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Netherlands

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Overview

Apart from relevant case law, the key legal framework for public 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 Wft*), 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 (*Autoriteit Financiële Markten*, 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 (made by the relevant issuer itself) 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 (*Ondernemingskamer*) 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 (*Autoriteit Consument & Markt*, ACM) or from the European Commission, respectively.

M&A activity in the Netherlands decreased in 2018 both in terms of number of deals and deal value. The number of deals decreased by 6.6%, while overall deal value dropped by 34.9%. As follows from those numbers, the average deal size decreased in 2018.

Compared with 2017, there was less activity in public bids for Dutch targets in 2018. Not only were there fewer bids in 2018, the bids that took place were predominantly (ultimately) friendly, whereas 2017 was characterised by a fair number of unsolicited/hostile takeover attempts, all of which ultimately failed. All public bids in 2018 were either successful or withdrawn by the bidder:

- Pon's €75m partial public bid for 20% of Accell's shares (which was later withdrawn because Pon had acquired 20% of the shares in the open market);
- PAI Partners' €1.6bn recommended public bid for Refresco (announced in 2017, but completed in 2018);

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- Thales' €4.8bn recommended public bid for Gemalto (announced in December 2017, but completed at the end of March 2019);
- Alychlo's €30m mandatory public bid for SnowWorld (announced in 2017, but completed in 2018);
- Saxo Bank's €424m recommended public bid for BinckBank (announced at the end of 2018, with financial regulatory approvals still outstanding); and
- McDermott's $6bn merger with Chicago Bridge & Iron Company (announced in 2017, but completed in 2018).

In addition to public bid activity, several (successful) major private deals involving Dutch targets were announced in 2018, including the €10.1bn acquisition of AkzoNobel's Specialty Chemicals business (renamed Nouryon) by the Carlyle Group and the acquisition of HEMA by Ramphastos Investments. In addition, TenCate Advanced Composites was acquired by Toray Industries for a total consideration of €930m.

Approximately 50.4% of the number of deals in 2018 were domestic transactions, while only 27.5% of the total deal value in 2018 stemmed from domestic deals. Although only 32.5% of the cross-border deals were inbound, they represent 70.5% of the deal value of cross-border transactions. Accordingly, the largest deals in the Netherlands tend to be inbound cross-border deals. Although deal flow deteriorated slightly in 2018, it seems that Dutch targets, and the Dutch market in general, remain attractive, and relatively receptive, for non-Dutch acquirers. Companies from the United States are by far the most active non-Dutch acquirers in the Dutch M&A market. Having said that, we note that the Dutch government that took office in 2017 proposed several measures, which – if adopted – could make the acquisition of certain Dutch companies by non-Dutch prospective buyers potentially more onerous (see 'Key developments' below).

It seems that Dutch deal value and volume have been pushed down slightly as a result of rising protectionism, particularly the 'U.S.-Chinese trade war', Brexit-uncertainty, and more stringent data privacy requirements following from the new EU General Data Protection Regulation (GDPR). At the same time, strong market fundamentals such as PE's high levels of dry powder, long-term changes in industries that lead to M&A activity and abundant debt availability, have resulted in ongoing general market confidence. These fundamentals have arguably resulted in a (continued) level of upward pressure in valuations in the mid and lower market segments.

Significant deals and highlights

Carlyle Group acquires AkzoNobel's Specialty Chemicals business

On 9 March 2017, one day after news was leaked of a contemplated unsolicited public bid for AkzoNobel N.V. (Euronext Amsterdam: AKZA) by PPG Industries, Inc. (NYSE: PPG), AkzoNobel issued its own press release rejecting the PPG bid, without having entered into any discussions with PPG, and announced "a review of strategic options for the separation of its Specialty Chemicals business". PPG's second proposal was rejected almost as swiftly as the first proposal: AkzoNobel issued a press release two days later arguing that the bid was too low and failed to address significant uncertainties and risks. On 24 April, PPG issued a press release in which it made a third proposal. Following a brief meeting between representatives of PPG and AkzoNobel on 6 May 2017, AkzoNobel rejected the third proposal on 8 May 2017, concluding that its own strategy (involving the spin-off of its Specialty Chemicals business) would offer "a superior route to growth and long-term value creation and is in the best interests of shareholders and all other stakeholders".

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Disagreeing with AkzoNobel's boards' strategy (and their refusal to enter into discussions with PPG), a group of shareholders (among them Elliott Advisors, as one of the largest shareholders of AkzoNobel) exercised their statutory right as shareholders to request to call an extraordinary general meeting in which the shareholders would be given the opportunity to vote on the dismissal of the supervisory board's chairman, Mr Antony Burgmans. The request was denied by the company, following which several shareholders filed a request with the Enterprise Chamber on 9 May 2017 to force AkzoNobel's boards to allow the vote on Mr Burgmans' position. On 29 May 2017, the Enterprise Chamber ruled on the shareholders' requests. Given that, according to the Enterprise Chamber, entering into discussions with a potential bidder is a matter of strategy, which is within the remit of the board(s) of a Dutch company, the Enterprise Chamber held that AkzoNobel's boards could not be forced to enter into discussions with PPG. Arguing that seeking to dismiss Mr Burgmans as chairman was *de facto* an attempt by the shareholders to push the boards to commence discussions with PPG and therefore attempt to affect AkzoNobel's strategy, the Enterprise Chamber dismissed that request.

At the extraordinary general meeting of 30 November 2017, shareholders of AkzoNobel approved the separation of AkzoNobel's Specialty Chemicals business and received a €1bn special dividend reflecting the boards' confidence in the planned separation. AkzoNobel subsequently ran the separation of the unit on a dual-track process with a carve-out through an initial public offering (IPO) under consideration alongside the sale process. Due to the number of prospective buyers and the level of interest, a sale ended up being the preferred scenario. On 27 March 2018, a press release was issued announcing that the auction had ultimately been won by private equity firm Carlyle and Singapore's sovereign wealth fund GIC. The total consideration in the deal was €10.1bn including debt. AkzoNobel received a cash payment of €8.9bn and much of it, put at about €7.5bn, was returned to its shareholders. The transaction valued the Specialty Chemicals business at 10 times its earnings before interest, taxes, depreciation, and amortisation (EBITDA) in 2017.

The transaction was completed on 1 October 2018, and on 9 October the Specialty Chemicals business was renamed Nouryon. New CEO Charles W. Shaver said that a return to the public stock market would be logical if Nouryon grows considerably and becomes more profitable. The company will then probably be listed in the United States, according to Shaver. Recently, a potential split and listing of separate parts has been rumoured as well.

Lion Capital finds buyer for HEMA

In September 2017, HEMA announced that it was to be put up for sale by owner Lion Capital. HEMA is a Dutch discount retail chain that has more than 750 stores in nine countries over two continents, more than 19,000 employees and it reported around €1.2bn turnover in 2018. A sale to a private party was the preferred scenario, but an IPO-exit was also one of the options. Lion Capital had already tried to sell HEMA in 2011 and 2014, without success. Lion Capital's asking price was approximately €1.4bn.

In April 2018, the sale of HEMA ran into difficulties. The two most likely buyers, a consortium of Alpinvest Partners and Gilde Buy Out Partners, and investment firm Clayton Dubilier & Rice, considered the asking price too high and appeared to believe that HEMA was recovering too slowly from financial difficulties. As a result, the negotiations slowed down. In May 2018, Dutch newspaper *De Financieele Telegraaf* reported that Lion Capital had reached an oral agreement with the Belgium private equity firm Core Equity Holdings and that it would take a few weeks for a contract to be signed. However, the talks were terminated when Core Equity Holdings realised that, in its view, HEMA's e-commerce plans were not sufficiently profitable due to the current franchisees' contracts.

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On 18 October 2018, Ramphastos Investments acquired HEMA from Lion Capital. In addition, it took over €750m in debt that needed to be refinanced in 2019. Ramphastos Investments is the investment company of Dutch entrepreneur Marcel Boekhoorn. Although financial details of the transaction were not disclosed, sources say that HEMA was sold for less than €100m, which would be far below the presumed asking price. Ramphastos Investments would make a post-deal cash investment of €40m into HEMA's business. The issues with the franchisees' contracts were resolved: new agreements with franchisees were entered into and all legal proceedings and franchise contract terminations were cancelled. HEMA plans to sell a number of shops to its franchisees and use the proceeds to speed up its international expansion. After receiving ACM approval, the transaction was completed on 30 November 2018.

Refresco acquired by PAI Partners and taken private

On 6 April 2017, Refresco, a Dutch bottler of juices and soft drinks, issued a press release regarding the rumours in the market on a proposal by French private equity firm PAI Partners SAS (PAI). Refresco confirmed that it received an unsolicited, indicative, and conditional proposal from PAI on 6 April 2017 regarding a possible bid to acquire all 81.2m issued shares in the company at an aggregate cash consideration of €1.4bn. It was not the first time that PAI had shown interest in Refresco: the firm was one of the final round bidders during Refresco's dual-track process in 2015. Refresco decided to go public in March 2015 at €14.50 per share. Again, PAI's attempt in April 2017 was (initially) unsuccessful: Refresco informed PAI that the proposed terms and conditions did not merit any further investigation and, accordingly, rejected the proposal. The bid sent the share price up 25% from about €14 to €18 and the stock stayed around that level after the bid fell through, indicating that shareholders expected the bidder to return.

On 25 July 2017, Refresco acquired Cott's bottling activities for $1.25bn. Activist investor Guy Wyser-Pratte argued against the Cott acquisition ahead of the Refresco extraordinary general meeting, that eventually approved the transaction on 5 September 2017, claiming that it served as a takeover defence. However, on 3 October 2017, Refresco announced that it had received a second unsolicited, indicative, and conditional proposal from PAI. PAI proposed to pay €19.75 per share, representing an aggregate cash consideration of €1.6bn. The offer included Cott's bottling activities. Refresco entered into negotiations with PAI on 18 October 2017.

On 25 October 2017, Refresco and a PAI-led consortium including British Columbia Investment Management Corporation jointly announced that they had reached conditional agreement on a recommended, fully funded, public bid for all Refresco shares at an offer price of €20 per share (cum dividend) in cash. The offer price represented a premium of approximately 22% to the average share price since the announcement of the Cott transaction, a premium of approximately 41% to the 5 April 2017 closing share price, and a premium of approximately 38% to the Refresco IPO price. The offer price values 100% of the shares at €1.62bn and equates to an enterprise value of approximately €3.3bn, which implies an EBITDA multiple of 8.5× post-Cott transaction synergies for the 12-month period ending 30 June 2017. The deal was, among others, subject to completion of the Cott transaction.

On 20 March 2018, the PAI-BCI consortium declared the bid unconditional. 97.4% of the shares were tendered for acceptance and all offer conditions were satisfied. On 4 April 2018, the consortium announced that another 2.0% of the shares were tendered during the post-acceptance period, resulting in ownership of 99.4% of all shares. In addition, the consortium announced a delisting of Refresco, which took place on 26 April 2018.

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Gemalto's 'white knight' Thales

On 11 December 2017, Atos, a French IT service and consulting company, announced that it had made a formal proposal to acquire Gemalto N.V. by way of a public bid for all of Gemalto's shares. Netherlands-based Gemalto is the world's largest maker of chips found in mobile phones and credit cards and reported revenue of roughly €3.0bn in 2018. This public bid was made after Atos had delivered a bid to the board of directors of Gemalto on 28 November 2017. Purportedly, for purposes of market transparency, the Atos board decided to make the proposal public while affirming its willingness to engage in friendly discussions. Atos proposed to pay €46.0 per Gemalto share (cum dividend) in an all-cash offer, representing a total consideration of roughly €4.3bn. In addition, the offer represented a premium of 42% to Gemalto's last unaffected closing price as of 8 December 2017, and a 42% and 34% premium to Gemalto's one-month and three-month volume weighted average trading prices, respectively.

Gemalto rejected the takeover bid from Atos on 13 December 2017, saying that the €4.3bn bid undervalued the company and did not reflect its growing position in businesses such as cybersecurity. In addition, Gemalto took the position that the bid did not provide adequate deal certainty, given the significant conditionality attached to it, in particular, the envisaged anti-trust hurdles. Lastly, Gemalto's board of directors noted that Atos' proposal was not reflective of a friendly and collaborative approach.

On 14 December 2017, rumours circulated that Gemalto was considering a range of ways to defend itself against the unsolicited approach from Atos, including a 'white knight' defence. On 18 December, Thales and Gemalto jointly announced that they had reached an agreement on a recommended all-cash bid by Thales for Gemalto. Thales proposed to pay €51.0 per share (cum dividend), representing a total consideration of approximately €4.6bn. Thales and Gemalto could terminate the merger agreement if a third-party bidder would make an offer which, in the opinion of the Gemalto board, taking into account certainty, timing, financing, strategic fit, consequences for employees, and other non-financial aspects of Thales's bid, would be substantially more beneficial than Thales' bid and exceed the bid price by at least 9%. In the event of a superior bid, Gemalto would give Thales the opportunity to match such bid, in which case the merger agreement could not be terminated by Gemalto. On termination of the merger agreement by Thales on account of a material breach by Gemalto or in the event of a third-party bid at a higher price, Gemalto would need to pay a termination fee of €60m to Thales.

On 28 March 2018, Thales launched its recommended all-cash offer, with an acceptance period ending 6 June 2018. On 1 June 2018, the acceptance period was extended to 15 August 2018 due to certain closing conditions (in particular, anti-trust conditions) not yet having been fulfilled. For equal reasons, the acceptance period was extended again on 10 August 2018. On 29 March 2019, Thales and Gemalto declared the offer unconditional. 85.6% of the shares had been tendered. After the post-closing acceptance period, a total of 97.0% of the shares had been tendered. On 23 April 2019, Thales and Gemalto announced that Gemalto would be delisted shortly after Gemalto's annual general meeting of 28 May 2019.

Alychlo makes mandatory public bid for SnowWorld

On 21 September 2017, SnowWorld issued a press release stating that it had been informed by Belgian entrepreneur Marc Coucke that he had acquired 40% of the shares in the capital of SnowWorld, a Netherlands-based company that owns and operates indoor and outdoor ski resorts, from SnowWorld founder and then CEO Koos Hendriks. Mr Coucke acquired

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the 40% stake through his investment firm Alychlo. Alychlo already held a 24% interest in SnowWorld and as a result of this transaction it had obtained a majority interest of 64%. Mr Coucke paid €9.50 per share for the 40% stake in SnowWorld.

On 28 September 2017, Alychlo confirmed the definitive acquisition of an additional interest in SnowWorld and announced a mandatory public bid (triggered by Alychio crossing the 30% mandatory bid threshold without obtaining in excess of 50% through a voluntary public bid. The mandatory bid was launched on 13 March 2018. Alychlo proposed to pay €9.50 per share (ex-dividend), valuing SnowWorld's total equity at €30m. By then, Alychlo had already built up an actual stake of 73.4% and an additional potential interest of 9.3% in SnowWorld. During the acceptance period, 3.3% of the shares were tendered. After the mandatory bid, Alychlo's total actual and potential stake was 82.8% and 9.3%, respectively. SnowWorld would not be delisted upon completion of the mandatory bid.

Pon Holdings' partial tender bid for Accell Group

On 11 April 2017, Accell Group announced that it had received a non-binding, conditional proposal from Pon Holdings. Accell focuses internationally on the mid-range and higher segments of the market for bicycles and bicycle parts and accessories. The proposal concerned a public bid for all shares of Accell at an indicative all-cash price of €32.72 per share, including the 2016 proposed dividend of €0.72. On 2 May 2017, Accell announced that it had discontinued talks with Pon, because it found that the bid did not reflect future value creation and lacked support from Accell's shareholders. Accell's board of directors came to this conclusion despite the fact that Pon raised its bid price per Accell share with €1 to €33 (ex-dividend) on 29 April 2017.

In April 2018, some Accell shareholders made it known that they believed it was time to reconsider the decision to stay independent, and suggested restarting negotiations with Pon. However, at the presentation of Accell's 2017 results, Ab Pasman, chairman of Accell's board of directors, said that he was not intending to restart takeover negotiations. On 13 November 2018, Pon announced a partial tender bid for 20% of the shares in the capital of Accell. Pon had already acquired a 5.1% stake in Accell from Boron Investments the day before. The partial tender bid was priced at €19.00 per share, valuing the total bid at roughly €75m.

On 20 November 2018, Pon announced that it had already acquired 20% of the shares in Accell in the open market at a volume weighted average price of €19 per share. As a result, there no longer was a rationale for Pon to proceed with its partial bid. Accordingly, Pon announced the withdrawal of its partial bid.

Saxo Bank acquires BinckBank

On 14 December 2018, BinckBank, a Netherlands-based online discount broker, confirmed being in advanced discussions with Saxo Bank regarding a potential combination of their businesses. The combination would be effected through a public bid by Saxo Bank for all of BinckBank's shares at a price of €6.35 (cum dividend) per share in cash.

On 17 December 2018, BinckBank and Saxo Bank announced a conditional agreement on a recommended all-cash public bid of €6.35 (cum dividend) per share of BinckBank, representing a total consideration of €424m. The bid price represented a premium of 35% over BinckBank's closing price of 14 December 2018, and a premium of respectively 42%, 43%, and 38% over the average volume weighted price per share over the preceding one, two, and three calendar months.

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The recommended public bid for all shares was launched on 12 March 2019. Shareholders had until 22 May 2019 to sell their shares to Saxo Bank, but the acceptance period was extended to 31 July 2019 due to ongoing financial regulatory approval processes.

Key developments

Proposals for a statutory 250-day waiting period

In an interview with the Dutch financial daily *Het Financieele Dagblad* that was published on 28 March 2017, Mr Jan Hommen proposed the introduction of new legislation that would give Dutch public companies that are subject to a hostile takeover bid the ability to invoke a so-called "response period" of one year, subject to a one-time extension for another maximum period of 180 days at the target's discretion. During that response period, the board(s) of the Dutch target would be given the opportunity to review the bid and assess to what extent it would be in the interests of all of the target's stakeholders (e.g. shareholders, but also creditors, employees, *etc*.), effectively creating a stand-still period. This response period would be in addition to the already existing response period of 180 days laid down in the Dutch Corporate Governance Code (applicable to Dutch public companies on a comply-or-explain basis), which may be invoked by boards if shareholders request items to be put on the agenda of the general meeting that may result in a change of strategy, such as the dismissal of one or more management board or supervisory board members.

In its coalition agreement, the Dutch government that took office in October 2017 proposed several measures protecting Dutch companies, including proposals to protect such companies from short-term-focused shareholders. The government proposed preparing legislation giving Dutch listed companies the right to invoke a (total) 250-day response period when confronted with proposals from shareholders for fundamental strategy changes, which response period could not be combined with takeover defences of the target company (e.g. the issue of preferred shares to a friendly foundation).

In a letter to the House of Representatives (*Tweede Kamer*) dated 29 March 2018, the Minister for Economic Affairs and Climate, Mr Eric Wiebes, announced that a draft legislative proposal had been prepared for a statutory response period that could also be invoked in the event of a hostile takeover bid, but that first advice was being sought from the Council of State (*Raad van State*) as to whether the draft proposal would conflict with EU legislation (e.g. the free movement of capital). The Council of State ultimately concluded that the draft proposal did not conflict with the EU Shareholder Rights Directive nor with the EU Takeover Directive. However, the statutory waiting period could impede the free movement of capital and the freedom of establishment. The Council of State was of the view that this could be justified: the waiting period would be in line with the stakeholder model that is applied in Dutch corporate law.

On 7 December 2018, a draft legislative proposal regarding a statutory 250-day waiting period was published for consultation. The draft proposal would give the management board of a Dutch N.V. the right to invoke a waiting period in two situations: first, if one or more shareholders would request the board to put on the agenda of the general meeting a proposal to appoint, suspend, or dismiss one or more management or supervisory board members, or a proposal to amend provisions in the company's articles of association relating thereto. Second, a board could invoke the waiting period in the event of a hostile takeover bid being announced. The waiting period could only be invoked if the board would conclude that either situation would materially conflict with the interest of the company and its business enterprise. The waiting period would suspend the power of the general meeting to appoint,

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suspend, or dismiss management board or supervisory board members (or to amend the relevant provisions of the articles of association), unless the company itself would propose the appointment, suspension, or dismissal or a management or supervisory board member.

The aim of the statutory waiting period as set out in the draft legislation is to protect the role of the board of a Dutch company in determining the strategy of the company, thereby taking into consideration the impact of all options on the company's stakeholders. During the waiting period, the management board should gather all information necessary for a careful determination of the company's strategy, and consult shareholders with a stake of at least 3%, the supervisory board, and the works council. In addition, the management board would need to report on the pursued policy and the course of affairs after the invocation of the waiting period, which report would need to be put on the agenda of the next general meeting as a discussion point.

The draft legislation was heavily criticised by interested parties (including, among others, the AFM, several major law firms, institutional investors, and proxy advisory services) in the consultation. At this time, no draft bill has been submitted to the House of Representatives.

Proposal to lower initial notification threshold for capital and voting rights from 3% to 2%

Another measure that the Dutch government that took office in October 2017 proposed in its coalition agreement was that Dutch listed companies with an annual turnover of more than €750m would be given the right to request their shareholders to register with the AFM upon acquiring a 1% interest, noting that the current initial notification threshold is 3%.

On 23 May 2019, the Minister for Finance, Mr Wopke Hoekstra, sent a letter to the House of Representatives announcing that a draft legislative proposal regarding a lower initial threshold for registration with the AFM had been published for consultation. The draft proposal requires parties that acquire a 2% (long or gross short) capital or voting rights interest in a listed company to report this to the AFM without delay; the vast majority of EU countries apply the default 5% initial threshold and only Portugal (2%) and the Czech Republic (1%) have an initial threshold below 3%. The proposed initial threshold of 2% is higher than the initial threshold of 1% that was initially proposed in the coalition agreement because the government believes that an initial threshold of 1% would impose too high an administrative burden on companies, in particular small ones. However, the draft proposal applies to all listed companies and not only to companies with an annual turnover of more than €750m. The draft proposal provides for a transitional regime requiring parties that have an interest between 2% and 3% on the date that the legislative proposal enters into force to – within four weeks following that date – report the interest to the AFM.

The draft legislation aims to protect companies from short-term-focused shareholders. A lower initial threshold would supposedly enable companies to engage in a constructive dialogue with material or activist shareholders, which would in turn promote the long-term relationship of a company with its shareholders. In addition, transparency with regards to substantial shareholdings in listed companies is viewed by the government as essential for orderly capital markets, as it would enable investors to make a more well-informed decision to buy or sell an interest in the relevant company.

Eumedion, a Dutch advocacy group for institutional shareholders, believes that the proposal is unnecessary, as the revised EU Shareholder Rights Directive – the implementation of which has been adopted by the House of Representatives and put to vote in the Senate at the time of writing – will enable companies to identify shareholders with an interest of more than 0.5%. The AFM believes that the lower initial threshold distorts the level playing field

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in Europe. However, VEUO, a Dutch advocacy group for Dutch listed companies, welcomes the 2% threshold, arguing that the expected increase in transparency would limit the room for opportunism. The government consultation among market participants closes on 4 July 2019.

Protection of the Dutch telecoms industry from a national interest point of view

On 5 March 2019, the Undersecretary for Economic Affairs and Climate, Ms Mona Keijzer, sent a draft bill to the House of Representatives under which the Dutch government could in the future potentially block a foreign acquisition of a Dutch telecoms party (which can either be a branch or establishment in the Netherlands). The need for legislation that would safeguard Dutch public order and national security was prompted by América Móvil's September 2013 attempted takeover of KPN, the leading Dutch telecoms company (and the former incumbent Dutch national fixed and mobile line operator). The aim of the draft bill is to create the power for the Minister for Economic Affairs and Climate to block a change of control in the Dutch telecoms sector if this is deemed to be in the interest of the Dutch public order or national security. The Dutch government noted that, as a result of globally shifting economic power, the chances are increasing that a change of control in the telecoms business would partly be driven by geopolitical motives. It believes that this could give rise to national security or public order concerns. For instance, according to the Dutch government, control could potentially be used to further a political agenda, putting pressure on the Dutch government. Also, it said, control over telecommunications infrastructure and services could potentially be abused to gather information from confidential communications. Where such confidential communications belong to the Dutch government, the government argues, this may affect national security.

The main element of the draft bill is that a party that intends to acquire a controlling interest in a Dutch telecoms party would need to notify the Minister if such acquisition could put public order or national security at risk. The Minister would then investigate whether there are grounds to block the acquisition. The public order or national security can only be at risk if the controlling interest leads to relevant influence in the telecoms sector and one or more of the specified grounds as laid down in the proposal apply to the acquirer (e.g. it is expected that the acquirer has the intention to influence the telecoms party to effect misuse or intentional outage). The draft bill furthermore enables the Minister to, based on the same grounds, order the reduction or termination of a controlling interest in a telecoms party so that the relevant party no longer holds such a controlling interest.

The definition of telecoms party is very broad. The draft bill does not only cover internet, cellular and landline telecom providers, but also companies that provide vital services such as internet hubs, data centres (unless for own use), and hosting providers. As noted above, it does not only cover Dutch entities, but also (dependent) Dutch branches of foreign legal entities.

In its review, the Council of State was very critical of the initial draft bill that it received on 19 April 2018. The Council of State was not convinced of the adopted approach, as the draft bill targeted control in the telecoms party rather than the ultimate objective of integrity and well-functioning of telecoms services. The draft bill did not contain any provisions that could directly protect the infrastructure and services of the telecoms sector. As a result, the adopted approach would be ineffective according to the Council of State. In addition, the Council of State was critical of the broad scope of the provisions and the uncertainties in the draft bill. The grounds that trigger the notification obligation are described vaguely, which would cause uncertainty. This also raised questions about European property rights and the free movement of capital and services in Europe.

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EU proposal for foreign investment screening

National security has also been resonating at a European level. On 10 April 2019, the new EU framework for the screening of foreign direct investments (COM (2019) 452) officially entered into force. The regulation allows EU Member States to apply a national screening mechanism to safeguard public order and safety, which is very broadly defined. Among other things, this would include protecting high-end technology.

The European Commission defines a foreign direct investment (FDI) as an investment of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom, or the undertaking to which, the capital is made available in order to carry on an economic activity in a Member State, including investments which enable effective participation in the management or control of a company carrying out an economic activity. The European Commission would itself also have a right to issue opinions on FDIs to safeguard public order and safety if it is plausible that such FDIs could affect projects or programmes that are of EU interest. For instance, this would include projects that are substantially financed by the EU or that are subject to sectorial EU legislation in relation to critical infrastructure (e.g. energy, transport, telecom, and data), critical technologies (e.g. AI, semiconductors, and nuclear technologies), or critical natural resources.

In addition to the screening mechanisms for individual Member States and the European Commission, the regulation establishes a cooperation mechanism between the Member States and the European Commission to inform each other of, and comment on, FDIs that may threaten security or public order, and to exchange information in this regard. This cooperation mechanism should allow for better coordination of any screening decisions taken by Member States, and should increase awareness of Member States and the European Commission about planned or completed FDIs that may affect security or public order. The regulation shall apply from 11 October 2020.

Industry sector focus

In 2018, the technology, media & telecoms (TMT) and industrials & chemicals (I&C) sectors were the most active sectors in terms of number of deals. The TMT sector was the most active sector in both strategic and financial acquisitions. In financial acquisitions, the I&C sector was the second-most active sector, while the Business Services sector was the second-most active sector as far as strategic acquisitions are concerned. A noticeable consolidation wave has taken place in the IT sector, where both strategic and private equity parties have contributed to a record level of deals. In addition, the Dutch financial regulators are known to be supportive of consolidation in the (life) insurance business, which has spurred M&A activity in that field. We expect more deal-making in the energy, mining, and utilities sector triggered by a long-term shift to renewables and new legislation to tackle climate change. Food and consumer goods remain another focus for potential market consolidation.

The year ahead

Although 2018 was a successful year for M&A in the Netherlands, it appears that M&A markets no longer ignore geopolitical issues. We believe it to be inevitable that the M&A environment will be somewhat less favourable in 2019, with the growth rate of European economies slowing down, the ECB ending its quantitative easing policy, rising protectionism, and uncertainty regarding the Brexit outcome. However, appetite for deal-making will not disappear, as private equity parties seek to deploy their massive pile of dry powder, and

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cheap means of financing continue to drive M&A deals. In addition, the year ahead might also see some transformative, strategic deals, as corporates prepare for a digital, less fossil fuel-dependent future. The year ahead will also see the long-anticipated sale of energy company Eneco through a controlled auction process (by its current governmental/municipal shareholders). Eneco, which has a substantial retail business and a focus on renewable energy transition, finally sees its shareholders aligned with a view to getting a deal done.

Private equity's dry powder is also expected to drive M&A activity in the midmarket, as experts indicate that half of the transactions in the midmarket are already private equity-driven. Also, more than half of the M&A deals in the midmarket involve foreign investors (both private equity and strategic buyers), and the general expectation is that foreign investors will continue to be interested in the Dutch market. This can be generally explained by the solid (ICT-)infrastructure and the general high educational levels in the Netherlands.

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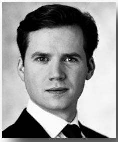

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