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The International Comparative Legal Guide to:

Mergers & Acquisitions 2016

10th Edition

A practical cross-border insight into mergers and acquisitions

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Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
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Fax: +44 20 7407 5255
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EDITORIAL

Welcome to the tenth edition of *The International Comparative Legal Guide to: Mergers & Acquisitions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of mergers and acquisitions.

It is divided into two main sections:

Five general chapters. These chapters are designed to provide readers with an overview of key issues affecting mergers and acquisitions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in mergers and acquisitions in 54 jurisdictions.

All chapters are written by leading mergers and acquisitions lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Michael Hatchard of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

Chapter 41

Netherlands

Alexander J. Kaarls

Houthoff Buruma

Willem J.T. Liedenbaum

1 Relevant Authorities and Legislation

1.1 What regulates M&A?

Apart from the relevant case law, the key legal framework 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 made by companies for their own listed (voting) 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 cases 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 or from the European Commission respectively.

1.2 Are there different rules for different types of company?

The applicable rules and competent regulatory authorities depend on the target's place of incorporation, and the place of its admission to trading on a regulated market.

With respect to a target incorporated in the Netherlands or outside the EEA, the AFM has the jurisdiction to review the bidder's offer memorandum if the target is admitted to trading on a regulated market in the Netherlands.

With respect to a target incorporated in an EEA Member State other than the Netherlands, the AFM has jurisdiction if: (i) the target's sole or first admission to trading on an EEA regulated market was in the Netherlands; or (ii) the target was simultaneously admitted to trading on a regulated market in the Netherlands and a regulated market in another EEA Member State, and the target designated the AFM as the competent authority. In either case, the AFM is not competent if that non-Dutch target is admitted to trading on a regulated market in the EEA Member State of its incorporation.

With respect to a target incorporated in the Netherlands and admitted to trading on a regulated market in the Netherlands or another EEA Member State (thus excluding non-EEA markets, e.g. the New York Stock Exchange), the Enterprise Chamber has the jurisdiction to rule on whether a mandatory bid is triggered.

1.3 Are there special rules for foreign buyers?

There are generally no special rules for foreign buyers, except that companies may impose certain restrictions under their organisational documents, such as Dutch residency or EU nationality requirements. This is atypical, however, especially for publicly traded companies.

1.4 Are there any special sector-related rules?

There are special rules for financial sector businesses with registered offices in the Netherlands (e.g. banks and insurance companies), requiring the prior approval of the competent supervisory authority (e.g. the European Central Bank) for any acquisition of 10% or more of such companies' capital or voting rights. In addition, for instance, the acquisition of an energy company may (depending on the nature and size of its activities in the Netherlands) be subject to the scrutiny of the Ministry of Economic Affairs, which may prohibit or impose conditions on the acquisition.

1.5 What are the principal sources of liability?

Shareholders who, alone or jointly, hold shares in excess of the requisite statutory thresholds (in capital or value) may bring mismanagement proceedings concerning the target before the Enterprise Chamber, a division of the Amsterdam Court of Appeals. This division has the jurisdiction to adjudicate certain corporate matters in the first instance, in addition to specific powers of inquiry, expertise and composition. Shareholders have done so in takeover situations, for example on the grounds of the board's failure to observe its fiduciary duties. The suit may also allege that the shareholder behaviour is in violation of the requirements of reasonableness and fairness. Pending a final decision, the Enterprise Chamber, which generally works on an expedited basis, can take a broad range of temporary actions. These actions are typically aimed at maintaining the *status quo* and ensuring continued proper management. The Enterprise Chamber cannot award damages. However, a ruling of mismanagement may be used by shareholders to substantiate a claim for damages based on tort in a separate civil action. Liability may also arise on the grounds of misleading or untimely disclosure of information by the target board.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

Control over a target is generally acquired through a (public) bid for all issued shares. The bid will often be in cash, but all or part of the consideration may also consist of securities (including shares, bonds and convertible instruments). In rare instances, a bidder has decided to make a partial bid or tender offer, which must be for less than 30% of the voting rights in the target (e.g. América Móvil's successful partial bid for KPN in 2012). Under the Dutch definition of "tender offer" (as opposed to a full or partial bid), the consideration must be all-cash and determined by a reversed book-building process (i.e. the consideration will be specified by the tendering shareholder).

Alternatively, but relatively rarely, control over the target may be acquired through a statutory merger, whereby a surviving company (pre-existing or newly-incorporated) acquires the assets and liabilities of one or more disappearing companies by operation of law (e.g. the 2013 merger between Fiat and CNH, and the 2014 merger between Fiat and Chrysler). Statutory mergers can be domestic, i.e. among Netherlands-incorporated companies, or cross-border, i.e. among EEA-incorporated companies, but not between Netherlands-incorporated companies and non-EEA-incorporated companies (e.g. Delaware corporations). (There are, however, other techniques by which to "merge" a Delaware corporation with a Dutch company, resulting in the Delaware corporation becoming a subsidiary, and its stockholders shareholders, of the Dutch company (e.g. the 2015 merger between NXP and Freescale).) Triangular statutory mergers are possible, but U.S.-style cash-out mergers are not. In an outbound cross-border merger, dissenting shareholders have appraisal rights which allow them to exit against cash compensation.

Finally, the business of the target (or the relevant part thereof) may be acquired by a simple asset or share purchase transaction, whereby the target sells the assets comprising the business, or the shares in the subsidiary (or subsidiaries) holding or operating the business.

2.2 What advisers do the parties need?

Advisers typically engaged by the target and bidder include accountants, auditors, investment bankers, lawyers and public relations consultants. In particular, the bidder's financial advisers assist with the "certainty of funds" announcement. In addition, although not required by law, the target board will typically obtain a fairness opinion on the public bid from its financial advisers.

2.3 How long does it take?

The statutory timetable starts to run once a public bid is announced, or where sufficiently concrete information on the bid has leaked or has otherwise been disclosed to the public. Within four weeks of this (actual or deemed) initial announcement, the bidder must confirm whether it will proceed with its bid and, if so, when it expects to file its draft offer memorandum with the AFM. The draft offer memorandum must be filed for approval within 12 weeks of the initial announcement. By this time, the bidder must have publicly confirmed the certainty of its funding for the bid. Additionally, at this stage, the draft offer memorandum, as filed, will not yet be publicly available. The AFM should notify the bidder of its decision on the request for approval within 10 business days of the date of filing or, if the AFM requests additional information, of the date on which the additional information is provided. In practice, a review period will typically take at least three to four weeks. Once approved, the offer memorandum must be published within six business days. The tender period must begin within three business days after such publication, and last between eight and 10 weeks. Within three business days after the expiration of the tender period, the bidder must either (i) declare the bid unconditional or lapsed, or (ii) extend the tender period. The tender period may be extended once, and the extension may last between two and 10 weeks. If the bid is declared unconditional, the bidder may, within three business days, invoke a post-acceptance period lasting up to two weeks to give non-tendering shareholders a last chance to tender their shares. Please see Appendix 1 for an indicative timetable for a friendly bid.

Regulatory issues or delays may affect this statutory timetable. The AFM may, therefore, grant exemptions from the tender period limitations. Although it tends to be reluctant to do so, precedents include situations where an extension was necessary to align the public offer timetable with the timetable for the ongoing antitrust review.

2.4 What are the main hurdles?

The bidder will want to ensure that sufficient shares of the target are tendered, given that statutory squeeze-out proceedings and de-listing (from Euronext Amsterdam) require 95% of the target's issued shares to be acquired in the bid. If a lower number is acquired, the bidder may consider alternative ways to obtain 100% of the target's shares, such as through a statutory merger or the target's liquidation. Moreover, the bidder may need to secure committed financing prior to launching the bid in connection with the requisite "certainty of funds" announcement. Other hurdles include antitrust and other regulatory clearances (e.g. the European Commission's prohibition under the EU Merger Regulation of the proposed acquisition of TNT Express by UPS in 2013).

2.5 How much flexibility is there over deal terms and price?

Generally, shareholders must be treated equally. In particular, the "best price" rule requires that the bidder pay the tendering shareholders either the higher of the bid price (as may be increased during the process) or the price paid by the bidder for shares outside the bid process at any time during that process. Also, if the bid is declared unconditional, the bidder is prohibited, within the first year of the date of publication of the offer memorandum, from acquiring shares on terms that are more advantageous to the seller than those offered to tendering shareholders. Notably, the "best price" rule does not apply to acquisitions of shares prior to the (actual or deemed) initial announcement of the bid. Also exempted are regular stock exchange transactions, whenever executed, and shares acquired through statutory squeeze-out proceedings.

Bidders may increase their consideration multiple times during the bid process (whereas before it could be increased only once), provided that shareholders must have at least seven business days to evaluate the increased bid.

2.6 What differences are there between offering cash and other consideration?

If the bid consideration consists of transferable securities, additional and extensive disclosure pertaining to the issuer of the transferable securities is required (e.g. an MD&A section in the offer memorandum). To this end, the bidder must make available either a prospectus (which has been approved by the AFM or, as the case may be, the competent regulatory authority of another EEA Member State), or an equivalent document (which does not need to be separately approved, and which could be the offer memorandum itself). Generally, the bidder must disclose, in either document, all the information necessary for an investor to make an informed assessment of the transferable securities (including the rights attached thereto) and of the issuer (including its financial position), as well as of the bidder (if different from the issuer).

2.7 Do the same terms have to be offered to all shareholders?

See question 2.5.

2.8 Are there obligations to purchase other classes of target securities?

The bidder must purchase all shares of the class for which the bid is made. It is common for a bid to be extended to securities that are convertible into the shares for which the bid is made. There is no requirement to purchase the target's non-voting securities. A mandatory bidder must purchase all classes of shares.

2.9 Are there any limits on agreeing terms with employees?

The "best price" rule applies to the terms to be agreed on with employees relating to the target's shares or their value (see question 2.5). In addition, the offer memorandum must disclose all individual amounts payable to directors of the target or the bidder upon completion of the bid (including individual severance payments payable to the target's resigning directors).

2.10 What role do employees, pension trustees and other stakeholders play?

One or more works councils within the target's (or the bidder's) group, as well as any relevant trade unions, may need to be consulted prior to formal launch of the bid. Their prior advice, but not consent, is generally required. Dutch works councils may bring proceedings for injunctive relief before the Enterprise Chamber if the procedural requirements for their consultation were not complied with. Such proceedings are rare, as the threat of litigation typically ensures that the required consultations take place.

2.11 What documentation is needed?

In a friendly bid situation, the bidder and target will typically enter into confidentiality and standstill arrangements, as well as a so-called "merger protocol" setting out the terms of the bid (including conditions for launching and completing the bid, no-shop provisions, and (reverse) break fees). The bidder may also seek to obtain irrevocable tendering commitments from one or more of the target's major shareholders, requiring them to tender their shares if the bid is launched (and subject to its completion). The foregoing documents are not required to be made publicly available, but their main terms must be disclosed in the offer memorandum. In addition, several press releases are required during the bid process, including: (i) the initial announcement; (ii) the confirmation on whether and when a draft offer memorandum will be filed with the AFM; (iii) the "certainty of funds" announcement; (iv) the announcement that the AFM-approved offer memorandum has been made publicly available; (v) the announcement of the start of the tender period; and (vi) the announcement on whether the bid is declared unconditional (and will therefore be completed), lapsed, or extended. Other main documents include the AFM-approved offer memorandum itself, a fairness opinion from the target's financial advisers (which is typical, but not required by law), the notice of the required extraordinary shareholders' meeting (for Dutch targets), and the position statement by the target board (outlining its position on the bid). If the bid consideration consists of transferable securities, the bidder must also make available a prospectus or equivalent document (see question 2.6).

2.12 Are there any special disclosure requirements?

The offer memorandum must include, among other things: (i) a comparative overview of the target's last three annual accounts and the most recent published annual accounts; (ii) an auditor's statement with respect to these accounts; (iii) the financial data for the current financial year (covering at least the first half-year of the current financial year if the bid document is published four months after the expiration of the half-year); (iv) a review statement from an accountant covering the financial data for the current year; and (v) the main terms of a merger protocol or irrevocable tendering commitment, if any (see question 2.11). Additional disclosures are required if the bid consideration consists of transferable securities (see question 2.6).

2.13 What are the key costs?

Key costs include the advisers' fees and expenses, borrowing costs (to finance the bid), break fees (if the bid is not completed), and the costs in preparing and making available the requisite documents (such as the offer memorandum and the notice of the shareholders' meeting).

2.14 What consents are needed?

The AFM must approve the offer memorandum before the bid can be launched. Also, clearance by one or more competition authorities may be required prior to completion of the bid. With respect to certain financial sector companies (e.g. banks and insurance companies), the prior approval of the competent supervisory authority (e.g. the European Central Bank) may be required. Finally, if the bid triggers change-of-control clauses in contracts of the target or its group members, counterparty consents may be needed.

2.15 What levels of approval or acceptance are needed?

The bidder is free to set minimum acceptance levels, but cannot acquire 30% or more (but less than 50%+1) of the voting rights without triggering a mandatory bid upon the completion of its voluntary bid. Acceptance levels ranging between 66⅔% and 80% are common. In addition, the bid terms will typically provide that the bidder has the right, but not the obligation, to complete the bid if less than *y*% but more than *z*% is tendered, but that it must abandon the bid if less than *z*% is tendered.

2.16 When does cash consideration need to be committed and available?

The bidder must have obtained and publicly confirmed the certainty and sufficiency of its funding for the bid no later than when it files the draft offer memorandum with the AFM for approval. This "certainty of funds" requirement means that the bidder must have received financing commitments that, in principle, are subject only to conditions that can reasonably be fulfilled by the bidder (e.g. credit committee approval should have been obtained). However, such conditions may include any resolutions to be adopted by the bidder's extraordinary general meeting in connection with the funding or consideration offered (e.g. the issuance of shares). Any drawing under the financing of the bid may not be conditioned on the absence of a material adverse effect (for the benefit of the prospective financers), unless the same applies to the bid itself (for the benefit of the bidder).

3 Friendly or Hostile

3.1 Is there a choice?

There are generally no legal impediments to launching a hostile bid in the Netherlands. However, friendly bids are far more common as they typically enable the bidder to conduct due diligence into the target and secure the recommendation of the target board. Also, hostile bids run the risk of being delayed, discouraged or defeated by defensive measures (e.g. América Móvil's withdrawal of its proposed full bid for KPN in 2013).

There is no statutory obligation requiring the target to allow hostile bidders to conduct due diligence, or provide them with any non-public information. However, the Dutch Supreme Court has held that the target board should respect the interests of "serious" potential bidders, both friendly and hostile. In particular, the target board may need to refrain from actions that would frustrate potential bids and disproportionally prejudice bidders' interests, and that would, for example, render illusory a level playing field. Furthermore, in a situation where a friendly bidder is competing with one or more hostile bidders, the statutory principle of equal treatment of shareholders may require that all *bona fide* bidders be given the same access to information.

3.2 Are there rules about an approach to the target?

There are generally no rules about an approach to the target. However, discussions with the target board typically constitute price-sensitive information ("inside information") and should therefore be kept strictly confidential until the parties are ready to announce the bid. In any event, an initial announcement must be made no later than when the parties have reached conditional agreement on the contemplated bid (typically by virtue of a merger protocol that is still subject to regulatory approvals and other non-discretionary conditions). Until that time, the target may delay the public disclosure of inside information in order not to prejudice its legitimate interests (e.g. to negotiate a friendly bid), provided that such omission would not be likely to mislead the public, and provided that the target is able to ensure the confidentiality of that information. However, if the target becomes subject to rumours or speculation, or there are unexplainable movements in its share price, a press release must be issued without delay and the AFM is typically vigilant in enforcing immediate disclosure. If, in that case, the target publicly confirms that discussions with the bidder are ongoing, the bid will not be deemed to have been announced (and no statutory timetable will therefore start to run) until a conditional agreement has been reached. A bidder may be required to proactively make a public announcement of material facts that might affect the target's trading price, particularly if there is a risk that inaccurate or misleading information may otherwise be available in the market.

3.3 How relevant is the target board?

The target board is important because it must disclose its position (often supported by a fairness opinion) on the bid to shareholders. Also, the target board may provide the bidder with the opportunity to conduct due diligence prior to launching or completing the bid (see also question 3.1).

3.4 Does the choice affect process?

The choice may not generally affect process. However, the "put up or shut up" rule allows the target (and no one else) to request the AFM to force a potential bidder to make a public announcement regarding its intentions with respect to the target. This announcement may be imposed if a potential bidder publicly discloses information that could create the impression that it is considering making a public bid. If the AFM grants the request, the bidder must announce a public bid within six weeks or announce that it will not make a bid. In the latter case, the bidder is prohibited from announcing or making a bid for the target for the next six months (unless an unaffiliated third party makes a bid during that time). A period of nine months will apply (instead of six months) if the bidder does not make the required announcement within the six-week period. The "put up or shut up" rule also applies if the bidder, during the bid process, decides that it will not launch a bid or that it will not declare the bid unconditional.

4 Information

4.1 What information is available to a buyer?

In a friendly bid situation, the information available to a bidder may include non-public or inside information, based on pre-existing arrangements with the target (typically laid down in a merger protocol and a non-disclosure agreement). Such a bidder who has obtained inside information, through a pre-bid due diligence or otherwise, cannot subsequently act on such information (i.e. engage in on- or off-market purchases, or launch and close a bid) as long as the information is price-sensitive or not publicly disclosed.

In a hostile bid situation, the bidder's access will generally be limited to publicly available information only. In a competing bid situation, the target board may, under certain circumstances, be required to grant all "serious" potential bidders (including, possibly, competitors of the target) the same access to information, to ensure a level playing field.

4.2 Is negotiation confidential and is access restricted?

Negotiations will typically be kept confidential until the parties reach conditional agreement on the contemplated bid (by way of a merger protocol). The parties will typically enter into confidentiality and standstill arrangements (preventing the bidder from disclosing inside information or trading in the target's securities). Also, Dutch law requires the parties to maintain up-to-date lists of all persons who are, or may become, exposed to inside information, and to instruct these persons to observe confidentiality commitments.

4.3 When is an announcement required and what will become public?

In a friendly bid situation, once the parties have reached conditional agreement on a contemplated bid, they must make an announcement to that effect. The parties need not disclose the agreement (the merger protocol), but the main terms of that agreement must be described in the offer memorandum. The bid is deemed to have been announced (and the statutory timetable commenced) once the bidder discloses to the public (through a press release or otherwise) concrete information on the bid in relation to an identified potential target (see question 2.3). This will be the case, in any event, if and when information is released containing either the proposed consideration or exchange ratio, or an envisaged timetable for the bid. Finally, if a potential bidder publicly discloses information that could create the impression that it is considering making a public bid, the target, pursuant to the "put up or shut up" rule, may request the AFM to force the bidder to publicly disclose its intentions (see question 3.4).

4.4 What if the information is wrong or changes?

The remedies available to a bidder, in the event that information provided by the target is wrong or changes, generally depend on its arrangements with the target (if any). If the information is materially wrong or changes materially, the bidder may be able to invoke "material adverse effect" provisions or to terminate the merger protocol on other grounds, and walk away from the bid (without the bidder incurring any liability for doing so, and with the bidder possibly collecting a break fee or reserving the right to claim damages for all costs incurred). A bidder, before the closing of the bid, may also try using that wrong or changed information to renegotiate the offer consideration. If the bidder, after the closing of the bid, becomes aware of the provided information being wrong, its remedies will be limited (i.e. to claims against former management) or unavailable.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Shares can be bought outside the process (save for standstill agreements). However, such purchases must be publicly disclosed following the (actual or deemed) announcement of the bid. In addition, they may have an impact on the terms of the bid in connection with the "best price" rule (see question 2.5).

5.2 Can derivatives be bought outside the offer process?

Yes, subject to the same rules as those applicable to share purchases.

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

The bidder's purchases of shares subject to the bid during the bid process must be immediately disclosed to the public. This also extends to regular stock exchange transactions and derivatives. The disclosure must include the purchase price and other terms. In addition, with respect to transactions in listed equity securities generally, the bidder must disclose the reaching, falling below, or exceeding of any of the following share capital or voting rights thresholds: 3%; 5%; 10%; 15%; 20%; 25%; 30%; 40%; 50%; 60%; 75%; and 95%.

5.4 What are the limitations and consequences?

A bidder who, alone or acting in concert with others, acquires 30% or more of the voting rights in a target, must launch a mandatory bid. However, irrevocable tendering commitments from shareholders, obtained by the bidder in anticipation of a voluntary bid, are exempted from the mandatory bid rules. Accordingly, a bidder who obtains such commitments will not be deemed to "act in concert" with the shareholders concerned.

6 Deal Protection

6.1 Are break fees available?

Break fees are allowed (including reverse break fees, although less typical). There are no specific rules in place, nor is there definite case law on the matter. However, it is generally believed that excessive break fees may conflict with the target board's fiduciary duties, and could qualify as a disproportional anti-takeover defence if they would frustrate potential competing bids.

6.2 Can the target agree not to shop the company or its assets?

No-shop provisions (subject to fiduciary outs) are commonly found in merger protocols. However, before agreeing to such provisions, the target board should have made an informed assessment of available alternatives to the bid, and on that basis have determined, exercising reasonable business judgment, that the bid is in the best interests of the company and its stakeholders.

6.3 Can the target agree to issue shares or sell assets?

The target cannot agree to issue shares or sell assets if such an action would, in effect, constitute a disproportional anti-takeover defence, frustrating potential (competing) public bids (see question 8.2). However, such transactions may be executed while a bid is announced or pending (and may adversely affect such a bid), and are not necessarily prohibited (e.g. the 2007 sale of LaSalle by ABN AMRO as part of its contemplated acquisition by Barclays, following a competing bid by RBS (together with its consortium partners, Fortis and Santander), whose competing bid was premised on the abandonment of the sale).

6.4 What commitments are available to tie up a deal?

Typical commitments are break fees, no-shop provisions, and matching rights.

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

The deal terms cannot provide the bidder with the discretionary power to determine unilaterally whether conditions to completion of the bid have been fulfilled. The AFM will take this rule into account when reviewing the draft offer memorandum. Typical conditions are the acquisition of a minimum percentage of outstanding shares, the receipt of regulatory clearances, the completion of labour and employee consultation procedures, and the absence of a material adverse effect or a competing bid.

7.2 What control does the bidder have over the target during the process?

The bidder's control over the target will depend on arrangements made with the target. In a friendly bid situation, where the parties have entered into a merger protocol, the bidder will typically be entitled to access the target's personnel, books and records. Also, certain material corporate or business decisions with respect to the target may be subject to the bidder's prior consent. Such consent/veto rights may be restricted by antitrust law, prohibiting a bidder to exercise decisive influence on the commercial or strategic policies of the target prior to completion of the bid (and antitrust law proceedings).

7.3 When does control pass to the bidder?

Once the bid is declared unconditional, control passes in accordance with the applicable settlement procedure, which must be laid down in the offer memorandum.

7.4 How can the bidder get 100% control?

If the bidder has acquired 95% or more of the issued capital in the target, it may force minority shareholders to be bought out for a "fair price" by means of statutory buy-out proceedings. The "fair price" must be in cash and may not necessarily be equal to the value of the bid consideration. There is no specific legal framework in place for situations where a bidder owns less than 95%. Case law indicates that a statutory merger or a liquidation of the target (accompanied by a transfer of assets to the bidder and a distribution of proceeds to shareholders) may be allowed if it was contemplated in the offer memorandum. However, the merger or liquidation may not disproportionately disadvantage minority shareholders, or be solely aimed at squeezing them out.

8 Target Defences

8.1 Does the board of the target have to publicise discussions?

Provided that discussions are kept confidential, no disclosure is necessary until the parties reach conditional agreement on the contemplated bid (see question 3.2 for the requirements to postpone publication of inside information).

8.2 What can the target do to resist change of control?

The target's defences against an unsolicited bid must be proportional, adequate, of a temporary nature, and serve to facilitate discussions between the target board and the bidder, while maintaining the *status quo*.

A typical defence would be the creation of a separate class of preference shares that can be called at nominal value, under a pre-existing option agreement with the target, by an independently managed foundation, whose sole purpose is to safeguard the target's continuity (e.g. Teva's proposed USD 40 billion bid for Mylan triggered the Mylan foundation to exercise its call option to acquire Mylan N.V. preference shares in July 2015, resulting in the Mylan foundation acquiring 50% of the issued capital – and voting rights – in Mylan). Another common takeover defence (that was recently put in place by ABN AMRO in the context of its IPO on Euronext Amsterdam in November 2015) is the (pre-IPO) transfer of (typically) all ordinary shares in the capital of the company to an independently-managed foundation in exchange (on a one-to-one basis) for depositary receipts. The depositary receipts (representing the ordinary shares) will then be offered to the public. The holders of the depositary receipts are, in principle, granted a power of attorney by the foundation's board to vote on the underlying shares, which power of attorney is typically only withheld or revoked in the event of, for example, a hostile bid.

Pending the bid process, defences can be reviewed and, where appropriate, neutralised by the Enterprise Chamber upon the request of one or more (likely activist) shareholders who hold a sufficient number of shares to have standing. However, the issuance of a significant block of shares or the disposal of material assets may not necessarily be prohibited, even when *de facto* frustrating a potential bid, if the target board could reasonably believe, in exercising its business judgment on a fully informed basis, that doing so would be in the best interest of the target (e.g. ABN AMRO's sale of LaSalle; see question 6.3). In that respect, the target board's fiduciary duties extend not only to shareholders but to all stakeholders, including the target's employees, customers and suppliers.

8.3 Is it a fair fight?

From a target board's perspective, it has leeway to take action against bidders as it deems appropriate, provided that such action is within the target's corporate interest, which under Dutch law includes not only the interests of its shareholders but also of other stakeholders, such as its employees. From a bidder's perspective, it is clear that a target board should respect the interests of a *bona fide* potential bidder, should refrain from actions that would frustrate a bid by such a bidder, and should treat competing *bona fide* potential bidders equally, while it may express a preference for a particular bidder (see questions 3.1 and 4.1). In practice, it appears that the value of the consideration is generally the determinative factor in successfully completing a bid and that the shareholders have the final say on whether or not to accept a bid.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

Major influences include: the value of the consideration; the availability of committed financing; the support from the target board and major shareholders; and constructive relations with governments and regulatory authorities, as well as employee and labour representatives.

9.2 What happens if it fails?

If the bid is not pursued, the bidder is prohibited from making another bid for the next six months (unless an unaffiliated third party makes a bid; see question 3.4).

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in your jurisdiction.

In the past, the exchange of ordinary shares against depositary receipts issued by an independent foundation was a very popular defence mechanism. Over the past years, however, the use of this particular defence mechanism has diminished. Currently, only three companies in the AEX, Euronext Amsterdam's premium listing segment, have this defence mechanism in place. However, we believe that this defence mechanism is making a comeback. This is, in particular, due to the fact that the currently most popular defence mechanism (the issuance of preference shares to a foundation based on the exercise of a call option right by such a foundation once certain – hostile – situations occur) is problematic for several Dutch financial institutions. Under Dutch law, a declaration of no-objection must be obtained from the competent supervisory authority (e.g. the European Central Bank) when acquiring at least 10% of the capital or voting rights in such a financial institution. The process to obtain such a declaration of no-objection may take several months, and will also apply to the foundation wishing to exercise its call option right as a result of which it would acquire a 10%+ interest in the Dutch financial institution. This would potentially weaken the defence mechanism considerably, as the foundation would not be able to immediately acquire its shares (and voting rights) upon exercise of its call option in a hostile situation. Mainly for this reason, one of the Netherlands' largest banks, ABN AMRO, has opted for the issuance of depositary receipts by an independent foundation (which will continue to hold the underlying shares, and which obtains its declaration of no-objection beforehand) in the context of ABN AMRO's November 2015 IPO (see question 8.2). In line with this recent ABN AMRO precedent, it is to be expected that, going forward, other Dutch financial institutions wishing to IPO will also seriously consider offering depositary receipts issued against their shares to the public by an independent foundation (instead of setting up a preference share call option mechanism).

Acknowledgment

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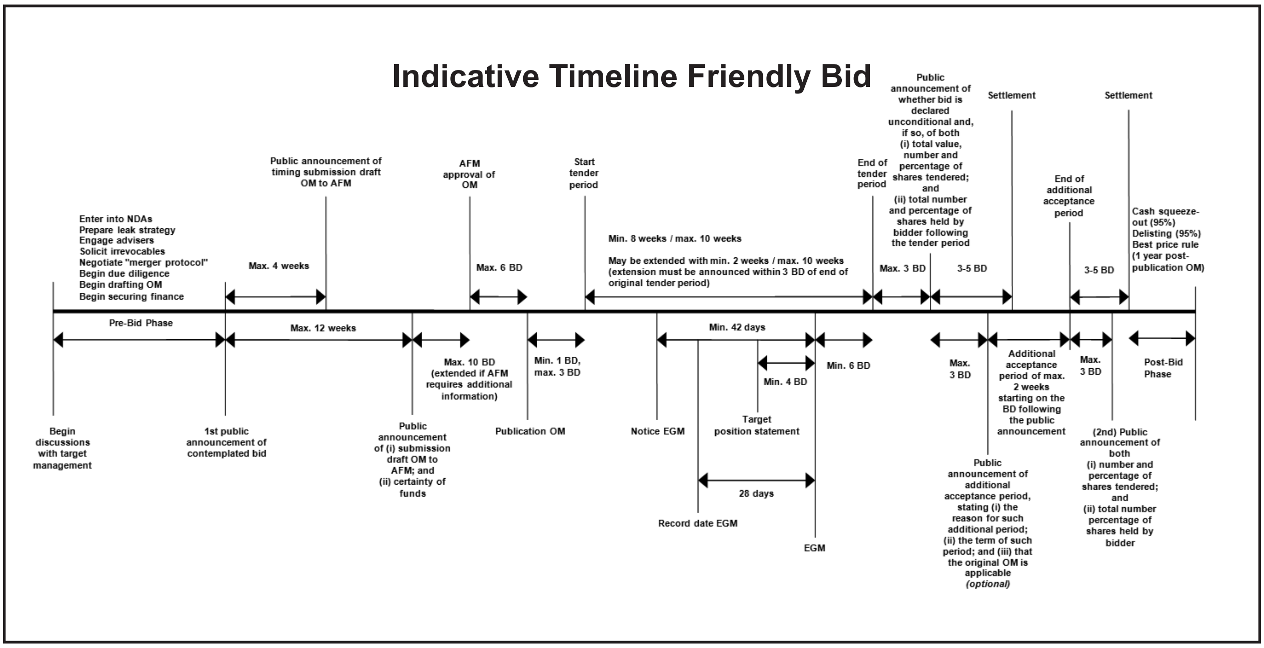
Appendix 1



Alexander J. Kaarls

Houthoff Buruma
Gustav Mahlerplein 50
1082 MA
Amsterdam
Netherlands

Tel: +31 20 605 6110
Email: a.kaarls@houthoff.com
URL: www.houthoff.com

Alexander Kaarls focuses on (cross-border) corporate transactions, including public and private M&A, and equity capital markets. Before joining Houthoff, Alexander practised law with Skadden, Arps, Slate, Meagher & Flom LLP from 1994 until 2004. He is recognised as a leading M&A practitioner in the Netherlands by *Chambers Global*, *Chambers Europe*, *Who's Who Legal – Mergers and Acquisitions*, and *IFLR1000*. Alexander studied at Leiden University (School of Law) and Sciences Po. Alexander is a member of the Bars in Amsterdam and California.

Willem J.T. Liedenbaum

Houthoff Buruma
Gustav Mahlerplein 50
1082 MA
Amsterdam
Netherlands

Tel: +31 20 605 6552
Email: w.liedenbaum@houthoff.com
URL: www.houthoff.com

Willem Liedenbaum focuses on (cross-border) corporate transactions, including private & public M&A, financing and capital markets. Willem studied at Radboud University Nijmegen (School of Law). Willem is a member of the Bar in Amsterdam.

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glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk