The Netherlands

Takeover Guide

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GENERAL

This guide provides an overview of the main features and issues in relation to public offers involving securities of a Dutch NV listed on a stock exchange in the Netherlands. Although several transaction structures involving the acquisition of a public company are discussed in 'Types of public offers and alternative transaction structures' below, the remainder of this guide primarily focuses on a full voluntary public offer.

LEGISLATIVE FRAMEWORK

A broad range of regulations are relevant in the context of a public offer for a Dutch NV listed on a stock exchange in the Netherlands. The Dutch Civil Code – in particular, Book 2 – applies to Dutch NVs and contains a wide range of rules on the company's share capital and governance arrangements, as well as specific provisions on public offers. These rules are mandatory law.

In addition, the Dutch Corporate Governance Code, which contains principles and best practice provisions relating to the corporate governance of Dutch listed companies (regardless of the jurisdiction of the listing), applies on a comply-or-explain basis. The company must explicitly state in its management report or on its website to what extent it complies with the principles and best practice provisions stipulated in the Dutch Corporate Governance Code and, where it does not comply with them, why and to what extent it deviates from them.

Specifically in relation to public offers, many rules are based on European Union directives, such as the Takeover Directive 2004/25/EC. The rules and regulations specific to public offer are included in section 1:1 and chapter 5 of the Dutch Financial Supervisory Act (Wet op het financieel toezicht or Wft), the Dutch Decree on Takeover Bids (Besluit openbare biedingen), the Exemption Regulations Wft (Vrijstellingsregeling Wft) and the Exemption Decree on Takeover Bids Wft (Vrijstellingsbesluit overnamebiedingen Wft) (the 'Dutch bidding rules').

Other regulations that are relevant in the context of a public offer include the EU Market Abuse Regulation (596/2014) (MAR), the Sociaal-Economische Raad (SER) Merger Code (SER Fusiegedragsregels), the Dutch Works Councils Act (Wet op de ondernemingsraden) and the Merger Regulation (EC) No 139/2004.

Although this guide primarily focuses on public offers for Dutch companies listed on a stock exchange in the Netherlands, it should be noted that several of the regulations above also partly or fully apply if: (1) a non-Dutch company is listed on a stock exchange in the Netherlands; (2) a Dutch company is listed on a stock exchange outside the Netherlands but within the European Union/European Economic Area; and (3) a Dutch company is listed on a stock exchange outside the EU/EEA.

The Dutch bidding rules apply when the Netherlands Authority for the Financial Markets (Autoriteit Financiële Markten or AFM) is the competent authority to approve the offer memorandum, which includes scenarios in which the securities of the relevant company (Dutch or non-Dutch) are: (1) solely listed on a stock exchange in the Netherlands; (2) listed both in the Netherlands and another Member State but admitted to trading for the first time in the Netherlands; or (3) listed both in the Netherlands and another Member State, admitted to trading for the first time in both the Netherlands and the other Member State and where the target company has chosen the AFM as the supervisory authority.

The Dutch bidding rules do not apply to a Dutch company that is only listed on a stock exchange outside the EU/EEA. In addition, the Dutch Civil Code and Dutch Corporate Governance Code do apply to Dutch companies if they are listed solely outside the EU/EEA (although, for instance, the specific public

offer buy-out procedure included in the Dutch Civil Code does not apply if the Dutch company is only listed outside the EU/EEA).

The Dutch bidding rules partly apply to a Dutch company that is listed in the EU/EEA but not listed in the Netherlands. In such cases, the AFM (as the supervisory authority of the Member State in which the target company has its statutory seat) has exclusive competence with respect to the 'seat rules'. The Dutch bidding rules provide that these include the rules regarding the disclosure of information to the target company's shareholders and employees. With regard to the 'market rules', the supervisory authority of the Member State where the securities are admitted to trading has exclusive competence.

The Dutch Civil Code and Dutch Corporate Governance Code do not apply to non-Dutch companies.

COMPETENT AUTHORITIES

The AFM is the competent authority regarding compliance with the Dutch bidding rules. The AFM approves the offer memorandum and monitors compliance with the rules related to the public offer.

The AFM is not the competent authority in relation to a statutory buy-out proceeding and whether a mandatory public offer must be launched. The AFM is, however, the competent authority for the mandatory offer process. In addition, corporate law matters are not within the competence of the AFM. The Enterprise Chamber of the Amsterdam Court of Appeal is the competent court on statutory buy-out proceedings, applicability of the mandatory public offer rules and for adjudication of certain corporate disputes relevant in the context of a public offer.

TYPES OF PUBLIC OFFERS AND ALTERNATIVE TRANSACTION STRUCTURES

Voluntary public offer

The most common way to obtain control of a Dutch listed company is by making a 'voluntary' public offer for all shares of that company. A public offer addresses the company's shareholders that can tender their shares in the offer. A public offer is 'voluntary' if it is not a 'mandatory' public offer (see 'Types of public offers and alternative transaction structures: Mandatory public offer' below). Although not required, nearly all public offers in the Netherlands are friendly. This means that the company is supportive of the public offer by the bidder, and the company and bidder entered into a merger agreement (also called a merger protocol) setting out the terms and conditions that apply to the public offer. The key terms addressed in the merger agreement are further described in 'Merger agreement' below. These terms apply in addition to the statutory requirements applicable to a public offer as also further described in this guide.

Mandatory public offer

In contrast to a 'voluntary' public offer, a person may be under the legal obligation to make a 'mandatory' public offer when that person alone or acting in concert with other parties can directly or indirectly exercise 30 per cent or more of the voting rights in the target company (predominant control or *overwegende zeggenschap*).

'Acting in concert' means persons cooperating pursuant to an agreement with the purpose of acquiring predominant control. The agreement does not have to be in writing, and factual collaboration and alignment between parties may be deemed to constitute an agreement. There is very limited guidance,

in case law or otherwise, on when acquiring predominant control is deemed the 'purpose' of cooperation between shareholders. As mentioned in 'Competent authorities' above, because the AFM does not oversee compliance with the mandatory offer rules, it is not possible to seek guidance from the AFM in relation to the type of arrangements that may constitute 'acting in concert' (as is possible in other Member States).

There are several exceptions to the requirement to make a mandatory public offer if the 30 per cent threshold is reached, which include:

- if predominant control is obtained following the completion of a voluntary public offer that resulted in the bidder holding more than 50 per cent of the company's voting rights;

- if predominant control is obtained by an independent legal entity that has the purpose to represent the interests of the company and its business, provided that such shares are held for a maximum of two years;

- if predominant control is held at the time the shares are admitted for the first time to trading on a regulated market (the 'IPO exemption'); and

- if the general meeting of the company consented to the person(s) acquiring predominant control by at least 90 per cent of the votes cast ('whitewash vote').

If a person obtains predominant control, the obligation to make a mandatory public offer ceases if that person reduces its stake below the 30 per cent threshold within 30 days after reaching the threshold.

Compared to a voluntary public offer, the most notable specific requirements of a mandatory public offer are that no conditions may be attached to the public offer by the bidder and that the bidder must offer a 'fair price'.

A 'fair price' is: (1) the highest price paid by the bidder or a person with whom it acts in concert for shares in the company in the 12 months before the announcement of the mandatory offer; (2) the highest price paid in the period between announcement of the mandatory offer and settlement (if higher than the price referred to under (1)); or (3) the average stock exchange price of the relevant shares during the 12 months before the announcement of the mandatory offer, if (1) and (2) do not apply. The fair price consideration can be in cash, listed instruments or a combination of the two. In certain circumstances, the court can be requested to adjust the fair price.

Partial/tender offers

In addition to a public offer for all instruments of a company of the same category or class, it is also possible to make a partial or tender offer. Both are aimed at obtaining less than 30 per cent of the voting rights and generally do not result in control by the bidder.

Other acquisition structures

Control over a listed company may be acquired by means other than a public offer. It is, for instance, possible to acquire all the assets and liabilities of the target company or to merge with the target company (either domestic or cross-border within the EU). In addition, it is also possible to acquire a controlling stake directly from a shareholder of the company. If the 30 per cent threshold is reached following such a block trade, a mandatory public offer must follow.

Although there are some examples of asset sales and legal mergers as a primary transaction structure for the acquisition of a listed company, nearly all listed company takeovers take place through a public offer.

A typical downside of an asset deal is that each asset and liability needs to be transferred individually, which can be time-consuming, complex and not feasible for all companies. In addition, tax structuring may be more complex in an asset deal. The benefits of an asset deal include that a bidder is not required to follow the regulated public offer process and that it can acquire full control over the target company's business without needing to have at least 95 per cent of the shareholders tender their shares (which is required to initiate statutory buy out proceedings; see 'Obtaining full control of the target company' below for more information). The decision by the target company's management board requires approval by the general meeting by an absolute majority (unless the company's articles of association provide for a qualified majority).

A typical downside of a legal merger is that a cash-out merger under Dutch law is not possible. Therefore, the merger route is only feasible if the consideration is in securities. In addition, the merger route is a formalised process with a one-month creditor opposition period and other restraints (eg, regarding the financials and timing of the merger process and completion). The benefits of the merger route also include that a bidder is not required to follow the regulated public offer process and that it can acquire full control over the target company's business without needing to have at least 95 per cent of the shareholders tender their shares. The approval of the merger by the general meeting requires an absolute majority (unless the company's articles of association provide for a qualified majority), provided that a two-thirds majority is required if less than half of the company's issued and outstanding share capital is represented at the relevant meeting.

In a cross-border legal merger, further formalities are imposed, including procedures for establishing co-determination rights for employees and the possibility for shareholders that vote against the merger proposal to receive a cash consideration.

INSIDE INFORMATION AND DISCLOSURE

The timely disclosure of inside information is critical when dealing with a potential public offer. Under the MAR (which also applies to Dutch issuers), 'inside information' is defined as information of a precise nature that has not been made public and that (directly or indirectly) relates to one or more issuers or to one or more instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments. Inside information must be made public as soon as possible under the MAR.

Given that negotiations on a potential public offer generally constitute inside information under the MAR (depending on the phase of the negotiations), such information must, in principle, be made public as soon as possible. The publication of inside information may, however, be delayed if: (1) immediate disclosure is likely to prejudice the legitimate interests of the company; (2) delaying the disclosure is not likely to mislead the public; and (3) confidentiality of the information is safeguarded. This option to delay disclosure is typically used during the negotiation phase of a public offer.

To ensure that all three cumulative requirements are continuously met, the parties involved in the public offer closely monitor the listed company's share price and trading volume, and possible rumours in the market. It is possible to establish a leak protocol that sets out the protocol to be followed in the case of a (potential) leak (including who to call and how to decide on a possible emergency press release).

Under the MAR, a listed company is under the obligation to maintain an insider list that contains an overview of all persons that work for the company and have access to inside information, including details on such persons' identity and reasons for having access to inside information.

Under the Dutch bidding rules, delaying the disclosure of inside information is, in any event, no longer allowed once the bidder and target company have reached an agreement (whether conditional or unconditional) on the public offer. See 'Announcement' below on the announcement of a public offer.

Furthermore, under the Dutch bidding rules, the bidder (also a non-listed bidder) is also under the obligation to make a public announcement on information that qualifies as inside information under the MAR if and to the extent it directly relates to itself or is related to the intended, announced or launched public offer.

DUE DILIGENCE

In relation to a public offer, a bidder often desires to conduct a due diligence investigation of the target company. The process, however, usually deviates from typical private M&A due diligence, both in scope and duration. Because a listed company has extensive disclosure obligations (including half-year and annual reports, and disclosure of inside information), a significant amount of relevant information is already publicly available. In addition, parties (in particular, the target company) may be inclined to keep the period during which due diligence takes place limited to limit the risk of a leak and a disclosure obligation. The inclination to opt for a short due diligence period may not be the case for a bidder that wants to conduct thorough due diligence, although, also for a bidder, a leak and subsequent public announcement may jeopardise the transaction (eg, increasing the risk of an interloper before having sealed the deal or unrealistic market speculation on the offer price).

See also 'Role of the target company's boards and anti-takeover measures' below on the role of the target company's boards in relation to permitting the bidder to conduct a due diligence investigation.

Before information is shared with a potential bidder, the target company and bidder will enter into a confidentiality agreement (also called a non-disclosure agreement or NDA). The main obligation set out in the confidentiality agreement is that the bidder agrees to keep the information received from the target company in relation to the intended public offer confidential. Sometimes, a standstill is agreed pursuant to which the bidder is not allowed to acquire shares in the target company for a certain period of time (see also 'Stake-building' below).

ROLE OF THE TARGET COMPANY'S BOARDS AND ANTI-TAKEOVER MEASURES

Under Dutch law, the boards of a company have the duty to act in the best interest of the company and its business. This means that boards should not only act in the best interest of the shareholders but also take other stakeholders of the company into account (eg, employees, creditors and customers). The boards of a target company must also make their decisions on this basis when approached by a party in relation to a potential public offer.

If the company's boards receive an initial (non-binding) offer from a party with the request to conduct a due diligence investigation to confirm the proposed offer price and other proposed terms, the company's boards are not under the obligation to allow such access if they deem such an offer to not be in the company's best interest. If the party is not allowed to conduct a due diligence investigation, it will generally become more difficult for such a party to proceed with an offer.

If the party decides to move forward with the public offer in spite of the target company's unwillingness to allow access for due diligence and/or negotiate a possible public offer on friendly terms, the target company's boards may have several anti-takeover measures at their disposal to impede a successful public offer.

The board neutrality rule under Article 9(2) of the Takeover Directive has been implemented in Dutch law, but the use of such a rule is optional for Dutch companies. If the rule is implemented voluntarily by

a company in its articles of association, the company's board should refrain from taking actions to frustrate a public offer with a prior mandate from the general meeting, but the voluntary implementation of this rule by Dutch companies is rare.

Typical anti-takeover measures that may be used in the context of a hostile offer include the following.

180-day response time

If a 'hostile' bidder is also a shareholder of the target company or the target company has shareholders that are supportive of the bidder's offer, it may be possible that the bidder and/or other shareholders initiate a general meeting and put the dismissal of the non-cooperative directors and/or other related matters on the agenda.

Pursuant to the Dutch Corporate Governance Code, which applies on a comply-or-explain basis, the management board may decide to stipulate a response time for a reasonable period not exceeding a 180-day period if one or more shareholders intend to request that an item be put on the agenda that may result in a change in the company's strategy, for example, as a result of the dismissal of one or several members of the management board or supervisory board.

The response time should be used by the company's management board for further deliberation and constructive consultation, in any event, with the relevant shareholder(s), and the management board should explore alternatives (eg, it may use this period to engage with other potential bidders or strengthen the company's standalone strategy).

250-day cooling-off period

In addition to the response time (although they are not cumulative), Dutch corporate law provides for the possibility that the company may invoke a cooling-off period of no more than 250 days in the following situations:

- a request by one or more shareholders to discuss a proposal for the appointment, suspension or dismissal of one or more management board members or supervisory board members, or to change provisions in the company's articles of association that deal with such an appointment, suspension or dismissal; and

- the announcement or launch of a public offer without an agreement having been reached between the bidder and the company.

The cooling-off period may only be invoked with the approval of the supervisory board and if the management board is of the opinion that the request or offer is substantially contrary to the interest of the company and its business.

During the cooling-off period, the management board must: (1) gather all information it requires to be able to determine its policy; and (2) consult, in any event, all the company's shareholders that hold at least 3 per cent of the issued and outstanding share capital, and its works council.

Anti-takeover foundation

A substantial number of Dutch listed companies have anti-takeover protection in place where an independent foundation (*stichting*) with the purpose to, in short, protect the target company's interests has a call option to subscribe for preference shares in the company. If the call option is exercised in the context of a (potential) public offer, the (potential) share interest of the bidder in the target company will be diluted and the bidder will not be able to exercise the majority of the voting rights in the company after completion of the offer. The existence of an anti-takeover foundation can function as a deterrent to hostile offers and incentivise potential bidders to aim for a friendly deal.

The foundation is independent and can therefore not be forced by the target company to use its call option. Furthermore, Dutch case law indicates that protective measures must be proportional, adequate and generally of a temporary nature. In addition, if an anti-takeover foundation exercises its call option and holds the issued shares for a period longer than two years, the exception to the requirement to make a mandatory public offer ceases to apply (see also 'Types of public offers and alternative transaction structures: Mandatory public offer' above).

Other

In addition to the anti-takeover measures summarised above, there are other (more permanent) anti-takeover measures that can be in place at the company. These include a foundation that holds all shares in the company and has issued depositary receipts (which are listed) and priority shares with special rights for the holders of such shares (eg, appointing board members).

MERGER AGREEMENT

In the case of a friendly offer, the bidder and company enter into a merger agreement (or merger protocol), which is the key transaction agreement in a negotiated public offer. The following key provisions are typically included in a merger agreement:

Board recommendation and support

This is the obligation for the target company's boards to: (1) recommend that the company's shareholders tender their shares in the public offer and vote in favour of the resolutions put on the agenda during the target company's informative extraordinary general meeting (EGM) (see also 'High-level overview of the regulated public offer process' below); and (2) cooperate with the bidder in relation to the public offer, for example, in order to obtain the required regulatory clearances.

Offer price

This refers to information on the offer price; see 'Offer price' below for more information.

Pre-offer conditions

These are conditions that must be satisfied or waived before the bidder is required to launch the public offer. These may include 'no MAC' and 'no warranty breach' conditions, but also that no competing offer was launched or that the boards' recommendation and support has not been changed.

Offer conditions

These are conditions that must be satisfied or waived before the bidder is under the obligation to declare the offer unconditional and proceed with settlement. In addition to the items included as pre-offer conditions, the offer conditions typically include regulatory clearances and a minimum acceptance threshold (see 'Obtaining full control of the target company' below).

Interim operating covenants

The target company will agree not to take certain actions without seeking the bidder's approval during the period between agreeing the merger agreement and settlement of the public offer.

Fiduciary out and break fee

Although the boards of a listed company may bind the company in relation to an intended public offer by a bidder and enter into exclusivity arrangements, the general view is that it should be possible for boards to change their recommendation and terminate the agreement under certain circumstances (fiduciary out). The fiduciary out is typically linked to a competing offer that is overall more favourable and whose offer price is at least a certain percentage higher than the offer price agreed with the initial bidder (usually between 6 per cent and 10 per cent). In practically all merger agreements, it is provided that, if the target's boards' use their fiduciary out, the bidder will be entitled to a break fee. From a fiduciary duties point of view, it is generally assumed that the board can only agree to a break fee that is a reasonable compensation for costs and lost opportunity, although there is no statutory rule for break fees in public offer situations. A break fee is usually around 1 per cent of the equity value of the target company.

Reverse break fees

It is also possible to agree that the bidder will pay a break fee to the target company under certain circumstances. If agreed, this is often linked to the bidder's obligation to obtain regulatory clearances. Although the break fee amount of the fiduciary out is sometimes mirrored, the amount of the reverse break fee is usually more deal specific.

Non-financial covenants

Since the target company's boards have a duty not only to take the interest of the company's shareholders into account but also that of other stakeholders, they should not only protect the fair price but also other interests of the company and its stakeholders. The target company will therefore often propose that the bidder agree 'non-financial covenants'. Typical non-financial covenants relate to the treatment of employees, location of headquarters and protection of minority shareholders. In particular, where a bidder is a financial investor (private equity), covenants on prudent financing may also be deemed important by the target company. Non-financial covenants relating to the protection of minority shareholders usually cease once the bidder either has acquired full ownership of the company or when statutory buy-out proceedings commenced. Other non-financial covenants usually continue to apply for between one to four years. In most cases, an independent director remains on the target company's board for as long as the non-financial covenants apply in order to oversee compliance.

IRREVOCABLE UNDERTAKINGS

If a listed company has one or more large shareholders (5 per cent or more), the bidder (and also the company) may consider ensuring, in advance of announcing the transaction, that such shareholders are supportive of the deal and will tender their shares. This may in particular be the case because any shareholder with a stake of 5 per cent or more is able to frustrate the bidder's ability to obtain full ownership of the target company through statutory buy-out proceedings (see 'Obtaining full control of the target company' for more detail on obtaining full control post-settlement, including through (pre-wired) back-end structures). If a shareholder is approached and willing to commit to tender its shares, it will enter into an 'irrevocable undertaking'. If a listed company has a controlling or majority shareholder, this shareholder is likely to be involved at an earlier stage or may even lead the process, instead of the company leading the process.

The irrevocable undertaking typically provides that the shareholder undertakes to tender all its shares in the target company. The irrevocable undertaking sometimes also contains a voting undertaking for the shareholder to vote in favour of certain resolutions relating to the public offer that are put on the agenda of the mandatory informative extraordinary general meeting of the target company (see also 'High-level overview of the regulated public offer process' below).

Approaching shareholders and sharing inside information with such shareholders in the context of a public offer may be allowed under the MAR when: (1) the information is necessary to enable shareholders to form an opinion on their willingness to offer their shares; and (2) the willingness of shareholders to offer their shares in the offer is reasonably required for the decision to make the offer. If these cumulative requirements are met, the procedural rules pursuant to Article 11 of the MAR should also be strictly followed in order to be able to benefit from the 'safe harbour' rule.

When approached, a shareholder should first decide if it is willing to receive inside information. Once it has received the inside information, it is no longer allowed to trade in the listed company's securities until the inside information no longer constitutes inside information. Some shareholders are not willing to limit themselves in this respect.

There is also a specific mandatory public offer exemption in the Dutch bidding rules to avoid a bidder who, obtaining commitments of 30 per cent or more, acts in concert with such shareholders and is obliged to launch a mandatory public offer. The mere commitment to tender should not bear the risk of being deemed to be acting in concert, but this may be the case in relation to voting arrangements. There are several requirements that must be met to ensure the bidder has the benefit of the exemption, including that the voting undertaking only relates to an obligation to vote in favour of resolutions specifically addressed in the agreement, where the resolutions are subject to the offer being declared unconditional and that directly relate to the public offer (or to vote against resolutions aimed at frustrating the offer).

ANNOUNCEMENT

Under the Dutch bidding rules, the public offer must be announced no later than when the bidder and target company have reached an agreement on the public offer, whether conditional or unconditional. Both the bidder and target company must make a public announcement containing the names of the bidder and target company; the intended price or exchange ratio; and the conditions to which the making and completion of the offer are subjected. The announcement is usually made through a joint press release. Once the public offer is announced, the regulated offer process commences (see 'High-level overview of the regulated public offer process' below).

A public offer may be deemed to be announced when a bidder makes specific information public on the intended public offer. Specific information is, in any event, the combination of the name of the target company with: (1) an intended offer price or exchange ratio; or (2) a specifically described timeline for the offer. This rule is mainly relevant in the context of an unsolicited and/or hostile offer. If the target company, however, immediately responds with a public statement that it is discussing a potential public offer with the bidder, the regulated offer process does not yet commence. This can also happen in a friendly situation if a bidder is, for instance, under obligation to publicly disclose the intended offer (see also 'Inside information and disclosure' above) before an agreement is reached.

'PUT UP OR SHUT UP' RULES

The Dutch bidding rules provide for the possibility that a target company can request that the AFM requires a potential bidder to clearly state its intentions regarding a possible public offer. If the AFM imposes this rule, the potential bidder must within six weeks either announce a public offer or publicly state that it will not announce a public offer. If the bidder announces within the six-week period that it will not announce a public offer, it will not be able to announce a public offer for six months. If the potential bidder fails to comply with the request from the AFM within the six-week period, the six-month period is extended to nine months. The prohibition lapses if a third party (not related to the party that is

prohibited from making an offer) announces a public offer for the same target company during the relevant six or nine-month period. The 'put up or shut up' rule described in this paragraph has not been invoked to date.

Furthermore, a potential bidder will be prohibited from making an offer for a six-month period if:

1. the bidder announces after the announcement that it will not make an offer;
2. the bidder fails to submit a timely offer memorandum to the AFM for approval (ie, not within 12 weeks after the announcement);
3. the offer memorandum is approved by the AFM, but the offer is not made; or
4. an offer is made, but not declared unconditional.

HIGH-LEVEL OVERVIEW OF THE REGULATED PUBLIC OFFER PROCESS

Once the public offer is announced, the regulated offer process commences. This process looks generally as follows:

Four-week update

Within four weeks following the announcement of the offer, the bidder must make a public announcement that it will submit an offer memorandum to the AFM within a certain time period (but, in any event, within 12 weeks of the announcement).

Certainty of funds

No later than at the time of submitting its offer memorandum to the AFM for approval, the bidder must have 'certainty of funds' and must make a public announcement in this regard.

Offer memorandum

Within 12 weeks of the announcement of the offer, the bidder must submit an offer memorandum to the AFM for approval. The offer memorandum is the formal offer document for which the Dutch bidding rules prescribe what should, in any event, be included. The overarching principle is that it should contain all information of interest to enable a reasonably informed person acting with due care to form a sound opinion on the public offer. The AFM has a statutory ten business day review period, following which it either approves the offer memorandum or provides comments. In practice, the AFM will always provide one or more rounds of comments on the offer memorandum. As a result, the approval process typically takes between six and ten weeks after the first submission of the offer memorandum. Following approval, the bidder publishes the approved offer memorandum.

Position statement

The company must publish a position statement on the public offer no later than four business days prior to the company's informative extraordinary general meeting (see 'EGM target company' below). In the case of a negotiated transaction, the position statement is usually published at the same time as the offer memorandum.

Offer period

The offer period during which the shares may be tendered may not be shorter than eight weeks and not longer than ten weeks.

EGM target company

No later than six business days prior to the end of the offer period, an EGM of the target company must be held during which the public offer is discussed. During this meeting, other items may be put on the agenda that may be relevant to the public offer, including board changes, changes to the company's constitutional documents and/or approval of back-end transactions aimed at obtaining full ownership post-settlement (see also 'Obtaining full control of the target company' below).

EGM bidder (optional)

If the bidder must hold a general meeting in order to obtain financing for the public offer, it must hold this general meeting no later than seven business days prior to the end of the offer period.

Extension offer period

The offer period may be extended only once for a period of at least two weeks and no more than ten weeks. However, if a competing offer is announced or launched during the (extended) offer period, the offer period may be extended until the end of the offer period of the competing offer. In addition, if the offer price is increased and fewer than seven business days remain until the end of the (extended) offer period, the offer period is extended so that seven business days remain until the end of the offer period. Furthermore, a bidder may seek to obtain an exemption from the AFM to extend the offer period even further in certain circumstances (eg, if a regulatory clearance process has not yet been finalised at the end of the extended offer period).

Declaring the offer unconditional

No later than on the third business day following the end of the offer period, the bidder must make a public announcement as to whether it declares the offer unconditional.

Settlement

There is no specific statutory period during which settlement must take place, but this is typically between two to five business days.

Post-acceptance period

After having declared the offer unconditional, the bidder may offer non-tendering shareholders another opportunity to tender their shares during a period no longer than two weeks after the bidder announced that such an opportunity is granted to the remaining shareholders. This announcement must be within three business days following declaring the offer unconditional.

Delisting

If the bidder acquired 95 per cent of the shares in the public offer, the delisting process can be initiated with the agreement of the target company. The request must be submitted to Euronext Amsterdam and if the delisting request is approved delisting will generally take place 20 trading days after the decision is published.

Statutory buy-out proceedings or back-end transaction

A shareholder holding at least 95 per cent of the company's share capital may initiate general statutory buy-out proceedings or statutory takeover buy-out proceedings (if it also holds at least 95 per cent of the voting rights). Both proceedings are effected before the Enterprise Chamber of the Amsterdam Court of Appeal and give a bidder the opportunity to obtain full ownership of the target company following the settlement of the public offer. In the event a bidder has not reached the 95 per cent threshold for initiating statutory buy-out proceedings, the bidder may decide to implement a (pre-wired) back-end structure in order to obtain full ownership. See 'Obtaining full control of the target company' below for more details on statutory buy-out proceedings and (pre-wired) back-end transactions.

OBTAINING FULL CONTROL OF THE TARGET COMPANY

As long as a bidder has not acquired all shares in the target company, the bidder's ability to integrate the company's business is impacted by the duty of the target company's boards to take the reasonable interests of minority shareholders into account and the requirements that apply to related party transactions, including transparency, arm's length terms and approval by independent directors. Immediately following the settlement of a public offer, however, the bidder will almost never own all shares in the target company.

To ensure that the bidder can obtain full ownership of the target company following the settlement of the offer, a common condition for declaring the offer unconditional is that the bidder holds at least 95 per cent of the company's share capital following the settlement. Once the bidder reaches this threshold, it will be able to commence statutory buy-out proceedings in which it can acquire the remaining shares. In practice, in nearly all public offers, the bidder reaches the 95 per cent threshold and has therefore been able to commence statutory buy-out proceedings and to subsequently acquire 100 per cent of the target company's shares.

If the bidder fails to reach the 95 per cent threshold, it may (depending on the precise arrangements entered into with the target company) nevertheless decide to declare the offer unconditional. If the bidder still desires to obtain full ownership of the company, it may achieve this result by implementing a 'back-end transaction'. Typical back-end transactions include: (1) a triangular legal merger of the target company into a newly incorporated empty indirect subsidiary followed by a sale of the shares in the indirect subsidiary to the bidder and liquidation of the also newly incorporated empty direct subsidiary; and (2) an asset sale followed by the liquidation of the target company.

The bidder may wait until after settlement of the public offer to decide whether and which back-end transaction to implement, but, in most public offers, a back-end transaction is 'pre-wired' before settlement of the offer. This means that all resolutions necessary to implement the pre-wired transaction have been adopted prior to the offer period having lapsed. If the back-end transaction is pre-wired, the merger agreement typically provides that, on the adoption of the relevant resolutions, the 95 per cent threshold for declaring the offer unconditional will be set at a lower acceptance threshold. In most cases, this lower threshold is 80 per cent, but it is also possible to set the threshold higher or lower. Back-end transactions are usually viewed as more litigation-sensitive compared to the statutory buy-out route, which is why target company's boards will typically want a sufficient level of shareholder support before agreeing to cooperate with a back-end structure.

STAKE-BUILDING

As long as a bidder is not in possession of inside information (other than its own intention to make an offer), it is allowed to acquire shares on the market in preparation of or during the process of a public offer ('stake-building'). Once a bidder receives (other) inside information, for instance, during its due

diligence investigation or the target company's response to an initial offer by the bidder, it will be prohibited from buying shares in the target company until the inside information no longer qualifies as such (ie, following public disclosure by the company).

If the bidder acquires shares in the target company after the public offer is announced, it must immediately publish the relevant details of such transaction(s), although only one announcement per day is required.

The bidder must disclose its shareholding in the target company to the AFM if the bidder's holding of share capital and/or voting rights reaches each of the following thresholds (both upwards and downwards): 3 per cent, 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 30 per cent, 40 per cent, 50 per cent, 60 per cent, 75 per cent and 95 per cent. This information will be publicly available on the AFM website.

OFFER PRICE

The offer price in a voluntary public offer is set by the bidder and/or as agreed between the bidder and target company. There is no minimum offer price the bidder must offer. This is different for a mandatory public offer, where the bidder must offer a 'fair' price. See 'Types of public offers and alternative transaction structures: Mandatory public offer' above on the calculation of a fair price in a mandatory public offer.

The offer price can be in cash, securities or a combination of the two.

The bidder is also allowed to increase the offer price once during the (extended) offer period.

Even though there is no minimum price a bidder must initially offer, the bidder must pay the highest price paid by it as of the announcement until the settlement of the offer ('best price rule') (except if the higher price was paid in regular trading on a regulated market).

Once the bidder has declared the offer unconditional, it is not allowed to acquire shares on more favourable conditions for a one-year period as from the date of publication of the offer memorandum, except if a higher price was paid in regular trading on a regulated market.

If the bidder commences statutory buy-out proceedings, it will have to pay a 'fair' price to the remaining shareholders. This fair price is not calculated on the same basis as the fair price under a mandatory public offer. In the specific takeover buy-out proceedings, which are usually the proceedings initiated following a public offer, if at least 90 per cent of the shares on which the offer was aimed were tendered, the offer price will be deemed to be a fair price, although the court may appoint experts to determine the value of the shares that are to be transferred in the buy-out proceedings. The price will be payable in cash, even if a non-cash element was part of the offer price.