue of a process letter to prospective bidders;
- limited due diligence and submission of non-binding offers by bidders;
- submission of binding offers by (selected) bidders, including mark-up of the purchase agreement;
- negotiations with selected bidders and confirmatory due diligence;
- entering into an exclusivity agreement with the preferred bidder and negotiations for the purchase agreement and ancillary documents;
- signing of the purchase agreement;
- if applicable, an interim period between signing and closing for the fulfilment of the closing conditions; and
- closing.

Given the prewired sales process and competitiveness involved in an auction sale, signing can take place within one month after the bidders have been invited to participate in the auction, and assuming a staggered signing and closing the whole process may take between two and five months.

*Law stated - 21 September 2022*

## Legal regulation

### Which laws regulate private acquisitions and disposals in your jurisdiction? Must the acquisition of shares in a company, a business or assets be governed by local law?

Private acquisitions and disposals are not governed by a single code or statute as such. Under Dutch law, the parties are to a large degree free to agree the terms and conditions of the purchase. The Civil Code sets outs the legal framework for the sale and purchase of all goods, including shares, businesses or assets. Parties often exclude the applicability of certain general provisions from which deviation is allowed such as provisions regarding remedies, warranties, performance, damages, nullification and termination, to avoid these provisions interfering with the contractually agreed regime, for example, with respect to a seller's liability in relation to a purchaser in the case of a warranty breach.

Other Dutch laws and regulations that govern private acquisitions and disposals are:

- the Competition Act;
- the Works Council Act;
- the Merger Code; and
- sector-specific laws, such as the Financial Supervision Act.

EU law and regulations (eg, on merger control) and national merger control rules of foreign jurisdictions may also be relevant.

Parties are free to choose the law that applies to the transaction documents of an acquisition of shares, a business or assets, except for the transfer deed regarding registered shares and registered property (such as real estate), which must be executed before a Dutch civil law notary and governed by Dutch law.

*Law stated - 21 September 2022*

## Legal title

### What legal title to shares in a company, a business or assets does a buyer acquire? Is this legal title prescribed by law or can the level of assurance be negotiated by a buyer? Does legal title to shares in a company, a business or assets transfer automatically by operation of law? Is there a difference between legal and beneficial title?

A buyer will typically acquire the full legal title (ie, legal and beneficial title) to shares, a business or assets. It is possible that the shares or assets are encumbered (eg, with pledges), which encumbrances will remain vested on the shares or assets when transferred unless released. Dutch law allows the legal and beneficial title to shares or an asset to be separated. In such case, the holder of the legal title is the owner of the share or asset, while the beneficial title grants the holder a certain beneficial right (eg, an economic interest) to the share or asset.

The legal title to shares, a business or assets does not transfer automatically; instead, the shares, assets and liabilities must be transferred individually and specific transfer requirements apply, depending on the nature of the asset and liability. In the event of a legal merger or demerger pursuant to the Civil Code, the legal title to shares, a business or assets will transfer automatically to the acquiring company or legal entity.

Registered shares in private companies are transferred by means of a notarial deed of transfer signed by the seller and the buyer in front of a Dutch civil law notary. In the context of the transfer of registered shares, a Dutch civil law notary

has an independent obligation to ascertain the title and ownership of the shares by the seller upon the transfer of the shares. This role of the civil law notary provides comfort regarding the validity of the transfer of title.

In addition to an agreement between the seller and buyer, which will be required for the transfer of most types of assets and liabilities, the following requirements, inter alia, apply:

- contracts: cooperation of the counterparty (specific transfer requirements or limitations may be included in the relevant contract);
- permits: additional transfer requirements may apply pursuant to the relevant permit, for example notification to or consent from the relevant governmental authority;
- receivables or loans provided: notification to the debtor (specific transfer requirements or limitations may be included in the relevant contract);
- debt: consent of the creditor (specific transfer requirements or limitations may be included in the relevant contract);
- real estate and other registered property: execution of a notarial deed of transfer by a Dutch civil law notary and registration of such deed with the appropriate land register;
- intellectual property: generally registration in the relevant register for purposes of third-party effect; and
- tangible, non-registered property (eg, inventory, stock): granting of possession (unless held by other parties on behalf of the seller, in which case different requirements apply).

As in other EU member states, special protection is granted to the employees in a business through an automatic transfer of their rights and obligations under the employment agreement to the buyer of the business in the event that the transaction qualifies as a 'transfer of undertaking' (TUPE). However, this protection does not extend to certain types of pension rights of such employees. It is, for instance, possible that the pension rights do not transfer, because the buyer has to apply the existing pension arrangement for its business to the transferred employees. If the acquisition does not qualify as a transfer of undertaking, the assumed employees will not transfer to the buyer by operation of law, and an agreement between the seller and the buyer with the consent of the employee will be required.

*Law stated - 21 September 2022*

## Multiple sellers

Specifically in relation to the acquisition or disposal of shares in a company, where there are multiple sellers, must everyone agree to sell for the buyer to acquire all shares? If not, how can minority sellers that refuse to sell be squeezed out or dragged along by a buyer?

A buyer will typically acquire the full legal title (ie, legal and beneficial title) to shares, a business or assets. It is possible that the shares or assets are encumbered (eg, with pledges), and the encumbrances will remain vested on the shares or assets when transferred unless released. Dutch law allows the legal and beneficial title to shares or an asset to be separated. In such a case, the holder of the legal title is the owner of the share or asset, while the beneficial title grants the holder a certain beneficial right (eg, an economic interest) to the share or asset.

The Civil Code provides for a squeeze-out mechanism for shareholders of both public and private companies, which is not often used in a private company context. A shareholder who holds at least 95 per cent of the shares of a company can institute proceedings against the other shareholders jointly for the transfer of their shares to the claimant (ie, the buyer).

Furthermore, minority shareholders can be forced to sell their shares through the enforcement of a drag-along right by the majority shareholder or shareholders. Drag-along provisions will be typically included in a shareholders' agreement.

In addition, such provisions can also be incorporated in the articles of association of a private company. However, in view of the statutory requirements that such arrangements need to comply with, drag-along provisions in articles of association require careful drafting, and often it will not be possible to implement the drag-along arrangement in the shareholders' agreement 'back-to-back', or by way of incorporation by reference.

*Law stated - 21 September 2022*

### Exclusion of assets or liabilities

Specifically in relation to the acquisition or disposal of a business, are there any assets or liabilities that cannot be excluded from the transaction by agreement between the parties? Are there any consents commonly required to be obtained or notifications to be made in order to effect the transfer of assets or liabilities in a business transfer?

In principle, a buyer and a seller can decide which assets and liabilities will be transferred to the buyer and which will remain with the seller.

However, as in other EU member states, special protection is granted to the employees in a business through an automatic transfer of their rights and obligations under the employment agreement to the buyer of the business in the event that the transaction qualifies as a TUPE. In such a case, all rights and obligations arising from employment agreements (other than, in certain cases, pension rights) will transfer to the buyer by operation of law, as a result of which these agreements cannot be excluded from the relevant transaction by the parties. If an acquisition does not qualify as a transfer of undertaking, the assumed employees will not transfer to the buyer by operation of law, and an agreement between the seller and the buyer with the consent of the employee will be required.

In the case of a transfer of assets and liabilities, and depending on the type of asset or liability transferred, third-party consents from, for example, counterparties, creditors or governmental authorities, or notifications to registers or governmental authorities, may be required to effect a transfer.

*Law stated - 21 September 2022*

### Consents

Are there any legal, regulatory or governmental restrictions on the transfer of shares in a company, a business or assets in your jurisdiction? Do transactions in particular industries require consent from specific regulators or a governmental body? Are transactions commonly subject to any public or national interest considerations?

#### Competition

It is possible that a transaction needs to be notified to the Dutch Authority for Consumers and Markets (ACM). The Competition Act applies if a transaction qualifies as a concentration and the turnover of the relevant businesses involved exceeds certain thresholds. A concentration is defined as:

- a merger of two previously independent undertakings;
- the direct or indirect acquisition of control over the whole or part of an undertaking; or
- the establishment of a joint venture that performs all the functions of an autonomous economic entity on a long-term basis.

The current thresholds for notification to the ACM are a combined worldwide turnover of the undertakings concerned of €150 million in the calendar year preceding the transaction; and at least two undertakings concerned each realised a turnover of €30 million or more in the Netherlands in the calendar year preceding the transaction.

If a concentration needs to be notified to the ACM, it may not be implemented prior to clearance from the ACM. Concentrations that involve at least two Dutch healthcare providers may be subject to lower turnover thresholds. Furthermore, specific methods for the calculation of the relevant turnover apply for banks, financial institutions, insurers and pension funds.

If a concentration triggers a notification to the European Commission under the EU merger filing rules, no separate notification to the ACM is required.

Furthermore, acquisitions and disposals taking place in certain sectors (eg, financial) may require prior consent or a declaration of no objection from the relevant regulatory authority. Dutch law does not include any foreign ownership or investment rules, nor any general public or national interest consideration rules. The most relevant sector-specific regulations are as follows.

### Energy sector

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. Such transaction can be prohibited for reasons of national security or supply security.

### Healthcare sector

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.

### Financial sector

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 or more in a financial institution. If 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, inter alia, the integrity, suitability and financial soundness of the prospective buyer. Increases in the interest held by the buyer above certain thresholds and decreases below those thresholds must be notified to the Dutch Central Bank.

### Telecom sector

*Law stated - 21 September 2022*

## Are any other third-party consents commonly required?

The articles of association of a private limited liability company may contain share transfer restrictions. First, there may be a blocking clause, which entails that a transfer of shares is subject to prior approval of the general meeting of shareholders (or another corporate body of the company) or a right of first refusal of the other shareholder or shareholders. Furthermore, the articles of association may contain other types of restrictions, such as a lock-up period,

restrictions on transferees (eg, competitors) or tag-along rights.

Furthermore, 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 by a simple majority of the votes cast. 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 considered to be subject to shareholder approval. Moreover, further-reaching approval rights may be included in the articles of association of a company.

In addition, change-of-control-related third-party consents may be required under the relevant contract (eg, under existing financing agreements or other loans, subsidies, lease agreements or commercial contracts).

Although not constituting an actual consent requirement, a Dutch works council can have the right to render advice on a transfer of control over a company.

*Law stated - 21 September 2022*

### Regulatory filings

Must regulatory filings be made or registration (or other official) fees paid to acquire shares in a company, a business or assets in your jurisdiction?

The transfer of specific assets (eg, real estate and intellectual property rights) may require registration of the transfer in the appropriate registers. Registration fees may be payable for such purpose. No stamp duties apply, and notary fees are not determined by law and will be agreed with the Dutch civil law notary involved (eg, on the basis of time spent).

*Law stated - 21 September 2022*

## ADVISERS, NEGOTIATION AND DOCUMENTATION

### Appointed advisers

In addition to external lawyers, which advisers might a buyer or a seller customarily appoint to assist with a transaction? Are there any typical terms of appointment of such advisers?

Parties will usually involve a financial adviser, such as a corporate finance adviser or a financial due diligence provider and tax specialists (to the extent such tax aspects are not dealt with by the lawyers). Depending on the size of the transaction and the target, an investment bank can be engaged, and a buyer may also engage a consultancy firm for the commercial due diligence, as well as environmental and pension specialists, for specific topics of the due diligence. Public relation advisers may be engaged if one of the parties in the transaction is a listed entity. Terms of engagement are typically discussed and agreed between the buyer and seller and the relevant adviser, and may include special fee structures (eg, a success fees).

*Law stated - 21 September 2022*

### Duty of good faith

Is there a duty to negotiate in good faith? Are the parties subject to any other duties when negotiating a transaction?

Under Dutch law, parties are in principle free to enter into contracts and to negotiate the terms of such contract. Dutch

case law has established that the relationship between parties in negotiations is governed by the principles of reasonableness and fairness, meaning that the parties have the obligation to take into account each other's reasonable interests.

This good faith principle also applies in pre-contractual negotiations and has been developed in case law. In principle, a party may terminate negotiations at its own discretion, unless the negotiations have reached such an advanced stage that a party cannot unilaterally break off negotiations without being liable towards the other party. In such case, the other party may be entitled to claim compensation of costs or an order to continue negotiations and, under certain exceptional circumstances, loss of profit. To be able to terminate negotiations without being exposed to the aforementioned actions, parties often enter into an agreement governing the pre-contractual phase (eg, a letter of intent) to mitigate as much as possible any pre-contractual obligations and liability.

Under Dutch law, the directors of a company have a duty to act in the corporate interest of the company and its business. The corporate interest of the company extends to the interests of all stakeholders, including shareholders, creditors, employees, lenders, suppliers, customers and the region in which the company is located. Making decisions, therefore, is a process of 'weighing up' the various interests of all stakeholders of the company. In the case of a joint venture company, the corporate interest is also determined by the nature and content of the cooperation agreed by both shareholders.

*Law stated - 21 September 2022*

## Documentation

### What documentation do buyers and sellers customarily enter into when acquiring shares or a business or assets? Are there differences between the documents used for acquiring shares as opposed to a business or assets?

In the context of a bilateral sale and purchase of shares, a business or assets, the parties will typically enter into the following documents:

- a non-disclosure agreement setting out the terms under which the parties will exchange confidential information;
- a letter of intent or term sheet laying down the heads of terms between the parties, for example, the transaction structure, purchase price, financing, corporate approvals, due diligence, transaction documents and exclusivity;
- a purchase agreement in which the terms and conditions of the transaction are reflected. In the case of a transfer of a business, assets and liabilities, more elaborate provisions are necessary for dealing with applicable specific transfer requirements (which may differ depending on the nature of the asset, liability or business), extensive post-closing obligations and possibly disentanglement aspects; and
- a disclosure letter prepared by the seller containing general and specific disclosures against the warranties in the purchase agreement. Full data room disclosure has become standard practice in the Netherlands, whereby information in the data room that is 'fairly disclosed' qualifies the warranties. Even if parties agree to such full data room disclosure, a buyer may still insist that the seller prepare a disclosure letter.

Depending on the type of transaction, the following documents are also often used in transactions:

- transitional or shared service agreements dealing with the disentanglement of certain aspects of the target group (eg, IT) from the seller's group following completion; or
- a notary letter setting out the payment of the purchase price (ie, the funds flow) at closing. In the context of a purchase of shares, a buyer will typically envisage the purchase price to be paid to the seller through the notary account, a third-party account held by a Dutch civil law notary. This payment process will ensure that the

purchase price will be released to the buyer only when the notarial deed of transfer of shares has been executed, and can also be a helpful mechanism if the shares are encumbered with a right of pledge that is to be released upon closing (in the context of a repayment of existing facilities).

Furthermore, the findings in the (legal) due diligence may require entering into documents to address identified issues (eg, assignment of intellectual property rights by the seller) either before the signing of the purchase agreement or the closing of the transaction.

*Law stated - 21 September 2022*

### Are there formalities for executing documents? Are digital signatures enforceable?

Under Dutch law, a distinction is made between a private deed and a notarial deed. For certain types of agreements, a notarial deed is prescribed by Dutch law, and such agreements are therefore valid only if they are laid down in a notarial deed. A transfer of registered shares and certain registered assets (eg, real estate) can be effected only by means of the execution of a notarial deed. Typically, the notarial deed will be executed on the basis of powers of attorney, which will be provided to a person acting under the supervision of a notary (ie, parties will not have to be present at the signing of the notarial deed). In cases where a foreign company is a party to the notarial deed, in addition to a legalised signature of the person signing the power of attorney, a Dutch notary will typically require an authority declaration stating that the signatories that sign the power of attorney are authorised to represent such company and, depending on what country the foreign company that is party to the notarial deed is from, an apostille.

As for the signing of private deeds, in principle, no legalisation is required.

Under the Regulation (EU) No. 910/2014 on electronic identification and trust services for electronic transactions in the internal market (the eIDAS Regulation), as implemented in the Netherlands, digital signatures are in principle valid, whereby it should be noted that under the Regulation only qualified digital signatures are legally identical to handwritten signatures. In the Netherlands, basic and advanced digital signatures (as defined in the eIDAS Regulation) have the same legal effect as handwritten signatures provided that the method used is sufficiently reliable, and taking into account the purpose for which the signature is used and all other circumstances of the case. If the method used is deemed insufficiently reliable, this does not mean that a particular signature is void, but it may negatively influence the evidentiary value of the signature. Certain documents, such as notarial deeds, require a 'wet ink' handwritten signature and cannot be executed by means of a digital signature.

*Law stated - 21 September 2022*

## DUE DILIGENCE AND DISCLOSURE

### Scope of due diligence

### What is the typical scope of due diligence in your jurisdiction? Do sellers usually provide due diligence reports to prospective buyers? Can buyers usually rely on due diligence reports produced for the seller?

The scope of the due diligence performed by a buyer in the context of a transaction can, in addition to a legal investigation, extend to a financial, tax, commercial and environmental investigation into the company and its assets and liabilities.

Under Dutch law, in the context of a transaction, a seller in principle has a duty to disclose all information in relation to the target that can be deemed essential for a buyer, and a buyer has the duty to investigate (ie, to perform adequate

due diligence, which includes asking for clarification on unclear matters). In contrast to the common law systems, the 'caveat emptor' or 'buyer beware' concept does not apply, in the sense that a seller typically cannot dismiss claims by the buyer on the sole ground that buyer should have performed a better investigation into the target if the seller has not informed buyer of essential information.

Parties can to a certain extent contractually agree the scope of the buyer's duty to investigate and the seller's duty to disclose in the context of a transaction. Absent any arrangement, it will be up to a Dutch court to determine whether information disclosed to the buyer will limit its ability to claim under the relevant warranty. Therefore, parties typically address the due diligence performed by the buyer and the consequences thereof (ie, to what extent this qualifies the warranties) in the purchase agreement. From a seller's perspective, all information known to the buyer, or any information that could have reasonably been discovered, should bar a claim under the warranties, while a buyer will want to lay down that the due diligence performed shall not limit its right to make such claim. Parties usually agree to a compromise whereby the purchase agreement provides what matters are considered disclosed for purposes of the warranties.

A seller will usually prepare a vendor due diligence report in the context of a controlled auction process, among other things, to ensure an expedited sales process and to frame complexities of the transaction upfront. In the context of such an auction process, typically reliance is provided to a buyer.

*Law stated - 21 September 2022*

## Liability for statements

Can a seller be liable for pre-contractual or misleading statements? Can any such liability be excluded by agreement between the parties?

Although the buyer has a duty to investigate, it may in principle rely on the correctness of statements made by the seller. Whether a seller will be liable in relation to the buyer for misleading statements will to a large extent be subject to negotiations.

A seller will usually insist on providing in the purchase agreement that the buyer may only rely on the representations and warranties included in the purchase agreement, and that no implied warranties are provided. Such provision will limit the buyer to rely on pre-contractual statements made by the seller (to the extent these are not reflected in the purchase agreement).

As for misleading statements, warranties commonly include an 'information warranty' in which the seller warrants that the information provided to the buyer is true, complete and not misleading, thereby creating a basis for a claim in the case of a misleading statement.

If the purchase agreement is silent on whether a seller is liable for misleading statements, a buyer can invoke the relevant remedies of the Civil Code (ie, error or fraud). The exclusion of such remedies by the parties may not be enforceable before a Dutch court (ie, the prevailing doctrine in the Netherlands is that the remedy for fraud cannot be contractually excluded).

*Law stated - 21 September 2022*

## Publicly available information

What information is publicly available on private companies and their assets? What searches of such information might a buyer customarily carry out before entering into an agreement?

In the trade register of the Dutch Chamber of Commerce, inter alia, the following information on private companies and

their assets and liabilities can be retrieved:

- deed of incorporation;
- current and previous articles of association;
- share capital;
- composition of the management board and, if installed, the supervisory board;
- details of persons authorised to represent the company;
- proxy holders;
- in cases where the company has a sole shareholder, the details of the sole shareholder;
- annual accounts; and
- descriptions of filings made by the company with the trade register, such as annual accounts, mergers and liability declarations.

In addition, the Dutch Land Registry contains information about real estate held by companies, including mortgages and other charges that are vested on the relevant property.

The online register of the Dutch courts contains judgments; however, only a selection of judgments are published on this website, and in most of the judgments the names and details of parties are redacted (the search capability is more intended for the public (in particular lawyers) to be able to follow case law, rather than to search for party names). In the Netherlands, other than the Dutch Land Registry, no public lien register exists in which liens are registered.

The online Central Insolvency Register contains an up-to-date overview of all companies for which bankruptcy has been petitioned with Dutch courts or which are currently subject to suspension of payments.

On 27 September 2020, an act implementing the Dutch ultimate beneficial owner (UBO) register (the UBO register) came into force. Under this act, legal entities must collect, maintain and register information about their UBOs in the UBO register. Existing legal entities are given 18 months to do so. Newly established legal entities must immediately record their UBOs when they first register their business with the trade registry. Certain UBO information is publicly available: the UBO's name, month and year of birth, country of residence, nationality and the nature and extent of the beneficial interest the UBO holds.

*Law stated - 21 September 2022*

## Impact of deemed or actual knowledge

What impact might a buyer's actual or deemed knowledge have on claims it may seek to bring against a seller relating to a transaction?

The purchase agreement may include arrangements between the parties with respect to the consequences of the actual or deemed knowledge of the buyer. Typical provisions in this respect are either that the seller shall not be liable for a claim in relation to any information known to, or that could have reasonably be discovered by, the buyer (seller-friendly), or that any knowledge attributable to the buyer shall not affect or limit the buyer's right to make a claim (buyer-friendly).

It is, however, argued in Dutch legal literature that a buyer's knowledge that a warranty is or may not be true will prevent a buyer from relying on and filing a claim for a breach of that warranty. Therefore, in cases where the buyer is aware that a certain warranty is not true, it is advisable for such buyer to request a specific indemnity.

*Law stated - 21 September 2022*

## PRICING, CONSIDERATION AND FINANCING

### Determining pricing

How is pricing customarily determined? Is the use of closing accounts or a locked-box structure more common?

In Dutch private M&A deals, the purchase price is usually determined by means of either closing accounts or locked-box structures. Which mechanism is used depends on the specifics of the transaction and the parties involved therein, but the locked-box mechanism is increasingly used, in particular in deals involving a private equity seller.

*Law stated - 21 September 2022*

### Form of consideration

What form does consideration normally take? Is there any overriding obligation to pay multiple sellers the same consideration?

The purchase price is typically settled in cash. Dutch law does not impose an obligation to pay multiple sellers the same consideration in a private deal context.

*Law stated - 21 September 2022*

### Earn-outs, deposits and escrows

Are earn-outs, deposits and escrows used?

Escrows are commonly used in Dutch transactions. Earn-outs are used on an occasional basis, but they may lead to disagreement between the buyer and seller post-closing and are, therefore, litigation-sensitive. Deposits are occasionally used.

*Law stated - 21 September 2022*

### Financing

How are acquisitions financed? How is assurance provided that financing will be available?

An acquisition can be financed by equity, debt or a mix of both. Which form of financing is used will depend, inter alia, on the type of buyer. Strategic buyers commonly use cash and private equity buyers will use a mixture of cash and equity.

If equity or financing is used, depending on the nature of the buyer and the financing, the buyer may deliver supporting documents to the seller, such as a debt or equity commitment letter, or similar letters confirming the availability of financing. If no financing commitment will be available at signing, a buyer may negotiate that completion be subject to the buyer obtaining the necessary financing, but this is not a commonly used closing condition.

*Law stated - 21 September 2022*

### Limitations on financing structure

Are there any limitations that impact the financing structure? Is a seller restricted from giving financial assistance to a buyer in connection with a transaction?

Financial assistance by a target company with a view to the acquisition of shares in its capital by a third party is restricted for public limited liability companies but permitted for private limited liability companies.

There is no limitation as such for a seller to provide financial assistance to a buyer. The boards of the seller and the target, however, need to take into account the general principles of Dutch law, that is, the directors must consider if the transactions are in the corporate interest of the company as well as the consequences for the company's financial position.

Furthermore, in the case of acquisition financing, the statutory advisory rights of a works council installed at the level of the target or the buyer may be applicable (eg, with respect to the granting of security).

*Law stated - 21 September 2022*

## CONDITIONS, PRE-CLOSING COVENANTS AND TERMINATION RIGHTS

### Closing conditions

Are transactions normally subject to closing conditions? Describe those closing conditions that are customarily acceptable to a seller and any other conditions a buyer may seek to include in the agreement.

Transactions are commonly subject to closing conditions. Other than regulatory conditions that are required to implement the transaction, conditions that are customarily accepted by a seller are obtaining change of control waivers or consents and other actions to be taken by the seller or target group on the basis of the buyer's due diligence findings (eg, intellectual property assignments or notifications to governmental authorities). A buyer may also negotiate other, less common, conditions, for example regarding:

- corporate approvals required by the buyer;
- the accuracy of representations and warranties;
- no material adverse change;
- financing;
- absence of legal proceedings challenging the transaction; and
- retention of employees.

We sometimes see that the rendering of a (positive) works council advice (if required) is included as a closing condition in purchase agreements. While there have not been judgments explicitly approving or denouncing this practice, some argue in Dutch legal literature that having the works council advice included as a condition precedent to closing in the purchase agreement, rather than obtaining such advice prior to the execution of the purchase agreement, is not in line with the Dutch Works Council Act. For this reason, a signing protocol might be used instead, meaning that parties enter into a separate agreement in which they state that the thereto attached finalised purchase agreement will be signed after (successful) completion of the works council advice process. In either case, the works council advice must be allowed to have a meaningful impact on the decision to enter into the transaction in question, if works council advice is required.

*Law stated - 21 September 2022*

What typical obligations are placed on a buyer or a seller to satisfy closing conditions? Does the strength of these obligations customarily vary depending on the subject matter of the condition?

The obligations of a buyer and a seller in the context of closing conditions are subject to negotiation. Typically a best efforts obligation will be included and, if an antitrust or other regulatory closing condition applies, a separate regime dealing with the satisfaction of this condition will be agreed.

*Law stated - 21 September 2022*

## Pre-closing covenants

Are pre-closing covenants normally agreed by parties? If so, what is the usual scope of those covenants and the remedy for any breach?

The purchase agreement usually contains some form of pre-closing covenants, especially in the event that the locked-box purchase price structure is used (in which case more extensive covenants may be agreed). The covenants will usually provide that the seller shall ensure that the target shall carry on its business in the ordinary course, be consistent with past practice and include certain specific covenants in this respect. They will also deal with a buyer's access to the target. In addition, the pre-closing covenants cover certain matters that require the prior consent of the buyer, such as:

- changes to the constitutional documents;
- adoption of shareholders' resolutions;
- changes to the share capital;
- granting of rights or options to shares;
- granting of security;
- payment of dividend;
- changes to the accounting policies;
- acquisition or disposal of business or assets;
- entering into or termination of certain types of agreement;
- mergers, borrowings and indebtedness;
- engagement or dismissal of employees or other employment-related covenants;
- initiating legal proceedings; and
- tax covenants.

The remedy for a breach of the pre-closing covenants is subject to negotiation. Usually, the buyer will have a claim for damages, specific performance or termination of the purchase agreement.

*Law stated - 21 September 2022*

## Termination rights

Can the parties typically terminate the transaction after signing? If so, in what circumstances?

The purchase agreement will usually provide for limited possibilities for termination before closing. The termination grounds, and which party may invoke such grounds, are subject to negotiation. Typical termination grounds are non-satisfaction of closing conditions (including the long-stop date concept) or non-compliance with completion

obligations (eg, payment of the purchase price). Depending on the negotiations, buyer-friendly termination grounds may be included, such as a material breach of an obligation of the seller or a warranty, or the occurrence of a material adverse change. In addition, parties typically exclude statutory post-closing termination grounds (eg, rescission or dissolution) in the purchase agreement, to the extent permitted by law.

*Law stated - 21 September 2022*

Are break-up fees and reverse break-up fees common in your jurisdiction? If so, what are the typical terms? Are there any applicable restrictions on paying break-up fees?

Agreed break-up fees and reverse break-up fees are rarely used in private deals. We occasionally see in a competitive auction process that a seller is able to negotiate that the buyer pay a deposit at the signing of the purchase agreement, which the seller may then retain if the transaction does not complete due to a circumstance that is for the account of the buyer. When agreeing to such fee, as part of its statutory duties, the board of directors of the buyer will need to assess if this is in the corporate interest of the company, particularly in view of the likelihood that the fee will be payable.

*Law stated - 21 September 2022*

## REPRESENTATIONS, WARRANTIES, INDEMNITIES AND POST-CLOSING COVENANTS

### Scope of representations, warranties and indemnities

Does a seller typically give representations, warranties and indemnities to a buyer? If so, what is the usual scope of those representations, warranties and indemnities? Are there legal distinctions between representations, warranties and indemnities?

The purchase agreement will, in principle, include warranties provided by the seller. The scope of the warranties will depend on the nature and circumstances of the transaction (eg, the business of the target and the room for negotiation). The warranties will usually cover the following areas:

- authority and capacity of the seller;
- corporate organisation;
- title to the shares (in the case of an acquisition of shares);
- the business (eg, warranties regarding conduct of business, compliance with laws and anti-corruption);
- licences and permits;
- financial statements;
- property and assets;
- employment and pensions;
- environment;
- intellectual property and IT systems;
- privacy and data protection;
- material agreements;
- insurance;
- litigation; and
- tax.

Depending on the due diligence and the negotiation position of the buyer, the purchase agreement may also include

indemnities for specific liabilities that have been identified but the size of which is not yet certain, if the parties agree that such liabilities should remain for the account of the seller. This might include, for example, identified environmental issues, ongoing litigation or pre-closing tax liabilities. Such indemnities are dealt with separately in the purchase agreement, and any agreed limitations to warranty claims (eg, basket or caps) typically do not apply to claims under the specific indemnities.

*Law stated - 21 September 2022*

## Limitations on liability

What are the customary limitations on a seller's liability under a sale and purchase agreement?

The following limitations will typically be included with respect to a seller's liability for warranty claims:

- de minimis threshold;
- basket;
- cap (which may distinguish between a cap for fundamental warranties and non-fundamental warranties, and which will typically not apply in case of, for example, fraud or wilful misconduct); and
- time limitations to claim under the warranties. Time limitations are typically between 18 and 24 months, with a separate, longer period applicable to claims under the fundamental and tax warranties.

Other customary limitations are no cumulation, and no liability for damage resulting from an act or omission of the buyer or recovered under an insurance policy. Parties also typically negotiate the extent of any damage for which the seller shall be held liable under the purchase agreement (eg, whether this shall include any loss of profits or any other consequential damages).

Furthermore, the warranties themselves may be subject to knowledge and materiality qualifiers and disclosures, the latter by means of disclosure of the data room or a disclosure letter, or both.

A seller will commonly insist on the inclusion of an overall cap for its liability under the purchase agreement. In the case of a locked-box purchase price structure, a separate regime for the seller's liability for leakage will also be agreed.

*Law stated - 21 September 2022*

## Transaction insurance

Is transaction insurance in respect of representation, warranty and indemnity claims common in your jurisdiction? If so, does a buyer or a seller customarily put the insurance in place and what are the customary terms?

Warranty and indemnity (W&I) insurance is increasingly used in Dutch transactions, especially when a private equity seller or other seller is looking for a 'clean' exit. The most common structure in this context is a seller pre-wiring the W&I insurance in the context of an auction process and the buyer ultimately taking out the insurance policy. The terms of the insurance policy are generally in line with European W&I standards (it is usually non-Dutch insurers that are engaged for the provision of the W&I insurance).

*Law stated - 21 September 2022*

### Post-closing covenants

Do parties typically agree to post-closing covenants? If so, what is the usual scope of such covenants?

Depending on the nature of the seller, parties can agree on certain restrictions for the seller with respect to the business, employees and business relations of the target. The scope of such covenants usually extends to the undertakings of the seller not to conduct any business competing with the target's business and not to solicit employees, customers or other business relations. The purchase agreement will typically impose a penalty on the seller in the event of a breach of a restrictive covenant.

Other common post-closing covenants relate to confidentiality and announcements, use of intellectual property by the seller or the buyer, required name changes or other items identified in the due diligence that have not been addressed prior to closing.

*Law stated - 21 September 2022*

## TAX

### Transfer taxes

Are transfer taxes payable on the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

Dutch real estate transfer tax (RETT) is, in principle, payable upon the acquisition of the legal or economic ownership of (certain rights on) real estate situated in the Netherlands. RETT can also be payable upon the acquisition of an interest of at least one-third in a Dutch or foreign entity (taking into account attribution rules) if, in short, at the moment of the acquisition or in the preceding year on a consolidated basis:

- the entity's assets comprise more than 50 per cent of real estate;
- the entity's assets at the same time comprise at least 30 per cent of Dutch real estate; and
- the real estate (as a whole) is or was for 70 per cent or more conducive to the acquisition, disposition or exploitation of such real estate.

RETT is levied from the acquirer at a rate of 8 per cent (2 per cent for residential properties – rates for 2021) over the higher of the purchase price and the fair market value of the Dutch real estate in proportion to the percentage of shares acquired. As of 1 January 2021, the RETT rate of 2 per cent for residential homes can only be applied by individuals buying a primary residence meaning that investors will always acquire property at a rate of 8 per cent.

No Dutch stamp taxes or duties are payable on the transfer of shares in a company, a business or other assets.

*Law stated - 21 September 2022*

### Corporate and other taxes

Are corporate taxes or other taxes payable on transactions involving the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

A company resident or deemed to be resident in the Netherlands for Dutch tax purposes will generally be subject to Dutch corporate income tax (CIT) with respect to income and capital gains derived or deemed to be derived from the disposal of shares, a business or other assets. The Dutch CIT rate for 2021 is 25 per cent (for taxable profits over €245,000; 15 per cent for the first bracket of €245,000). As of 1 January 2022, the first bracket of €245,000 will be increased to €395,000, meaning that the first €395,000 will be subject to a rate of 15 per cent. Exemptions (eg, the participation exemption for shareholdings of, in short, 5 per cent or more of the nominal paid-up and outstanding capital) or reliefs (eg, rollover relief) may be available. Anti-abuse rules may apply with respect to the application of the exemptions or reliefs.

In general, Dutch VAT is due on the supply of goods or services for consideration carried out by taxable persons (entrepreneurs) for VAT purposes, unless such supply is exempt from VAT. The general VAT rate is 21 per cent (reduced rates of 9 or zero per cent rate apply to certain designated supplies – rates for 2021). A sale of shares is generally an exempt supply for VAT purposes. A sale of a business may be outside the scope of VAT if it qualifies as a transfer of a going concern for VAT purposes. The party liable to account for the VAT (ie, the supplier of the goods or services or the receiver thereof), if due, depends on the nature of the supply and of the parties, and on where the supply is treated as taking place for VAT purposes.

*Law stated - 21 September 2022*

## EMPLOYEES, PENSIONS AND BENEFITS

### Transfer of employees

Are the employees of a target company automatically transferred when a buyer acquires the shares in the target company? Is the same true when a buyer acquires a business or assets from the target company?

In the case of a transfer of shares in a target company, the employees of the target will transfer automatically to the buyer's group upon the transfer of shares (as part of the target company).

The acquisition of a business or certain assets might be qualified under Dutch law as a transfer of undertaking. Whether this is the case depends on the specific circumstances of the transaction, including whether the assets or business transferred constitute an economic unit that maintains its identity. In the case of a transfer of undertaking, all rights and obligations arising from employment agreements (other than, in certain cases, pension rights) associated with the relevant undertaking will transfer to the buyer by operation of law, as a result of which the agreements cannot be excluded from the relevant transaction by the parties. If a transfer of a business or assets does not qualify as a transfer of undertaking, the transfer of employees to the buyer should be agreed upon with the relevant employees (eg, their consent will be required).

*Law stated - 21 September 2022*

### Notification and consultation of employees

Are there obligations to notify or consult with employees or employee representatives in connection with an acquisition of shares in a company, a business or assets?

Employees of Dutch companies may be represented within the company through a 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 certain intended economic, organisational and financial

decisions of the company listed in the Works Council Act (inter alia, on the divestment of an important part of the business, a change of control over the business and the instruction of external advisers in connection with these matters). 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, strictly speaking, 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). In practice, when addressing the works council advice in the context of an M&A transaction, parties work with a signing protocol (meaning that parties enter into a separate agreement in which they state that the thereto attached finalised purchase agreement will be signed after (successful) completion of the works council advice process), or include the works council advice as a closing condition. In any case, the works council advice must be allowed to have a meaningful impact on the decision to enter into the transaction in question, if works council advice is required.

If the advice of the works council on the decision to implement the transaction is neutral or positive, the company may start implementing the transaction. If the advice of the works council is negative, the company is obliged to postpone the implementation of the transaction for one month. During this one-month waiting period, the works council may file an appeal with the Enterprise Chamber of the Amsterdam Court of Appeal. During the waiting period and as long as the proceeding continues, the company may not implement the transaction. The works council may also appeal to the Enterprise Chamber if the company implements the transaction 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 employees. In the context of an acquisition financing and the granting of security thereunder, the statutory advice rights of a works council may also come into play.

In addition, a sale of shares or assets may qualify as a merger within the meaning of the Merger Code. The Merger Code applies if:

- at least one of the companies involved in the merger is established in the Netherlands and regularly employs at least 50 employees;
- a company involved in the business belongs to a group of companies whereby the companies established in the Netherlands regularly employ at least 50 employees; or
- the relevant collective bargaining agreement provides for its applicability.

Pursuant to the Merger Code, the trade unions and the Dutch Social and Economic Council must receive a notification of the intended decision to sell the shares or assets and should be allowed to express their views insofar as the decision may affect employees' interests. Exceptions to the notification obligation apply, inter alia, if the transaction falls outside the scope of the Dutch jurisdiction of the target company that regularly employs fewer than 10 employees. The Merger Code is a non-binding 'best practices' code established by the Dutch Social and Economic Council. Non-compliance with the terms of the Merger Code does not breach any statutory provision, but may in severe cases lead to the breach and the names of the breaching company or companies being published on the Dutch Social and Economic Council's website. In general, parties comply with the Merger Code in M&A-transactions.

*Law stated - 21 September 2022*

## Transfer of pensions and benefits

Do pensions and other benefits automatically transfer with the employees of a target company? Must filings be made or consent obtained relating to employee benefits where there is the acquisition of a company or business?

In the case of a transfer of shares in a target company, employees will transfer automatically upon the transfer of shares (as part of the target company). This entails that the pensions and other employee benefits (including related liabilities), in principle, transfer with the employees. This may be different if the employees have benefits that are provided by the seller's group (eg, stock options).

In the case of an acquisition of a business or certain assets, all rights and obligations pursuant to employment agreements will transfer if such transaction qualifies as a transfer of undertaking. Whether this is the case depends on the specific circumstances of the transaction, including whether the assets or business transferred constitute an economic unit that maintains its identity.

In the case of a transfer of undertaking, all rights and obligations arising from employment agreements associated with the relevant undertaking will transfer to the buyer by operation of law. As an exception, this main rule does not apply to rights and obligations pursuant to a pension plan if the new employer provides the employee with a different, existing plan that already applies to its own employees or if the new employer must apply an applicable industry-wide pension plan. It is possible that filings have to be made to effect the transfer of certain employment benefits or a change in pension plan (eg, notifications to the pension provider). Depending on the exact changes to the pension scheme, a works council may have to be asked for consent to the change.

*Law stated - 21 September 2022*

## UPDATE AND TRENDS

### Key developments

What are the most significant legal, regulatory and market practice developments and trends in private M&A transactions during the past 12 months in your jurisdiction?

### Trends in M&A and W&I market

The current M&A market in the Netherlands can be characterised as a seller-friendly market. This means that many sales processes, in particular where the seller is a private equity party, are organised as controlled auctions, with the aim of maximising returns for sellers. Buyers look for strategies to differentiate themselves to be competitive in auction processes. This results in generally seller-friendly deal terms with limited conditionality.

Another trend we are seeing is the conclusion of warranty and indemnity (W&I) insurance policies whereby the buyer will only have recourse against the W&I insurer and there is no residual warranty liability for the seller.

### Protection of companies within vital sectors, active in sensitive technology or operating a business campus

The Netherlands currently has sectoral investment screenings for the electricity, gas and telecom sectors. A regime for the defence sector is also being developed.

On 17 May 2022, a legislative proposal introducing investment screening on the grounds of national security in the Netherlands (Dutch National Security Screening Regime) was adopted by the Senate. The law is expected to enter into force at the beginning of 2023. Although the regime is not yet effective, parties to a potential transaction should already account for the potential and retroactive effects of the regime.

The legislative proposal for the Dutch National Security Screening Regime introduces a notification obligation concerning investment activities related to vital providers, companies active in sensitive technology and business campuses that are seated in the Netherlands. Under this regime, a filing must be made for an investment activity (eg, takeovers, mergers, or joint ventures) in a company that is seated in the Netherlands if the transaction leads (directly or

indirectly) to an acquisition of control over a vital provider, companies active in sensitive technology or companies operating a business campus; or, if the transaction leads (directly or indirectly) to the acquisition of or significant increase in influence over companies active in very sensitive technology.

The proposed regime serves to complement the existing sectoral investment screening regimes for the electricity, gas and telecom sectors. The proposal concerns various issues, such as:

- the standstill obligation;
- the consequences of a failure to notify;
- failure to provide complete and correct information; and
- failure to comply with measures imposed.

The review period is a minimum of eight weeks, and can be extended to 16 months (or longer, if the EU Foreign Direct Investment mechanism is triggered). The proposal also contains provisions regarding possible mitigating measures and prohibitions. A number of draft decrees have been published for consultation, specifying products that are considered sensitive technology, and the information that should be submitted to the Investment Screening Desk (BTI).

Once the regime enters into force, which is expected to occur at the beginning of 2023, it will have retroactive effect up to 8 September 2020. Accordingly, the Minister of Economic Affairs and Climate Policy may, within eight months after the entry into force of the regime, call in all activities carried out between this date and the entry into force of the regime if there is a reasonable suspicion that they pose a threat to national security.

*Law stated - 21 September 2022*

# Jurisdictions

| | |
|---|---|
| **Australia** | MinterEllison |
| **Austria** | Schoenherr |
| **Belgium** | Stibbe |
| **Brazil** | Campos Mello Advogados |
| **Canada** | Bennett Jones LLP |
| **China** | Haiwen & Partners |
| **Denmark** | Gorrissen Federspiel |
| **Dominican Republic** | Guzmán Ariza |
| **Egypt** | Soliman, Hashish & Partners |
| **Finland** | Waselius & Wist |
| **France** | Davis Polk & Wardwell LLP |
| **Georgia** | MG Law Office |
| **Germany** | Gleiss Lutz |
| **Greece** | Karatzas & Partners Law Firm |
| **Hong Kong** | Davis Polk & Wardwell LLP |
| **Indonesia** | Makes & Partners |
| **Israel** | Naschitz Brandes Amir |
| **Italy** | Legance - Avvocati Associati |
| **Japan** | TMI Associates |
| **Latvia** | VILGERTS |
| **Luxembourg** | Stibbe |
| **Malaysia** | Foong and Partners |
| **Myanmar** | Myanmar Legal MHM Limited |
| **Netherlands** | Stibbe |
| **New Zealand** | Hesketh Henry |

| | |
|---|---|
| **Philippines** | Zambrano Gruba Caganda & Advincula |
| **Portugal** | Cuatrecasas |
| **Romania** | MPR Partners |
| **Serbia** | Stankovic & Partners NSTLaw |
| **Singapore** | WongPartnership LLP |
| **South Korea** | Bae, Kim & Lee LLC |
| **Spain** | Uría Menéndez |
| **Sweden** | Vinge |
| **Switzerland** | Homburger |
| **Turkey** | Turunç |
| **United Kingdom** | Davis Polk & Wardwell LLP |
| **USA** | Davis Polk & Wardwell LLP |
| **Zambia** | Dentons Eric Silwamba Jalasi & Linyama |