The Netherlands

Negotiated M&A Guide

Corporate and M&A Law Committee

Contacts

Paul Cronheim and Erik Stegerhoek

De Brauw Blackstone Westbroek N.V.
Amsterdam, the Netherlands

paul.cronheim@debrauw.com

erik.stegerhoek@debrauw.com

1 INTRODUCTION

1.1 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 W&I insurance solutions for recourse.

1.2 This chapter sets out a general overview of negotiated acquisitions of private companies 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

2.1.1 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 sections 3.3 and 3.4.

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

(a) 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*);

(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*).

2.1.3 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*" ("**N.V.**") (public company with limited liability) and the "*besloten vennootschap met beperkte aansprakelijkeid*" ("**B.V.**") (private company with limited liability). An N.V. can issue its shares in bearer form, in book-entry form only or in book-entry form with corresponding share certificates. A B.V. can issue its shares in book-entry form only (as registered shares) and may issue share certificates at its option. An overhaul of B.V. legislation in 2012 has reinforced the B.V. as a modern and flexible type of company. 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 companies 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 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 employees, creditors, suppliers, customers, and the environment, as well as the shareholders. 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 B.V. and an N.V. may, but do not need to, contain one or more limitations on the transfer of shares of that B.V. or N.V. Historically, B.V.s will typically have transfer restrictions in their articles of association due to a requirement of law that has meanwhile been abolished.

2.6 Financial assistance

Under Dutch financial assistance rules, for the purpose of a third party's subscription for or acquisition of shares in the capital of an N.V. or depositary receipts issued therefor, such N.V. may not:

(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 N.V. has approved such loans and certain other specific conditions have been met.

Historically, similar restrictions applied to B.V.s 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 a controlling stake in, or the entire 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.

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 and the business assets of the other.

3.2 Share versus asset acquisitions

3.2.1 A share purchase and an asset are fundamentally different transactions from a Dutch law perspective. If shares in a company are purchased, all of 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 purchaser agrees to purchase, and which are specified in the agreement, will generally 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.

3.2.2 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:

(a) <u>Liabilities</u>*:* 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 (*e.g.*, product liability claims) or in respect of liabilities that may be unknown or unquantifiable, may prefer to structure the transaction as an asset purchase so as to have the ability to choose which assets to acquire and liabilities to assume (and thereby only assume known and quantified liabilities).

(b) <u>Tax</u>*:* 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 (e.g., 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 a 6% real estate transfer tax. The Netherlands does not levy stamp duty or similar taxes of a documentary nature.

(c) Partial sale*:* If the business for sale forms one 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 or (b) transferring the non-target components in the current corporate entity to another company owned by the seller before effecting the share sale).

(d) 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.

3.2.3 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. As set out in section 2.4, 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. Most past defects may be remedied in order not to unduly frustrate otherwise valid transactions.

3.2.4 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.

3.2.5 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.

3.3 Legal mergers

3.3.1 The Dutch Civil Code defines a legal 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 legal 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:

(a) 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.

(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.

(c) 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).

(d) 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).

(e) 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 (commonly referred to as a "sister company merger").

(f) 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 (a group company), not of acquiring company B (commonly referred to as a "triangular merger").

3.3.2 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:

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

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

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

3.3.3 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 addition, creditors may require that adequate security is provided to them for their outstanding claims.

3.3.4 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 legal merger is effected through a notarial deed.

3.3.5 In addition to the above, European law facilitates cross-border mergers between limited liability companies in the European Union.

3.4 Triangular mergers

3.4.1 As set out above, 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 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, 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 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.

3.4.2 The legal 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-SIGNING MATTERS

4.1 Confidentiality letters

4.1.1 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 a confidentiality letter are generally enforceable and under Dutch law there are no restrictions on the duration of a confidentiality letter.

4.1.2 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

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

(a) exclusivity;

(b) acquisition structure;

(c) purchase price and purchase price mechanism;

(d) conditions precedent (such as works council consultations and merger clearance procedures);

(e) due diligence;

(f) timetable;

(g) whether provisions are binding or non-binding;

(h) confidentiality (also depending on whether a confidentiality letter was entered into);

(i) governing law and dispute resolution; and

(j) costs.

4.2.2 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 generally specify this in the letter of intent. In exceptional circumstances, a court may decide that provisions of 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.

4.2.3 Both a binding and a non-binding letter of intent can give rise to a duty to negotiate in good faith (see section **Error! Reference source not found.** below for further details). Usually, the parties to a letter of intent will address this issue in the letter of intent.

4.3 Break fees

In Dutch practice, the parties sometimes agree to break fees, especially in controlled auctions. Break fees are permitted under Dutch law but courts may mitigate such fees.

4.4 Due diligence

4.4.1 Acquisitions of private companies in the Netherlands are typically 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.

4.4.2 It should be noted that, 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.

4.4.3 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: 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.

4.4.4 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

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

4.5.2 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. However, the WCA does not require that the works council *approve* the proposed acquisition.

4.5.3 The advice must be requested at such a time that it can substantially influence the decision before it is made (see also paragraph 6.2.2). 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.

4.5.4 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 take approximately six weeks, but if the works council requests additional information or proposes alternatives, the time may be longer.

4.5.5 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. Making a decision for different reasons would require a new consultation procedure.

4.5.6 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.

4.5.7 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 Section of the Amsterdam Court of Appeal (*de Ondernemingskamer*). 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. This waiting period cannot be disregarded or shortened without the consent of the works council.

4.6 Labour organisations/trade unions

4.6.1 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".

4.6.2 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.

4.6.3 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 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. A trade union may decide not to exercise its right to have such a meeting. The Merger Code does not require that the trade unions approve of the merger.

4.6.4 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. Concurrent with the notification to the trade unions, the secretarial department of the Social Economic Council must be informed in writing.

4.6.5 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.

4.7 Duty to negotiate in good faith

4.7.1 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.

4.7.2 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

5.1 Introduction

The following is a discussion of 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.

5.2 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 working capital calculation with post-closing adjustments or a locked-box mechanism, with the latter in practice regularly being the preferred mechanism in domestic or European deals.

5.3 Conditions precedent

5.3.1 The obligation to acquire (and transfer) the target (commonly referred to as "closing") is usually subject to certain conditions. Acquisition agreements usually provide for a specified period of time after signing during which these closing conditions must be satisfied or waived. Typically, if any conditions are not satisfied or waived by a certain date, the agreement terminates or completion is delayed for a specified period agreed between the parties.

5.3.2 Typical closing conditions which are frequently included in acquisition agreements involving Dutch private companies are briefly described below. Some of these closing conditions stem from Dutch statutory law, but the inclusion of other closing 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.

(a) 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.

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

(i) the undertakings concerned have a combined worldwide turnover of more than EUR 150 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 Authority for Consumers & Markets (*Autoriteit Consument & Markt* or *ACM*).[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 ACM. If the parties complete the transaction without clearance a fine of up to the greater of (i) 10% of the turnover of the relevant undertakings or (ii) EUR 900,000, may be imposed by ACM (which fine can even be increased by 100% for repeat offenders).

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[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.

(b) Works council advice. Completion of required works council consultations, as described in section 4.5, is typically included as a closing condition in acquisition agreements. Alternatively, completion of required works council consultations is sometimes 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.

(c) 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 and are not included as closing conditions but merely referenced in the recitals.

(d) No material breach of representations and warranties. As discussed in section 5.6, it is common for warranties to be repeated at completion. One condition precedent, though fairly uncommon in the Dutch market, may be that completion cannot 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 adverse effect on the target. This is particularly common if the seller is a private equity company. Certain "fundamental" warranties may 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 extend to the absence of a breach by the seller of the agreement or of the pre-completion covenants set forth therein.

(e) 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 and is driven by the intended level of deal certainty.

(f) No prohibition of the completion of the transaction. 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.

5.4 Pre-completion covenants

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

5.4.2 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.

5.4.3 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) 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.

5.4.4 If the acquisition agreement is terminated prior to completion due to a breach of one of the convents, the parties are generally responsible for their own costs without a right of reimbursement from the opposing party.

5.5 Post-completion covenants

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

5.5.2 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 Dutch court may not enforce this covenant. Generally, three years post completion is the maximum length of a non-compete covenant. 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.

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

5.5.4 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.

5.5.5 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

5.6.1 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 a number of factors, particularly the results of the due diligence.

5.6.2 Warranties are commonly be qualified by disclosure. It is common practice for the seller to seek to disclose the entire contents of the 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 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 (i) information only referred to by reference, (ii) information not recorded in writing (for evidence purposes) and (iii) information in the public domain.

5.6.3 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 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 or a schedule thereto. Where such a list is included, the agreement will typically further provide that the listed individuals are deemed to have knowledge following reasonable enquiry. The seller will seek such limitations (*i.e.*, materiality and knowledge) for any warranty with respect to the absence of "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).

5.6.4 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.

5.6.5 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 more 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.

5.6.6 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 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.

5.6.7 Warranties are commonly given as of 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.

5.6.8 It is common practice for acquisition agreements to specify a maximum amount (usually between 10% and 40% 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 (i) to claims in respect of certain key warranties (*e.g.*, those relating to title) or (ii) claims related to fraud or 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). Purchasers have the ability to negotiate separate and higher caps for tax and environmental warranties.

5.6.9 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 prefer to structure this threshold as a “deductible” so that it is deducted from any successful claim made by the buyer.

5.6.10 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 warranties, however, final agreements often provide for a time limit tied to a full audit cycle to give the purchaser the opportunity to discover any problems with its acquisition (*i.e.*, 18 to 24 months following completion). Time limits will generally be longer for claims for breach of tax and environmental warranties:

(a) for claims for breach of environmental warranties, the buyer will typically be able to bring a claim within five years of completion; and

(b) 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.

5.6.11 In recent years, W&I insurance solutions are more often seen in transactions on the Dutch market.

5.7 Indemnities

5.7.1 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 (*e.g.*, where the intention is for the risk to remain with the seller) will have no maximum to the amount recoverable. Furthermore, in some but not all cases, the time period during which the purchaser can bring a claim under the indemnity will be limited to a specific number of years.

5.7.2 In relation to tax and environmental 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.

5.8 Consequences of default

5.8.1 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.

5.8.2 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.

5.8.3 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.

5.9 Termination

While Dutch law provides parties with the right to rescind an acquisition agreement as a result of a breach of contract, this right is generally 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 negate 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.

5.10 Governing law and dispute resolution

5.10.1 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 paragraph 2.4).

5.10.2 The parties may choose between arbitration or litigation 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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