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The 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*), 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 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 (*Autoriteit Consument & Markt*, ACM) or from the European Commission, respectively.

M&A activity in the Netherlands slowed slightly in 2016, compared to 2015. The market slowed down markedly when the UK voted to leave the EU. However, we saw activity pick up again quickly following the summer, with somewhat of a rally at the end of the year, which continued into 2017. With a healthy economic outlook, we do not (yet) see any signs of deal flow slowing. Also, some good size deals are getting done or, in some cases, being attempted.

Still, where we saw six public bids for Dutch targets in 2015 (with Prosensa, TNT Express, Grontmij, Royal Ten Cate, Ballast Nedam and Batenburg Techniek as targets), we saw four public bids in 2016 (USG People, NXP Semiconductors, AVG Technologies and Royal Reesink). However, 2017 appears off on a healthy start with public bids for Cnova and Delta Lloyd, while also Kraft Heinz's short-lived interest in Unilever recently created a stir in the Dutch market (see, 'Significant deals and highlights', below).

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The continued healthy deal flow appears to reflect an ongoing, general market confidence, whereby the financial crisis seems to bit-by-bit be viewed as a thing of the past (even though we believe that some of the adverse dynamics might still be present), resulting in increased activity by Dutch as well as non-domestic strategic buyers. At the same time, the continued availability of private equity funds and improved debt availability have arguably resulted in a (continued) 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. Having said that, we note that on 16 February 2017, the Minister of Economic Affairs published, and invited comments on, a draft for a Dutch Act on Avoidance of Undesired Control Telecommunications, which – if adopted – might make an acquisition of a Dutch telecoms company by a non-Dutch prospective buyer more onerous (see 'Key developments', below).

Also, the establishment of anti-takeover devices has made somewhat of a resurgence over the past few years. 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.

In the meantime, as US and other tax dynamics have changed, the previously existing flow of inversion deals has dried up. Also, on 23 May 2016, CF Industries Holdings, Inc. (NYSE: CF) and OCI N.V. (Euronext Amsterdam: OCI) announced the termination of the proposed combination of CF and the European, North American and Global Distribution businesses of OCI. The parties explained that the US Treasury announcement of 4 April 2016 materially reduced the structural synergies of the combination. Since that time, both companies explored alternative transactions and structures that would be attractive to their respective shareholders. However, the companies noted that they were unable to identify an alternative acceptable to both parties and, therefore, agreed to terminate the combination.

Although we personally see a very healthy Dutch M&A pipeline, we also see a level of economic and political uncertainty, including uncertainty surrounding the potential outcomes in key elections coming up in Europe (among others, in the Netherlands, on 15 March 2017). Generally, Dutch M&A practitioners send mixed messages about their pipelines as this book goes to press in early 2017.

Significant deals and highlights

NXP sells its Standard Products business

Arguably, NXP has been one of the most prolific 'Dutch deal machines' in 2015 and 2016.

In March 2015, NXP Semiconductors N.V. (NASDAQ: NXPI) and Freescale Semiconductor (NYSE: FSL) 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.

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Subsequently, in August 2016, JAC Capital, a subsidiary of Chinese state-owned investment company JIC, and Wise Road Capital, acquired the Standard Products business of NXP in a US$ 2.75bn deal, subject to amongst others European Commission, Federal Trade Commission (US), CFIUS and the Chinese Ministry of Trade clearance.

Qualcomm acquires NXP

On 27 October 2016, Qualcomm Incorporated (NASDAQ: QCOM) and NXP Semiconductors N.V. (NASDAQ NXPI) announced a definitive agreement, unanimously approved by the boards of directors of both companies, under which Qualcomm will acquire NXP. Under the agreement, a subsidiary of Qualcomm makes a tender offer to acquire all of the issued and outstanding common shares of NXP for US$ 110.00 per share in cash, translating into an equity value of US$ 38.5bn and a total enterprise value of approximately US$ 47bn. The transaction is expected to close at the end of 2017, pending approval by shareholders and regulatory bodies.

Apollo acquires Lumileds

In March 2015, a consortium led by GO Scale Capital announced its intention to acquire an 80.1% interest in Lumileds, the LED components and automotive lighting business headquartered in California, United States, of Royal Philips (NYSE: PHG, Euronext Amsterdam: PHIA). Philips would retain the remaining 19.9% interest. The value of the transaction would amount to US$ 3.3bn.

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 terminated their March 2015 agreement for the intended acquisition. Both parties were unable to resolve CFIUS' concerns and, thus, regulatory clearance was not granted.

Subsequently, in early 2016, according to (unidentified) sources, private equity groups CVC and KKR were rumoured to target Lumileds. The consortium lost the auction of Lumileds in 2015, but was rumoured to be reassessing the options for the unit.

However, on 12 December 2016, Philips announced that it had signed an agreement to sell an 80.1% interest in Lumileds to certain funds managed by affiliates of Apollo Global Management, LLC (NYSE: APO). Philips will retain the remaining 19.9% interest in Lumileds.

The transaction values Lumileds at an enterprise value of approximately US$ 2bn, including debt and debt-like items. Philips expects to receive cash proceeds, before tax and transaction-related costs, of approximately US$ 1.5bn and participating preferred equity. The transaction is expected to be completed in the first half of 2017.

NN Group acquires Delta Lloyd

On 5 October 2016, NN Group, the leading Dutch insurer (Euronext Amsterdam: NN), announced a conditional, unsolicited proposal to acquire its competitor Delta Lloyd (Euronext Amsterdam: DL AE, Euronext Brussels: DL BB) through a public bid.

Delta Lloyd initially rejected the unsolicited offer, but on 2 February 2017, NN Group and Delta Lloyd jointly announced a recommended public cash offer by NN Group for all issued and outstanding ordinary shares of Delta Lloyd. The offer is an all-cash public bid for the issued and outstanding ordinary shares (traded on Euronext Amsterdam) in the capital of Delta Lloyd at an offer price of €5.40 (cum dividend) per ordinary share, representing a total consideration of €2.5bn.

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Kraft Heinz approaches Unilever

On Friday, 17 February 2017, the Kraft Heinz Company (NASDAQ: KHC) acknowledged recent speculation regarding a possible combination of Kraft Heinz and Unilever PLC/ Unilever N.V. Unilever has a dual headed structure, whereby its business is held by LSE and NYSE listed Unilever PLC (LSE: ULVR, NYSE: UL) and Euronext Amsterdam and NYSE-listed Unilever N.V. (Euronext Amsterdam: UNA, NYSE: UN). A contractual equalisation agreement and several other agreements are in place between the two companies, so that they economically operate as a single group, and so that the shares have the same economic value.

Kraft Heinz confirmed that it had made a comprehensive proposal to Unilever about combining the Kraft Heinz and Unilever groups to create a leading consumer goods company with a mission of long-term growth and sustainable living. Kraft Heinz noted that while Unilever had declined the proposal, Kraft Heinz looked "forward to working to reach agreement on the terms of a transaction."

On the same day, Unilever announced that it had noted the announcement made by Kraft Heinz to the effect that it had made a potential offer for all of the shares of Unilever PLC and Unilever N.V. Unilever went on to say that Kraft Heinz's proposal represented a premium of 18% to Unilever's share price as at the close of business on 16 February 2017, and that that fundamentally undervalued Unilever. Unilever further noted that it had rejected the proposal as it saw no merit, either financial or strategic, for Unilever's shareholders. Unilever further noted that it did "not see the basis for any further discussions". The Unilever release went on to specify Kraft Heinz's proposal: Unilever common shareholders would receive US$ 50.00 per share in a mix of US$ 30.23 per share in cash payable in US dollars and 0.222 new enlarged entity shares per existing Unilever share, valuing Unilever at a total equity value of approximately US$ 143bn. The release also noted that, as at the close of business on 16 February 2017, a mix of US$ 30.23 in cash payable in US dollars and 0.222 Kraft Heinz shares per existing Unilever share would value each Unilever common share at US$ 49.61, representing the premium of 18% to Unilever's share price. Unilever confirmed, in line with the requirements under the UK Takeover Code, that its announcement was not being made with the agreement of Kraft Heinz. Unilever's (unsolicited) specification of Kraft Heinz's proposal triggered the commencement of statutory bid timetables, effectively putting (further) pressure on the bidder.

Following the above announcements, Kraft Heinz, under the rules of the UK Takeover Code (which are slightly more tight than, but ultimately have the same effect as, the Dutch takeover rules, which also applied to this situation) had to, by not later than 17 March 2017, either announce a firm intention to make an offer for Unilever or announce that it does not intend to make an offer for Unilever (i.e., triggered by the respective "put up or shut up" rules).

The US$ 143bn takeover, if completed, would have constituted the largest cross-border merger since Vodafone's US$ 183bn acquisition of Mannesmann in 2000. However, on Sunday, 19 February 2017, Unilever and Kraft Heinz, in a joint statement announced that Kraft Heinz had amicably agreed to withdraw its proposal for a combination of the two companies. They added that "Unilever and Kraft Heinz hold each other in high regard. Kraft Heinz has the utmost respect for the culture, strategy and leadership of Unilever." These kind words will "keep" Kraft Heinz away from a possible Unilever bid for six months, but not necessarily indefinitely.

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De Telegraaf in play

On 14 December 2016, Mediahuis N.V., the Belgian newspaper publishing house, and VP Exploitatie N.V., the family vehicle of the Van Puijenbroek family, announced their intention to jointly commence a public bid for Telegraaf Media Groep N.V. (Euronext Amsterdam: TMG), the publisher of, in particular, the leading Dutch morning paper *De Telegraaf*. The joint bidders' stated intention was to integrate TMG's business into the Mediahuis (newspaper) business. The announced bid price was €5.25, subject to ongoing due diligence. On 11 January 2017, the parties announced that they had, in the meantime, received tender commitments covering 55% of TMG's outstanding share capital, including the 41.3% stake in TMG's share capital held by VP itself.

On 23 January 2017, Talpa, the TV production firm run by high-profile Dutch media entrepreneur John de Mol (The Voice, etc.), announced that it intended to make a competing bid to acquire TMG with the aim of forming an independent Dutch multimedia company, with strong positions in print, radio, television and online content. Talpa noted that it had sent the boards of TMG a proposal for an intended public bid for all outstanding shares of TMG for an offer price of €5.90 per TMG share (cum dividend) in cash.

Subsequently, on 19 February 2017, Mediahuis and VP announced that they would be increasing their indicative bid price from €5.25 to €5.90. They announced that Mediahuis had acquired a 6.7% stake (previously committed to be tendered) at that €5.90 price. Including the (now still valid) irrevocables provided to the consortium, the two would again hold commitments for close to 60% of TMG's outstanding share capital. At the time of going to press of this book, shareholders were still speculating on a further increase in the ultimate bid price. However, a joint deal involving each of Mediahuis, VP and Talpa appears to be a distinct possibility as well.

Key developments

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

On 16 February 2017, the Dutch Secretary of Economic Affairs (currently, Henk Kamp) published draft legislation under which the Dutch government could in the future potentially block a foreign acquisition of a Dutch telecoms company.

The aim of the draft legislation is to create the power for the Secretary of Economic Affairs to block a change of control in the Dutch telecoms sector if such is deemed to be in the interest of the Dutch public order or national security. The Dutch government notes 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 that 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 says, 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, such may affect national security.

The draft legislation defines relevant control, and relevant influence in the telecoms sector. It also lays down the criteria based on which the Secretary of Economic Affairs would need to assess whether the public order or national security is at risk. The legislation would furthermore enable the Secretary of Economic Affairs to terminate existing relevant control at a telecoms player, based on the same grounds. However, such interference in an existing situation would only be allowed if the relevant facts on the basis of which the

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interference would be sought would have occurred after the acquisition of control, or would have become known to the Secretary of Economic Affairs after such acquisition of control by the party concerned.

Any interested party can submit its comments on the draft legislation to the Secretary of Economic Affairs until 30 March 2017. Also after that, there is no certainty that this legislation will ever be enacted. The CEO of Dutch telecoms incumbent KPN has voiced his scepticism *vis-à-vis* the desirability of any such legislation.

Moreover, it is noteworthy that the Secretary of Economic Affairs has now explicitly singled out the telecoms business for protection from a national interest point of view. When, last year, Bpost, the partly state-owned Belgian national mail delivery company (Euronext Brussels: BPOST), submitted a bid, followed by a further improved bid, to PostNL, the privatised and now publicly traded Dutch national mail delivery company (Euronext Amsterdam: PNL), such approach(es) were roundly rejected by the board of PostNL. Bpost ended up retracting its offers, but not until after several prominent Dutch politicians had made statements to the effect that such an acquisition might be undesirable from a Dutch national perspective.

Having said that, the Secretary of Economic Affairs did at the time note that he did not see a basis to interfere with a view to Dutch national interests. He did the same, on 9 September 2016, in a letter to parliament after having been asked whether the Dutch government could potentially interfere in a possible sale of Tata Steel Netherlands. In that letter, the Secretary of Economic Affairs explicitly noted that the relevant strategic decision-making was up to Tata itself.

As it was widely known that the Secretary of Economic Affairs was working on legislation under which the Dutch government would become empowered to block a potential change of control of companies that run a business of national interest, there was a level of speculation in the market on which industries might be covered. That speculation is now gone (at least insofar as the position of the Dutch government is concerned). If legislation is adopted based on the current proposal, it will cover the telecoms business only.

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 or charged to the reserves of the listed company). The preferred dividend on the shares concerned will typically be low, just sufficient to cover the foundation's financing costs, and fixed if the payment of the preference shares is charged to the reserves. Such preference shares must ultimately be cancelled, no later than 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.

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As part of its (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 limit or withhold the voting rights from depositary receipt holders 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.

Notably, following the recent discussions between Kraft Heinz and Unilever, we understand that many international investors were somewhat surprised to learn that Unilever does not in fact have a foundation structure in place that functions as an anti-takeover device. Like ABN AMRO, Unilever has a foundation structure in place in the Netherlands under which the shares in its capital are held by the foundation in trust for the holders of publicly traded depositary receipts. However, as opposed to the ABN AMRO foundation, the Unilever foundation (a) can vote on shares with respect to which it does not receive voting instructions in relation to any of Unilever's general meetings, but (b) must grant voting rights to depositary receipt holders at all times (even in the event of hostile situations). Moreover, Unilever depositary receipt holders can demand the exchange of their depositary receipts against the underlying shares concerned in the capital of Unilever at any time (against a reasonable administrative fee).

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 2016. As noted above, not many public deals happened in 2016. Of those that did get announced, two (Qualcomm/NXP and Avast/AVG) were in the tech sector, with a heavy cross-border focus. The same goes for Apollo's privately negotiated acquisition of Royal Philips' Lumileds business. In an entirely different field, the Dutch financial regulators are known to be supportive of consolidation in the (life) insurance business. A clear example of a deal that appears to be driven (in part) by the underlying dynamics thereof is the recently announced public bid by NN Group for Delta Lloyd. Apart from that deal, we see smaller deals happening in the insurance business (including run-off portfolio acquisitions), and we expect to see more (substantial deal size) activity in 2017. Clearly, the sector is heavily regulated, but the regulators are generally receptive to (sensible) deal-making in the sector. Food and consumer goods remain another focus for potential market consolidation. After Kraft Heinz's recent approach to Unilever, many would now not be surprised if Unilever would make a move (whether by doing a substantial acquisition itself, renewing discussions with Kraft Heinz, or otherwise). Finally, we see the logistics sector as an active (growth) area where we would expect more deal-making to come.

The year ahead

In general, 2016 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 2017. The economic upturn in the Netherlands, the abundance of capital, and the cheap means of debt financing continue to

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be the main drivers for M&A deals. As follows from the above, 2017 appears to have had a strong start from a public M&A point of view, and we expect more to come as the year progresses.

M&A activity is also expected to stay strong in the midmarket. Experts indicate that at least half of the transactions in the midmarket are 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 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.

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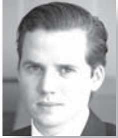

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