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# **The Netherlands**

## Takeover Guide

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## INTRODUCTION

### General

This Guide sets forth the various legislation, regulations and procedural steps a company must take into account when it is preparing for and issuing a public offer in the Netherlands.

### Dutch Public Offerings in General

The main legislation and regulations affecting a public offer's procedure and requirements are the Securities Trade Supervision Act ("Wte 1995"), the Securities Trade Supervision Decree ("Bte"), Exemption Regulation Wte 1995, and several Policy Regulations of the Netherlands Authority for the Financial Markets. From 1 January 2007 these laws are all one by one incorporated into the Financial Supervision Act ("FSA").

Affecting this body of law is the implementation of the European Directive on takeover bids (the "Takeover Directive"), which is incorporated in the FSA and Decrees since 28 October 2007. The implementation of the Takeover Directive will be discussed in detail.

The statutory basis of the Netherlands public offer rules is incorporated as a prohibition: a public offer for securities admitted to an official listing on a securities exchange is prohibited. The prohibition is not applicable if an offer document has been made available and if a reference to the offer document is made in every announcement relating to the public offer.

Before elaborating on the requirements of the offer document and the offer procedure in general, a brief outline on the three types of offerings known in the Netherlands (being the full offer, the partial offer and the tender offer) will be set forth in the following sections. The mandatory offer and the hostile offer will also be briefly addressed.

### Full Offer

A full offer is a public offer, stipulating the offered payment, aimed at the acquisition of all issued and outstanding shares of the class to which the offer relates. The public offer is made and published for securities or an invitation to make such an offer, outside a restricted group, for securities when the offerer has the intention to acquire such securities. The full offer is the most common kind of public offer issued in the Netherlands.

### Partial Offer

Less common, a partial offer is a public offer stipulating the offered payment to acquire only a part of the issued and outstanding shares of the class to which the offer relates.

The main conditions for issuing a partial offer are:

- that the offer may not result in the acquisition of more than 30% of the issued share capital of the target company for a one year period starting from the acceptance of the tendered shares; and
- that the offer is unconditional and irrevocable.

The offerer cannot make a public offer for all shares in the capital of the target company during the one year period.

Partial offerings are mainly issued to:

- acquire a substantial interest in a target company for strategic considerations against a purchase price per share, which should be at the same level as the stock exchange rate;
- to explore the willingness of target shareholders to sell their shares; and
- to intervene in a public offer of a competitor of the offerer.

## **Tender Offer**

The tender offer is also uncommon in the Netherlands. Since its introduction, the only successful tender offer was issued by Bergson Holdings N.V. on a part of the ordinary shares of Hunter Douglas N.V.

A tender offer is addressed to all holders of the (class of) shares to which the offer relates. The offerer invites the addressees to sell their shares for a price stipulated by each of the tendering shareholders. A tender offer stipulates the number or percentage of shares to be acquired by the offerer and the maximum price per share the offerer will pay. A tender offer will be declared unconditional if the intended acquisition is possible at the indicated maximum price.

A tender offer may only be revoked if a competing offer is launched or announced prior to the end of the tender period. The highest price accepted by the offerer shall be paid to all tendering shareholders. If more shares are tendered than the offerer is entitled or obliged to accept, the tendered shares are accepted proportionally.

For a period of one year from the acceptance of the tendered shares under the tender offer, the offerer may not, directly or indirectly, hold more than 30% of the outstanding share capital of the target company. Therefore, during this one year period, the offerer is prohibited from making a public offer for all of the shares in the capital of the target company.

## **Cash or Exchange Offer**

It is possible to offer a cash amount per share, an amount of securities issued by the offerer per share, a combination of both, or an optional offer. In the event of an optional offer, the tendering shareholders may choose between a cash amount or an amount of securities.

An exchange offer is not permitted where a tender offer is being issued. This results from the nature of the tender offer procedure, as the tendering shareholders will determine the exchange rate.

Where a (partial) exchange offer is being issued, more extensive requirements are applicable to the disclosure of information with regard to the exchange rate.

## **Mandatory Offer**

Prior to 28 October, 2007, the Netherlands offer rules did not provide for a mandatory offer. However, as obligated by article 5 of the Takeover Directive, a mandatory offer regulation is now incorporated in the Netherlands law.

The holder of a controlling interest, defined as holding more than 30% of the voting rights, must make a public offer for all the shares. This obligation also applies to a group of parties acting in concert.

The price of the offer must be a reasonable price, defined as the highest price for which the offerer bought such shares in the last year and if it bought no shares the average list price over the last year. There are quite a lot of exemptions and grandfather rights.

## Hostile Offers

If a public offer is issued without the consent of the board of managing directors of the target company, the public offer can be qualified as a hostile offer. Hostile offers have not been traditionally common in the Netherlands. More recently, however, successful hostile offers have been concluded.

A shift in the appraisal of defence mechanisms has occurred. This shift is mainly due to discussions of corporate governance policies of listed companies, the subsequent incorporation of the Netherlands Corporate Governance Code (the Tabaksblat Code), as well as other changes to Netherlands corporate law including the Takeover Directive. Before the aforementioned shift, it was common for companies listed on the Amsterdam stock exchange to have extensive defence mechanisms in place.

Since shareholders have become increasingly involved in the course of events of a company, more companies listed on the Amsterdam stock exchange have chosen to be unprotected against (hostile) takeovers. However, the possibility to issue preference shares and, to a lesser extent, the structure regime are systems of protection which are still common with companies listed on Euronext Amsterdam.

A public offer without notice was prohibited under the old law. Since 28 October, 2007, it is possible for an offerer to announce a bid without consulting with the board of the target.

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## PRE-OFFERING PHASE

### First Announcement

The principle of market transparency determines that all investors should have access to the same information at the same time. Resolving information inequalities significantly reduces the possibility of insider trading. Pursuant to Netherlands law, a company listed on Euronext Amsterdam should always make immediately public any price-sensitive information in order to prevent rumours or incorrect information which might interfere with the exchange rate or encourage insider trading.

As a general rule, Netherlands law provides that if a public offer is in preparation or disclosed, then, as soon as the offerer and the target reach conditional or unconditional agreement, the offeror and the target company shall make such an announcement, each to the extent applicable to it.

### No longer Justifiable Expectation, now agreement stage

Under previous laws, reaching a stage in the preparatory talks preceding a public offer justifying the expectation that an agreement will ultimately be reached, was always considered to be an event necessitating a public announcement. That was a difficult definition. Now the timing, that is, the moment that the offerer and the target reach conditional or unconditional agreement is the moment of the first announcement.

### Share Price Development

Another important indicator for a first public announcement is the pricing of the target company's shares. The pricing of the target company's shares should be closely monitored and, pursuant to the Bte, the offerer and the target company have to make a public announcement in the event the share pricing or other developments may indicate that discussions about the public offer are no longer confidential.

## **Interaction with Target**

In addition to the notice requirement for public offers, there are other means of interaction often held between the offerer and the target company before the first announcement; such as the mutual assent on the heads of agreement, a merger protocol, an announcement protocol, and a confirmatory due diligence investigation. Prior to any discussion being held, it is most likely that the offerer and the bidder will sign a standstill agreement as well as a confidentiality agreement.

The heads of agreement could include topics such as future corporate governance, conditions of employment, the participation of group companies of the offerer, exclusivity provisions, and termination provisions including lock-up and break-up fee provisions.

A merger protocol usually provides an outline of the transaction's terms including the offer price or exchange ratio, the number or percentage of shares the offerer wishes to acquire in order for it to declare its offer unconditional, and any other conditions the offer is being subjected to.

## **Leakages**

In principle, not every exploratory interaction between a target and an offerer will result in the obligation to make a public announcement. However, if rumours begin to spread, whether or not by means of a leak, a simple denial is not always the best solution. Denial may be contrary to the facts and may even lead to actions for damages in certain circumstances. Refraining from any comments may lead to even further speculation on the market. A neutral position and comment by means of a public announcement on the nature and the state of affairs might often be the best solution.

## **Employee Consultation**

Employee consultation is an important part of any acquisition or divestment process of a Netherlands company. The advice of the works council must be obtained before entering into a binding merger agreement. In practice, the formal request for the works council's advice is submitted to the works council just after the initial public announcement, and for this reason the initial announcement does not contain any information regarding the consequences for the personnel of the target company resulting from the transaction.

After the initial announcement, the offerer and target company must notify the trade unions, if any, and provide them with a statement concerning the rationale for the transaction, the intentions with respect to the company's policy and the social, economic and legal consequences of the contemplated transaction. This notification must also be sent to the SER Merger Committee.

The consultations with the works council and the trade unions should take place at such a time that the advice of both may still have a material influence on the decision of the board of managing directors of the target company.

## **Acquisition of Target Shares**

The offerer is free to acquire shares of the target company after the initial public announcement, provided the offerer does not hold any price sensitive information.

If after the acceptance period the offerer declares the offer unconditional, the offerer must pay an amount per share that corresponds to the highest consideration paid by it for each share purchased after the initial public announcement, except for transactions made in the normal course of trading in the target company's shares.

## Disclosure of Major Holdings

Disclosure obligations may occur for entities, such as an offerer, in the event a certain percentage of control in an issuing institution is acquired or sold. The disclosure requirements apply to holdings of shares and voting rights in an 'issuing institution'. Issuing institutions are:

- Netherlands' public limited companies whose shares or depositary receipts are admitted to trading on a regulated market in an EEA member state; and
- non-EEA companies whose shares or depositary receipts are admitted to trading on a regulated market in the Netherlands.

An open-end or semi open-end collective investment undertaking is not considered to be an issuing institution.

The threshold values which trigger notification requirements if reached or crossed with respect to Netherlands public limited companies and non-EEA companies of which the Netherlands is the home member state within the meaning of the Transparency Directive are: 5%, 10%, 15%, 20%, 25%, 30%, 40%, 50%, 60%, 75% and 95%. There is a proposal to add the threshold of 3% and there are proposals to make it possible for the board and shareholders to know who the shareholders are and if a shareholder owns 10%, what their intentions are.

The thresholds apply to non-EEA companies whose shares or depositary receipts are admitted to trading on a regulated market in the Netherlands and of which the Netherlands is the host member state within the meaning of the Transparency Directive. Shareholders who have voting agreements must register as a concern if together they exceed the threshold.

The situations in which a person is deemed to hold voting rights include:

- that are held by a third party with whom it has entered into a contract which provides for a temporary and paid transfer of voting rights; or
- that it could exercise as proxy holder at its own discretion.

## Ongoing Disclosure Obligation

As from the first public announcement, the bidder and the target company have an ongoing obligation to provide the AFM with a statement of the transactions in the securities to which the envisaged public offer relates, unless the AFM has granted exemption to this rule.

## Consultation of Shareholders and Irrevocables

The offerer and the target company are allowed to approach (large) shareholders and discuss an envisaged public offer prior to the first public announcement regarding such an offer. Such contact with (large) shareholders is permissible provided the consultation is limited to the extent reasonably necessary to determine whether the offer will be successful and appropriate measures are taken to ensure confidentiality and compliance with the rules prohibiting the use of price sensitive information.

It is common to acquire irrevocable undertakings from (large) shareholders to tender their shares under a public offer prior to the first public announcement. Irrevocables are not considered a violation of the prohibition to use price sensitive information, provided the irrevocables state exactly how many shares the shareholder agrees to tender.

If (large) shareholders are approached regarding an envisaged public offer, these shareholders become insiders and are no longer allowed to trade their shares or inform anyone about the envisaged public offer. The irrevocables and the information provided to such shareholders should be made public at the time the public offer is issued.

## ISSUANCE OF A PUBLIC OFFER

### Standard Timeline

For the issuance of a public offer the following indicative time schedule may be regarded as a standard timeline for the offer procedure of a friendly cash offer.

DAY	ACTION
-30 to -1	Negotiations between offerer and target, which lead to conditional or unconditional agreement.
-1	A pre-notification is sent to the AFM and Euronext Amsterdam.
+0	A first public announcement and press release are to be dispatched before the opening of the stock market, with copies to the trade unions and the Social Economic Council. There is also an ongoing obligation of notification to the AFM.
+1	A request for advice is to be submitted to the works council.
+1 up to and including +29	Representatives of the trade unions and the target company's works council are to be consulted.
+28	Ultimate day of second press release with the AFM announcing when the offer document will be filed with AFM for consent.
+28 to +70	Obtaining of the final (positive) advice from the target company's work council and completion of consultations with the trade unions.
+28 (to +70)	Filing offer document with AFM.
+38 (to +80)	AFM must give its decision within 10 working days after filing.
+44 (to +86)	Offerer must make offer document public within 6 working days after AFM's decision. Start tender period 4 to 10 weeks.
+68 (to +150)	6 working days before the end of the tender period an extraordinary meeting of shareholders of the target company should take place, in which the board of the target informs the shareholders.
+74 (to +156)	End of the acceptance period of 4 to 10 weeks, if not extended by 2 to 10 weeks.
+77 (to +159)	3 days after the end of the acceptance period the offerer must announce whether the public offer is declared unconditional.
+80 (to +162)	Settlement will occur.
DAY	ACTION

In the case of a hostile takeover, the above schedule also applies from +0, the first announcement.

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## CONTENT OF THE OFFER DOCUMENT

### Announcement of Public Offer

Within 6 days of obtaining consent from the AFM the offerer shall announce its offer by means of an offer document listing the required information. The availability of the offer document must be publicly announced.

### Disclosure of Information

An offer document for a public offer shall include the information required by the provision of articles 9g and 9p Bte.

Should the offerer submit a friendly exchange offer, the information required by article 9n Bte must also be included in the offer document.

### Certainty of Funds

Since the implementation of the Takeover Directive the offerer must provide certainty of funds.

### Conditions to the Public Offer

All conditions to the offer must be inserted into the offer document. However, if the price or exchange ratio is publicly announced the offerer should also announce the conditions to its offer known at the time of the offer, except for the standard conditions, which are:

- a minimum percentage of all the shares must be offered, usually 95%;
- a third-party public offer has been made;
- new circumstances arise not known to the offerer;
- the AFM gives a public rebuke;
- the removal of anti-takeover measures and amendment of the articles of association;
- competition clearances.

Non-standard conditions could include::

- the receipt of certain notifications of the AFM;
- the receipt of a judgment or decree by means of which the offer will be delayed or prohibited;
- the passing of certain resolutions in the general meeting of shareholders of the target company or the offerer; and
- resignation of key personnel.

As soon as the offerer can determine that a condition to its offer will not be fulfilled, the offerer must publicly announce this event without delay and also its decision as to whether the offer is withdrawn as a result.

No conditions may be made where the condition's fulfilment depends on the will of the offerer.

### **Regulatory Approvals**

Depending on the type of offerer, the type of target company, and the businesses of both companies, competition and security regulatory approvals and filings from the Netherlands and the EC, as well as other jurisdictions, may be necessary and may influence the timeline of the envisaged public offer.

### **Tendering of Target Shares**

The holders of the target company's shares to which the public offer relates may be tendered from the start of the acceptance period. The acceptance period starts on the first trading day following the date of the public announcement stating the availability of the offer document.

As stated above, the minimum acceptance period will be 28 days. The maximum limit of the acceptance period is 70 days. The convocation of the extraordinary general meeting of shareholders of the target company will take 15 days, which the target company is obligated to hold a minimum of 6 days before the end of the acceptance period.

Holders of target company's shares are usually requested to make the tendering of their shares known through their bank or stockbroker to the appointed exchange agent.

### **Recommendation by Target**

In the event of a firm offer, the target company must hold an extraordinary general meeting of shareholders to discuss the offer as laid down in the offer document. In this extraordinary general meeting, the board of managing directors and the board of supervisory directors should provide all information necessary to assess the offer, unless this is inconsistent with a material interest of the target company.

The target company may conduct an informative extraordinary general shareholders' meeting and may also submit to the shareholders' meeting certain decisions to be made (for example, appointment of members of the board of managing directors and/or board of supervisory directors or the amendment of the articles of association).

The target company must make available a notice to its shareholders ultimately four days before the extraordinary general meeting. Insofar as the following information has not been included in the offer document, this notice must include:

- an explanation of the management's position;
- information on the equity and results of the target company and, if more than one quarter has expired, the available information on the current financial year, which the shareholders will need in order to make an informed opinion on the offer; and
- other information necessary for a good evaluation of the offer.

In a friendly offer the board of managing directors and the board of supervisory directors are likely to request a fairness opinion from an investment bank. In such an opinion, the bank concerned will declare whether the offered price or exchange rate is fair. The managing and supervisory boards will request such an opinion for two main reasons:

- in order to prevent liability for a potential unfair offer; and
- to inspire confidence with the target company's shareholders.

The fairness opinion is generally incorporated into the offer document.

### **Right to Withdrawal**

In general, shareholders of the target company do not have a right to withdraw the shares they have tendered under the offer. A right to withdrawal can exist however, as a result of an amendment of the offer or if the acceptance period is extended.

Shareholders who have tendered their shares irrevocably may withdraw their tendered shares in the event of a (qualified) third party offer. The offerer must include in the offer document the applicable provision which gives effect to such a right.

### **Competitive Offer**

Should a third party make a competitive offer, the competitive offerer will have its own timeline and be subjected to the same timing rules as the initial offer. In order to have the same acceptance period as the competitive offerer, the initial offerer could extend its own acceptance period.

If a competitive offer is made for the same shares prior to the end of the acceptance period of the initial offer, the board of managing directors of the Target Company will not need to convene another extraordinary shareholders meeting, but may simply make a public announcement as to its views on the competitive offer.

Should the initial offerer not amend its initial offer after the issuance of the competitive offer, then the offerer must immediately disclose the amount of shares that have been tendered under its offer as soon as the acceptance period has ended.

### **Settlement**

Ultimately, on the third trading day after the acceptance period has ended, the offerer must publicly announce whether it will settle its offer or whether there are still uncertainties regarding the fulfilment of conditions made in the offer. The offerer must include in this announcement the number and percentage of shares tendered under the offer. If the offer is not declared unconditional, the reasons therefore must be included in the announcement.

An extension of the acceptance period is allowed only if:

- shares tendered prior to the end of the original acceptance period may be withdrawn during the extension period;
- a firm offer's extension is publicly announced no later than the third trading day from the end of the original period, and this announcement also states the final date of the extended period; and
- the offerer publicly states any other information necessary for a good consideration of the offer or shall make such information available in a supplemental offer document.

It is common for an offerer to render the shareholders of the target company, which have not tendered their shares, an opportunity to tender after the offerer has declared its offer unconditional. This is possible during a subsequent acceptance period. There is no

formal legislation or regulation regarding the subsequent acceptance period. However, the AFM provides certain required conditions:

- the offerer must announce the subsequent acceptance period ultimately at the time it announces the offer is declared unconditional;
- in the announcement referred to above, the offerer must state that the subsequent acceptance period is subject to the same conditions as in the offer document;
- the subsequent acceptance period lasts for a maximum of 4 – 10 weeks;
- the offerer must publicly announce (ultimately on the third trading day following the end of the subsequent acceptance period) the amount and percentage of shares acquired during the subsequent acceptance period and the total amount and percentage of shares the offerer holds after the subsequent acceptance period; and
- the offerer may raise its price once.

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## POST OFFERING PHASE

### Successful and Unsuccessful Offers

If an offerer declares its offer unconditional, and therefore the offer should be regarded as successful, the offerer may not, for a period of one year following the date of the publication of the offer document, acquire shares of the same type to which the offer related on terms more favourable for the holders of these shares than if they would have tendered their shares under the original public offer.

This prohibition envisages preventing the offerer from making agreements with shareholders to acquire their shares for a better price than if these shareholders would have tendered under the original public offer. This prohibition is not applicable in the event that:

- the shares are acquired in the normal course of a purchase on a stock exchange;
- a third party subsequently launches a new public offer; or
- the squeeze-out procedure is applied.

If an offer is unsuccessful, a standstill period will not be applicable.

### Delisting

After the offerer has made a successful public offer, the offerer may decide to delist the target company from Eurolist by Euronext Amsterdam. Maintaining the listing is not cost efficient because the various rules of the exchange must be complied with.

The policy of Euronext Amsterdam with respect to delisting shares is laid down in an announcement. Pursuant to the announcement of Euronext Amsterdam shares of a certain type can be delisted from Euronext Amsterdam's stock exchange at the request of the offerer or the target company in the following cases:

- if a public offer becomes unconditional, and after such public offer the offerer holds at least 95% of the shares, and the target company agrees to the delisting;

- if the offerer holds at least 95% of the shares other than by means of a public offer, and the target company agrees to the delisting provided that the other shareholders are offered an exit arrangement as described in more detail below;
- if several shareholders acting in concert hold at least 95% of the shares, and the target company agrees to the delisting provided that the other shareholders are offered an exit arrangement as described in more detail below; or
- if the shares listed on Euronext Amsterdam's stock market have also been listed for at least 12 months on another regulated and sufficiently liquid market that offers, in Euronext Amsterdam's opinion, adequate safeguards for the protection of investors and the proper functioning of this market.

If the conditions in one of the above cases are met and the target company or offerer wants to proceed with the delisting, a request to that effect must be submitted to Euronext Amsterdam. If Euronext Amsterdam decides in favour of the request, delisting will take place 20 trading days after publication of the decision, or later if this is specified in an exit arrangement.

An exit arrangement is defined as:

- a public offer for listed shares;
- a legal buyout arrangement involving the listed shares;
- an offer by the target company to buy the listed shares that remains open for a period of 20 trading days; or
- an arrangement that meets Euronext Amsterdam's requirements regarding the protection of investors and the proper functioning of the market if and insofar as the AFM has granted full or partial dispensation from the rules regarding offers.

Such an arrangement must specify that:

- it applies to all remaining shares or depositary receipts for shares of a certain type;
- the offer shall remain open for 20 trading days;
- the offer is based on the exchange price and/or the intrinsic value of the securities prior to the initial announcement of the exit arrangement.

The shares of the target company will not be delisted if Euronext Amsterdam is of the opinion that this would be detrimental to the protection of investors or the proper functioning of the market.

### **Buy-Out Proceedings**

If the offerer has acquired 95% or more of the issued share capital after a public offer of the target company, the most common way to acquire 100% of the target company's shares is through the statutory buy-out proceedings. By means of this procedure, the remaining shareholders can be forced to transfer their shares to the offerer. The Enterprise Chamber of the Court of Appeal in Amsterdam is the competent authority to render a decision on such a claim and will determine the value of the minority shares to be transferred.

A claim instituted by the offerer will likely be allowed, as only a limited number of restrictive defences are available for the remaining minority shareholders. In principle, the Enterprise Chamber shall only reject a claim if:

- the other shareholder would sustain serious tangible loss by such transfer notwithstanding compensation;
- the other shareholder is the holder of a share in which, pursuant to the articles of association of the target company, a special right of control of the target company is vested; or
- the offerer has renounced its power to initiate such proceedings against a minority shareholder.

### **Dilution of Minority Interest and Post Offer Mergers**

In addition to the statutory squeeze-out proceedings, and depending on the state of affairs after the offerer has declared its public offer unconditional, an offerer may also seek other means to dilute minority shareholders not tendering their shares under the public offer. These means of dilution exist below the aforementioned 95% threshold and include:

- an asset sale followed by a liquidation;
- a legal merger;
- a legal split-off; and
- open market purchases.

In addition to other legal remedies, the minority shareholders could claim the annulment of any resolution taken by a corporate body of the Dutch company (for example, a management board resolution or shareholders resolution) on the grounds that the rules of reasonableness and fairness were violated.

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## **IMPLEMENTATION OF TAKEOVER DIRECTIVE**

### **Introduction**

The Takeover Directive was implemented into Dutch law on 28 October 2007

The distinction between firm or full, partial, tender offers will be maintained under the new regulations. However, after the incorporation of the new rules a 'firm offer' will be referred to as a 'full offer'. The major change with regard to the tender and partial offer rules is that a partial or tender offer may not result in the acquisition of more than 30% of the voting rights of the target company. Due to this change, the partial and tender offer rules will be in line with the mandatory offer rules.

### **Supervisory Authority**

The Netherlands supervisory authority of the financial markets, the AFM, is appointed to oversee the compliance with the legislation and regulations by the offerer and the target company as well as the respective managing directors and supervisory directors involved. The AFM supervises the conduct and provision of information by all parties on the financial markets in the Netherlands, whether on the savings, lending, investment or insurance markets. In accordance with its articles of association, the AFM's objectives are to promote an orderly and transparent market process on the financial markets,

preserve the integrity of relations between market players, and protect the consumer. Three sub-objectives serve as a guideline to the AFM:

- to promote access to the market;
- to promote the efficient, fair and orderly operation of the market; and
- to guarantee confidence in the market.

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## IMPORTANT REVISIONS

### Restrictions on defence mechanisms

This paragraph discusses the ways the articles 9, 11 and 12 of the Takeover Directive have been implemented in the Netherlands.

The new rules regarding the restrictions on the transfer of shares are laid down in article 359b of Book 2 of the Dutch Civil Code and applicable to Netherlands companies which have shares listed on a regulated market in the European Community.

Article 395b gives target companies the ability to incorporate in their articles of association certain actions in the event of a hostile or unsolicited offer. These are:

- the target company will not take any ad hoc defence measures; and
- an offerer which has acquired 75% or more of the issued and outstanding share capital of the target company may put permanent defence measures out of order in a shareholder's meeting.

Both situations are optional for the target company, which may 'opt-in' or 'opt-out' of such a protected character.

### Not take any ad hoc defence measures

Sub (a) of paragraph 1 of article 395b specifies that the articles of association of the target company may provide that, after the first announcement of a public offer, the target company may not perform any legal action which might frustrate the success of the public offer. Two exceptions will exist to this proposed rule. The first exception occurs when the potential impeding action has been approved by the general meeting of shareholders of the target company. The second exception allows the target's board of directors to explore an alternative public offer from a 'white knight'.

In addition, article 359b paragraph 1(b) provides that a target company may provide that resolutions duly resolved before the public offer, but which have not yet been fully executed, may not be further executed if this would frustrate the success of the public offer.

### Putting permanent defence measures out of order

Pursuant to article 359(b) paragraph 2, the articles of association of the target company may provide that an offerer, which has acquired 75% or more of the issued and outstanding share capital of the target company, is authorised to convene a general meeting of shareholders, wherein any special rights of shareholders regarding appointment and dismissal of managing board and supervisory board members will not apply.

## **Reciprocity**

Due to the reciprocity rule, an unprotected company may incorporate defence measures should it be targeted by an offerer which itself has put defence measures in place. A target company may also call on the reciprocity rule if the offerer has incorporated defence measures the target company has not put in place. If a foreign company issues a public offer on a Netherlands target company which applies to the rules laid down in article 359b paragraph 1 and 2, then article 359b paragraph 4 provides that it is being reviewed whether the foreign company has incorporated 'a similar provision', if not the Netherlands target company is allowed to call on the reciprocity rule.

## **Disclosure Obligations Listed Company**

Under article 10, the obligation for listed companies falling within the scope of the Takeover Directive to disclose information such as the corporate structure, restrictions on the transfer of shares of the company, important participations, holders of shares in the company with special voting rights and other required information of the company, is implemented in article 392 in conjunction with article 391 paragraph 4 of book 2 of the Dutch Civil Code.

On the basis of article 391 paragraph 4, the remainder of article 10 of the Takeover Directive is implemented in further regulations. In order to prevent the obligation to disclose the information in both the annual report and the annual accounts, an exemption will be introduced.

## **First Announcement and Offer Process.**

The first announcement must be made as soon as the offerer and target company have reached a conditional agreement on the public offer. The agreement will normally be conditional on the outcome of the advice procedure with the works council and the consultation procedure with the trade unions.

The first announcement must set forth the intended price or exchange rate, if such has been agreed upon. A guidance or temporary price or exchange rate may also be issued, as the final price or exchange rate need only be included in the offer document. Before the issuance of the public offer, as soon as the definite price or exchange rate has been set, the price or exchange rate must be publicly announced.

Within four weeks after the first announcement a second announcement must be made and the offerer must file a request for approval of the offer document with the AFM within 4 to 10 weeks. Within 10 working days, the AFM must decide whether it approves or disapproves the offer document. If the AFM has approved the offer document, the offerer must issue the public offer within 6 working days. The public offer is issued by means of making the offer document publicly available. The acceptance period commences on the first trading day after the public offer has been issued. The minimum acceptance period will be 28 days and the maximum acceptance period will be 10 weeks.

Under the new regulations, an offerer may extend the acceptance period only once. The extension period shall be a minimum of 2 weeks and maximum of 10 weeks.

## **Certainty of Funds**

Another new rule under Netherlands law is the proposed certainty of funds rule. This rule obligates an offerer to ensure, ultimately by the time the request for approval of the offer document is lodged with the AFM, that the offerer is able to make a payment in cash, or has taken all other reasonable measures to perform any other means of payment necessary to settle the issued offer. The offerer must make a public announcement as soon as the offerer is able to make the payment in cash or has taken the measure to perform the other means of payment.

## Disclosures in Offer Document

The new disclosure obligations do not differ substantially from the obligations under the current regulations.

The disclosures are laid down in annexes to the Bob. The two main new disclosure obligations are:

- the obligation to disclose break fee agreements; and
- the content of obtained fairness opinions.

## Mandatory Public Offer

A major change resulting from the implementation of article 5 of the Takeover Directive (through the Implementation Act) will be the mandatory public offer rule.

Pursuant to this rule, the person or entity that acquires "considerable control" in a listed company is obligated to issue a public offer on all the outstanding shares and depository receipts of such listed company. "Considerable control" is deemed to occur when such acquiring person or entity is able to exercise 30% or more of the voting rights in the general meeting of shareholders of the company.

The obligation to issue a public offer will also apply to persons or entities which acquire a considerable control in mutual consultation, together with other persons or entities. Pursuant to the proposed legislation, persons or entities are deemed to act in mutual consultation:

- when persons or entities agree to work together with the aim of acquiring considerable control in the listed company; or
- when the co-operation is with the listed company and this agreement is aimed at the frustration of the success of an announced public offer.

The mandatory public offer should be issued against an equitable price. Pursuant to the proposed legislation, an equitable price is one which equals the highest price paid by the offerer in the period one year before the mandatory public offer is announced. When the offerer has, after the announcement but before the settlement of the offer, acquired shares for a higher price, such price shall be regarded as the equitable price.

Certain exceptions apply to the obligation to issue an offer. These include exceptions with regard to :

- open-ended investment companies;
- when depository receipts of shares have been issued by a trust office fund, the trust office fund is exempted; and
- entities or persons that already have a considerable control at the time of implementation of the Netherlands legislation and regulations on public offers.

In principle, if a person or entity should acquire considerable control, but is able to dispose such control within 30 days after the acquisition, then this person or entity is not obligated to issue a public offer.

## **Squeeze-Out and Sell-Out**

On the basis of article 15 and 16 of the Takeover Directive, the Netherlands legislator has incorporated the possibility for a majority shareholder to squeeze-out a minority shareholder and for a minority shareholder the possibility to be sold-out by the majority shareholder following a mandatory or a voluntary offer.

The squeeze-out proceedings may be initiated against the remaining shareholders if one or more co-operating shareholders provides 95% or more of the share capital of the target company, which also represents at least 95% of the voting rights of the share capital of the target company. The remaining shareholders of the target company have a sell-out right against the offerer if the offerer has acquired 95% of the share capital representing at least 95% of the voting rights.

Both the sell-out and the squeeze-out proceedings must be initiated within 3 months after the acceptance period of the public offer has lapsed and must be brought before the Enterprise Chamber of the Amsterdam Court of Appeal. If the claim is honoured, the court will determine what the equitable price will be for the transferred shares in the target company.