Public Mergers and Acquisitions in the Netherlands

by *Björn van der Klip* and *Marc Habermehl*, *Stibbe*

Practice notes | Law stated as at 01-Jul-2024 | The Netherlands

A Practice Note outlining the law and regulation of public takeovers and principal considerations involved in a public takeover in the Netherlands.

Regulation of Public M&A

- Statute and Regulations
- Regulatory Bodies
- Takeover Code/Takeover Rules/Other
- Forms of Public Offers

Outline of Offer

- Bid Planning
- Due Diligence
- Public Domain
- Maintaining Secrecy
- Committed Funding
- Announcing the Offer
- Distribution of the Announcement
- Possible Offer Announcements
- Offer Memorandum
- Failed Bid
- Offer Timetable
- Stakebuilding
- Purchase Thresholds Imposed by the Code/Takeover Rules/Other
- Irrevocable Undertakings
- Overseas Shareholders

Documents

- Position Statement and Related Information
- Other
- Offer Document
- Responsibility Statement
- Buying up Outstanding Minorities

Employee Consultation

Target's Response

Preparing for a Hostile Bid

Internal Housekeeping

Looking out for Dealings in Shares

Marshalling Defences

Defence, Strategy, and Tactics

Recommended Offers

Directors' Duties

Offer-Related Arrangements

Regulatory Restrictions

Merger Control

Regulated Industries

Impact on Public Offer Timetable

Foreign Ownership

Foreign Subsidies Regulation

Other Approvals

Blocked Transactions

Exchange Control Restrictions

This Note looks at, in outline, the law and regulation of public takeovers in the Netherlands, focusing on public offers which aim at achieving 100% control of the target company. Control of varying degrees can be obtained through other means, but if 100% control is desired, in practice the only alternative methods are to acquire all the assets and liabilities of the target (an asset sale) or to merge with the target (a legal merger). However, nearly all listed company takeovers take place through a public offer.

Regulation of Public M&A

Statute and Regulations

In the context of a public offer for a Dutch listed company, the following Dutch statutes and regulations may be relevant:

- The *Financial Supervision Act* (*Wet op het financieel toezicht*).
- The *Public Takeover Bid Decree* (*Besluit openbare biedingen Wft*) .
- *Book 2 of the Dutch Civil Code* (*Burgerlijk Wetboek*).

- The *Dutch Corporate Governance Code*.
- The *Dutch Competition Act* (*Mededingingswet*).
- The *Dutch Works Council Act*(*Wet op de ondernemingsraden*).
- The *Sociaal-Economische Raad (SER) Merger Code 2015* (*SER Fusiegedragsregels 2015*).
- The *Security Screening of Investments, Mergers and Acquisitions Act* (*Wet veiligheidstoets investeringen, fusies en overnames*) (Vifo Act).

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. Several rules also apply if:

- A non-Dutch target is listed on a stock exchange in the Netherlands.
- A Dutch target is listed on a stock exchange outside the Netherlands but within the EU/EEA.
- A Dutch target is listed on a stock exchange outside the EU/EEA.

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 (see Practice Notes, *Mergers in the Netherlands* and *Cross-Border Mergers of Dutch and EU and EEA Companies (The Netherlands)*.
- There are general corporate governance rules.
- There are statutory buy-out proceedings for the buy-out of minority shareholders following a public offer.

In relation to Dutch public listed 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 public offers.

In addition to national regulations and statutes, EU regulations may be relevant for the public offer of a Dutch listed company. In particular, the following may be important when making a public offer:

- *EU Market Abuse Regulation*.
- *Regulation (EC) 139/2004 on the control of concentrations between undertakings* (Merger Regulation).

- *EU Foreign Direct Investment Screening Regulation ((EU) 2019/452)*.
- *EU Prospectus Regulation*.
- *Foreign Subsidies Regulation*.

Furthermore, other foreign regulatory requirements may apply depending on the activities and venue (or venues) of listing of a Dutch public company.

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 is regulated by the AFM because of the sector it operates in (for example, offering certain financial products). Other potentially relevant regulators include the:

- *The Netherlands Authority for Consumers and Markets*, and the European Commission (competition authorities).
- The *Dutch Central Bank* (*De Nederlandsche Bank*) (DNB) (financial sector).
- The *Ministry of Economic Affairs and Climate Policy* (energy and telecom sector, compliance with the Vifo Act).
- The *Dutch Healthcare Authority* (healthcare sector).

Takeover Code/Takeover Rules/Other

For the main statutes and rules regarding public offers, see *Statute and Regulations*.

Forms of Public Offers

The most common 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 *Consideration*).

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.

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 the support of the target's boards, 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 legal merger between Peugeot and Fiat Chrysler Automobiles in 2021.
- Cross-border legal merger between Ahold and Delhaize in 2016.

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 3G Capital of a controlling interest in Hunter Douglas through a combination of a block trade agreement and asset sale in 2021.
- The acquisition by certain large shareholders of all assets and liabilities of Roto Smeets in 2015.

- The acquisition by Jumbo of all assets and liabilities of Super de Boer in 2009.

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 Walter de Gruyter for Koninklijke Brill, Torqx Capital for Beter Bed, Sopra Steria for Ordina, 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 (see *Pre-Wired/Second-Step Transactions*).

However, in the vast majority of the public offers for Dutch listed companies, the bidder obtains 95% or more of the target's shares and therefore often elects to initiate statutory buy-out proceedings to buy out minority shareholders. Examples of recent public offers followed by statutory buy-out proceedings include the offer of Walter de Gruyter for Koninklijke Brill, Torqx Capital for Beter Bed, Sopra Steria for Ordina, and KKR/Teslin for Accell.

Outline of Offer

Bid Planning

As set out in *Forms of Public Offers*, several statutory rules apply in the context of a public offer for a Dutch public company. It is important for a bidder to take such rules into account, starting in the preparatory phase. In particular, the bidder must monitor to what extent an envisaged public offer may constitute inside information (see *Maintaining Secrecy*).

Furthermore, under the Dutch bidding rules, strict regulatory timelines apply (see *Offer Timetable*). For example, within four weeks following the announcement of the offer, the bidder must publicly declare its intention to submit an offer memorandum to the AFM. Subsequently, the offer memorandum must be submitted within 12 weeks of the initial announcement. No later than at the time of submitting the offer memorandum with the AFM, the bidder must have "certainty of funds" and confirm this in a public announcement (see *Committed Funding*).

The bidder can, while preparing a public offer, be confronted by the AFM with the obligation to clearly state its intentions regarding a possible public offer (the "put up or shut up" rule). The AFM can impose such obligations at the request of the target. If imposed, the bidder must, within six weeks, either announce a public offer or publicly state that it will not announce the public offer.

Due Diligence

Recommended Bid Due Diligence Approach

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

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 *Maintaining Secrecy*), the scope of the due diligence investigation is typically more limited than in a non-public setting.

Hostile Bid Due Diligence Approach

The due diligence enquiries available to a hostile bidder are usually limited to publicly available information. There is no specific obligation for the target to allow a bidder due diligence access. The target'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 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;
  - publication of price-sensitive information;
  - transactions by managers in instruments of the target; and
  - relevant documents in relation to the public offer process.
- Information in the Trade Register (*Handelsregister*) of the *Dutch Chamber of Commerce* (*Kamer van Koophandel*) (KVK), 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's website, including:
    - board rules;
    - committee charters;
    - codes of conduct;
    - remuneration reports;
    - explanatory notes to the agenda for the general meeting;
    - policy on bilateral contacts with shareholders; and
    - presentations given to analysts and investors.

Maintaining Secrecy

Under the Market Abuse Regulation, a listed company must make public any inside information as soon as possible. The negotiations regarding a public offer generally constitute 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, parties may 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.

Article 5(1) of the Public Takeover Bid Decree requires public disclosure in any event no later than when the bidder and the target have reached an agreement (whether conditional or unconditional) on the public offer.

Committed Funding

Article 7(4) of the Public Takeover Bid Decree requires 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 the Offer

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 typically issue a joint press release.

From the moment the public offer is announced, the statutory timelines start running. If an agreement has not (yet) been reached between the target 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. In such a situation, the statutory timelines may therefore start running before a potential agreement is reached between the bidder and the target. 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.

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 (see *Interruptions to the Timetable*).

Distribution of the Announcement

Under the Dutch bidding rules, the bidder and target must publicly announce the offer upon reaching agreement on the offer, whether conditional or not. Under the *EU Market Abuse Regulation*, such information must be disseminated to as wide a public as possible on a non-discriminatory basis, free of charge and simultaneously throughout the EU.

In practice, the public offer is usually announced by the publication of a joint press release by the bidder and the target on their respective websites. Furthermore, the announcement is published on the AFM's website and PR advisors of the bidder and/or target may publish the announcement on public media channels.

For more information regarding the announcement, see *Possible Offer Announcements*.

Possible Offer Announcements

A distinction should be made between the announcement of a possible offer and the formal launch of the offer by way of the publication of an offer memorandum.

Following the announcement of a possible public offer, the bidder must publicly announce within four weeks whether it will continue with the preparations for the launch of the offer or refrain from further actions. If it decides not to proceed with the offer, the bidder is prohibited from announcing or launching a new offer for the target's shares for the following six months (unless prior approval is obtained from the AFM).

Once the bidder has launched the public offer, such offer is "firm", subject to the offer conditions included in the offer memorandum.

Offer Memorandum

The bidder must submit an offer memorandum to the AFM for approval within 12 weeks of announcement of the public offer. The offer memorandum will be made publicly available after approval by the AFM, but in friendly situations it is typically published simultaneously with the offer memorandum. 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.

The bidder launches its offer by making the offer memorandum publicly available (for example, by publishing the offer memorandum on its website) after having received approval of the AFM. In the case of a recommended bid, the offer memorandum will normally also be published by the target on its own website.

The offer memorandum includes the material details of the offer, such as information on:

- The offer price (see *Consideration*).
- The acceptance period (see *Offer Timetable*).
- The recommendation of the public offer by the target's boards to the company's shareholders to tender their shares and vote in favour of the resolutions set on the agenda for the target's extraordinary general meeting (EGM) (see *Position Statement and Related Information*).
- The conditions that must be satisfied or waived before the bidder is obligated to declare the offer unconditional and proceed with settlement (see *Offer Document*).
- The non-financial covenants agreed between the bidder and the target's boards, including, but not limited to:
  - the treatment of employees;
  - the location of the headquarters;
  - the financing; and
  - the protection of minority shareholders.

- The post-closing restructuring measures the bidder may implement after settlement of the public offer to acquire 100% of the shares (see *Buying up Outstanding Minorities*).

Recommended Offers

Although the content of the offer memorandum is the responsibility of the bidder, in the case of a recommended offer, the target usually contributes by providing input on certain sections of the offer memorandum (for example, financial information, strategic rationale for the transaction, decision-making and recommendation of the boards) (see *Responsibility Statement*).

Failed Bid

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

This includes the situation in which a public offer has failed because one or more offer conditions have not been fulfilled upon expiry of the acceptance period.

Offer Timetable

Offer Period

The acceptance period is set out in the offer memorandum and will commence in any event no earlier than the first business day after publication of the offer memorandum and no later than the third business days after publication of the offer memorandum.

The acceptance period cannot last less than eight weeks or longer than ten weeks (see *Minimum Period for Which Offer Must Remain Open for Acceptance*). In the case of a recommended offer, the duration of the acceptance period (and extension thereof) is agreed between the bidder and target in the merger protocol.

Electronic Communications and Use of Websites

A public offer is launched by making it publicly available. The offer memorandum can be made publicly available by:

- Publication in a nationally distributed daily newspaper.
- A printed document available free of charge at the offices of the holder of any regulated market on which the shares to which the public offer relates are admitted to trading.
- Publication on the website of the bidder or the target.
- Publication on the website of the holder of each regulated market where the shares are admitted to trading.
- Publication on the website of the AFM.

Simultaneously with making the offer memorandum available, the bidder must publicly announce the availability of the offer memorandum, indicating where it is available.

Minimum Period for Which Offer Must Remain Open for Acceptance

In the case of a full or mandatory offer, the acceptance period cannot last less than eight weeks and no longer than ten weeks. In the case of a partial offer or tender offer, the minimum acceptance period is two weeks and the maximum acceptance period is also ten weeks.

The acceptance period can be extended by the bidder once for a minimum of two weeks and a maximum of ten weeks. In the event of a competing offer, the bidder may extend the acceptance period until expiry of the acceptance period of such competing offer (see *Interruptions to the Timetable*).

The bidder can offer the shareholders who have not yet tendered their shares during the initial acceptance period the opportunity to do so during a post-acceptance period, which cannot exceed two weeks.

Revised Offers

The bidder is not allowed to change the conditions of the offer, except for an increase of the offer price. An increase of the offer price may take place several times during the offer process. Any increase in the offer price is communicated by means of a public announcement, accompanied by assurance of financing (see *Committed Funding*). If the increase in the offer price results in a change in the composition of the offer price and such increase does not consist solely of cash, a document informing shareholders of the change in composition must be made publicly available. The shareholders who have tendered their shares prior to publication of such document can withdraw their shares within seven business days (see *Acceptance Condition*).

The shareholders must be granted at least seven business days to accept the revised offer. The revised offer may lead to an extension of the acceptance period by operation of law, during which the bidder is prohibited from further increasing the offer price.

Acceptance Condition

Shares tendered during the acceptance period may not be withdrawn, provided that:

- Shareholders have a statutory right to withdraw any tender during the post-acceptance period.
- If a revised offer comprises a change in the composition of the offer price and does not consist solely of cash, any tender prior to publication of a document informing shareholders of the change in composition may be withdrawn within seven business days (see *Revised Offers*).

Interruptions to the Timetable

The bidder may extend the acceptance period by a minimum of two weeks and a maximum of ten weeks unless otherwise agreed between the bidder and the target. The announcement of such extension must be made no later than on the third business day after the original acceptance period expires. Additionally, the bidder may, unless otherwise agreed, seek to obtain an exemption from the AFM to extend the acceptance period even further in certain circumstances (for example, if a regulatory clearance process has not yet been finalised at the end of the extended acceptance period).

Furthermore, if a competing offer is announced or launched during the (extended) acceptance period, the acceptance period may be extended until the expiration of the competing offer's period.

Finally, if the bidder increases the offer price and fewer than seven business days remain until the end of the (extended) acceptance period, the acceptance period is extended by such number of days to provide shareholders at least seven business days to consider the revised offer.

If all the conditions of the offer are either met or waived and no competing offer has been announced or launched, the bidder must declare the offer unconditional and no extension is possible, except for the post-acceptance period of two weeks.

Long Stop Date

Within four weeks following the announcement of the public offer, the bidder must publicly announce it has decided to either submit an offer memorandum to the AFM, or refrain from further actions regarding the public offer. If the bidder has announced it will submit an offer memorandum to the AFM for approval, such submission must be made within 12 weeks of the announcement of the public offer.

If the bidder submits an offer memorandum and the AFM has approved the document, the bidder must launch the offer within six business days after receipt of approval from the AFM.

The acceptance period, as set out in the offer memorandum, cannot last less than eight weeks and no longer than ten weeks (see *Minimum Period for Which Offer Must Remain Open for Acceptance*) and may be extended by two to ten weeks. The post-acceptance period cannot last longer than two weeks.

If no submission is made within this period of time or the bidder has announced it will not proceed with the offer, the bidder is prohibited from announcing or launching an offer for the target's shares for the following six months (unless an exemption of the AFM is obtained).

Stakebuilding

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 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 (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 (see *Consideration*). Further acquisition of shares after a public offer has been declared unconditional is allowed, but the bidder must not purchase instruments on more beneficial terms than the terms of its 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).

Purchase Thresholds Imposed by the Code/Takeover Rules/Other

Mandatory Offers

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 *Forms of Public Offers*). 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. As a result, where there is any uncertainty as to whether a certain situation or arrangements will qualify as "acting in concert", it will not be possible to approach any competent authority for guidance.

Consideration

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.

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 *Stakebuilding*).

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".

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

Irrevocable Undertakings

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. 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 MAR also sets out detailed arrangements on market sounding, which includes approaching shareholders in the context of a public offer.

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

- Walter de Gruyter for all shares in Koninklijke Brill in 2023, in which 60.4% of share capital was irrevocably committed.

- Microtest S.p.a. for all shares in RoodMicrotec N.V. in 2023, in which 30.9% of share capital was irrevocably committed.
- Sopra Steria for Ordina in 2023, in which 26.6% of share capital was irrevocably committed.
- KKR and Teslin for all shares in Accell in 2022, in which 18.3% of share capital was irrevocably committed.

Overseas Shareholders

The bidder must address its offer on equal terms to all shareholders of the same class or category of shares.

This may require that the bidder must also launch its offer in jurisdictions other than the Netherlands. If the local bidding rules differ from the Dutch bidding rules, distribution of the offer memorandum could violate local bidding rules. It is therefore generally accepted that the offer memorandum is subject to territorial restrictions.

Territorial restrictions can only result in the bidder not actively engaging in the financial markets of other jurisdictions. Since the bidder is obliged to address its offer on equal terms to all shareholders of the same class or category of shares, the territorial restriction cannot entail that foreign shareholders are excluded from the offer.

Documents

Position Statement and Related Information

The target 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.

The target must also publish certain financial information 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 and the instruments of the bidder in the year before the offer memorandum is published.

The target 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's boards to obtain one or more fairness opinions.

Other

Other information that the public and the target'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).

Offer Document

For a description of the contents of the offer memorandum, see *Offer Memorandum*.

The offer memorandum typically includes conditions that must be satisfied or waived in order to declare the offer unconditional.

The conditions that are commonly agreed between a bidder and the target and included in the offer memorandum are the following:

- Acceptance threshold being met.
- No breach of the merger protocol.
- No material adverse change.
- No change in recommendation.
- Regulatory clearances obtained.
- 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's shares.

Similar conditions commonly apply as offer conditions. In any case, the most common conditions that are agreed between a bidder and the target 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 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.

Responsibility Statement

The offer memorandum must state the names and functions of the persons responsible for preparing the offer memorandum or, where applicable, certain sections of it. Additionally, the offer memorandum must include a declaration by the responsible person affirming the accuracy and completeness of the information presented in it and that no information has been omitted.

Buying up Outstanding Minorities

Statutory Buyout Proceedings

A bidder can initiate a statutory buyout proceeding if it holds 95% or more of the share capital in the target. 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.

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'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's business.

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

- Walter de Gruyter for all shares in Koninklijke Brill in 2023.
- Torqx Capital for all shares in Beter Bed in 2023.
- Sopra Steria for all shares in Ordina in 2023.
- KKR and Teslin for all shares in Accell in 2022.

- Gilde Equity Management for all shares in DPA Group in 2021.

Employee Consultation

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

If the target has a Dutch works council and that works council has a right of advice in relation to the public offer, the target must request advice after the public offer has been 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 (see *Forms of Public Offers*).

Target's Response

Preparing for a Hostile Bid

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, because this also facilitates the due diligence investigation and the co-operation of the target in respect of competition and other regulatory clearance procedures.

Internal Housekeeping

Listed companies may undertake internal housekeeping measures to ensure that the directors are well-informed about their responsibilities in public offer scenarios.

Under the pressure of a hostile bid, it can be challenging to carefully assess the interests of the company and its stakeholders. In preparation for hostile bids, "dry runs" are often organised with financial and legal advisers to simulate and outline different offer scenarios to train directors on decision-making processes and actions to be taken in such situations. In addition, the target's legal advisors typically prepare a "defence manual" for the target with steps to be taken, "do's and dont's", and contact details.

Looking out for Dealings in Shares

Each shareholder must disclose its interest in the target company's share capital to the AFM (and this information will be publicly available on the AFM's website) if certain thresholds are crossed (see *Stakebuilding*).

Marshalling Defences

In marshalling its defences against a potential hostile bid, the target's board will typically seek assistance from the anti-takeover foundation (when in place) (see *Defence, Strategy, and Tactics*). It is important to note that the anti-takeover foundation is independent from the listed company and cannot be forced by the company to actively protect the listed company's interests.

In addition, the board may engage in efforts to persuade shareholders (and other stakeholders) of the target's standalone position, possibly through a public campaign. Furthermore, the board may seek the assistance of a white knight or white squire by soliciting a competitive offer, or granting a minority stake in the company, respectively.

Defence, Strategy, and Tactics

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 (see *Hostile Bid Due Diligence Approach*).

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

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

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) 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 that 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.
- The response time is included as best practice in the Corporate Governance Code while the reflection period is a statutory regime.

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 defensive 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 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 instructed by the listed company to actively protect the listed company's interests. Under an option agreement the foundation has entered into with the target, 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'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 from initiating any actions to frustrate the public offer without a prior mandate granted by the general meeting.

Recommended Offers

Prior to expiry of the acceptance period, the target must convene an informative EGM to allow shareholders to discuss the public offer.

The target is required to make a position statement publicly available to its shareholders before the informative EGM takes place (see *Position Statement and Related Information* for further details on this statement).

Directors' Duties

The board of directors is responsible for the company's strategy and day-to-day management under supervision of the supervisory board (see *Directors' Duties (The Netherlands)*). In fulfilling its duties, the board of directors and the supervisory board must act in the best interests of the company and the sustainable success of its affiliated enterprise, taking into account the interests of all stakeholders (for example, shareholders, employees, creditors, and so on).

In the context of a public offer, this may also mean that the management board must carefully assess the offer and consider whether:

- The offer provides a superior alternative to the standalone strategy or another (friendly) offer proposal.
- The legitimate interests of the company or its stakeholders are at risk of being disproportionately prejudiced.

The response of the target to an (unsolicited) offer is ultimately determined by the management board under the supervision of the supervisory board. The management board is not obliged to consult the general meeting before responding to the offer proposal, nor can it be forced by the general meeting to enter into discussions with the (potential) bidder. However, under its fiduciary duties, the management board should re-evaluate their response and chosen strategy at each stage of the process as changed circumstances may require a different approach.

Although the management board is not obliged to consult the general meeting, it must actively involve the supervisory board in the negotiations with the bidder. The supervisory board must critically review the offer process and assess, independently of the management board, whether the public offer is in the best interest of the company and all its stakeholders.

Furthermore, a public offer may impose stricter disclosure requirements regarding the management board's decision-making process. The supervisory board will need to monitor the decision-making process for transparency and diligence. In the event of a potential conflict of interest of one or more members of the management board or supervisory board, the boards should adequately disclose such conflict and the relevant board members should abstain from further deliberations on the offer. If all management board members are conflicted, the supervisory board must take over the duties of the management board. If all supervisory board members are conflicted, the general meeting may assume the duties of the supervisory board, unless the target's articles of association provide otherwise.

Offer-Related Arrangements

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 the boards should in principle not bind the target to a public offer without a "fiduciary out". A fiduciary out creates a right for the boards of the target 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, 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, 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 is usually around 1% of the equity value of the target.

Reverse break fees (that is, where the bidder pays a break fee to the target) 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, and can be a fraction of the target's break fee, but also a multiple.

Regulatory Restrictions

Merger Control

Merger clearance in relation to the public offer may be required (see Practice Notes, *Mergers in the Netherlands* and *Competition Law in the Netherlands: Overview*).

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 at least 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 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 billion; 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 EU member state.

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

Obtaining the approval of the relevant competition authorities may delay the offer process (see *Offer Timetable* and *Impact on Public Offer Timetable*).

Regulated Industries

On 1 June 2023, the Vifo Act entered into force. The Vifo Act regulates the screening of investments, mergers, and acquisitions to protect national security interests in the Netherlands (see *Foreign Investment in the Netherlands*). The goals of the Vifo Act are to:

- Maintain the continuity of vital processes.

- Preserve the integrity and exclusivity of knowledge and information.
- Avoid unwanted strategic dependencies.

The Vifo Act applies to acquisitions where the target is active in any of the following sectors:

- Is considered a "vital provider".
- Operates a business campus.
- Is active in the field of highly sensitive technology.

The Vifo Act stipulates that any transaction involving a target active in the above sectors must be notified by the acquirer and the target to the *Bureau for Verification of Investments* (*Bureau Toetsing Investeringen*) (BTI). In the case of a public offer, the notification must be made simultaneously with the announcement of the public offer.

The BTI, operating under the responsibility of the *Ministry of Economic Affairs and Climate Policy*, assesses whether the acquisition may pose a threat to national security and either approves it (with or without conditions) or prohibits the transaction. The approval of the BTI is a prerequisite for the offer to become unconditional. Also, in the case of a mandatory offer, the bidder may not make their offer unconditional before the BTI has rendered its review decision or decided that no such decision is required. The BTI's assessment can take between several weeks and several months.

The *EU Foreign Direct Investment Screening Regulation ((EU) 2019/452)*, which provides a mechanism for co-ordinating foreign direct investment investigations among EU member states, requires the BTI to notify the European Commission and other EU member states of all FDI notifications in connection with investments by a third (non-EU) country.

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.

Foreign Ownership

See *Regulated Industries* and *Foreign Subsidies Regulation* for more information on legislation relating to regulation of (foreign) investment, respectively foreign subsidies.

Foreign Subsidies Regulation

The *Foreign Subsidies Regulation* (FSR) entered into force on 12 January 2023 and aims to contribute to the proper functioning of the EU's internal market. The FSR addresses distortions of competition caused by foreign subsidies.

Under the FSR, the European Commission reviews the subsidies granted by non-EU governments. It determines whether a foreign subsidy distorts the competition in the internal market, by examining (amongst other things) the amount and nature of the foreign subsidy and the purpose of, and conditions attached to, it.

A company participating in a public offer may be obliged to notify and acquire clearance from the European Commission when satisfying both the following thresholds:

- At least one of the merging parties (in the case of a legal merger) or the target (in the case of a public offer) has achieved an EU turnover of at least EUR500 million in the previous financial year.
- The merging companies, or the buyer's group and target's group together, received a total of more than EUR50 million in financial contributions from third countries in the three years preceding the conclusion of the merger agreement or public offer.

Following the notification to the European Commission, a standstill obligation of 25 working days applies. If the European Commission initiates an in-depth investigation in that period, the concentration cannot be implemented for a period of 90 working days following the opening of the in-depth investigation. This period may, in certain circumstances, be extended by another 15 working days.

Other Approvals

Depending on the sector the target 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, energy, or healthcare sectors.

For example, if a bidder acquires 10% more in the capital or voting rights of a Dutch financial institution (for example, insurers, investment firms, payment service providers), such acquisition is subject to a declaration of no objection from the DNB. Where a bidder acquires 10% or more in the capital or voting rights of a Dutch bank, a declaration of no objection should be sought from either the DNB or the *European Central Bank*.

Furthermore, the existing sector-specific regimes in the energy and telecoms sectors, for which related notifications are also assessed by the BTI, continue to apply and take precedence over the Vifo Act (see *Regulated Industries*). A foreign direct investment filing under the *Dutch Gas Act* (*Gaswet*) is required in the case of an acquisition or change of control in a target that is a liquefied natural gas (LNG) facility or company located in the Netherlands. A filing under the *Dutch Electricity Act* (*Elektriciteitswet*) is required in the case of an acquisition or change of control in a target that qualifies as, or operates, a production plant located in the Netherlands. The *Energy Act* (*Energiewet*), passed by the Dutch Parliament on 4 June 2024, is expected to replace the current Gas Act and Electricity Act as from 1 January 2025.

For investments into providers of telecommunication services, a filing obligation exists if a party acquires predominant control over a Dutch telecommunication party, leading to relevant influence in the Dutch telecommunications sector.

In addition, the *Healthcare Market Regulation Act* (*Wet marktordening gezondheidszorg*) provides for a specific regime for companies active in healthcare that includes a mandatory pre-closing filing with the *Dutch Healthcare Authority* (*Nederlandse Zorgautoriteit*) (NZa). A notification obligation is triggered if either the bidder or the target (or both) qualifies as a "provider of care" with at least 50 people within the entire corporate group (including entities in which they have (direct or indirect) control), involved in the provision of "patient-facing" care services in the Netherlands. The NZa assesses whether the standards of care are not prejudiced by the acquisition and conducts a procedural review of the diligent involvement of clients, employees, and other stakeholders.

Blocked Transactions

Examples of blocked acquisitions include the public offer by:

- Qualcomm for all shares in NXP Semiconductors in 2016.
- UPS for all shares in TNT in 2012.

Qualcomm and NXP Semiconductors announced a recommended public offer for all outstanding shares in NXP Semiconductors in 2016. The offer was subject to, among other conditions, receipt of all necessary regulatory and competition clearances or approvals. The European Commission had declared the proposed acquisition compatible with the internal market, subject to certain commitments made by Qualcomm and NXP Semiconductors. The parties ultimately did not obtain clearance in China and subsequently decided to terminate the offer. For the European Commission's decision, see *Case M.8306 – Qualcom/NXP Semiconductors*.

UPS and TNT announced a recommended public offer for all outstanding shares in TNT in 2012. One of the offer conditions agreed between UPS and TNT was obtaining EU competition clearance. Although UPS had proposed several remedies (for example, divestments and access to UPS's air network for competitors), the European Commission declared the proposed acquisition incompatible with the internal market. For the European Commission's decision, see *Case M.7630 – Fedex/TNT Express*.

Exchange Control Restrictions

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

Other Methods of Obtaining Control of a Public Company

An overview of other methods of obtaining control of a Dutch public company is set out in *Forms of Public Offers*.

END OF DOCUMENT