# The Netherlands

## Negotiated M&A Guide

### Corporate and M&A Law Committee

## Contact

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## 1 Introduction

This chapter sets out a general overview of negotiated acquisitions of private companies in the Netherlands. This chapter should be read as an introduction to possible acquisition structures and typical provisions included in Dutch acquisition agreements.

### 1.1 Legislative and legal context

Dutch statutory law does not provide for a single code or statute that specifically regulates the acquisition agreements used in the sale and purchase (either by way of transfer of shares or business) of private companies. Rather, the Dutch law principle of freedom of contract (*contractsvrijheid*) is the underlying leading principle which defines the content of the agreements used in these acquisitions. As a result, the specific clauses of acquisition agreements are, in general, not specifically regulated by statutory law and may differ on a case-by-case basis. Nonetheless, many acquisition agreements will take similar form and will have, to a large extent, similar content. This is the result of both a developed market practice that takes inspiration from Anglo-Saxon practice, and certain other general statutes and codes that are applicable to the sale and purchase of private companies. By contrast, the statutory legal merger, as a form of acquisition of a private company, is strictly regulated, as further set out below in sections 3.5 and 3.6.

Relevant corporate and other legislation within the context of acquisitions of private companies are:

- The Dutch Civil Code ("**DCC**"), in particular Book 2 (*Boek 2 Burgerlijk Wetboek*) and Book 6 (*Boek 6 Burgerlijk Wetboek*), as well as certain provisions of the Commercial Code (*Wetboek van Koophandel*) and, to a limited extent, of Book 3 of the Dutch Civil Code (*Boek 3 Burgerlijk Wetboek*);

- the Dutch Works Council Act (*Wet op de Ondernemingsraden*);

- the 2000 Dutch Merger Code (*SER-besluit Fusiegedragsregels 2000*); and

- the Dutch Competition Act (*Mededingingswet*).

Although the legal system of the Netherlands can be characterised as a civil code system, statutory law is not the only source of law. In practise, judgements of the Supreme Court and, to a lesser extent, of the appellate courts, influence subsequent court decision. However, no formal rules with respect to the adherence to precedents exist.

## 2 Preliminary Dutch law considerations

The following sections briefly describe some Dutch law considerations to be taken into account in the acquisition of Dutch private companies.

### 2.1 Types of companies

Dutch law provides for two types of companies: the "*naamloze vennootschap*" ("**N.V.**") (company with limited liability) and the "*besloten vennootschap met beperkte aansprakelijkeid*" ("**B.V.**") (private company with limited liability). The N.V. can issue its shares in bearer form, in book-entry form only or in book-entry form with corresponding share certificates. The B.V. can issue its shares in book-entry form only (as registered shares) and is not allowed to issue share certificates.

## 2.2 Two-tier governance structure and duties of directors

Dutch companies generally have a two-tier board system consisting of a management board and a supervisory board. Large companies will have a supervisory board with considerable powers. Each of the boards has the duty to perform their management or supervisory duties properly in the interests of the company. These interests include the interests of all stakeholders, such as employees, creditors, suppliers, customers, and the environment, as well as the shareholders. In other words, neither of the boards only have a fiduciary obligation to the shareholders.

## 2.3 Transfer of shares

The registered shares issued by a company can only be transferred by execution of a deed of transfer before a Dutch "*notaris*" (civil law notary). Upon the execution of the deed of transfer, the transfer will be valid vis-à-vis the transferor, the transferee and the company. However, in order for the transferee to exercise any right regarding its shares, it will be necessary for the company to acknowledge the transfer, unless the company itself was a party to the deed of transfer. Alternatively, a copy of the deed of transfer may be served upon the company, with the same effect as if the company had formally acknowledged such transfer.

## 2.4 Transfer restrictions

The transfer of shares in a B.V. must be restricted in its articles of association, either by granting a right of first refusal (pre-emptive right) to the other shareholders or by making the transfer of shares subject to the prior approval of a corporate body of the company, such as the general meeting of shareholders, the managing board or the supervisory board. The articles of association of an N.V. do not need to contain any limitation on the transfer of shares.

## 2.5 Financial assistance

Under Dutch financial assistance rules, a B.V. is prohibited from rendering financial assistance to others to acquire shares in its share capital and may not provide collateral, a price guarantee or otherwise guarantee or bind itself jointly and severally with or for third parties, for the purpose of the subscription or acquisition by third parties of shares in its own capital. A B.V. may provide loans for the purpose of the subscription or acquisition of shares in its capital, to the extent of its distributable reserves and to the extent so permitted by its articles of association.

Similarly, an N.V. may not provide collateral, a price guarantee or otherwise guarantee or bind itself jointly and severally with or for third parties, for the purpose of the subscription or acquisition by third parties of shares in its own capital or of depositary receipts issued therefor. In addition, an N.V. may only grant loans for the purpose of the subscription or acquisition by third parties of shares in its own share capital or of depositary receipts issued therefor, if the management resolves thereto and certain specific conditions have been met.

# 3 Possible structures for the acquisition of a private company

## 3.1 General

In the Netherlands, private companies are most frequently acquired in the following ways:

- the acquisition of a controlling stake in, or the entire share capital of, the target company;

- the acquisition of all or substantially all of the assets of the target company; or

- by way of a statutory merger.

It is also possible to use these methods in combination. For example, if the target is comprised of two corporate entities, the purchaser may wish to acquire the share capital of one entity whilst acquiring the business assets of the other.

### 3.2 Share versus asset acquisitions

A share purchase and an asset purchase have fundamental differences. If shares in a company are purchased, all of the assets, liabilities and obligations of that corporate entity are acquired whether or not the purchaser knows about them. If assets are purchased, only the identified assets and liabilities which the purchaser agrees to purchase, and which are specified in the agreement, will be acquired or assumed.

In a share purchase, shares are transferred to the purchaser by means of a notarial deed of transfer. Where assets are transferred (as in the case of an asset purchase), those assets need to be identified and transferred pursuant to specific forms of transfer. The form of transfer and the formalities required will differ depending on the nature of the asset being transferred.

More consents and approvals are likely to be required on an asset purchase than on a share purchase. This is because there may be restrictions on the transfer of an asset or liability from one corporate entity to another (so called “assignment restrictions”). These restrictions will apply on a transfer of that asset or liability but will not apply on the transfer of the entity owning that asset or liability.

There may also be restrictions on a change of control of the corporate entity owning the asset (so called “change of control” provisions) and these will be triggered on a share purchase.

The other key commercial difference between the two types of transaction is in the nature of what the purchaser acquires. In a share purchase, the purchaser acquires a company which owns a business and is running it as a going concern. An asset purchase will not transfer contracts or existing trading arrangements to the purchaser, unless these are capable of being transferred and are specifically identified in the acquisition agreement. The issues which tend to influence the structure chosen in practice (that is, whether the business is acquired by way of a share purchase or an asset purchase) are as follows:

*Liabilities:* a seller will often prefer to transfer the company or group of companies in its entirety by structuring the acquisition as a share purchase. In these circumstances, the seller's ongoing liability is limited to the extent of the warranties and indemnities it gives to the purchaser, the full ambit of which it can negotiate. By contrast, the purchaser may have reasons for preferring an asset purchase. It may be concerned about particular liabilities in the target company (such as product liability claims or other un-quantified or unknown liabilities) and may therefore prefer to choose which assets to acquire, and thereby only assume known and quantified liabilities.

*Tax:* share purchase transactions are in most cases Dutch tax neutral and are therefore often preferred from a seller’s perspective. Share purchases generally do not attract Dutch transfer taxes, stamp duties or VAT. Capital gains on such transactions are usually not subject to Dutch taxation. Ordinarily, the tax basis of the target’s assets and liabilities is not affected by a sale and transfer of its shares.

By contrast, an asset purchase generally triggers taxable capital gains for the seller and results in a step-up of the tax basis of the assets for the purchaser. For that reason, purchasers may prefer an asset purchase over a share purchase. Under certain circumstances, sellers may also prefer an asset purchase, for example if assets are sold at a loss or if the seller has losses to offset a capital gain. An asset purchase generally does not attract Dutch transfer taxes, stamp duties or VAT, except for a transfer of Dutch real estate which is subject to a 6% real estate transfer tax.

*Partial sale:* if the business for sale forms one part of, but not the whole of, the assets of a corporate entity, it may be more practical to structure the sale as an asset sale. Otherwise, it will be necessary first to set up a new company and transfer (or "hive off") the division to that company.

*Consents:* where third party consents are required to transfer assets, and it is commercially unattractive or thought to be impossible to obtain any or all of the necessary consents, a share purchase may be the only practical way of acquiring the target business. It is important to bear in mind that consents may also be necessary on a share purchase where the target company is party to agreements with change of control provisions. These issues are likely to be assessed after some preliminary due diligence of the key contracts of the target.

### 3.3 Acquisition of shares

The most common way to acquire a private company in the Netherlands is to acquire a controlling interest in the equity of a company through the acquisition of its shares. An acquisition agreement for shares will typically include provisions related to the following.

As set out in section 2.3, the transfer of title to registered shares is effected by means of a deed of transfer executed in the presence of a Dutch civil law notary. In an attempt to limit the possibility of abusing the corporate persona of limited companies, a duty has been created for the notary executing the deed to conduct an investigation into the validity of previous transfers of title. Defects in such transfers or the authority of the previous transferors are frequently found. In order not to unduly frustrate otherwise valid transactions, a number of rules were created to remedy such past defects.

Based on a review of corporate legal issues – known as due diligence and further explained in section 4.4 – the purchaser will seek to limit its risk by obtaining representations and warranties relating to the company Such representations and warranties, provisions on the computation of damages, limitations to the recoverability of losses and disclosures by the seller will make up a substantial part of the acquisition agreement and the time taken to negotiate it.

In relation to tax and environmental matters, the purchaser will often negotiate a specific indemnity not subject to the limitations of the representations and warranties. Specific industries or risks may give rise to further indemnities being included in the acquisition agreement.

Frequently, the right to rescind the acquisition agreement for breach of contract is waived in transactions dealing with transfer of corporate control. Although such a rescission would not have a retroactive effect, it would create a duty to negate all actions rendered under the agreement. In general, such an approach is not considered to be feasible, practical or appropriate in such transactions. For much the same reason, the right to cancel for mistake is often waived. If not waived, such a cancellation could be effected by simple notice and would have retroactive effect.

### 3.4 Acquisition of assets

An acquisition of the assets of the target company will be common where the purchaser seeks greater certainty as to the assets and liabilities that it will be acquiring. As described in section

3.2, other factors may also be relevant. An acquisition agreement for assets will typically include provisions relating to the following.

An asset transfer may be a laborious process as it can only be put into effect by observing the rules of law relating to the conveyance of different types of property. For transfers of tangible, non-registered property, the transfer of possession suffices. For real estate and other registered property, a notarial deed of transfer and registration is required. The transfer of contractual rights and claims may only be affected through a tripartite agreement between the transferor, the transferee and the contract party/debtor, or a deed of transfer and notification to the contract party or debtor. Intangibles are transferred in the manner prescribed in the legislation pertinent to each specific intangible asset. Therefore, in the documentation of the transaction, more elaborate provisions are necessary, including those required to regulate the conduct of the business while the legal transfer of all rights and duties is being completed.

As in other EU Member States, special protection is granted to the employees in a business through an automatic transfer of most of their legal rights to the purchaser of the business. However, this protection does not extend to certain types of pension rights of such employees.

### 3.5 Statutory mergers

The Civil Code defines a statutory merger as a legal act between two or more legal entities whereby: (i) one entity acquires all of the assets and liabilities of the other by universal transfer of title, or (ii) a new legal entity is established by the merging entities through the said legal act and acquires all of the assets and liabilities under universal transfer of title. A statutory merger is only possible between legal entities which have the same legal form (e.g. between companies or between foundations). Legal mergers can take a number of different forms:

- Merger between disappearing company A and acquiring company B. Company A is absorbed by company B and the shareholders of company A become shareholders in company B.

- Merger between disappearing company A, disappearing company B and acquiring company C to be created by companies A and B upon the merger. Companies A and B are absorbed by company C and their shareholders become shareholders of company C after the merger.

- Merger between disappearing company A and its 100% parent company B as acquiring company. Company A is absorbed by company B. This type of merger does not lead to the allocation of shares in parent company B (so-called upstream parent-subsidiary merger).

- Merger between acquiring company A and its 100% parent company B as disappearing company. Company B is absorbed by its subsidiary company A. This type of merger leads to the allocation of shares in subsidiary company A to the shareholders of parent company B (so-called downstream parent-subsidiary merger).

- Merger between disappearing company A and acquiring company B. The shares in companies A and B are held by their mutual parent company C. Company A is absorbed by company B. In this case the merger does not necessarily lead to allocation of shares in company B to parent company C (so-called sister company merger).

- Merger between disappearing company A and acquiring company B. Company A is absorbed by company B, but after the merger the shareholders of company A become shareholders of company C, not of acquiring company B (so-called triangular merger).

Unlike acquisition agreements for the purchase of shares or assets, the content of the relevant documentation prepared for a legal merger is heavily regulated in Dutch statutory law. In short, the merger procedure commences with a preparatory and publication phase during which:

(i) the management board of the merging companies prepares a merger proposal (which includes an explanatory memorandum);

(ii) the accountants prepare reports related to the companies and, where applicable, the share exchange ratio; and

(iii) the proposal and reports are made available to the public.

Creditors of the company or companies may object to the merger by filing a petition, at any time during the one month period following the notice of publication of the proposal and reports. In addition, creditors may require that adequate security is provided to them for their outstanding claims.

After the completion of the preparatory activities, the competent corporate bodies of the companies (as specified in the articles of association) may adopt the resolution on the merger. If the shareholders are the competent corporate body, the legal merger may only proceed if it is approved by that special majority which is required to amend the articles of association (or, if relevant, the different majority explicitly set forth in the articles of association for approving a legal merger), of both sets of shareholders. Following this resolution, the statutory merger is effected through a notarial deed.

### 3.6 Triangular mergers

As set out above, Dutch law provides for a statutory triangular merger by allowing the shareholders of a disappearing company in a statutory merger to become the shareholders of a group company of the acquiring company. Such a merger is permitted only if such group company (the shares of which will be provided to the shareholders of the disappearing company, itself or together with other group companies) holds the entire issued share capital of the acquiring company and has resolved to effect such a merger in conformity with the rules applicable to the issue of shares. This provision is invoked in cases where the acquiring company uses an operating company to act as surviving entity in a statutory merger. In this case, it may be considered appropriate to provide the shareholders of the disappearing entity with shares in the capital of the holding company of the group of which the surviving entity forms a part.

The statutory triangular merger can be used as a mechanism for corporate restructuring, and in connection with, preceding or following a takeover and as a "squeeze-out" mechanism.

## 4 Pre-agreement

### 4.1 Confidentiality letters

Confidentiality letters (agreements) are commonly entered into on acquisitions of private companies in the Netherlands. Even in the absence of such a letter, privacy protection law may prohibit the disclosure of certain types of information. It is not usual for the target company to be made a party to the confidentiality letter. Restrictive covenants in the confidentiality letter are generally enforceable and under Dutch law there are no restrictions on the duration of a confidentiality letter.

In the case of a breach of a confidentiality letter, the party in breach may be subject to a claim for damages, injunctive action or both. In addition, it is possible for the confidentiality letter to contain a penalty clause. In some circumstances, substantial penalties may be agreed.

## 4.2 Letters of intent

Letters of intent (under a variety of different names) are commonly entered into on acquisitions. Issues commonly covered in a letter of intent are:

- Exclusivity;
- Structure of a possible acquisition;
- Purchase price and its formula;
- Conditions precedent (such as, approval of supervisory board, discussions with the trade union and works council and merger clearance);
- Due diligence;
- Timetable;
- Whether provisions are binding or non-binding;
- Confidentiality (also depending on whether a confidentiality letter was entered into);
- Governing law and regulation of disputes; and
- Costs.

The substance of the document, rather than its name or form, will determine whether or not it is binding. If the parties want to ensure that the letter will not be legally binding they must include an express provision to this effect. The parties will generally wish some clauses to be enforceable, such as the confidentiality and the exclusivity clauses.

A court may decide, depending on various factors, that a letter of intent is binding even if it contains an express provision that it is not binding. Whether or not a letter of intent is binding is a question of construction for the court. In principle this will depend, among other things, on the wording of the document and other evidence as to the intention of the parties.

A non-binding letter of intent can give rise to a duty to negotiate in good faith (see section 5 below for further details). Usually, the parties to a letter of intent will address this issue contractually.

## 4.3 Lock-out and lock-in agreements

Under Dutch law, an agreement where the seller agrees not to negotiate with or provide information to another prospective purchaser for a period of time (often known as a “lock-out agreement”) is enforceable. The parties can agree that, until a certain date or event, the seller will not negotiate with other third parties or may so negotiate but only after having obtained the prospective purchaser's approval.

A so called “lock-in agreement” (whereby the parties agree to continue negotiations for a set period of time) is also enforceable under Dutch law. The parties can agree to negotiate further on the basis of an agreement in principle. Such an agreement in principle may contain conditions which must be satisfied for the obligation to negotiate to apply.

In the case of breach of a lock-out agreement, the non-breaching party will be entitled to damages for breach of contract. Such damages will include costs and, under certain circumstances, loss of profit. Under certain circumstances, it may be possible to obtain an injunction forcing the other party to continue negotiations.

It is becoming more common for the parties to agree to "break fees" whereby each party agrees to pay the other party a predetermined sum if the deal does not complete because of the "fault" of that party. However, break fees may not be enforced by a Dutch court if that court is of the opinion that the break fee is higher than the genuine cost of compensation.

### 4.4 Legal review/due diligence

Most acquisitions of private companies in the Netherlands are preceded by a legal due diligence review. Generally, such a review is conducted contemporaneously with financial, technical, environmental and tax due diligence. The purpose of such legal due diligence is to assist the purchaser in determining: (i) whether to proceed with the acquisition; (ii) what the appropriate purchase price is for the target; (iii) what warranties and indemnities to seek in the acquisition agreement; (iv) how to structure the transaction; (v) what consents and approvals will be required to effect the acquisition.

It should be noted that, under Dutch law, there is in many cases a duty on the purchaser to investigate and this creates the necessity for legal due diligence. However, Dutch law deviates from certain common law systems in that it does not apply a strict "*caveat emptor*" or "*periculum est emptoris*" rule. Although duty-bound to investigate, a party in negotiations may rely on the correctness of statements and disclosures made by the other party.

The extent and scope of such a duty varies with the factual circumstances of the transaction. Significant factors in determining whether or not a duty to investigate exists are the nature and complexity of the transaction, the existence of specialised knowledge amongst the parties concerned, the feasibility of an investigation and the relationship based on trust between the parties concerned.

An action to rescind an agreement for mistake may be barred in the case that the party instituting such an action was under a duty to investigate but failed to do so or decided not to obtain full information or further guarantees.

### 4.5 Works council advice

Dutch law requires a substantial amount of employee and labour organisation involvement at the early stages of the negotiations.

According to section 25 Works Councils Act ("**WCA**"), an "entrepreneur" must request the prior advice of the competent works council in respect of specific proposed decisions (and implementation thereof) on "business" matters, including the transfer of control of the enterprise or any part thereof. However, the WCA does not require that the works council approve the proposed acquisition.

The advice must be requested at such a time that it can substantially influence the decision to be made. In the request for advice to be submitted to the works council, the proposed decision should be described and the reasons for that decision should be set out. Moreover, the anticipated consequences of the decision for the employees working in the enterprise of the entrepreneur, and the measures which the entrepreneur intends to take to mitigate such consequences, should be explained. The proposed decision should be the subject of discussion in at least one consultation meeting.

There is no fixed period within which the works council must render its advice. It must be given a reasonable period to do so, which may vary from a few weeks to potentially several months. In practice, obtaining advice from the works council will take approximately six weeks, but if the works council requests additional information or proposes alternatives, the time may be longer.

After advice has been rendered, the entrepreneur is free to make a decision either following the advice or not. If the entrepreneur follows the advice, the decision may be executed immediately. However, the entrepreneur may not make a decision on the basis of reasons different from the reasons presented to the works council. Making a decision for different reasons would require a new consultation procedure.

The entrepreneur should, as soon as possible after the decision has been made, give written notice of its decision to the works council. If the decision is not completely in conformity with the works council advice, the entrepreneur must explain to the works council why it has deviated from the advice.

If the decision by the entrepreneur deviates from the advice of the works council, a suspension period of one month must be observed. During that period, the works council can challenge the decision before the Enterprise Section of the Amsterdam Court of Appeals (*de Ondernemingskamer*). The works council can bring an appeal against the entrepreneur's decision based on the fact that, in balancing the interests of those involved, the latter could not have reached his decision in all reasonableness. This suspension period can not be disregarded or shortened, unless the works council agrees.

### 4.6 Labour organisations/trade unions

The Merger Code is a code of conduct (not legislation) issued by the Social Economic Council and establishes rules for the protection of the interest of employees during merger negotiations. In the Merger Code, a merger is defined as "an acquisition or transfer of the direct or indirect control over an enterprise, or part of an enterprise, as well as the establishing of a group of enterprises".

The Merger Code provides a compulsory procedure for the notification of the relevant trade unions. These unions must be notified at such a time that they can substantially influence the realisation of the merger and the conditions of the merger. Hence, the test in terms of timing under the Merger Code is very similar to that under the WCA.

According to the Merger Code, the parties must inform the trade unions in writing about the merger and its expected legal, economic and social consequences. Also, information must be given about the measures the parties intend to take in connection with those consequences. The reason for this notification to the trade unions is to allow the trade unions the opportunity to express their opinion before the terms of a merger are finalised. The trade unions are allowed to request additional information about the merger and, primarily, its social consequences. The merger negotiations should be the subject of discussion in at least one meeting with the trade unions, which meeting must take place before the terms of the merger are finalised. In this meeting, the trade unions are given the opportunity to express their opinion. The trade union may decide not to honour its right to such a meeting. The Merger Code does not require that the trade unions approve of the merger.

If a public announcement regarding the preparation or realisation of a merger is made, the trade unions must be informed about the content of the announcement before it is made. Simultaneously with the notification to the trade unions, the secretarial department of the Social Economic Council must be informed in writing.

Therefore, unlike the WCA, the Merger Code does not provide for legal remedies by the relevant trade unions. However, the Merger Code Dispute Resolution Committee may rule that a party did not comply with the Merger Code. The Committee's decisions are public. Furthermore, it is generally held that the Merger Code contains unwritten rules of diligence and care and that the violation of the Merger Code may lead to injunctions against threatened non-compliance.

## 5 Dutch legal principles in relation to acquisition agreements

The Dutch Supreme Court has ruled that if parties enter into negotiations, their relationship is, from the outset, governed by the principles of fairness and reasonableness ("good faith"). As a consequence, each party must take into account the reasonable interests of the other(s) during negotiations.

The principle of freedom of contract is also one of the starting points of entering into agreements under Dutch law. As a result, there is also a freedom to withdraw from negotiations. However, based on the principle of reasonableness and fairness, pre-contractual good faith is deemed to exist between two negotiating parties. As a result, at a certain stage in the negotiations, the parties cannot terminate the negotiations without possibly being held obliged to compensate the other party for its costs, and, in certain circumstances, even its loss of profit. It may be possible in certain circumstances to obtain an injunction requiring the other party to continue negotiations.

## 6 Acquisition agreements

The following is a discussion of some typical material provisions found in an agreement setting out the terms of an acquisition of a private Dutch company. This section is not intended to be a comprehensive overview of all material provisions included in acquisition agreements, but rather focuses, in more detail, on a number of provisions that are typical to Dutch negotiated acquisitions of private companies.

### 6.1 Sale and purchase; consideration

The acquisition agreement will set forth the object of the transaction, being shares or the specified assets and liabilities. The consideration for the shares or the assets is generally calculated based on a purchase price mechanism, such as a cash free/debt free working capital calculation, a locked-box mechanism or an earn-out. In the case of a working capital calculation, the consideration to be paid at closing will be based on an estimated purchase price and estimated working capital adjustment. The consideration will be adjusted, post completion, based on the post-completion statements, according to a specified procedure agreed between the parties.

### 6.2 Conditions precedent

Acquisition agreements usually have a period of time between the signing of an agreement to acquire the shares or assets (commonly referred to as “signing”) and “completion” or "closing", which is the point of time at which the seller is legally obliged to transfer the target to the purchaser. This obligation to acquire (and transfer) the target is usually subject to certain conditions. If and when these conditions are satisfied or waived, completion occurs. Typically, if the conditions are not satisfied or waived by a certain date, the agreement terminates or completion is delayed by a specific period agreed between the parties.

Below, a number of typical conditions of completion (commonly referred to as "conditions precedent") are set forth and explained in further detail. Whilst a number of these conditions precedent stem from Dutch obligatory statutory law, the inclusion of other conditions precedent may depend on the bargaining power of both parties and their intended achievement of a certain level of deal certainty. A number of these conditions may also function as conditions to signing, to be fulfilled or waived before the acquisition agreement is entered into. To the extent relevant, this is indicated below.

6.2.1 Merger clearance

Merger control legislation must be taken into account in acquisitions of private companies in the Netherlands. The acquisition may be subject to (i) the merger control provisions of the European Union (as set forth in Regulation EC 139/2004), (ii) the merger control provisions of the Dutch Competition Act (*Mededingingswet*), or (iii) no merger clearance rules if it does not meet the relevant turnover thresholds in the Netherlands.

The provisions of the Dutch Competition Act governs concentrations[1] that exceed the following turnover thresholds:

(i) the undertakings concerned have a combined worldwide turnover of more than EUR 113.45 million; and

(ii) at least two of the undertakings concerned each achieve a turnover of at least EUR 30 million in the Netherlands.

If a transaction qualifies as a concentration and these thresholds are exceeded, prior notification should be made to the Dutch Competition Authority (*Nederlandse Mededingingsautoriteit* or *NMa*).[2] Notification can take place at such time as it is sufficiently clear that the parties intend to proceed with the proposed transaction. A qualifying transaction cannot be completed until it has been granted clearance by the NMa. If this standstill provision is breached, a maximum fine of 10% of the turnover of the relevant undertakings or EUR 450,000, whichever is higher, can be imposed.

6.2.2 Works council advice

The required works council advice, as described in section 4.5, is increasingly included as a condition precedent in acquisition agreements. To ensure that this condition precedent can be fulfilled if the works council's advice is not followed, the one-month suspension period provided in the WCA is often incorporated into the wording of this condition precedent.

6.2.3 Corporate approvals

Based on Dutch statutory law and the parties' articles of association, the parties should incorporate the relevant corporate approvals required for the transaction in the acquisition agreement. Often, the relevant approvals will have been obtained prior to the signing of the acquisition agreement.

6.2.4 No material breach of representations and warranties

As discussed in section 6.5, it is common for warranties to be repeated at completion. One condition may be that completion can not occur at a point in time if, at that point in time, any of warranties are untrue. It is common for a seller to seek to limit this condition so that it only applies if, by the warranty being untrue, it has a material

[1] The interpretation of "concentration" in EC Regulation 139/2004 is mirrored in the Dutch Competition Act.
[2] However, if the EU turnover thresholds are met, EU merger control rules apply and the notification should be made to the European Commission.

adverse effect on the target. This is particularly common if the seller if a private equity company. Certain “fundamental” warranties will be carved out (e.g. authorisation, organisation, title to shares etc.) so that if they are untrue, in any respect, the purchaser can choose not to proceed to completion.

This condition precedent may also include the absence of a breach by the seller of the agreement or of the pre-completion covenants set forth therein.

6.2.5 No material adverse change to the relevant business and/or the market

The extent of the material adverse change ("MAC") or material adverse event ("MAE") condition is mostly subject to negotiation between the parties, which are often driven by the intended level of deal certainty.

6.2.6 No prohibition of the completion of the transaction as a result of a decision by a government authority or legal action by a third party

Often worded as a condition to capture all enactments, issuances or enforcements by any government authority or law, judgement or injunction that can prohibit the acquisition agreement or the transaction, as well as all pending legal action or legal proceeding by a third party seeking to prohibit or restrain the completion of the transaction, this condition seeks to secure a right for the parties not to complete for a wide range of circumstances outside their control that prohibit or restrain completion.

**6.3 Pre-completion covenants**

Certain covenants may be given by the parties to an acquisition agreement relating to the period between signing of the acquisition agreement and completion of the transaction. These are often designed to ensure that the target continues to operate in a manner expected by the purchaser.

In general, the purchaser will require that the target carries on its business activities as a going concern in the ordinary course, consistent with past practice. In addition, the purchaser will require that certain material actions of the target are subject to its prior approval. It is common for the seller to agree to such pre-completion covenants.

Furthermore, the seller will typically agree to give the purchaser reasonable access to the books, records and management of the target between signing and completion and may agree to update the disclosure schedules between signing and completion and to advise the purchaser of any breach of its covenants in this period.

If the agreement terminates ahead of completion because of a breach of one of the convents, the parties generally bear their own costs without right of reimbursement.

**6.4 Post-completion covenants**

The seller and purchaser can choose to provide certain post completion covenants, but these may be limited both because of restrictions under law and because of the circumstances of the particular transaction.

The seller may give a covenant not to compete with the target after completion, but the period of time and geographical scope of this covenant will be limited by competition law. If the period of time is too long, a judge may not enforce this covenant. Generally, three years post completion is the maximum length of a non-compete covenant. Typically, the relevant provision in the acquisition agreement will refer to the period agreed between the parties as well as such period as is permitted under relevant law, if this is shorter, for the duration of the non-compete covenant. Private equity sellers will resist giving a non-compete covenant to avoid limiting the range of businesses they can invest in.

It is typical for such a non-compete covenant to include a covenant from the seller not to solicit the customers of the target. Furthermore, it is common for the seller to agree not to solicit the employees of the target, typically for a period of two to three years after completion.

The purchaser may also give certain covenants. For example, the purchaser may agree to make divestments required to achieve anti-trust clearance, provided that such divestments do not have a material adverse effect on the business of the target or the purchaser's group.

In the case of an asset purchase, the acquisition agreement will typically include a "wrong pockets" provision, setting out the obligations for both parties to transfer assets or liabilities, for no consideration, that were inadvertently not transferred at completion whilst these were the object of the transaction or, likewise, transferred whilst these were not the object of the transaction.

### 6.5 Representations and warranties

In an acquisition agreement for a private Dutch company, it is common for the seller to give warranties relating to the business being sold. The scope of these warranties will depend on a number of factors, in particular the outcome of due diligence. Private equity sellers will resist giving extensive warranties.

Warranties will be qualified by disclosure. It is common for the seller to seek to disclose the entire contents of a data room. The seller will also seek to disclose everything included in management interviews and presentations given to the purchaser and attempt to have the disclosure also cover information in the public domain and information that would have been revealed to the purchaser by reasonable enquiries. The purchaser will seek to exclude from disclosure information only referred to by reference, information not recorded in writing (for evidence purposes) and information in the public domain.

It is common for the seller to seek further limitations to the scope of the warranties. Firstly, it may seek to do so by limiting the scope to matters that are "material" to the business. It is sometimes the case that the threshold for materiality is defined. Secondly, with respect to certain warranties, the seller may only warrant matters within its knowledge. The purchaser will tend to resist such a qualification. In the case of warranties qualified by "so far as the seller is aware", a list of people to whom the knowledge refers is commonly included in the agreement. The listed individuals are usually deemed to have knowledge following reasonable enquiry.

The seller will seek such limitations (i.e. materiality and knowledge) for any warranty as to "no undisclosed liabilities" (i.e. other than liabilities disclosed in the balance sheet and liabilities incurred in the ordinary course of business since the balance sheet date).

It is common for the seller to give a warranty that the warranties given are not materially misleading and that no material information as to the business is omitted from its disclosures. The seller may push to limit this warranty by stating in the agreement that the information disclosed was disclosed in good faith and no information was knowingly omitted or that no untrue information was knowingly included.

It is common to have a warranty that the target company is compliant with applicable law. This is particularly common where the target is subject to regulatory supervision. Other more specific warranties as to compliance with law may be sought where relevant. The seller may want to limit this warranty to its awareness and to material compliance.

With respect to financial statements, it is common to have a separate schedule with the agreed accounting policies and a warranty that the preparation of financial statements is in compliance with such policies “in all material respects”. There will also often be a warranty that the financial statements present a “true and fair” view of the financial state of the target. Warranties on more specific balance sheet items may be sought depending on the nature of the target, the outcome of due diligence and the bargaining power of the parties. It is uncommon for the seller to give warranties as to internal accounting controls of the target.

It is typical for the warranties to be given both at signing and at completion. However, the seller may seek to limit the warranties given at completion to exclude statements that are not true because of an act or event which is outside its reasonable control.

It is typical for an acquisition agreement to place a maximum on the amount the seller can be held liable for in the event that a warranty is untrue. Such a “cap” is typically between 10% to 40% of the purchase price. This cap will typically not apply for certain key warranties (for example those relating to title). The cap will also not apply if the seller is fraudulent or has made a wilful misrepresentation (this may be stated in the agreement but will probably be the case under Dutch law in any case). It is sometimes the case that the purchaser can negotiate a separate and higher cap for tax and environmental warranties.

On claims for breach of warranty, it is common for the acquisition agreement to state that, unless the purchaser has a claim over a specified minimum, no claim against the seller may be brought. This minimum will vary but typically will be about one per cent. of the purchase price. The seller will try and negotiate to make this threshold a “deductible” so that it is deducted from any successful claim made by the buyer.

There will usually be a time limit following completion beyond which the purchaser may not bring a claim for breach of warranty. The seller will usually want this to be 12 months. Often it is tied to a full audit cycle (to give the purchaser the opportunity to discover any problems with its acquisition) so is likely to be negotiated to be 18 to 24 months following completion. The time limit will generally be longer for claim for breach of warranties on tax and environment. For claims for breach of environmental warranties, the buyer will typically be able to bring a claim within five years of completion; for claims for breach of tax warranties, this will typically be within a short period after the end of the statutory additional assessment period (*naheffingstermijn*) for the relevant taxes.

### 6.6 Indemnities

The purchaser will seek indemnities to cover risks (often those uncovered during the due diligence process), in particular where the potential financial impact of that risk is difficult to quantify and, therefore, factor into the purchase price. Certain indemnities (for example where the intention is for the risk to remain with the seller) will have no maximum to the amount recoverable. Furthermore, the time limit within the purchaser is required to bring its claim under the indemnity will either be a number of years or perpetual.

### 6.7 Consequences of default

In light of case law in the Netherlands, it is important that the agreement transferring the shares or assets clearly set out the consequences of a default under that agreement.

Under Dutch contract law, it is generally the case that, in the event of a breach of a contractual duty, the remedies of rescission, damages and specific performance are available to the plaintiff. However, case law has suggested that indemnification or hold harmless clauses are to be construed narrowly and in light of the reasonable expectations of the parties.

In addition, Dutch courts have held that, in the absence of an agreement stating otherwise, the damage sustained by a shareholder, due to a loss incurred by the company of which he has purchased shares, is limited to the purchase price of such shares.

### 6.8 Governing law and dispute resolution

Acquisitions of Dutch private companies will typically be governed by Dutch law.

The parties can choose between arbitration or litigation provisions in the case of a dispute. In the case of arbitration, the parties must choose the rules it wishes to govern that arbitration. It is common to choose the Dutch Arbitration Rules. The parties may choose to include provisions for mediation in their agreement. An acquisition agreement will often include a provision providing for the involvement of a reporting accountant in the case of a dispute over the adjustment of the purchase price or the completion accounts.

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