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Overview

Apart from relevant case law, the key legal framework for M&A in the Netherlands consists of the Financial Supervision Act (*Wet op het financieel toezicht*) and the Civil Code (*Burgerlijk Wetboek*), which lay down the main principles, and the Public Bid Decree (*Besluit Openbare Biedingen*), which contains detailed regulations that govern the public bid process (including the bid timetable, required announcements and contents of the offer memorandum).

The Authority for the Financial Markets (AFM) is generally competent to supervise a public bid for (voting) securities that are listed on a regulated market in the Netherlands (in particular, Euronext Amsterdam). The AFM does not supervise self-tender bids for such securities, as these are exempt from the public bid rules. If the AFM is competent, no public bid may be launched without the publication of an AFM-approved offer memorandum. The AFM will not act as an arbiter during a public bid (unlike, for example, the UK Panel on Takeovers and Mergers). Instead, the AFM supervises compliance with the (mainly) procedural aspects of the bid process, and may take enforcement actions in case of infringement, including fines. The AFM is not competent to rule on whether a mandatory bid is triggered. This is the exclusive competence of the (specialised) Enterprise Chamber at the Amsterdam Court of Appeals.

Other relevant legislation includes the Works Councils Act (*Wet op de ondernemingsraden*), which may require employee consultation, as well as the Competition Act (*Mededingingswet*) and the EU Merger Regulation, which may require merger clearance from the Authority for Consumers and Markets (ACM) or from the European Commission, respectively.

M&A activity targeting the Benelux (Belgium, the Netherlands, and Luxembourg) during 2015 (€55.4bn, 545 deals) increased 13.7% by value compared to 2014 (€48.7bn, 571 deals), reaching a post-crisis high. The Netherlands was the most targeted country (€35.2bn, 361 deals), followed by Belgium (€19.8bn, 161 deals) and Luxembourg (€0.4bn, 23 deals). Industrials & Chemicals was the most attractive sector within the region (€15.1bn, 116 deals), accounting for 27.3% of total market share by value and increasing 431.3% compared to 2014 (€2.9bn).¹

The increased deal value realised in 2015 appears to reflect a general return of market confidence, resulting in increased activity by Dutch as well as non-domestic strategic buyers. At the same time, the continued availability of private equity and improved debt availability (particularly, in the earlier part of the year) have arguably resulted in a level of upward pressure in valuations.

Both inbound and domestic M&A were healthy, whereby the largest deals taking place in the Netherlands tend to be inbound, or have at least significant cross-border angles. The Netherlands is and appears to remain an attractive, and receptive, market for non-domestic acquirers.

It was a good year in 2015 for recommended deal activity in the Netherlands. Unlike in previous years, no major hostile deals were attempted (other than, of course, the high-profile Teva bid for Mylan, a Netherlands incorporated company publicly traded in the US) and no deals were ‘forced’ by activist investors. As noted below, at the same time, the establishment of anti-takeover devices has made somewhat of a resurgence. In that respect, the typical Dutch model in M&A has moved back towards consensual, negotiated deal-making. However, that is not to say we could not see an unsolicited public bid in the year to come.

Although we see a very healthy M&A pipeline in the Netherlands as this book goes to press in early 2016, we are somewhat wary about the possible consequences of general market and oil price volatility. Separately, we expect – in any case – as in preceding years, a level of distressed M&A (frequently resulting from over-leverage) to continue.

Significant deals and highlights

NXP acquisition of Freescale

In March 2015, NXP Semiconductors and Freescale Semiconductor jointly announced their agreement to enter into a merger agreement under which NXP would merge with Freescale in a US\$ 11.8bn transaction valuing the combined enterprise at just over US\$ 40bn. In exchange for their shares, Freescale shareholders received US\$ 6.25 in cash and 0.3521 of an NXP ordinary share for each Freescale common share. The transaction was unanimously approved by the boards of directors of both companies. Closing of the transaction occurred in December 2015, simultaneously with NXP’s US\$ 1.8bn divestiture of its RF Power business to JAC Capital. The divestiture was a condition for NXP’s merger with Freescale. Clearance for the RF Power transaction was obtained from the US Committee on Foreign Investment in the United States (CFIUS) at the end of November 2015.

TNT Express offer by FedEx

In April 2015, FedEx and TNT Express jointly announced a public cash offer by FedEx on TNT Express of €8.00 per share, implying an equity value for TNT Express of €4.4bn. The executive board and supervisory board of TNT Express fully supported the transaction and PostNL – holding approximately 14.7% of the shares at the time of the offer – had undertaken to tender its shares.

FedEx and TNT Express intend to create a leading global player in the field of providing for, amongst other things, logistics and express delivery. By combining their businesses they would be able to offer their customers access to an integrated global network and comprehensive transportation solutions. Furthermore, TNT Express would be strengthened by the investment capacity and sector expertise of FedEx.

The offer is subjected to a minimum acceptance level of 80%. The acceptance period has been extended to 6 June 2016, as a result of the ongoing process of obtaining all necessary approvals and competition clearances. The transaction has already been approved by the European Commission in January 2016, and by the relevant regulatory authorities in the United States and Brazil in February 2016. FedEx and TNT Express are awaiting Chinese competition clearance as this book goes to press. UPS is appealing the Brazilian approval, potentially frustrating or delaying the transaction.

Acquisition of LeasePlan by consortium of long-term investors

In the spring of 2015, Global Mobility Holding was investigating options for the sale of LeasePlan, one of the largest vehicle leasing companies in the world. LeasePlan was formerly owned by ABN Amro, one of the major banks in the Netherlands.

After having announced in April 2015 that discussions between Global Mobility Holding and a group of potential investors regarding a potential change of ownership had been terminated and that there were no plans to pursue further options leading to divestment, LeasePlan was informed in June 2015 that Global Mobility Holding had reached agreement with a consortium of long-term investors to acquire full ownership. The total value of the transaction would amount to €3.7bn.

The abovementioned consortium includes leading Dutch and Danish pension funds, amongst others leading Dutch pension fund services provider PGGM, global investment companies and private equity firms. The transaction would bring about strategic experience to the benefit of LeasePlan, in addition to a strong track record of long-term investing.

In February 2016, LeasePlan announced that the European Central Bank had issued a declaration of no objection for the acquisition of LeasePlan by this consortium. Other regulators, including the European Commission and local anti-trust authorities, had already given clearance for the transaction. Closing is expected to occur in the first quarter of 2016.

Acquisition of 80.1% stake in Lumileds by GO Scale Capital falls through

In March 2015, a consortium led by GO Scale Capital announced its intention to acquire an 80.1% interest in Lumileds, the Philips-led business headquartered in California, United States. Philips would retain the remaining 19.9% interest. The value of the transaction would amount to US\$ 3.3bn.

The transaction would reportedly have allowed Lumileds to benefit from the experience of the investors in growing technology, particularly in the industry where Lumileds operates. The transaction would allegedly have generated accelerated growth and scale for Lumileds. Furthermore, it would be in line with Philips' pending strategy of separating its overall lighting division from its healthcare and consumer lifestyle divisions.

In October 2015, Philips announced that the intended transaction had led to unforeseen concerns by CFIUS. As a consequence, the closing of the transaction – which was initially foreseen in the third quarter of 2015 – became uncertain. In January 2016, GO Scale Capital and Philips jointly announced that they had terminated their March 2015 agreement for the intended acquisition. Both parties were unable to resolve CFIUS' concerns and, thus, regulatory clearance was not granted.

According to (unidentified) sources, private equity groups CVC and KKR are currently expected to target Lumileds. The consortium lost the auction of Lumileds in 2015, but is rumoured to be reassessing the options for the unit.

Ballast Nedam takeover by Renaissance Construction

In July 2015, Renaissance Construction, a Turkish construction company, and Ballast Nedam, one of the major Dutch construction companies, jointly announced a recommended public cash offer for Ballast Nedam by the former at an offer price of €1.55 per publicly traded Ballast Nedam depositary receipt. As the offer was subject to a subsequent €30m capital contribution through a rights offering and a private placement, it would increase the solvency of Ballast Nedam as well as reduce its vulnerability to the consequences of cost over-runs.

Prior to launching the offer, Renaissance Construction had purchased a 20% stake in

Ballast Nedam from Dutch family office Navitas Capital, for a total consideration of approximately €6m.

In September 2015, due to additional material losses of approx. €20m incurred by Ballast Nedam, Renaissance Construction lowered its offer price to €0.30 per depositary receipt. Renaissance Construction agreed to procure an additional capital contribution of €17.6m to satisfy Ballast Nedam's additional need for funding. The stock price of Ballast Nedam fell by 80% after this announcement was made. Following completion of the offer in December, Renaissance Construction had acquired a 80.8% stake in Ballast Nedam.

As a consequence of the rights offering and private placement of new depositary receipts, depositary receipt holders other than Renaissance Construction suffered a dilution of 60% to 91%, depending on whether or not they participated in the rights offering.

Following completion of the rights offering and private placement, Renaissance Construction held a 97.8% stake in Ballast Nedam, entitling it to force remaining depositary receipt holders to transfer their depositary receipts to Renaissance Construction through a statutory squeeze-out procedure before the enterprise chamber at the Amsterdam Court of Appeals. Ballast Nedam's depositary receipts were delisted from Euronext Amsterdam on 26 February 2016.

CF Industries merger with OCI business

In August 2015, US-based fertiliser maker CF Industries announced its agreement with Netherlands-based producer of fertiliser and industrial chemicals OCI to acquire the European and North American operations and the global distribution business of OCI for US\$ 8.2bn. According to CF Industries and OCI, this transaction would create the world's largest publicly traded nitrogen company.

Of the total US\$ 8.2bn consideration, US\$ 5.4bn is paid in newly issued CF Industries common stock and US\$ 2.8bn in cash, which also includes the settlement of US\$ 2bn of OCI businesses' net debt. Through the transaction, current CF Industries will become a subsidiary of a new holding company. The ownership is divided among current CF Industries shareholders (approximately 72.3%) and current OCI shareholders (approximately 27.7%). Although the parties initially intended to move the merged business to the UK, the decision was made in December 2015 to opt for domicile in the Netherlands instead. The merger remains subject to regulatory approval, as well as shareholder approval at both CF Industries and OCI.

Key developments

After the extensive legislative changes of the previous three years, 2015 brought a year of relative calm for corporate law in the Netherlands. The limited number of significant court decisions, and significant changes to the legislative structure underlying M&A, allowed legal academia and practice to focus on upcoming changes. As a result, we believe, 2015 can be considered a stepping stone towards more significant and impactful developments in the near future.

Changes to cartel fines

In 2016, the ACM will be granted the power to impose substantially higher fines for cartels and many other infringements. The ACM not only enforces the Dutch Competition Act (*Mededingingswet*) and EU competition law in the Netherlands, but also, among other things, the Electricity Act 1998 (*Electriciteitswet 1998*) and the Consumer Protection Act (*Wet handhaving consumentenbescherming*).

The legislative changes are intended to take effect on 1 July 2016. The main changes include:

- an increase of the existing statutory maximum fine for cartels to be imposed by the ACM of 10% of the annual worldwide turnover of the undertaking (potentially the entire group) by multiplying this amount by the number of years the cartel infringement endured, with a maximum of four years and a minimum of one year;
- an increase of the statutory maximum fine for individuals that can be held responsible for a cartel infringement from €450,000 to €900,000; and
- an additional 100% increase of the maximum fine in case of recidivism.

The legislative changes can effectively lead to cartel fines by the ACM that are four times higher than in the past, or – for that matter – as can be imposed by the European Commission, or most other national competition agencies. In case of recidivism, the new maxima are even eight times higher. There are currently no indications that the fining guidelines for the ACM will change. On the basis of these guidelines, fines are related to the turnover of the products or services that are affected by the illegal behaviour. The new law therefore particularly affects the exposure of ‘monoline’ companies specialising in the sale of one particular product or service. The new statutory maxima will only apply to those infringements that have been committed after the legislative changes have taken effect.

Implementation of the fourth anti-money laundering directive

Dutch corporate law will impose new measures to combat money laundering as a result of the implementation of the fourth anti-money laundering directive (AMLD), which was introduced in 2015. Pursuant to the AMLD, the Netherlands will implement a so-called central ultimate beneficial owner register that shows which natural persons hold, directly or indirectly, a 25% capital or voting rights interest in Dutch entities. This central register may be accessed by government agencies, EU financial intelligence units, obliged entities taking customer due diligence measures, and other persons who are able to demonstrate a legitimate interest with respect to money laundering, terrorist financing, and the associated predicate offences, such as corruption, tax crimes and fraud.

In addition to the central ultimate beneficial owner register, it is expected that the Netherlands will introduce a central shareholders’ register in which records are kept of the shareholders in (non-listed) companies. Only certain government agencies (e.g. the Dutch tax authorities and the public prosecutor) and civil-law notaries will be able to access this central shareholders’ register as a whole and individual shareholders will be able to access their personal information.

Renewed interest in anti-takeover defences

During 2015, the hostile takeover attempts on Mylan further confirmed the strength and potential utility of defence mechanisms against hostile takeovers available to listed companies under Dutch law. Mylan managed to successfully fend off a hostile takeover attempt by Teva Pharmaceutical Industries through the use of a so-called ‘continuity foundation’; a strong anti-takeover measure where an independent (Dutch) foundation is granted a call option for newly issued preference shares to match the amount of the then outstanding voting rights in the listed company in case of hostile activity. The preference shares can be acquired by the foundation at nominal value (even paying up as little as 25% thereof; an amount that can typically easily be borrowed by the foundation). The preferred dividend on the shares concerned will typically be fixed, low and just sufficient to cover the foundation’s financing costs. Such preference shares must ultimately be cancelled, generally within two years following the issue, and are intended to create a (temporary)

level playing field to enable the listed company to assess the bidder's intentions and act appropriately. Thus, this type of defence mechanism can temporarily move voting power to an independent entity (the foundation) without affecting public shareholders' economics. The mechanism has (re)gained popularity in recent years, following a tendency by Dutch public companies to abandon anti-takeover devices in the early years of this century.

As part of its recent (privatisation) IPO, ABN AMRO put a foundation structure in place in which it issued its shares to a (Dutch) foundation, which in turn issued a depositary receipt for each share, which depositary receipts are the publicly traded securities. As a general matter, in this particular structure, the depositary receipt holders will always and immediately receive all economic benefits on the shares for which they hold depositary receipts as well as the voting rights thereon. This foundation will not normally vote any shares in its own discretion. However, in certain hostile situations, the foundation may withhold the voting rights from shareholders and vote as it deems in the best interest of ABN AMRO. This structure, as opposed to the preference share option structure described above, was suited to ECB preapproval. We expect that (European) financial institutions may look at this structural defence more frequently in the future.

Corporate governance code consultation

In 2015, it was announced that the current Dutch corporate governance code, dating back to 2009, would be renewed in the near future. A proposal draft of the new corporate governance code was published on 11 February 2016 for purposes of a public consultation round. The revised version of the code is expected to become effective early 2017. The renewed code aims to further strengthen risk management, say-on-pay and long-term value creation in Dutch companies. In addition, the code will focus more strongly on matters of corporate culture and shareholder engagement. Further revisions aim to suit modern trends, such as the (relatively recent) introduction of executive committees in Dutch companies.

Employment law reforms

Significant reforms in the realm of employment law, and in particular termination law, have entered into effect during 2015. Amongst others, a statutory severance payment when terminating an employment agreement was introduced. In general, this severance payment is lower than the severance payment that was generally awarded to employees by Dutch courts under the old regime.

Reform of Dutch SER Merger Code

In the event of a change of control of an undertaking, the Social and Economic Council's Merger Code (*SER Fusiegedragsregels 2015*) could be applicable to such change of control (defined as a 'merger' in the Merger Code). The Merger Code is primarily aimed at protecting employee interests in the event of a proposed merger. Its purpose is to ensure that employees are given due consideration when enterprises are contemplating a merger. The Merger Code could be applicable if a proposed merger involves private enterprises and all the conditions as stipulated in the Merger Code are fulfilled. The Merger Code is not part of the formal Dutch legislation, but rather a code of conduct. Failure to comply with the Merger Code could still have adverse effects. For instance, the Social and Economic Council may issue a public statement that a party has failed to comply with the Merger Code.

An updated Merger Code was introduced in 2015 to replace the 2000 Merger Code. This revision broadened the scope of the Merger Code and, more importantly, increased the influence that a Dutch company's works council and the employee associations may

have on an M&A transaction. Under the revised Merger Code, parties must provide the relevant employee associations a notice in advance of their intentions, providing relevant information to allow the employee associations to express their view on the impact of the transaction from an employment perspective. The relevant works councils must then be given an opportunity to review the views of the relevant employee associations, when advising on the transaction.

Reforms related to insolvency law

A number of insolvency law reforms are currently being prepared and are expected to enter into force in the near future. These reforms, inspired by US procedures such as Chapter 11 restructuring, aim to modernise crucial parts of the Dutch Bankruptcy Act (*Faillissementswet*), which dates back to 1893. Noteworthy among these changes is the formal introduction of the so-called pre-pack construction in Dutch law, which is already being applied on a non-statutory basis in parts of the Netherlands to increase the efficiency of the sales process for an insolvent company, thus decreasing the loss of value.

Industry sector focus

No particular sector dominates the M&A market in the Netherlands. In the midmarket, there was a particular interest in the technology sector, the media sector, and the food sector during 2015.

The currently largely consolidated telecommunications market is expected to be stirred up (and actually further consolidate afterwards) with the recently announced merger between Ziggo and Vodafone, the anticipated sale of T-Mobile Netherlands, and a potentially looming bid on KPN.

The year ahead

In general, 2015 was a successful year for M&A in the Netherlands and there is no reason to believe that M&A activity will necessarily decline in 2016. The economic upturn in the Netherlands, the abundance of capital, and the cheap means of debt financing, continue to be the main drivers for M&A deals. There are three particular deals highly anticipated by all players in the market and these are considered to likely become the major deals for 2016 in the Netherlands.

The potential sale (or IPO) of Philips' lightning division is estimated to have a net worth of €5bn (lower estimate) to €+6bn (higher estimate). Apparently both J.P. Morgan and Goldman Sachs are involved to sort out the best option for Philips (i.e., sale vs. IPO). On a side note, Philips' sale of its Lumileds business to GO Scale Capital was called off after CFIUS appeared to have blocked the transaction.

Reportedly, a sale process for T-Mobile Netherlands by Deutsche Telekom was initiated in 2015, but did not come to fruition. Many expect that a sale process may lead to a deal during the year 2016. Although experts find it hard to predict what the eventual net worth of T-Mobile Netherlands is, it is anticipated to be one of the major deals for the year 2016.

The last eagerly expected notable deal involves the IPO of state-owned insurance company ASR with an expected net worth of €3bn (lower estimate) to €5bn (higher estimate). ABN Amro, Citigroup Global Markets and Deutsche Bank are understood to be the global coordinators in the IPO.

M&A activity is also expected to increase in the midmarket. Experts indicate that at least half of the transactions in the midmarket are PE-driven. Also, more than half of the M&A

deals in the midmarket involved foreign investors (both PE and strategic buyers) in 2015, and the general expectation is that foreign investors continue to be highly interested in the Dutch market. This can be generally explained by the solid (ICT-)infrastructure and the general high educational levels in the Netherlands.

* * *

Endnote

1. Source: *Mergermarket* – Benelux M&A brief, Q1-Q4 2015.

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