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The International Comparative Legal Guide to:

Mergers & Acquisitions 2014

8th Edition

A practical cross-border insight into mergers and acquisitions

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Strategic Partners

General Chapters:

1	**Corporate Governance in the M&A World** - Michael Hatchard & Scott Hopkins, Skadden, Arps, Slate, Meagher & Flom (UK) LLP	1
2	**The Global Phenomenon of Shareholder Activism** - Scott V. Simpson & Lorenzo Corte, Skadden, Arps, Slate, Meagher & Flom (UK) LLP	4
3	**Shareholder Activism in the UK** - Gavin Davies & Stephen Wilkinson, Herbert Smith Freehills LLP	7
4	**An Antidote to Multiforum Shareholder Litigation** - Adam O. Emmerich & Trevor S. Norwitz, Wachtell, Lipton, Rosen & Katz	13

Country Question and Answer Chapters:

5	**Albania**	Dobjani Lawyers, Attorneys & Counselors at Law: Erajd Dobjani & Irena Kita	20
6	**Australia**	Allens: Vijay Cugati	28
7	**Austria**	Schoenherr Rechtsanwälte GmbH: Christian Herbst & Sascha Hödl	34
8	**Belarus**	Sysouev, Bondar, Khrapoutski: Alexander Bondar & Elena Selivanova	44
9	**Belgium**	Astrea: Steven De Schrijver & Jeroen Mues	51
10	**Bermuda**	MJM Limited: Peter Martin & Brian Holdipp	59
11	**Brazil**	Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados: Daniel Calhman de Miranda & Rodrigo Ferreira Figueiredo	65
12	**Bulgaria**	Schoenherr (in cooperation with Advokatsko druzhestvo Andreev, Stoyanov & Tsekova): Ilko Stoyanov & Tsvetan Krumov	71
13	**Canada**	Osler, Hoskin & Harcourt LLP: Emmanuel Pressman & Doug Bryce	79
14	**Colombia**	Peña Mancero Abogados: Gabriela Mancero	88
15	**Czech Republic**	Schoenherr: Martin Kubánek & Vladimír Čížek	95
16	**Denmark**	Bech-Bruun: Steen Jensen & Trine Damsgaard Vissing	105
17	**Finland**	Dittmar & Indrenius: Anders Carlberg & Jan Ollila	111
18	**France**	Linklaters LLP: Marc Loy & Marc Petitier	118
19	**Germany**	Schilling, Zutt & Anschütz: Dr. Marc Löbbe & Dr. Stephan Harbarth	124
20	**Hungary**	Lendvai Partners: András Lendvai & Dr. Gergely Horváth	131
21	**India**	Khaitan & Co: Bharat Anand & Arjun Rajgopal	137
22	**Indonesia**	Ali Budiardjo, Nugroho, Reksodiputro: Theodoor Bakker & Herry N. Kurniawan	142
23	**Ireland**	LK Shields Solicitors: Gerry Halpenny & Seanna Mulrean	149
24	**Italy**	Santa Maria Studio Legale Associato: Luigi Santa Maria & Mario Pelli Cattaneo	157
25	**Japan**	Nishimura & Asahi: Masakazu Iwakura & Tomohiro Takagi	166
26	**Kazakhstan**	SIGNUM Law Firm: Liza Zhumakhmetova & Gaukhar Kudaibergenova	175
27	**Kosovo**	Boga & Associates: Sabina Lalaj & Delvina Nallbani	180
28	**Kyrgyzstan**	Mortimer Blake LLC: Stephan Wagner & Svetlana Lebedeva	185
29	**Liechtenstein**	Ospelt & Partner Attorneys at Law Ltd.: Alexander Ospelt & Remo Mairhofer	190
30	**Luxembourg**	Ober & Partners: Stéphane Ober & Thomas Ségal	196
31	**Mexico**	Nader, Hayaux & Goebel: Yves Hayaux-du-Tilly Laborde & Eduardo Villanueva Ortíz	203
32	**Morocco**	Hajji & Associés: Amin Hajji	209
33	**Netherlands**	Houthoff Buruma: Alexander J. Kaarls & Nils W. Vernooij	214
34	**Nigeria**	Udo Udoma & Belo-Osagie: Yinka Edu & Ngozi Agboti	221
35	**Norway**	Aabø-Evensen & Co Advokatfirma: Ole Kristian Aabø-Evensen & Harald Blaauw	228
36	**Peru**	García Sayán Abogados: Luis Gastañeta A. & Alfonso Tola R.	242
37	**Portugal**	Albuquerque & Associados: António Mendonça Raimundo & Ana Isabel Vieira	246

Continued Overleaf

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Country Question and Answer Chapters:

38	**Puerto Rico**	Ferraiuoli LLC: Fernando J. Rovira-Rullán & Yarot T. Lafontaine-Torres	253
39	**Romania**	Pachiu & Associates: Ioana Iovanesc & Alexandru Lefter	259
40	**Serbia**	Moravčević Vojnović i Partneri in cooperation with Schoenherr: Matija Vojnović & Luka Lopičić	267
41	**Slovakia**	Schoenherr: Stanislav Kovár & Monika Kormošová	274
42	**Slovenia**	Schoenherr: Vid Kobe & Marko Prušnik	281
43	**Spain**	Roca Junyent: Natalia Martí Picó & Xavier Costa Arnau	290
44	**Sweden**	Advokatfirman Vinge KB: Erik Sjöman & Christian Lindhé	300
45	**Switzerland**	Lenz & Staehelin: Jacques Iffland & Hans-Jakob Diem	306
46	**Turkey**	Türkoğlu & Çelepçi in cooperation with Schoenherr: Levent Çelepçi & Burcu Özdamar	313
47	**Ukraine**	Vasil Kisil & Partners: Anna Babych & Oksana Krasnokutska	319
48	**United Kingdom**	Slaughter and May: William Underhill	325
49	**USA**	Skadden, Arps, Slate, Meagher & Flom LLP: Ann Beth Stebbins & Kenneth M. Wolff	332
50	**Vietnam**	Gide Loyrette Nouel A.A.R.P.I.: Samantha Campbell & Huynh Tuong Long	350

EDITORIAL

Welcome to the eighth 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:

Four general chapters. These are designed to provide readers with a comprehensive 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 46 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.

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

Apart from relevant case law, the key legal framework consists of the Financial Supervision Act and the Civil Code, which lay down the main principles, and the Public Bid Decree, which contains detailed regulations that govern the public bid process (including the bid timeline, 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 NYSE Euronext Amsterdam). 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 Takeover Panel). 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, which may require employee consultation, as well as the Competition Act 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 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 is in the Netherlands; or (ii) the target is 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 the 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 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 Dutch Central Bank for any acquisition of 10% or more of such companies' voting rights. Also, 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. 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 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 proper management for the time being. The Enterprise Chamber cannot award damages. However, a finding 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.

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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 outstanding 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 may decide 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 any other "public bid"), the consideration has to 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 mergers between Omnicom and Publicis, and between Fiat and CNH). 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). Triangular mergers are possible, but cash-out mergers are not. In an outbound cross-border merger, dissenting shareholders have appraisal rights allowing 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 PR consultants. In particular, the bidder's financial advisers assist with the "certainty of funds" announcement. Also, although not required by law, the target board will typically obtain a fairness opinion on the public bid from its financial advisors.

2.3 How long does it take?

A statutory timetable starts to run once a public bid is announced or, in a hostile bid situation, where sufficiently concrete information on the bid has leaked, or has otherwise been disclosed, to the public. Within 4 weeks of the 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. *De facto*, a review period will typically take at least 3 to 4 weeks. Once approved, the offer memorandum must be published within 6 business days. The tender period must begin on the first, second or third business day after publication, and last between 8 and 10 weeks. Within 3 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. The extension may last between 2 and 10 weeks. If the bid is declared unconditional, the bidder may, within 3 business days, invoke a post-acceptance period lasting up to 2 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 allow for continued 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 NYSE Euronext Amsterdam) require 95% of the target's outstanding shares to be tendered. If a lower tender results, 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. Also, 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 publication of the offer memorandum, from acquiring shares at terms 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 initial announcement of the bid. Also exempted are regular stock exchange transactions, whenever executed, and shares acquired through statutory squeeze-out proceedings.

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 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).

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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 extend 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 may impact terms to be agreed on with employees relating to the target's shares or their value (see question 2.5). Also, 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 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 completion 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 completing the bid, no-shop provisions, and (reverse) break fees). The bidder may also seek to obtain irrevocable 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 of the start of the tender period; and (v) 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, a fairness opinion from the target's financial advisors (which is typical, but not required by law), the notice of the required extraordinary shareholders' meeting (for Dutch targets), and the position paper 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 annual accounts; (ii) the audit statements 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 expiry 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 (such as banks and insurance companies), the prior approval of the Dutch 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 in excess of 30% but less than 50% plus 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. Also, 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). 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).

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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, 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 bidders be given the same access to information.

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 disproportionly prejudice bidders' interests, and that would, for example, render illusory a level playing field.

3.2 Are there rules about an approach to the target?

There are generally no rules on 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). If confidentiality is maintained, no disclosure obligations will apply for as long as discussions are of an exploratory or otherwise non-binding nature. 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 timeline 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, in particular if there is a risk that inaccurate or misleading information may otherwise be available to 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, and access to non-public information prior to launching or completing the bid.

3.4 Does the choice affect process?

The choice may not generally affect process. However, the recently implemented "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 its intentions within 6 weeks. If, within those 6 weeks, the bidder announces that it will not make a bid, it is prohibited from announcing or making a bid for the target for the next 6 months (unless an unaffiliated third-party makes a bid during that time). A period of 9 months will apply (instead of 6 months), if the bidder does not make the required announcement within the 6-week period.

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 price-sensitive information, based on pre-existing arrangements with the target (typically laid down in a merger protocol and a non-disclosure agreement). 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. 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 have them 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, but the main terms of the agreement need to be described in the offer memorandum. In a hostile bid situation, the bid is deemed to have been announced (and the statutory timeline 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. 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, pursuant to the "put up or shut up" rule, the target may request the AFM to force the bidder to disclose publicly 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 is wrong or changes, generally depend on its arrangements with the target (if any). Under a merger protocol, the bidder may be able to

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seek damages from the target, or abandon the bid; provided, typically, that the wrong or changed information was sufficiently material. For example, the bidder may be able to walk away on the grounds of the (alleged) occurrence of a material adverse effect.

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 may need to be publicly disclosed. Also, 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 implications?

A bidder who, alone or in concert with others, acquires 30% or more of the voting rights in a target, must launch a mandatory bid. Notably, irrevocable tendering commitments from major 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 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.) But such transactions may be a side effect of 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), which 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 and no-shop provisions.

7 Bidder Protection

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

The deal terms cannot provide the bidder with 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, 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, in effect, allowing 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 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

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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 must 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.

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., América Móvil's proposed full bid for KPN triggered the KPN foundation to exercise its call option for preference shares, thereby acquiring just below 50% of the voting rights). 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 connection, it should be noted that 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?

The target board has leeway to take action as it deems appropriate, provided that they can be justified by a business rationale. This is underscored by the legal principle that shareholder value should be a marked but not the only measure driving board decision-making, as other stakeholder interests may come into play as well. However, the particular dynamics of a bid process may be (and typically are) such that a target board may have no choice but to succumb to consistent pressures from the target's shareholder base, in particular activist shareholders. Indeed, relevant precedents show that the value of the consideration is generally, in the end, the determinative factor in successfully completing a bid. We believe that – if well executed – a fair fight for the benefit of the company and its stakeholders is possible.

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 6 months (unless an unaffiliated third party makes a bid).

10 Updates

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

As of 1 January 2014, in the event of (among certain other corporate events) a public bid for the shares of a Netherlands-incorporated public limited company, any increase (based on a statutory reference period) in the value of such shares (or depositary receipts for such shares, or rights to subscribe for such shares, including stock options) awarded to the company's managing directors (or, with respect to financial sector businesses with registered offices in the Netherlands, their managing directors and actual day-to-day policymakers) as part of their remuneration, must be deducted from their remuneration. The foregoing rule will expire on 1 July 2017. An additional (lower) threshold of 3% was recently (2013) added to the rules requiring disclosure of substantial shareholdings (see question 5.3). Earlier legislative amendments (2012) introduced the "put up or shut up" rule, making it possible for targets to force potential bidders to publicly confirm their intentions regarding a public bid (see question 3.4). Also, bidders may now increase their consideration multiple times during the process (whereas before it could be increased only once), provided that shareholders must have at least 7 business days to evaluate the increased bid. Finally, the minimum tender period has been extended from 4 to 8 weeks (see question 2.3).

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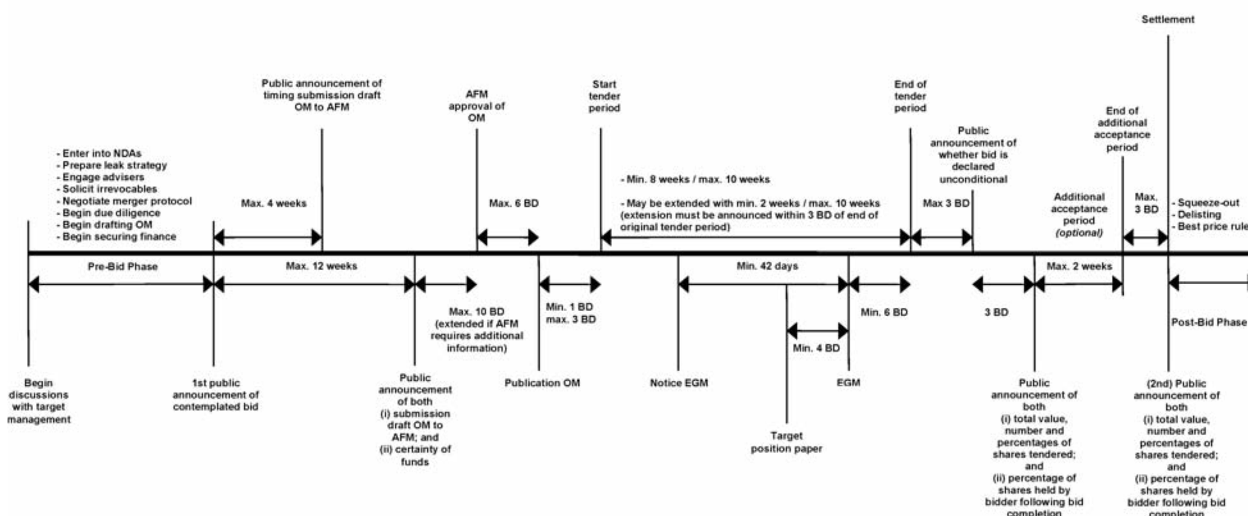
Appendix 1

Indicative Timeline Friendly Bid



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Alexander Kaarls has a corporate practice, with particular emphasis on (public) M&A work and equity capital markets. In addition, he regularly advises on corporate governance, joint venture, securities regulatory compliance and general cross-border matters. 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 IFLR 1000. OverFusies (the Dutch M&A website and database) listed Alexander as the leading M&A lawyer in the Netherlands (in terms of deal value) for each of the years 2006 and 2010 (#3 in 2012). Alexander has authored and co-authored articles published in, among others, the International Financial Law Review, the International Law Practicum and the European Lawyer. Alexander was admitted to the bar in the Netherlands in 1993 and in California in 2002. He joined Houthoff Buruma in 2004, after practising for ten years in the London, Brussels and Palo Alto (California) offices of Skadden, Arps, Slate, Meagher & Flom LLP.

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