The Netherlands

Negotiated M&A Guide 2022

Corporate and M&A Law Committee

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1. INTRODUCTION

In recent years, the Dutch M&A market has been a seller's market. Prospective buyers have easy access to capital to fund acquisitions and find themselves bidding for private companies in increasingly competitive controlled auctions. As a result, acquisition agreements have become more seller-friendly over the past years – in particular, the post-closing liability regime – and buyers increasingly rely on warranty and indemnity (W&I) insurance solutions for recourse.

This guide sets out a general overview of the legal aspects of private M&A transactions in the Netherlands and provides an introduction to available acquisition structures and typical provisions included in Dutch acquisition agreements.

2. PRELIMINARY DUTCH LAW CONSIDERATIONS

2.1 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 (by transfer of shares or assets) of private companies. Instead, 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 or prescribed by statutory law and thus may differ on a case-by-case basis. Nonetheless, due to 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, many acquisition agreements will be similar in form and will have, to a large extent, similar content. In contrast, a legal merger, as a form of acquisition of a private company, is strictly regulated, as further set out below in section 3.3.

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

(a) the Dutch Civil Code (*Burgerlijk Wetboek*), in particular Book 2 (*Boek 2 Burgerlijk Wetboek)* regarding the law of legal entities and Book 6 (*Boek 6 Burgerlijk Wetboek*) regarding contract law, 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)* regarding property law;
(b) the Dutch Works Councils Act (*Wet op de Ondernemingsraden*);
(c) the 2015 Dutch Merger Code (*SER-besluit Fusiegedragsregels 2015*); and
(d) the Dutch Competition Act (*Mededingingswet*).

Depending on the seller or target company, certain additional legislation or regulation may apply, including (1) the Dutch Financial Supervision Act (*Wet op het Financieel Toezicht*) applicable to financial institutions such as banks and insurance companies, and (2) the Dutch Corporate Governance Code applicable to listed companies having their statutory seats in the Netherlands, containing best practice principles regarding corporate governance of such companies.

Depending on the type of business in which the target company operates, additional legislation or regulation may apply, including for companies active in the healthcare, telecom, or gas and energy sectors, and for contractors of the Dutch Ministry of Defence (also see section 5.2).

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 practice, judgments of the Supreme Court and, to a lesser extent, of the lower courts, influence subsequent court decisions. However, no formal rules exist with respect to the adherence to precedent decisions.

2.2 Types of companies

Dutch law provides for two types of limited liability companies: the *naamloze vennootschap* (NV) (public company with limited liability) and the *besloten vennootschap met beperkte aansprakelijkeid* (BV) (private company with limited liability). Both types of companies can issue shares in book-entry form, whether or not with corresponding share certificates. The BV is the most commonly used for privately held companies as the BV regime provides more flexibility to tailor the company's governance and share capital structure. Besides these limited liability companies, a range of other types of legal entities may be formed under Dutch law.

2.3 Governance structure and duties of directors

Dutch corporate law offers the choice between a one-tier board, consisting of executive and non-executive directors, and a two-tier board system consisting of a management (executive) board and a supervisory (non-executive) board. Large companies that meet certain statutory criteria may be required by law to have non-executive directors or a supervisory board with considerable powers. Regardless of the applicable system, each board has the duty to perform its duties (whether management or supervisory) properly and in the best interests of the company, which takes into account the interests of all relevant stakeholders, such as the shareholders, employees, creditors, suppliers, customers and the environment. In other words, the fiduciary obligation of the board of a Dutch company is not owed solely to the shareholders.

2.4 Transfer of shares

If a company has issued registered shares, such shares can only be transferred by execution of a deed of transfer before a Dutch *notaris* (civil law notary).

2.5 Transfer restrictions

The articles of association of a BV and an NV may, but do not need to, contain one or more limitations on the transfer of shares of that BV or NV. Historically, BVs will typically have transfer restrictions in their articles of association due to a requirement of law that has meanwhile been abolished.

2.6 No financial assistance

Under Dutch financial assistance prohibition rules, an NV may not for the purpose of a third-party subscription for, or acquisition of, shares in such NV's capital (or depositary receipts issued therefore):

(a) provide collateral, a price guarantee or otherwise guarantee or bind itself jointly and severally with or for third parties; and
(b) grant loans unless the management of the NV has approved such loans and certain other specific conditions have been met.

Historically, similar restrictions applied to BVs but those have meanwhile been abolished.

3. ACQUISITION STRUCTURES

3.1 General

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

(a) the acquisition of all of, or a controlling stake in, the share capital of the target company;
(b) the acquisition of all or substantially all of the assets of the target company; or
(c) by way of a legal merger.

The most common way to acquire a private company in the Netherlands is to acquire all the shares, or at least a controlling interest in the equity of a company, through the acquisition of its shares.

It is also possible to use a combination of the methods set out above. For example, if the target is comprised of two corporate entities, the purchaser may wish to acquire the share capital of one entity and the business assets of the other. A legal merger is in principle only available in a share-for-share transaction.

3.2 Share versus asset acquisitions

A share purchase and an asset purchase are fundamentally different transactions from a Dutch law perspective. If shares in a company are purchased, all the assets, liabilities and obligations of that company are acquired, whether or not the purchaser knows about them. If assets are purchased, only the identified assets and liabilities which the parties agree to sell and purchase, and which are specified in the agreement, will be acquired or assumed. Also, in a share purchase, shares are transferred to the purchaser by means of a notarial deed of transfer, while assets need to be identified and transferred in accordance with varying requirements applicable to each type of asset or liability.

The main issues which tend to influence the decision to acquire a Dutch business by way of a share purchase or an asset purchase are:

3.2.1 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, so that all liabilities and obligations of the target company transfer along with it. 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.

A purchaser with concerns about the liability potential of the target company, whether in relation to certain known matters or in respect of liabilities that may be unknown or unquantifiable, may prefer to structure the transaction as an asset purchase to have the ability to choose which assets to acquire and liabilities to assume. However, a purchaser in an asset purchase should be aware of certain strict liabilities that may transfer automatically with the business or assets (for example, liabilities from competition law violations).

3.2.2 Tax

Share purchases are not subject to Dutch transfer taxes (unless the target's assets predominantly consist of Dutch real estate) or VAT. Capital gains realised in connection with share sale transactions are, in most cases, exempt from Dutch corporate income tax pursuant to the application of the participation exemption, and are therefore often preferred from a seller's perspective.

Ordinarily, the tax basis of the target's assets and liabilities is not affected by a sale and transfer of the target's shares. In contrast, an asset purchase transaction 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. In certain circumstances, sellers may also prefer an asset purchase over a share purchase (eg, where the seller will be able to sell the assets at a loss or where the seller has available tax losses which can offset a capital gain).

An asset purchase is subject to VAT, unless it qualifies for the transfer of a going concern exemption. An asset purchase generally does not attract Dutch transfer taxes, except in respect of the transfer of Dutch real estate which is generally subject to an 8 per cent real estate transfer tax (2021). The Netherlands does not levy stamp duty or similar taxes of a documentary nature.

3.2.3 Partial sale

If the business for sale forms part of, but not the whole of, the assets of a company, it may be more practical to structure the sale as an asset sale. Otherwise, the target business would need to be isolated from the non-target components of the company, either by:

a) setting up a new company and transferring (or 'hiving off') the business being sold to that new company;
b) transferring the non-target components in the current corporate entity to another company owned by the seller before effecting the share sale; or
c) through a legal demerger whereby the identified assets and liabilities are transferred under universal transfer of title to an existing or a new legal entity, to which requirements apply similar as those applicable to legal mergers as set out in section 3.3.

3.2.4 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. Preliminary due diligence in respect of the key contracts of the target should be undertaken to determine the existence of any such consents and change of control provisions and to assess their significance for the structuring of the overall transaction.

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.

As in other European Union Member States, special protection is granted to the employees of the target company in a share or asset transaction. In share acquisitions, employees are being protected while they remain employed by their existing employer/entity; their employment agreements and employment conditions simply remain in place. In an asset acquisition, an automatic transfer of most of their legal rights to the purchaser of the business is safeguarded by mandatory law. However, this protection by way of an automatic transfer does not extend to certain types of pension rights of such employees.

3.3 Legal mergers

As in other EU Member States, special protection is granted to the employees of the target company in a share or asset transaction. In share acquisitions employees are being protected while they remain employed by their existing employer/entity; their employment agreements and employment conditions simply remain in place. In an asset acquisition an automatic transfer of most of their legal rights to the purchaser of the business is safeguarded by mandatory law. However, this protection by way of an automatic transfer does not extend to certain types of pension rights of such employees.

Creditors of the merging 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 which they may require that adequate security is provided to them for their claims.

After completion of the preparatory activities, including publication of the merger proposal and expiry of the one-month waiting period without objection having been filed or, in the event objection was filed, adequate security having been provided, the competent corporate bodies of the companies (typically the shareholders meeting, sometimes also the board) may adopt the resolution to merge. If the shareholders are the competent corporate body, the legal merger may only proceed if it is approved by the 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 legal merger is effected through a notarial deed.

In addition to the above, Dutch law facilitates cross-border mergers between limited liability companies in the European Economic Area.

3.4 Triangular mergers

Dutch law provides for a legal triangular merger by allowing the shareholders of a disappearing company in a legal merger to become the shareholders of a group company that is the (direct or indirect) shareholder of the acquiring company. Such a merger is permitted only if such group company 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 issuance of shares, and the companies involved are Dutch. This triangular merger structure is invoked in cases where the acquiring company uses an operating company to act as surviving entity in a legal merger. In this case, it may be considered appropriate to provide the shareholder of the disappearing entity with shares in the capital of the holding company of the group of which the surviving entity forms a part.

4 PRE-SIGNING MATTERS

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. Restrictive covenants in a 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 but, under Dutch law, courts may mitigate such penalties.

4.2 Letters of intent

Letters of intent (under a variety of different names, including heads of terms or term sheet) are commonly entered into on acquisitions. Items commonly covered in a letter of intent include:

a) acquisition structure (including, if applicable, any rollover investment terms);
b) purchase price and purchase price mechanism;
c) completion conditions (such as works council consultations and merger clearance procedures);
d) due diligence;
e) approach on liability regime;
f) timetable and signing conditions;
g) exclusivity;
h) whether provisions are binding or non-binding, and any duties to negotiate and pursue the transaction in good faith;
i) confidentiality (also depending on whether a confidentiality letter was entered into);
j) governing law and dispute resolution; and
k) costs.

Whether or not a letter of intent is binding is a question of construction. The substance of the document, rather than its name or form, and the underlying intentions of the parties will determine whether or not a letter of intent is binding. The parties will generally wish some clauses to be binding and enforceable in any event, such as the confidentiality and the exclusivity clauses, and some clauses to be non-binding, and will specify this in the letter of intent. In exceptional circumstances, a court may decide that provisions of the letter of intent are binding even though these are expressed in the letter of intent to be non-binding (and vice versa), for instance based on subsequent conduct of the parties.

Both a binding and a non-binding letter of intent can give rise to a duty to negotiate in good faith (see section 4.7). Usually, the parties to a letter of intent will address this issue in the letter of intent.

4.3 Due diligence

Acquisitions of private companies in the Netherlands are typically preceded by a legal due diligence review. Generally, such a review is conducted contemporaneously with commercial, financial, technical, environmental, IT, tax and any other due diligence. The purpose of such legal due diligence is to assist the purchaser in determining:

a) whether to proceed with the acquisition;
b) what the appropriate purchase price is for the target;
c) what warranties and indemnities to seek in the acquisition agreement;
d) how to structure the transaction; and
e) what consents and approvals will be required to effect the acquisition.

Under Dutch law, there is in many cases a certain duty on the seller to disclose and on the purchaser to investigate, which 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. The significant factors for determining whether or not a duty to investigate exists are:

a) the nature and complexity of the transaction;
b) the existence of specialised knowledge among the parties concerned;
c) the feasibility of an investigation; and
d) the relationship based on trust between the parties.

During the due diligence phase, a purchaser will generally also review in more detail whether the proposed transaction is permitted under applicable merger control legislation, and whether any filing for merger clearance will be required as a result of certain turnover thresholds being met by the relevant companies involved (as set out in section 5.2.1).

4.4 Works council advice

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

According to the Dutch Works Councils Act (WCA), an ‘entrepreneur’ must request the prior advice of the competent works council in respect of certain proposed decisions (and the implementation thereof) on ‘business’ matters, including the transfer of control of the enterprise or any part thereof and obtaining control of another enterprise as well as any contemplated appointment of external experts assisting in these matters. However, the WCA does not require that the works council approves the proposed acquisition.

The advice must be requested at such a time that the works council can substantially influence the decision before it is made (see also section 5.2.2). 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 proposed 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. At least one consultation meeting should be held to discuss the proposed decision.

There is no fixed period within which the works council must render its advice. The works council 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 typically take approximately six weeks, but if the works council requests additional information or proposes alternatives, the time may be longer. In case of a non-complex situation, a good relationship with the works council and good preparations, a shorter period may be possible.

After the works council advice has been rendered, the entrepreneur is free to make a decision which may or may not follow the advice. 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 in the request for advice. Making a decision for different reasons than communicated with the works council 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 waiting period of one month must be observed. During that period, the decision cannot be executed and the works council may challenge the decision before the Enterprise Chamber of the Amsterdam Court of Appeal (*de Ondernemingskamer*). This waiting period cannot be disregarded or shortened without the consent of the works council. The works council may 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. Approximately within eight weeks after lodging the appeal, an oral hearing will take place at the Enterprise Chamber, and thereafter approximately within six to eight weeks the Enterprise Chamber will render its decision. The Enterprise Chamber may (1) annul the decision and order the entrepreneur to undo the decision under review, or (2) uphold the decision after which the transaction may proceed.

4.5 Labour organisations/trade unions

The Merger Code is a code of conduct (not legislation) issued by the Dutch Social Economic Council, an advisory and consultative body of employers’ representatives, union representatives and independent experts. The Merger Code establishes rules for the protection of employee interests 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. In addition, the works council involved should be enabled to take into consideration the opinion of the trade unions when rendering its advice. 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, its expected legal, economic and social consequences, and the measures the parties intend to take in connection with those consequences. This notification is intended 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 may be the subject of discussion in a meeting in case the trade unions request for such meeting. In this meeting, the trade unions are given the opportunity to express their opinion. 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 such announcement is made. Concurrent with the notification to the trade unions, the secretarial department of the Dutch Social Economic Council must be informed in writing.

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

4.6 Break fees

In Dutch practice, break fees may be negotiated in specific circumstances. The amount of such break fee and the direction (ie, seller or purchaser as the payor) will depend on the rationale for the break fee and the other specific circumstances. Break fees are permitted under Dutch law but courts may mitigate such fees.

4.7 Duty to negotiate in good faith

The Dutch Supreme Court has ruled that, if parties enter into negotiations, their relationship is from the outset governed by the principles of reasonableness and fairness (‘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, parties are free 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. In certain circumstances it may even be possible to obtain an injunction requiring the other party to continue negotiations.

5 ACQUISITION AGREEMENTS

The following paragraphs set out some typical material provisions found in an acquisition agreement involving 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.

5.1 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 cash-free/debt-free basis, including working capital adjustment. This can be done by way of post-completion adjustments (ie, completion accounts) or a locked-box mechanism, but in practice, if feasible considering the deal specifics, the locked-box mechanism is generally the preferred mechanism in domestic and European deals.

5.2 Completion conditions

The obligation to acquire (and transfer) the target (commonly referred to as 'closing' or 'completion') is usually subject to certain conditions. Typically, if any conditions are not satisfied or waived by a certain date, the agreement can be terminated or completion is delayed for a specified period agreed between the parties. It will depend on the bargaining power in the negotiations whether only the seller or the purchaser or both parties can terminate the agreement.

Typical completion conditions which are frequently included in acquisition agreements involving Dutch private companies are briefly described below. Some of these completion conditions stem from Dutch statutory law, but the inclusion of other completion conditions may depend on the bargaining power of both parties and their desired 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 executed by the parties. Where relevant, this has been indicated below.

5.2.1 Merger clearance

Merger control legislation must be taken into account in acquisitions of private companies in the Netherlands. The acquisition may be subject to (1) the merger control provisions of the European Union (as set forth in Regulation EC 139/2004), (2) the merger control provisions of the Dutch Competition Act (*Mededingingswet*), or (3) no merger clearance rules if it does not meet the relevant turnover thresholds. The provisions of the Dutch Competition Act govern concentrations that exceed the following turnover thresholds:[1]

a) the undertakings concerned have a combined worldwide turnover of more than €150m; and
b) at least two of the undertakings concerned each achieve a turnover of at least €30m in the Netherlands.

[1] The interpretation of 'concentration' in EC Regulation 139/2004 is mirrored in the Dutch Competition Act.

Different thresholds apply to concentrations relating to healthcare providers and to pension funds. If a transaction qualifies as a concentration and these thresholds are exceeded, prior notification should be made to the Dutch Authority for Consumers & Markets (*Autoriteit Consument & Markt* or ACM).[2] Notification can take place at such a time when 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 ACM. If the parties complete the transaction without clearance, a fine of up to the greater of (1) 10 per cent of the turnover of the relevant undertakings or (2) €900,000 may be imposed by the ACM (which can be increased by 100 per cent for repeat offenders).

The purchaser may give certain undertakings in the acquisition agreement to satisfy the merger clearance condition. Customary 'hell or high water' negotiations are also seen in the Netherlands.

5.2.2 Works council advice

Completion of required works council consultations, as described in section 4.4, is regularly included as a completion condition in acquisition agreements. Alternatively, completion of required works council consultations is construed as a condition to signing in a cover letter or 'signing protocol' to an otherwise fully agreed acquisition agreement, so as to allow the works council to render its advice before the acquisition agreement is technically entered into.

5.2.3 National/public security clearance and FDI

Legislation concerning investment review must also be taken into account in the acquisition of Dutch private companies. The acquisition may be subject to sector-specific screening legislation, such as those applying to telecom service providers (including internet hubs and data centres), gas and electricity producers, and contractors of the Ministry of Defence. The transaction is only notifiable when specific thresholds are met by the target company.

Furthermore, a bill establishing a national security screening regime for investments in vital sectors and sensitive technology was recently submitted to the Dutch Parliament and is pending approval. Whenever in the future the bill enters into force, it is intended to apply retroactively to qualifying investments made after 8 September 2020. The bill considers the following sectors to be vital: energy, financial market infrastructure operated by banks, and certain activities at Amsterdam airport and the port of Rotterdam. According to the bill, military goods and dual-use items which fall under EU export control rules (Regulation EU 2021/821) are considered sensitive technology.

Under both the sector-specific screening regimes and the screening regime proposed by the bill, notification can take place at such a time when 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 Minister of Economic Affairs and Climate Policy.

[2] However, if the EU turnover thresholds are met, EU merger control rules apply and the notification should be made to the European Commission.

5.2.4 Corporate approvals

Obtaining the relevant corporate approvals required for the transaction may be included as a completion condition, but often the relevant approvals will have been obtained prior to the signing of the acquisition agreement. Hence, they are not included as a completion condition but merely referenced in the recitals.

5.2.5 No material breach of representations and warranties

As discussed in section 5.6, (certain) warranties may be repeated at completion. One completion condition may be that completion will not occur if at completion any of the (material) warranties are untrue, which completion condition may only be waived by the purchaser. This completion condition is fairly uncommon in the Dutch market and is typically only negotiated in specific circumstances.

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

To the extent such condition is acceptable given the circumstances, the extent of the material adverse change (MAC) or material adverse event (MAE) condition is mostly subject to negotiation between the parties.

5.2.7 No prohibition of completion of the transaction

Often worded as a condition to capture all enactments, issuances or enforcements by any government authority or law, judgment 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.

5.3 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 covenants 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 typically require that certain material actions of the target are subject to prior approval by the purchaser. It is common for the seller to agree to such pre-completion covenants, but the parties should ensure that such provisions do not violate the standstill obligations under the applicable merger control rules.

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 (subject to restrictions resulting from applicable competition law). The seller may also agree to update the disclosure schedules between signing and completion and to inform the purchaser of any breach of its covenants between signing and completion.

5.4 Completion actions

If the acquisition has been structured as a share transfer, the seller will transfer the shares in the target company to the purchaser at completion. The transfer of shares in a BV or NV company requires a notarial deed executed before a Dutch notary. In practice, especially when it concerns cross-border M&A, the parties to the deed of transfer often grant a power of attorney to the notary's office to have the notarial deed executed on their behalf. For non-Dutch parties to the deed, the notary will require a confirmation issued by a lawyer authorised to practice under the relevant jurisdiction confirming that such party can validly enter into the transaction. In a share purchase transaction, it is common that the purchase price is paid into a special notary bank account. The notary ensures that the shares are only transferred after such payment has been received and the amount is only paid out upon the transfer of the shares.

A legal merger is also effected by a notarial deed executed before a Dutch notary, and the minutes of the general meeting resolving on the merger must be laid down in a notarial deed. In the event of a cross-border merger, completion mainly takes place under the jurisdiction of the acquiring entity. If a Dutch company is the disappearing entity, the Dutch notary will have to confirm that all Dutch law formalities have been complied with before the merger can be implemented.

Following the transfer of the shares or the merger, various registers such as the Dutch trade register, the ultimate beneficial owner's registers and the shareholders' register may have to be updated. These registrations are not a condition to the effectiveness of the share transfer or merger.

If the acquisition has been structured as an asset transaction, the various assets and liabilities will be transferred in accordance with the applicable transfer requirements under the relevant jurisdictions (see section 3.2).

5.5 Post-completion covenants

The seller and purchaser can choose to provide certain post-completion covenants. These may be limited because of the circumstances of the particular transaction or restrictions under law.

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, this covenant will not be upheld by a Dutch court. Generally, a period ending three years after completion is the maximum duration of a non-compete covenant, provided that know-how has been transferred in addition to goodwill. If only goodwill is transferred, the maximum duration is two years. Typically, the non-compete provision in the acquisition agreement will specify that the covenant will extend for the period agreed between the parties, or if such period exceeds the maximum duration permitted by law, such period as is permitted by law.

It is common for non-compete covenants to be accompanied by covenants from the seller not to solicit customers or employees of the target (typically for a period ending one to three years after completion).

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 if these were the object of the transaction or, likewise, transferred if these were not the object of the transaction.

5.6 Representations and warranties

In an acquisition agreement for a Dutch private company, it is common for the seller to give warranties relating to the business being sold. The scope of these warranties will depend on several factors, particularly the results of the due diligence. In case of a private equity seller, depending on the circumstances and the arrangements with management, the private equity seller may require management to give the business and tax warranties in the form of a separate warranty agreement.

Warranties are commonly qualified by disclosure. It is common practice for the seller to seek to disclose the entire contents of the data room. Depending on the circumstances, disclosure against the fundamental warranties may be excluded or limited. The seller will also seek to disclose everything included in management interviews and presentations given to the purchaser, as well as attempt to have the disclosure cover all information in the public domain and all information that would have been revealed to the purchaser had the purchaser made reasonable enquiries. The purchaser will seek to exclude from the disclosure (1) information only referred to by reference, (2) information not recorded in writing (for evidence purposes) and (3) 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. Some agreements will define a threshold for materiality. Secondly, with respect to certain warranties, the seller may wish to only warrant certain matters within its knowledge while 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.

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 intentionally 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. Where relevant to the target, other specific warranties in respect of compliance with laws may be sought. The seller may want to limit any such warranties with knowledge and materiality qualifiers.

With respect to financial statements, it is common to have a warranty that the preparation of financial statements is 'in all material respects' in compliance with the accounting principles as used for preparation of the latest audited financial statements of the target group/company. If the financial statements have been audited, there will also often be a warranty that such financial statements present a 'true and fair' view of the financial state of the target.

Warranties on specific balance sheet items may be sought by the purchaser depending on the nature of the target, the outcome of due diligence and the respective bargaining power of the parties. It is uncommon for the seller to give warranties as to internal accounting controls of the target.

Warranties are commonly given at both signing and 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 common practice for acquisition agreements to specify a maximum amount (usually between 10 per cent and 25 per cent of the purchase price) for which the seller can be held liable in the event that a warranty is untrue. This 'cap' will typically not apply (1) to claims in respect of (certain) fundamental warranties (eg, those relating to title) or (2) claims related to fraud and possibly wilful misrepresentation on the part of the seller (this carve-out from the cap may be expressly stated in the agreement but will likely apply under Dutch law in any case).

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. The amount of this *de minimis* will vary but will typically be between 0.05 per cent and 0.2 per cent of the purchase price. In addition, it is common to include a basket in the acquisition agreement, stating that no claim against the seller may be brought unless the aggregate amount of claims exceeds a certain threshold. The basket will typically be between 0.25 per cent and 2 per cent of the purchase price. Depending on the negotiations, this may either be a tipping or non-tipping basket.

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 for all business warranties; however, the purchaser will ask for 18 to 24 months following completion. Time limits will generally be longer for claims for breach of tax warranties, which will typically be within three to six months after expiry of the statutory limitation period applicable to the relevant tax matter. With respect to the fundamental warranties, a seller will usually want to limit this to one to three years following completion, while the purchaser may ask for seven to ten years following completion.

5.7 Warranty and indemnity insurance

In recent years, the use of W&I insurance solutions has continued to increase significantly, especially in transactions in which a financial sponsor is involved. For W&I insurance, a certain level of (vendor) due diligence is required by the insurer. Known/disclosed exposures are typically excluded from W&I insurance coverage unless affirmative cover is obtained. An actual quantification of the exposures is generally required as part of the (vendor) due diligence, in order to allow the purchaser to decide on either (1) assuming the exposure, (2) reflecting it in the purchase price or (3) requiring a specific (capped) indemnity in respect thereof.

Specific exposures that are often excluded (in whole or in part) from W&I insurance coverage are matters in relation to:

a) sanction laws;
b) Covid-19;
c) pension underfunding;
d) holiday pay/unpaid leave entitlements;
e) risk for contractor–employee reclassification;
f) environmental pollution and asbestos; and
g) identified tax exposures and exposures relating to deferred tax assets, transfer pricing, secondary liabilities, management equity/incentive plans and interest deductibility.

Also, the scope of the due diligence will have an impact on the scope of the W&I insurance coverage.

With respect to applicable time limitations, the purchaser will generally be able to bring claims under the fundamental warranties (eg, in relation to title of the shares) and tax claims (meaning claims for beach of tax warranties or claims under a tax indemnity) under W&I insurance within seven years of completion. In relation to claims under the business warranties, including pensions and environmental warranties, the purchaser will generally be able to bring claims within two years of completion.

The insurance premium for the W&I insurance policy depends on, *inter alia*, the complexity of the transaction, the business of the target, the reputation of the purchaser and the status of the insurance market. The insurance premium is typically about 1–2 per cent of the insured amount, increased with 21 per cent insurance premium tax and possibly the certain legal fees of the insurer.

Any payments made by the insurer to the buyer under the W&I insurance are in principle subject to Dutch corporate income tax, since the participation exemption should not apply in respect thereof. A gross-up for such taxes is therefore typically included in the W&I insurance policy but does eat into the policy limit in case of any claims.

5.8 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, difficult to factor into the purchase price. Monetary and time limitations to such indemnities are subject to negotiations.

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

5.9 Consequences of default and termination

In light of case law in the Netherlands, it is important that the agreement transferring the shares or assets clearly sets 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/she/it has purchased shares, is limited to the purchase price of such shares.

While Dutch law provides parties with the right to rescind an acquisition agreement as a result of a breach of contract, this right to rescind is usually waived in transactions dealing with a transfer of corporate control. Although such a rescission would not have a retroactive effect, it would create a duty to reverse all actions rendered under the agreement. In general, such an approach is not considered to be feasible, practical or appropriate in acquisition transactions. For similar reasons, the right, under Dutch law, to cancel a contract due to a mistake is often waived in acquisition agreements. If the right to cancel is not waived, such a cancellation could be effected by simple notice and would have retroactive effect.

Certain other Dutch law provisions, being Articles 6:89, 7:17 and 7:20–7:23 of the Dutch Civil Code, are also often waived by the parties in an acquisition agreement to allow for an 'entire agreement' approach.

5.10 Governing law and dispute resolution

Acquisition agreements of Dutch private companies will typically be governed by Dutch law. In any event, the transfer of shares in a Dutch company is governed by mandatory Dutch legal requirements, involving a Dutch civil law notary (see section 5.4).

The parties may choose between arbitration or court litigation in the case of a dispute. In the case of arbitration, the parties must choose:

a) the rules it wishes to govern that arbitration;
b) the language of arbitration;
c) the seat of arbitration; and
d) the procedure for nomination and appointment of the arbitral tribunal.

It is common to choose the Arbitration Rules of the Netherlands Arbitration Institute (NAI) or, in international transactions, the Rules of Arbitration of the International Chamber of Commerce (ICC). 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.