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Contents

1. Trends p.4
- 1.1 M&A Market p.4
- 1.2 Key Trends p.4
- 1.3 Key Industries p.4

2. Overview of Regulatory Field p.4
- 2.1 Acquiring a Company p.4
- 2.2 Primary Regulators p.4
- 2.3 Restrictions on Foreign Investments p.4
- 2.4 Antitrust Regulations p.5
- 2.5 Labour Law Regulations p.5
- 2.6 National Security Review p.5

3. Recent Legal Developments p.5
- 3.1 Significant Court Decisions or Legal Developments p.5
- 3.2 Significant Changes to Takeover Law p.6

4. Stakebuilding p.6
- 4.1 Principal Stakebuilding Strategies p.6
- 4.2 Material Shareholding Disclosure Threshold p.6
- 4.3 Hurdles to Stakebuilding p.6
- 4.4 Dealings in Derivatives p.7
- 4.5 Filing/Reporting Obligations p.7
- 4.6 Transparency p.7

5. Negotiation Phase p.7
- 5.1 Requirement to Disclose a Deal p.7
- 5.2 Market Practice on Timing p.7
- 5.3 Scope of Due Diligence p.7
- 5.4 Standstills or Exclusivity p.7
- 5.5 Definitive Agreements p.7

6. Structuring p.8
- 6.1 Length of Process for Acquisition/Sale p.8
- 6.2 Mandatory Offer Threshold p.8
- 6.3 Consideration p.8
- 6.4 Common Conditions for a Takeover Offer p.8
- 6.5 Minimum Acceptance Conditions p.8
- 6.6 Requirement to Obtain Financing p.8
- 6.7 Types of Deal Security Measures p.9
- 6.8 Additional Governance Rights p.9
- 6.9 Voting by Proxy p.9
- 6.10 Squeeze-out Mechanisms p.9
- 6.11 Irrevocable Commitments p.10

7. Disclosure p.10
- 7.1 Making a Bid Public p.10
- 7.2 Type of Disclosure Required p.10
- 7.3 Producing Financial Statements p.10
- 7.4 Transaction Documents p.11

8. Duties of Directors p.11
- 8.1 Principal Directors' Duties p.11
- 8.2 Special or Ad Hoc Committees p.11
- 8.3 Business Judgement Rule p.11
- 8.4 Independent Outside Advice p.12
- 8.5 Conflicts of Interest p.12

9. Defensive Measures p.12
- 9.1 Hostile Tender Offers p.12
- 9.2 Directors' Use of Defensive Measures p.12
- 9.3 Common Defensive Measures p.12
- 9.4 Directors' Duties p.13
- 9.5 Directors' Ability to 'Just Say No' p.13

10. Litigation p.13
- 10.1 Frequency of Litigation p.13
- 10.2 Stage of Deal p.13

11. Activism p.13
- 11.1 Shareholder Activism p.13
- 11.2 Aims of Activists p.14
- 11.3 Interference with Completion p.14

Houthoff is a leading Netherlands-based law firm with over 310 lawyers worldwide. Focusing on complex transactions and dispute resolution matters, the firm typically advises domestic and international corporations, financial institutions, private equity houses and governments on a wide variety of matters, including those that may have key strategic impact or present the most significant challenges to the organisation. In addition to its offices in Amsterdam and Rotterdam, Houthoff has offices in London, Brussels and New York, and representatives in Singapore, Houston and Tokyo. The firm is the Netherlands' only member of the leading professional services network Lex Mundi, and it frequently works jointly with leading New York and London-based firms on cross-border matters, as well as with major firms in other global economic centres. Houthoff also has strong ties with clients in emerging markets including China and Brazil.

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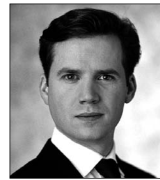

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1. Trends

1.1 M&A Market

Although M&A activity in the Netherlands continued at a healthy rate in 2018, there was a decline both in value (down 17.5%) and in volume (down 11%) compared to 2017. In 2017, public M&A activity was quite eventful, with several contested bids taking place in the Dutch market (eg, the battle between Mediahuis (together with the Van Puijenbroek family) and Talpa for Telegraaf Media Groep, in which Mediahuis was ultimately successful, and – although less eventful – between Thales and Atos for Gemalto (in which Thales was ultimately successful)). Also, multiple public bids that were announced (or leaked) in 2017 were ultimately not pursued (eg, Kraft Heinz's bid for Unilever and PPG's bid for AkzoNobel), or were ultimately blocked by competent regulators (eg, Qualcomm's bid for NXP Semiconductors).

In 2018, public M&A activity slowed, with only two public bids announced, one of which was a partial tender offer by Pon Holdings for Accell Group to acquire a 20% interest, which was ultimately withdrawn following the acquisition by Pon of a 20% interest through block and market trading.

M&A activity in the Dutch market in 2017, and in particular in 2018 was mainly driven by small and mid-market transactions. Important drivers were (and still are) the continued availability of large amounts of cheap cash (resulting from low interest rates and investors looking for high yields) and many opportunities in the scale-up and family-owned business sectors.

For 2019, a stable continuation of M&A activity in the small-to-medium-sized enterprise (SME) segment is anticipated. The high-end and public segments also appear to have a healthy pipeline, but it will remain to be seen how current market uncertainty (resulting from, eg, the Brexit-discussions, the US-China trade tensions and the 2019 US Government shutdown) will ultimately impact these market segments.

1.2 Key Trends

In 2017 and 2018, the Dutch markets experienced increasing engagement by activists, and other involved shareholders, with the boards of publicly traded companies. This appears to have resulted in increased M&A activity, in particular involving (disposals of) divisions of such companies. However, public M&A transactions without board support continue to be difficult.

In private deals, warranty and indemnity (W&I) insurance has become a well and truly established part of deal making.

1.3 Key Industries

The Dutch technology sector experienced significant M&A activity in 2017 and 2018. In particular, the FinTech, software and online services segments were generally active. We expect this trend to continue in 2019, whereby we also see increased activity in the financial services and energy industries.

2. Overview of Regulatory Field

2.1 Acquiring a Company

Companies that have shares (or depositary receipts for shares) admitted to trading on a regulated market (eg, Euronext Amsterdam) are acquired by means of a public bid for such securities (and, potentially, any other outstanding classes of shares). The acquisition of a privately owned company, however, is typically done through the entry into a share purchase agreement (SPA) with the company's shareholders or by entering into an asset purchase agreement (APA) with the company itself. Like in many other jurisdictions, an asset transaction in the Netherlands allows the purchaser to 'pick and choose' the assets and liabilities that it intends to acquire, with the exception of the mandatory transfer of employees who are deemed to be part of the transferred business/assets, but it may be less attractive for the target company's shareholders from a tax perspective.

2.2 Primary Regulators

Other than antitrust scrutiny by the European Commission (EC) and the Dutch Authority for Consumers and Markets (ACM) (see **2.4 Antitrust Regulations**, below) and sector-specific supervision, the acquisition of privately owned companies is not a regulated activity in the Netherlands. A bidder intending to launch a (full or partial) bid for a public company will need to prepare an offer memorandum and submit that to the Dutch Authority for the Financial Markets (the AFM) for review and approval.

In addition to the above cross-sector regulators, sector-specific supervision is conducted by the Dutch Central Bank (DCB) and the European Central Bank for M&A activity involving financial institutions (eg, banks and insurers), the DCB for M&A transactions involving corporate services providers (trust firms), the Dutch Healthcare Authority for the healthcare industry, and the Minister of Economic Affairs and Climate Policy for certain large energy installations.

2.3 Restrictions on Foreign Investments

At this time, there are no national restrictions on foreign investments in the Netherlands. However, applicable international sanctions regulations may restrict certain foreign investments. In addition, the European Parliament, the European Council and the EC reached (political) agreement on a draft EU Regulation in November 2018 that will allow screening of takeovers of companies that are of strategic importance to Europe. The draft EU Regulation has not yet

been ratified by the European Parliament and the European Council.

2.4 Antitrust Regulations

The ACM must be notified of a potential business combination if the following two (cumulative) thresholds are met:

- the merging businesses have a combined global annual turnover of at least EUR150 million; and
- at least two of the merging businesses each have an annual turnover of at least EUR30 million in the Netherlands.

Different thresholds apply for mergers in the healthcare and pension fund sectors. If the ACM is of the view that the combination will have a negative effect on competition, it must notify the merging businesses within four weeks that it does not consent to the business combination. In such cases, the merging businesses can then put forward proposed remedies to reduce the negative effect of the combination on competition. If the ACM does not approve those proposed remedies, the merging businesses must apply to the ACM for a permit.

The EC is the competent regulator for (larger) business combinations that meet the following thresholds:

- the merging businesses have a combined global annual turnover of at least EUR5 billion; and
- at least two of the merging businesses each have an EU-wide annual turnover of at least EUR250 million,

unless each of the merging businesses achieves more than two-thirds of its aggregate EU-wide turnover within one and the same EU member state, in which case the competent local regulator has jurisdiction. Note that alternative thresholds may apply.

2.5 Labour Law Regulations

The prior advice of the target company's works council(s) (comprising employee representatives) must be requested within a reasonable timeframe, to allow the works council's advice to be of meaningful influence on the intended acquisition. Target entities employing at least 50 persons in the Netherlands will in principle need to have a works council. If there is no works council, or if there is only a works council at a lower level in the target group (without overlap in target management and the management of such business lower in the target group), it may not be necessary to obtain any works council advice in relation to the transaction. When required, advice is typically requested shortly prior to signing the SPA or APA or between signing and closing of the transaction. Negative advice will not block the transaction, strictly speaking, but may of course negatively impact the relationship between the purchaser and the target company's employees.

Where there is negative advice, a one-month waiting period applies prior to implementation of the proposed transaction, during which the works council could appeal to the Enterprise Chamber at the Amsterdam Court of Appeals. The court can only apply a marginal test to its review as to whether management's decision to move forward would qualify as unreasonable, failing which the works council will not be able to block the deal in court. Failure to (timely) obtain (any) works council advice, while required, may result in an injunction.

2.6 National Security Review

At this time, there is no national security review of acquisitions in the Netherlands. The Dutch Government is, however, working on a legislative proposal that would protect important Dutch telecom companies against takeovers that risk Dutch national security or public order. Pursuant to the proposed legislation, the Minister of Economic Affairs and Climate Policy would have the power to intervene by prohibiting the acquisition of a controlling interest in a Dutch telecom company (eg, by holding 30% of the voting rights in that company or the power to appoint more than half of its board members), ordering a shareholder to reduce his or her controlling interest in the telecom company to under 30%, or prohibiting a shareholder from exercising its voting rights, amongst other means.

3. Recent Legal Developments

3.1 Significant Court Decisions or Legal Developments

In 2017, both Unilever and AkzoNobel received unsolicited takeover bids that were turned down by the target entities' boards. After AkzoNobel's board refused to enter into negotiations with its bidder (while several large shareholders publicly called for such discussions to be held), legal proceedings were ultimately initiated before the Enterprise Chamber by a substantial group of AkzoNobel shareholders, among them hedge fund Elliott.

The Enterprise Chamber's decision reiterated that there was no statutory obligation that required a target to allow hostile bidders to conduct due diligence or to provide them with any non-public information. In addition, the court considered that there was no statutory obligation for boards to enter into negotiations with unsolicited bidders, and that the primary responsibility for setting strategy rested with the board. As a whole, while telling AkzoNobel to improve its interactions with its shareholders (and while postponing its final judgment), the court on a preliminary basis did not find that there was a reasonable suspicion of potential mismanagement surrounding the board's conduct in the unsolicited bid situation. AkzoNobel ultimately entered into a standstill agreement with Elliott.

3.2 Significant Changes to Takeover Law

In an apparent response to the unsolicited takeover bids for Unilever and AkzoNobel, and following broader concern voiced by the representatives of some public company boards, the Dutch Government prepared a draft legislative proposal that it published for consultation in December 2018. The proposal introduced a statutory waiting period of up to 250 calendar days for publicly traded Dutch companies that are facing either an unsolicited public bid or a shareholder request to make changes to their board composition (ie, appointment, dismissal or suspension of directors) or to the provisions in the articles of association relating to board composition. During this waiting period, the rights of all shareholders would be suspended to the extent that they relate to changes to board composition, unless the changes are proposed by the company itself.

The stated intention of the legislator is to create a period for target boards to duly assess and weigh the interests of the company and all of its stakeholders, and in particular to assess the possible consequences of actions demanded by shareholders (whether or not in the context of a bid) and to prepare an appropriate response to such actions. The public consultation period with respect to this draft legislative proposal ended in February 2019. An authoritative group of investor groups, law firms and board lobbyists has submitted observations, which vary from highly sceptical to highly supportive of the legislative proposals.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies

Although the majority of the bidders launch their bids for a publicly traded Dutch company without holding any (equity) interest in that company, there is ample precedent of situations in which bidders built a stake in the target company prior to launching an offer. Since 2014, there have been three clear cases in which bidders acquired an interest of more than 30% in the target company in anticipation of making their initial announcement and increasing their stake with a further 10% before launching their bids through the publication of their respective offer memoranda. Also, since 2014, there have been two clear cases in which bidders held an interest in the target company of 6.2% and 19.99% respectively, before making their initial bid announcements, while increasing it to 15.34% and 29% respectively before launching their offer memoranda. The acquisition of Grontmij by Sweco in 2015 is one of the rare cases in which Sweco did not hold any (equity) interest at the time of its initial announcement, but acquired an interest of about 9% before formally launching its bid through the publication of its offer memorandum.

Stakebuilding may provide the bidder with a sufficient level of deal certainty, as it may frustrate a successful competing offer. A recent example dates from 2017, in which Mediahuis and VP Exploitatie successfully barred Talpa's hostile bid for TMG by gradually increasing their stake in TMG before successfully launching their public bid. The strategy of stakebuilding is typically combined with obtaining irrevocable tendering commitments from one or more of the target company's principal shareholders (see **6.11 Irrevocable Commitments**, below).

4.2 Material Shareholding Disclosure Threshold

As a rule, any person who (directly or indirectly) reaches, falls below or exceeds any of the statutory thresholds – either in terms of percentage of total share capital or voting rights of a listed company – must promptly file this 'substantial interest' with the AFM. The AFM keeps a public register of substantial interest filings on its website. The relevant thresholds are 3%, 5%, 10%, 15%, 20%, 25%, 30%, 40%, 50%, 60%, 75% and 95%.

Additional disclosure rules apply to the bidder and the target company in the case of an announced public bid for that company. The bidder and the company must each promptly make a public announcement of any transaction executed, or agreement entered into, by the bidder or the company (as the case may be) relating to any class of securities that is the subject of the bid, or relating to any securities that are offered in exchange for such securities. The announcement by a bidder must state the number and relevant class of securities, the terms (including the price or exchange ratio), and the size of any direct or indirect capital interest.

4.3 Hurdles to Stakebuilding

Although a company can impose stricter disclosure thresholds in its articles of association or bylaws, for example, it cannot increase the mandatory disclosure thresholds as described in **4.2 Material Shareholding Disclosure Thresholds**, above. A legislative proposal is expected later this year granting publicly traded Dutch companies with an annual revenue exceeding EUR750 million the right to demand that shareholders holding more than 1% in their capital register this fact with the AFM. The AFM, however, expressed its concerns in a public letter to the Dutch Minister of Finance, arguing that the proposal would, in essence, be contrary to the aim to get to internationally harmonised market legislation and would lead to unnecessary complexity.

In any case, a bidder must be mindful not to acquire 30% or more of the voting rights in the target company, which would trigger the requirement for the bidder to launch a mandatory bid for all classes of shares in the capital of the target company. This voting rights interest is calculated on an aggregated basis with all with whom the bidder is deemed to act in concert. For the avoidance of doubt, a bidder is not deemed to act in concert with the target company's shareholders from whom it obtained irrevocable tender commitments.

4.4 Dealings in Derivatives

Dealings in derivatives are allowed in the Netherlands.

4.5 Filing/Reporting Obligations

The transaction reporting requirements described in **4.2 Material Shareholding Disclosure Thresholds**, above, apply equally to dealings in derivatives. In the case of transactions in cash-settled instruments (such as contracts for difference or total return equity swaps), the holder of the instruments is deemed, by law, to possess the underlying shares and voting rights. Accordingly, such underlying share and voting rights interests must be reported to the AFM.

4.6 Transparency

There is no statutory requirement for shareholders to make known the purpose of their acquisition or their intention regarding control of a company. A company can, however, request the AFM to force a person (eg, a shareholder) to disclose his or her intentions (whether or not to commence a public bid) if that person has publicly disclosed information that may give the impression that he or she is contemplating making a public bid for the company. If granted by the AFM, that person must make an announcement, within six weeks of being so instructed by the AFM, that he or she does or does not intend to make a public bid. In the latter, the person (and any persons acting in concert) will be prohibited from announcing or launching a public bid for that company for a period of six months from the announcement. If no such announcement is made, a period of nine months applies (commencing at the end of the six-week response period). If a third party subsequently announces a public bid for the company during the six- or nine-month 'put up or shut up' period, this restrictive period automatically ends.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal

The bidder and the target company are required to announce a public bid, in any case, no later than the time that (conditional or unconditional) agreement has been reached on the bid. This is typically the moment when the bidder and the target sign a 'merger protocol', containing the terms and conditions of the bid (see **5.5 Definitive Agreements**, below). In the announcement, the parties must disclose the names of the bidder and the target company and, to the extent applicable, the contemplated price or exchange ratio and any conditions agreed at that time for launching the bid or for declaring the bid unconditional.

The bidder and target company may be required to make disclosures at an earlier than anticipated stage as a result of leaked bid information, if the information qualifies as inside information (within the meaning of the EU Market Abuse Regulation).

5.2 Market Practice on Timing

In practice, friendly public bids are announced once the bidder and target company have reached agreement on the bid.

5.3 Scope of Due Diligence

The scope and duration of due diligence conducted by a bidder is very much dependent on the type of bidder (eg, strategic or private equity) and the level of detail that the target board is willing to provide. In its assessment, the board will be guided by what it deems to be in the best interest of the company and its business, while at all times taking into account the potential risk of an unsuccessful bid. Given the substantial amount of information that the target company will have already made publicly available to comply with its disclosure obligations as a listed company (eg, annual and semi-annual accounts, and press releases to publish inside information), target company boards may in some cases not be willing to provide more than a few days of due diligence. Elsewhere, in particular where material antitrust hurdles for the proposed combination need to be addressed, the target company's board may need to provide detailed information to allow the bidder to conduct detailed due diligence over a period of several months.

5.4 Standstills or Exclusivity

To the extent the bidder obtains inside information that the target company has not yet made public, the relevant provisions of the EU Market Abuse Regulation will prohibit the bidder from trading in the target company's securities. In addition, the target may wish to bind the bidder by contractual restrictions from trading in its securities by demanding that the bidder enters into a standstill commitment. This would prevent the bidder from acquiring a controlling interest in the target company without its consent. A contracted standstill between the bidder and the target company may facilitate a level playing field between the parties, which could positively impact the possibility of the bidder conducting due diligence or the successful conclusion of a merger protocol. At the same time, the bidder may negatively influence the relationship between the bidder and the target company by declining a standstill.

A bidder may typically seek to acquire exclusivity from the target in a stage prior to entering into a merger protocol. In 2008, the Court of Appeal held that an exclusivity period of one month between ABN AMRO and Barclays was not unusual or unacceptable.

5.5 Definitive Agreements

It is common for public bid terms to be documented in a so called 'merger protocol', as discussed in **5.1 Requirement to Disclose a Deal**, above. In this agreement, the bidder and the target company document the main terms and conditions of the bid, such as the conditions for launching and completing the bid, no-shop provisions, and (typically) regular and reverse break fees.

6. Structuring

6.1 Length of Process for Acquisition/Sale

In a public M&A scenario, the process for acquiring/selling a business is generally regulated by statutory law once the bidder makes its (actual or deemed) initial announcement. In the period before the initial announcement, however, the timing depends on various circumstances, such as the duration of negotiations, the scope and duration of due diligence (see **5.3 Scope of Due Diligence**, above) and whether the offer is friendly or hostile. Within four weeks of the initial announcement, the bidder must either confirm that he or she will proceed with the bid or announce that he or she does not intend to make an offer.

When confirmed, the draft offer memorandum must be filed for approval by the AFM within twelve weeks of the initial announcement. When filed with the AFM, the draft offer memorandum will not yet be made publicly available. The bidder must publicly confirm that he or she has funding for the bid by the time of filing with the AFM (see **6.6 Requirement to Obtain Financing**, below). In practice, the review period will typically take at least three-four weeks before the AFM notifies the bidder of its decision. Once approved, the bidder must publish his or her offer memorandum within six working days, triggering the tender period of eight to ten weeks, which begins within three working days of publication. After the expiry of the tender period, the bidder must either:

- declare the bid unconditional or lapsed; or
- extend the tender period, within three working days.

The tender period may be extended once for a period of two to ten weeks. If the bidder declares the bid unconditional, he or she may, within three working days, invoke a two-week post-acceptance period to give non-tendering shareholders a last chance to tender their shares.

In a private M&A scenario, the offer process can be completed within weeks or months, depending on circumstances such as the familiarity of the bidder with the acquisition process, the duration of any due diligence efforts, and the requirement of financing and antitrust approval.

6.2 Mandatory Offer Threshold

Following on from **4.3 Hurdles to Stakebuilding**, above, a mandatory bid for all the shares in the capital of a target company is triggered where a shareholder, acting alone or in concert with others, acquires an interest of 30% or more of the voting rights in the target company. A bidder who obtains irrevocable tender commitments from shareholders in anticipation of a voluntary bid is exempted from the mandatory bid rules and will not be deemed to 'act in concert' with the shareholders concerned.

6.3 Consideration

A public bid for all shares in the target company will often be in cash, but all or part of the consideration may also consist of transferable securities (including shares, bonds and convertible instruments). Additional and extensive disclosure pertaining to the issuer of the transferable securities, in the form of either a prospectus or an equivalent document in the offer memorandum itself, is required if the bid consists of transferable securities. See **7.3 Producing Final Statements** and **7.4 Transaction Documents**, below, for further details.

The consideration for offers qualifying as 'tender offers' under Dutch law must be all-cash, and determined by a reversed book-building process (ie, the consideration will be specified by the tendering shareholder).

Since 2014, in 15 of the 18 completed Dutch public bids, the offer consideration was all cash. Two of the considerations in the completed Dutch public bids consisted of a combination of cash and shares and one consisted of only shares.

6.4 Common Conditions for a Takeover Offer

Apart from the conditions required by law (eg, merger control), negotiated offers are, in contrast with (unconditional) mandatory offers, typically made subject to extensive conditions. A negotiated bid may contain pre-offer conditions such as certainty of funding, antitrust approval and the non-occurrence of a material adverse change. Once the pre-offer conditions have been fulfilled, the conditions under which the offer (once commenced) will be declared unconditional are typically concluded in the merger protocol between the bidder and the target company. Since 2014, the most frequently negotiated conditions include minimum acceptance thresholds and the adoption of certain resolutions (ie, asset, sale and liquidation or (cross-border) legal merger).

6.5 Minimum Acceptance Conditions

The bidder will generally aim to purchase more than 95% of the shares in a target company to acquire full control through squeeze-out mechanisms with a legal foundation (see **6.10 Squeeze-out Mechanisms**, below). In recent years it has, however, become increasingly common to pre-wire alternative restructuring options to be able to acquire full control if the 95% threshold is not satisfied in the public bid, the options for which are usually included in the merger protocol. Such restructurings are normally pre-agreed between a target company and the bidder. In these cases, the bidder is typically willing to lower the acceptance level to 75%-80%, for instance, by including alternative squeeze-out mechanisms, such as a post-bid sale of all of the target's assets to the bidder, followed by a liquidation of the target, a legal merger or a legal split-off (see **6.10**).

6.6 Requirement to Obtain Financing

Within four weeks of the initial announcement of a bid, the bidder must confirm whether it proceeds with its bid and, if

so, when the draft offer memorandum is expected to be filed with the AFM. Before the bidder files its draft offer memorandum with the AFM, it must have obtained and publicly confirmed the certainty and sufficiency of its funding for the bid. This 'certainty of funds' requirement means that the bidder must have received sufficient financing commitments that are, in principle, only subject to conditions that can be reasonably fulfilled by the bidder (eg, credit committee approval should have been obtained). No term sheets, etc, need to be publicly filed.

These conditions may include that resolutions are adopted by the bidders' extraordinary meeting with regard to the funding or consideration offered (eg, the issue of shares). However, the financing of the bid may not be conditional upon the absence of a material adverse effect (for the benefit of a prospective financer), unless the same condition is applicable to the bid itself (for the benefit of the bidder). The bidder's financial advisers assist with this 'certainty of funds' announcement.

6.7 Types of Deal Security Measures

In principle, the bidder and the target company are free to agree on any deal security measures (as long as the target company's board deems it to be in the best interest of the company). The deal security measures that a bidder seeks normally concern the possibilities of a fiduciary out by the target board in light of intervening events. In Dutch practice, a bidder mainly seeks to limit the possibilities of a target company to respond to a superior bid. Dutch deal protection therefore mainly concerns the exclusivity obligation of the target company and that of the management and the supervisory board to continue to support and recommend the offer (ie, the limitation to examine and bind itself to a potential superior bid). Consequently, the conditions that constitute a superior bid are laid down, eg, the minimum price threshold for a competitive bid to be considered a superior bid (in practice the bid has to be between 7.5%-10% higher), a matching right of the bidder and a break fee (typically around 1% of the transaction value).

In addition, other elements of the transaction may be classified as deal protection, such as support from major shareholders through irrevocable tendering commitments, whether information is provided to and due diligence is allowed by other potential bidders, whether a standstill agreement is concluded with the bidder and special agreements such as the provision of a convertible loan by the bidder or a top-up option.

All potential deal security measures must be assessed by the board of the target company in light of the interests of the company and its business.

6.8 Additional Governance Rights

It is quite common for major shareholders in Dutch listed companies to obtain further governance rights, eg, additional information rights and the right to nominate one or more members of the supervisory board. Such rights are typically structured through a relationship agreement between the shareholder and the company. A bidder who does not seek 100% ownership of the target may seek to obtain such governance rights.

6.9 Voting by Proxy

Voting by proxy is permitted under Dutch law. US-style proxy solicitation is rare.

6.10 Squeeze-out Mechanisms

Dutch law provides for two major squeeze-out mechanisms for shareholders. First, a shareholder who holds at least 95% of the shares of a company may institute proceedings before the Enterprise Chamber at the Amsterdam Court of Appeals towards the other shareholders jointly for the transfer of their shares to the claimant. The claim will be rejected if, notwithstanding compensation, one of the defendants would suffer serious tangible loss by such a transfer (rarely deemed to be the case and, accordingly, squeeze-out claims are typically successful once the 95% threshold is met). Further, such proceedings cannot be started if there are shares with special voting rights outstanding. The price offered for the shares in the proceedings is usually equal to the bid price (offered in a recently completed public bid).

Second, as a result of the implementation of the EC Takeover Directive, a bidder who holds at least 95% of the shares as a consequence of a public offer, may file a squeeze-out claim with the abovementioned court within three months of the expiry of the term for acceptance of the offer. The price is set at the offer price, unless less than 90% of the shares were acquired through the offer.

Alternative squeeze-out mechanisms (restructurings) are normally also included in the merger protocol, such as a pre-wired asset sale, which entails that the bidder purchases all assets of the company shortly after declaring the public bid unconditional. The bidder in this scenario pays a part of the purchase price in cash and remains due for another part in the form of a loan that is equal to the stake of the bidder in the company. As a result of the asset sale, the target company will essentially become a 'cash box' and all remaining shareholders will receive cash for their shares upon liquidation of the target company. An asset sale will only be permissible if certain conditions are met.

For the bidder it is important to ensure sufficient transparency about his or her intentions in this respect during the bid process and to have a business motive (typically integration) for the post-bid asset sale and liquidation of the target. Further, the target executive board and (independ-

ent) supervisory board members may only approve an asset sale after careful consideration, especially where minority shareholders' interests are concerned. Finally, the asset sale may not lead to a disproportionate disadvantage of minority shareholders and the price should be fair (eg, based on a fairness opinion).

Also, a bidder may choose to squeeze out remaining shareholders via a triangular merger. Here, a bidder will establish an acquisition vehicle that concludes an agreement with the target company to enter into a legal merger. As a result of the legal merger, the target company ceases to exist and the assets of the target company are transferred to the acquiring company. Under Dutch legal merger law, the shareholders of the target company may become shareholders of a group company of the acquisition vehicle. This will normally be a much larger company and will result in the remaining shareholders of the target company having an interest below 5% in this group company. As a consequence, the 'regular' squeeze-out mechanism may then be exercised. Naturally, whether this latter mechanism works will be heavily dependent of the nature of the acquirer.

6.11 Irrevocable Commitments

Before announcing the bid, during negotiations with the target company, it is common for a bidder to also enter negotiations with the target company's principal shareholders. These negotiations often lead to irrevocable tender commitments from one or more of the target's principal shareholders, requiring them to tender their shares if the bid is launched (and subject to its completion) and to vote in favour of the bid at the (Extraordinary) General Meeting.

The existence of such irrevocable commitments, as well as their main terms, must be disclosed in the offer memorandum. Typically, but not necessarily, such commitments will contain an escape (out) for the committing shareholder in the event of a subsequent (financially) superior offer (usually subject to a minimum hurdle requiring the competing bid to be a minimum percentage higher to qualify as superior offer).

Irrevocable tendering commitments from shareholders are exempted from the mandatory bid rules (see **4.3 Hurdles to Stakebuilding**, above).

7. Disclosure

7.1 Making a Bid Public

As described in more detail in **5.1 Requirement to Disclose a Deal**, **5.4 Standstills or Exclusivity** and **5.5 Definitive Agreements**, above, the manner and timing of the announcement of a public bid are regulated by statutory law.

A voluntary bid is deemed to have been made public as soon as the bidder has disclosed concrete information regarding the intended bid, unless it is immediately followed by a public announcement from the target company that it has entered negotiations with the bidder.

A person acquiring a (30%) 'controlling' interest in the target company who has not lost his or her controlling interest during the subsequent 30-day grace period is required to announce the mandatory bid no later than the moment this grace period expires.

If the Enterprise Chamber orders the announcement of a mandatory bid, but the person required to make the bid does not do so, the mandatory bid is deemed to have been announced at the moment the Enterprise Chamber's order becomes irrevocable.

A mandatory bid is also deemed to have been announced if such a bid is required by the rules of another EU member state, and the target company has made a public announcement in this regard in accordance with the EU Market Abuse Regulation.

7.2 Type of Disclosure Required

After the bid is made public, any subsequent issue of shares by the target company during the bidding process must be accompanied by a public announcement.

Within four weeks of the bid being made public, the bidder must announce whether he or she intends to proceed with the bid. If so, he or she is required to file the draft offer memorandum with the AFM no later than twelve weeks of the initial announcement.

The offer memorandum must contain all information necessary for a reasonably informed and careful person to make an informed assessment of the bid. If the bid consideration (partly) consists of transferable securities, the bidder is generally required to make available either a prospectus (approved by the AFM or the competent regulatory authority of another EEA member state), or a document containing equivalent information.

7.3 Producing Financial Statements

The bidder is required to include information regarding the target company's financial position in the offer memorandum. The offer memorandum must include, among other things:

- a comparative overview of the target's last three annual accounts and the most recent published annual accounts;
- an auditor's statement with respect to these accounts;
- 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);
- a review statement from an accountant covering the financial data for the current year; and
- the main terms of a merger protocol or irrevocable tendering commitment, if any. If the bid consideration consists of transferable securities, the required prospectus or equivalent document must include sufficient information regarding the financial position of the issuer and the bidder (if different from the issuer).

Consolidated financial statements must be prepared in accordance with International Financial Reporting Standards (IFRS).

7.4 Transaction Documents

The approved offer memorandum must be disclosed in full, whereas only the main terms of the merger protocol have to be made public.

The bidder and the target company are generally allowed not to disclose information in case such disclosure would be detrimental to their vital interests, for instance in the event of business secrets or information that is heavily competition-sensitive.

8. Duties of Directors

8.1 Principal Directors' Duties

Most (large) companies in the Netherlands have a two-tier board system (although the possibility of a one-tier board is laid down by law) consisting of the management board, which manages the company, and the supervisory board, which supervises the actions of the management board. Each director is responsible towards the company for the proper performance of his or her duties and for the general course of affairs, which includes the day-to-day management, exclusively determining the strategy and outlining, preparing, adopting and executing the policy. The directors therefore have the freedom to structure the governance of a target company and have the possibility of taking protective measures.

In fulfilling their tasks, directors must be guided by the interests of the company and its business, with due regard to the requirements of reasonableness and fairness. These corporate interests are not only given substance by the interests of shareholders; directors owe their duties to all stakeholders, including but not limited to employees, customers, creditors and suppliers. Directors have an autonomous role in this regard and do not have the duty to behave according to instructions given by the general meeting. Accordingly, shareholder value is relevant but clearly not the only measure driving board decision-making in connection with a business combination. Finally, when assessing a business combination, boards of listed companies have the obligation to create long-term value (when complying with the Corporate Governance Code).

The management board of private (and smaller) companies have similar duties. Dutch law, however, provides for more flexibility to structure the governance of a private limited company. Eg, more power can be given to the general meeting by obliging the board of directors to comply with its directions, unless it is contrary to the interest of the company and its business.

8.2 Special or Ad Hoc Committees

It has become more and more common for the board of directors to establish special or ad hoc committees in the context of a business combination. The board of directors must establish an internal organisation so that the process with regard to the business combination is as effective as possible. Therefore a transaction or negotiation team or steering group is typically established. The team often forms separate sub-teams for different work streams, such as financial/valuation, due diligence, transaction documentation, disclosures, PR, strategy, integration and synergy. A special committee of independent non-executives will usually closely monitor and supervise the process. It is further relevant to note that in recent years establishing an executive committee has become a trend. Currently, about 58% of listed companies have established such a committee. It consists of the directors and the higher management and often plays an important role in establishing the strategy, managing the company on a day-to-day basis and assessing potential business combinations.

A director with a conflict of interest may not participate in the deliberation and adoption of resolutions and other directors will need to adopt the resolution. The conflicted director is in practice therefore excluded from any meeting on the matter concerned. If there are several conflicted directors and no management resolution can be adopted, the resolution will be adopted by the supervisory board, or, if there is no supervisory board, by the general meeting, unless the articles provide otherwise.

8.3 Business Judgement Rule

A director must perform his duties to the best of his abilities and does not have to guarantee a particular result. Courts are therefore hesitant to second-guess substantive management decisions and actions. Liability does not follow as a result of ordinary negligence, but only in the case of serious blame. A director can only be liable against the company in the event of improper performance of the directors' duties. Board duties are collective in nature, ie, each director is responsible for the proper performance of the company's management as a whole.

In the case of improper management of the board, every director is wholly liable unless he or she cannot be attributed serious blame and was not negligent in acting to prevent the consequences of improper management. The external liability of the (de facto) directors may follow towards third parties, mainly creditors, for wrongful acts and is generally imposed on a director only if the director can personally and seriously be blamed for wrongful/tortuous conduct towards that party. Under this liability, it is required that a personal serious blame can be attributed to a director. In practice, the threshold for director liability is generally considered to be high and director liability rarely occurs outside of insolvency situations.

The directors of insolvent companies can be liable on the ground mentioned above, and the trustee may hold the director liable in bankruptcy if the director has significantly contributed to the bankruptcy through apparent improper administration of the company. This means that no reasonable and sensible director would have acted in the same manner under the same circumstances. It should be noted, however, that certain legal presumptions may apply. In particular, a company will be presumed to have been evidently mismanaged if it went bankrupt and, over the last three years, failed to keep proper financial records (such that its assets and liabilities could not be known at all times) or did not file one or more of its annual accounts within twelve months following the end of the relevant financial year.

8.4 Independent Outside Advice

In a business combination, companies usually have assistance from investment banks and lawyers, but sometimes also from consultants and other experts who can advise about the proposed transaction. As part of a due process, the board of directors and supervisory directors further receive fairness opinions from financial advisers about the reasonableness of the transaction price. In principle, seeking advice does not affect the responsibility of the (supervisory) directors, but can be a mitigating circumstance in assessing their conduct later on in court.

8.5 Conflicts of Interest

Directors who have a conflict of interest vis-à-vis the company may not participate in the board's deliberations and decision-making process on the issue in question. In addition, the conflict should be timely disclosed to the director's fellow board members or – if there are no other board members – to the company's shareholders, allowing them to take appropriate action. A director's failure to observe this may result in liability on the part of that director, or even the entire board. It should be noted that a director's affiliation with a shareholder, even indirectly, might constitute a conflict if that shareholder's interests are not aligned with the interests of the company and its other stakeholders.

In case law, a clear assessment framework has been developed. A director is conflicted if he or she has to deal with interests that are so incompatible with those of the company that it can be reasonably doubted whether he or she was guided exclusively by the interests of the company. It is not required that the potential conflict will actually lead to the company being disadvantaged. In the context of a business combination, it is not sufficient to show that the director of the target company may have a seat on the board of directors of the bidding entity or that he or she will exercise his or her options or sell his or her shares with a takeover premium. In cases where there has been an (apparent) conflict of interests (eg, detrimental to the interests of a minority shareholder), the Enterprise Chamber appointed an independent (supervisory) director with a decisive vote. Finally, special care should be taken in a private equity transaction in which the board member is offered to participate in the company after a successful bid.

9. Defensive Measures

9.1 Hostile Tender Offers

Hostile offers are allowed in the Netherlands, but there is no track record of them being completed successfully. Generally there are no legal impediments to launching a hostile offer in the Netherlands. Dutch law does not make any distinction between hostile and friendly offers. However, the control over a target company is in the Netherlands generally acquired through friendly bids for all issued shares, as they typically enable the bidder to secure the recommendation of the management board and to conduct due diligence on the target company. Hostile bids are extremely rarely pursued as they run the risk of being delayed, discouraged or defeated by defensive measures (see **9.2 Directors' Use of Defensive Measures**, below). Also, there is no statutory obligation for the management board to facilitate a level playing field among bidders.

9.2 Directors' Use of Defensive Measures

The board is in principle allowed to take protective measures in case of a hostile scenario, within the limitations set out in the RNA case (see **9.3 Common Defensive Measures**, below).

9.3 Common Defensive Measures

A common defence measure would be the so-called protective foundation. This may be structured in various ways. For instance, a commonly used structure is the creation of a separate class of preference shares that can be called at nominal value by an independently managed foundation, pursuant to a separate call option agreement. The foundation would exercise the call option in case the continuity of the company concerned is threatened, typically in a hostile bid scenario. The structure has a proven 'preventive effect' as there have only been a couple of instances in which a

foundation actually exercised its call option, whose strength was further confirmed during 2015, in which year Mylan successfully managed to ward off a hostile bid through the exercise of a call option by the Mylan Foundation.

Another type of anti-takeover foundation was that put in place by ABN AMRO in 2015, in the context of its initial public offering on Euronext Amsterdam. In this structure, all ordinary shares in the company's capital are transferred to an independent foundation in exchange for depositary receipts. This structure splits the economic ownership of shares from the legal ownership thereof, including the voting rights on the shares, which will be held by the independent foundation.

9.4 Directors' Duties

The criteria set out by the Dutch Supreme Court in the RNA case are considered to be the basis for the assessment of the permissibility of protective measures when so invoked by a management board. Defensive measures must be proportionate, adequate and allowing the management board to enter into discussions with the bidder, while maintaining the status quo. The defensive measures should be in the company's corporate (long-term) interest, which under Dutch law involves taking into account not only the interests of its shareholders but also of other stakeholders. Also, defensive measures should be of a temporary nature.

9.5 Directors' Ability to 'Just Say No'

The management board has substantial freedom to develop the company's strategy and, when deemed appropriate given the circumstances of a takeover scenario, may take action against hostile bidders, within the limits as discussed above (see **9.4 Directors' Duties**, above). The management board may decide to withhold its support of the offer and take substantial measures to delay or discourage the takeover. However, the Dutch Supreme Court has held that the interests of 'serious' potential bidders, both friendly and hostile, should be taken into account by the management board. Fully valued bids that address broad stakeholder interests will typically be successful as such an offer would be in the best interest of the company's stakeholders. Having said that, the management board's support is a major influence on the success of an acquisition, but will not necessarily prevent a takeover scenario. Since 2014, company management boards have recommended 15 of the 18 completed, non-mandatory bids.

10. Litigation

10.1 Frequency of Litigation

Litigation related to public M&A deals is uncommon, especially between the bidder and target company. In recent years, only few disputes relating to high-profile public bids have been brought before the Enterprise Chamber by shareholders (see **1.1 M&A Market**, above and **11.1 Shareholder Activism**, below). These disputes generally involve shareholders seeking a change in the composition of a company's board. Eg, the takeover foundation of Stork and ASMI respectively exercised the call option it held, which – in both cases - was challenged by shareholders before the Enterprise Chamber.

Litigation related to private M&A is more common, with the grounds for such disputes being diverse and ranging from pre-contractual liability to warranty claims and earn-out provisions.

10.2 Stage of Deal

Public M&A-related litigation is normally brought in the early stages of the bidding process, often as a response to the invoking of protective measures by the target company's management board.

In private M&A situations, litigation can occur at virtually every stage, at pre- and post-closing of the transaction, and will generally relate to financial contractual provisions or warranty claims.

11. Activism

11.1 Shareholder Activism

The support of major shareholders is one of the major influences on the success of an acquisition. Hedge funds and activist shareholders have been an important force in encouraging companies' boards to pursue business combinations, to sell certain divisions or to reassess long-term strategy. Example cases are discussed in **10.1 Frequency of Litigation**, above. Where the majority of the interest in a company is held by a (group of) shareholders, they will have to agree to the offer for it to be successful. Also, shareholders who, individually or jointly hold a sufficient number of shares to have standing, may bring proceedings before the Enterprise Chamber concerning mismanagement within the target company. This division has the jurisdiction to adjudicate certain corporate matters in the first instance, in addition to specific powers of enquiry, expertise and composition. Shareholders have done so in takeover situations, eg, on the grounds of the board's failure to observe its duties.

In the Stork case in 2007, two activist shareholders of Stork, in an apparent effort to force Stork to divest its non-core businesses, challenged the composition of Stork's supervisory board. In the ASMI case in 2010, activist shareholders pursued the implementation of a new corporate strategy by seeking to change the company's board. Both the protective foundations of Stork and ASMI respectively responded by exercising the call option it held, which in both cases was challenged before the Enterprise Chamber by the activist shareholders concerned. In the Stork case, the court held

that the call option agreement between Stork and the stichting preference shares only permitted the exercise of the call option in a hostile bid scenario. Accordingly, the Enterprise Chamber ordered the cancellation of the preference shares. In the ASMI case, the legality of the exercise of the call option could not be reviewed as the Dutch Supreme Court held that the Enterprise Chamber had no jurisdiction to rule on such a legality. In both cases, the parties used the time created by the call option exercises, and subsequent litigation, to reach solutions satisfactory to the respective boards.

11.2 Aims of Activists

As described in **11.1 Shareholder Activism**, above, many instances of shareholder activism in the Netherlands have involved encouraging companies to enter into M&A transactions, most notably major divestitures.

11.3 Interference with Completion

In recent years there have been no notable occasions of shareholders seeking to interfere with the completion of an announced transaction. As mentioned previously, shareholder activism is mostly focused on encouraging the board to enter into transactions or to sell certain divisions. It is relevant to note that under Dutch law, the board of a public company needs approval from the general meeting if it seeks to sell assets or buy a participation worth at least one third of the assets of the company or if it wishes to establish a long-term co-operation. Failing to obtain approval does not, however, affect the authority of the board to represent the company, but can be reason to doubt the board's correct policy or proper course of action and may thus be a ground for a finding of mismanagement.

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