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LEXOLOGY
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the second edition of *Public M&A*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Egypt and Thailand.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Alan M Klein of Simpson Thacher & Bartlett LLP, the contributing editor, for his assistance in devising and editing this volume

LEXOLOGY®
Getting The Deal Through

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Netherlands

Allard Metzelaar and Willem Beek

Stibbe

STRUCTURES AND APPLICABLE LAW

Types of transaction

1 | How may publicly listed businesses combine?

The most common ways for publicly listed businesses to combine are through a public offer or by means of a legal merger.

Public offer

A public offer can be made in the form of a full offer, a partial offer, a tender offer or a mandatory offer.

A full offer is a public offer for the acquisition of all shares in a target company of a specific category or class. This is the most common type of public offer in public takeover practice in the Netherlands. In a partial offer, a public offer is made for the acquisition of shares representing less than 30 per cent of the voting rights in the general meeting of a target company. A tender offer is a public offer where the bidder invites the shareholders of a target company to tender their shares to the bidder at a price determined by each of the shareholders individually, aimed at the acquisition of shares representing less than 30 per cent of the voting rights in the general meeting of that target company. Both the partial offer and the tender offer are relatively uncommon types of public offers. Lastly, if a party – solely or acting in concert – acquires or has acquired shares representing 30 per cent or more of the voting rights in the general meeting of a company (ie, 'predominant control'), that party is obliged to make a full offer for all shares in that company. Certain exceptions can apply to the obligation to make a mandatory offer. A party is exempt from making a mandatory offer if, for example, that party:

- acquires predominant control over a company by declaring a full offer for the shares of the company unconditional, if as a consequence of such declaration that party has acquired more than 50 per cent of the voting rights in the general meeting of the company;
- is an anti-takeover foundation (as described in question 9), on the understanding that the anti-takeover foundation may only hold the shares for a maximum period of two years; or
- is a trust office that has issued depository receipts for the shares in the company.

Legal merger

In a legal merger, one entity by operation of law acquires all assets and liabilities of a publicly listed company, which subsequently ceases to exist.

Within the European Economic Area (EEA) limited liability companies may also enter into a cross-border legal merger, effectively amalgamating by operation of law the business of a company incorporated in one EEA jurisdiction with the business of a company incorporated in another EEA jurisdiction (see question 15).

Statutes and regulations

2 | What are the main laws and regulations governing business combinations and acquisitions of publicly listed companies?

Regular business combinations (including legal mergers) are mainly governed by the Civil Code. Public offers, however, are regulated through specific laws and regulations such as the Financial Supervision Act, the Public Takeover Bid Decree and various ancillary regulations.

Other Dutch laws and regulations governing business combinations and acquisitions of publicly listed companies include:

- the Competition Act;
- the Works Council Act;
- the Merger Code; and
- the Corporate Governance Code.

European Union law and regulations (eg, on merger control) and national merger control rules of foreign jurisdictions may also be relevant. In the case of a regulated business (eg, financial services and insurance), specific regulatory approvals may be necessary.

Transaction agreements

3 | Are transaction agreements typically concluded when publicly listed companies are acquired? What law typically governs the agreements?

In a friendly offer, the bidder and the target company usually enter into a merger protocol.

The merger protocol is an agreement that contains certain obligations for the bidder and the (boards of the) target company and the key terms of the offer. In the merger protocol, the bidder undertakes to pursue the public offer and the boards of the target company undertake to recommend the offer to the shareholders. The merger protocol normally also includes provisions on the structure of the offer process. Other matters typically covered in a merger protocol include break fees, non-financial covenants, pre-offer conditions, offer conditions, access to information of the target company, future governance of the target company, exclusivity for the bidder and a 'fiduciary out' provision for the boards of the target company in case of a superior competing offer. The merger protocol is usually governed by Dutch law.

FILINGS AND DISCLOSURE

Filings and fees

4 Which government or stock exchange filings are necessary in connection with a business combination or acquisition of a public company? Are there stamp taxes or other government fees in connection with completing these transactions?

In the Netherlands, no stamp taxes or other government fees are due in connection with completing a business combination or acquisition of a public company as such, with the possible exception of real estate transfer tax. See question 18 for tax issues relating to public offers and business combinations involving real estate.

The following filings are the most noteworthy.

Public offer

In the case of a public offer, the bidder must prepare and publish an offer memorandum that must be filed with and approved by the Netherlands Authority for the Financial Markets (AFM). See question 5 regarding the information that needs to be disclosed in the offer memorandum.

Legal merger

In the case of a legal merger, the management boards of the merging companies have to prepare a merger proposal. This proposal needs to be filed with the trade register of the chamber of commerce and deposited at the company's offices. The relevant companies must also publish a notice of the filing in a daily newspaper with national circulation.

Competition filing

Under the Competition Act, certain transactions have to be notified to the Netherlands Authority for Consumers and Markets (ACM). A transaction has to be notified to the ACM if it qualifies as a 'concentration' and the turnover of the businesses concerned exceeds the ACM's jurisdictional thresholds. A concentration is defined as: (i) a merger of two previously independent businesses, (ii) the direct or indirect acquisition of control over a business, or (iii) the establishment of a joint venture that performs all the functions of an autonomous economic entity on a long-term basis. The notification thresholds are that the combined worldwide turnover of the businesses concerned exceeded €150 million in the calendar year preceding the transaction and at least two of the businesses concerned each realised a turnover of €30 million or more in the Netherlands. As a general rule, a transaction that must be notified to the ACM may not be implemented prior to obtaining clearance from the ACM. However, in case of a public offer the shares may be acquired before clearance is obtained, provided that (i) the ACM is immediately notified and (ii) the acquiring party does not exercise the voting rights attached to the acquired shares before the clearance is obtained. If a transaction needs to be notified to the European Commission, no separate notification to the ACM is required.

Information to be disclosed

5 What information needs to be made public in a business combination or an acquisition of a public company? Does this depend on what type of structure is used?

In a public offer, the offer memorandum must include information on:

- the names of the bidder and target company;
- whether the bidder and target company are party to an agreement regarding the public offer (eg, a merger protocol);
- the proposed price or exchange ratio;
- an explanation of how the bid is financed;
- the offer conditions;
- whether the bidder has acquired any irrevocable undertakings from shareholders;
- any price-sensitive information related to the bid that might be relevant to a reasonably acting investor;
- a statement on the consequences for current employees of the target company;
- the total costs related to the transaction and a statement confirming which party bears these costs; and
- a summary of the offer memorandum in Dutch if the original version is in English.

Ongoing disclosure requirements for public companies

Companies listed on a regulated market in the Netherlands have an ongoing obligation to disclose any information which, if made public, would be likely to have a significant effect on the price of its shares. Under the Markets Abuse Directive, such disclosure of information may, however, be delayed if: (i) immediate disclosure is likely to prejudice the legitimate interests of the company, (ii) the delay is not likely to mislead the public, and (iii) the company is able to ensure the confidentiality of the information.

Disclosure of substantial shareholdings

6 What are the disclosure requirements for owners of large shareholdings in a public company? Are the requirements affected if the company is a party to a business combination?

The Financial Supervision Act includes certain ownership thresholds for shareholders of listed companies (3, 5, 10, 15, 20, 25, 30, 40, 50, 60, 75 and 95 per cent). A shareholder must notify the AFM if he or she obtains shares representing 3 per cent or more of the capital or voting rights. Following notification, the shareholder must notify the regulator if the shareholding reaches, exceeds or drops below one of the thresholds. This disclosure obligation also applies to indirect holdings, potential holdings and economic interests in shares (eg through derivatives). Likewise, short positions must be notified to the AFM.

DIRECTORS' AND SHAREHOLDERS' DUTIES AND RIGHTS

Duties of directors and controlling shareholders

7 What duties do the directors or managers of a publicly traded company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination or sale? Do controlling shareholders have similar duties?

General duties

The management board and each of its members must perform their duties in the best interests of the company and its business. The company's best interests is a combination of the interests of all stakeholders of the company, including shareholders, employees, suppliers and customers. In an acquisition, the management board of the acquiring company is, among other things, obliged to ensure the conduct of proper due diligence on the target company.

The supervisory board of a company consists of the non-executive directors of a company. The supervisory board advises and supervises the management board. Supervisory and managing directors can also be combined in a one-tier board.

The Dutch Corporate Governance Code contains several governance principles and best practices and is mandatory for listed companies. The focus of the Corporate Governance Code is on continuity and long-term value creation.

Shareholders are free to pursue their own interests within the limitations of reasonableness and fairness.

Specific duties in case of a public offer

The management board and supervisory board of a target company have a central role during a public offer. If the offer is friendly, the management board of the target company, in close consultation with or involvement of the supervisory board, negotiates the financial and non-financial terms of the offer with the bidder. After the bidder has published the offer memorandum, the boards of the target company have to inform the shareholders whether they support the public offer by publishing a position statement. The position statement must include a substantiated explanation of the position of the boards, stating, among other things, their opinion on the offer price and the considerations on which the offer price is based and the consequences of the offer for jobs and employment conditions. In the case of a friendly offer the position statement is usually published together with the offer memorandum.

Approval and appraisal rights

8 What approval rights do shareholders have over business combinations or sales of a public company? Do shareholders have appraisal or similar rights in these transactions?

Shareholders of public companies have a statutory right to approve decisions of the management board relating to an important change in the identity or character of the company or its business. These decisions include the transfer of all or substantially all of the business of the company and the acquisition or divestment of an interest in another company with a value of at least one-third of the company's assets. Further-reaching approval rights can be set out in the articles of association of a company.

In a full public offer, the target company is obliged to convene an extraordinary meeting of shareholders to discuss the offer. If the public offer is made subject to certain shareholder approvals (eg, approval on post-completion restructuring and/or board appointments), resolutions for such approvals are usually submitted to the shareholders of the target company at the extraordinary meeting.

In a legal merger, both the general meeting of the acquiring entity and the general meeting of the entity that ceases to exist decide on the merger by adopting a merger resolution. Alternatively, the acquiring entity may also decide to merge by a resolution of its management board, unless its articles of association provide otherwise.

COMPLETING THE TRANSACTION

Hostile transactions

9 What are the special considerations for unsolicited transactions for public companies?

Although most successful public offers in the Netherlands are friendly, an increasing number of offers start out hostile or unsolicited but eventually become friendly during the preparation phase of the offer process. The rules and regulations relating to public offers as such do not make any distinction between hostile and friendly offers. However, the following is noteworthy in the context of a hostile offer.

Put up or shut up rule

Under the 'put up or shut up' rule, if a potential bidder has disclosed information from which the target company may deduce an offer may be on its way, the target can request the AFM to oblige the bidder to confirm whether or not it intends to launch an offer. If the potential bidder does not confirm that it intends to launch an offer, the potential bidder cannot make an offer for the target during the next six months.

Anti-takeover foundation

A common defence mechanism against hostile takeovers is the use of an 'anti-takeover foundation' (*stichting*). In short, a foundation is incorporated and enters into an option agreement with the relevant company under which the foundation has the right to call for newly issued high voting shares in the capital of the company. The potential voting rights of a hostile bidder will be greatly diluted if the foundation exercises its option. Typically special preference shares are used in this mechanism, which may be issued against their nominal value. The anti-takeover foundation can, therefore, acquire a high number of voting rights against minimal cost. The consideration for the shares to be issued to the foundation may not be funded with the assistance of the company, as this would violate restrictions on financial assistance. Usually, the anti-takeover foundation has ongoing credit arrangements in place with banks or other institutions for the financing of its subscription to preference shares. This anti-takeover mechanism can, therefore, be utilised at short notice.

Break-up fees – frustration of additional bidders

10 Which types of break-up and reverse break-up fees are allowed? What are the limitations on a public company's ability to protect deals from third-party bidders?

The merger protocol will usually stipulate a break-up fee to be paid by the target company to the bidder in the event the company withdraws its recommendation for the offer or supports a competing offer. Break-up fees are accepted as long as they are intended as reimbursement of the bidder's realistic expenses. Break-up fees are often calculated as a percentage of the deal value, for example, 1 per cent. The fee may not serve as a de facto 'poison pill'. However, the board of the target company should be free to consider and possibly support offers that are deemed superior. The definition of 'superior' can be negotiated between the bidder and the target as it is not provided by law, although the threshold may not be set too high so as to ensure that the board can comply with its fiduciary duty to act in the best interest of the company and its stakeholders by supporting a competing offer that the board deems superior from an overall perspective.

A reverse break-up fee – to be paid by the bidder to the target company – typically might be agreed upon for the event that the bidder does not obtain the relevant clearances for completion of the offer (eg, competition clearance) and hence cannot complete the offer. Reverse break-up fees can be substantial, depending on the circumstances.

Government influence

11 Other than through relevant competition regulations, or in specific industries in which business combinations or acquisitions are regulated, may government agencies influence or restrict the completion of such transactions, including for reasons of national security?

Other than the situations as stated in question 17, there is no formal government influence over business combinations or acquisitions.

Conditional offers

12 What conditions to a tender offer, exchange offer, mergers, plans or schemes of arrangements or other form of business combination are allowed? In a cash transaction, may the financing be conditional? Can the commencement of a tender offer or exchange offer for a public company be subject to conditions?

Conditional offers are allowed under Dutch law and there are generally no restrictions on the types of conditions attached to an offer, provided that the satisfaction of a condition is not controlled by the bidder (ie, potestative conditions are not allowed). Examples of frequently used conditions are:

- acceptance of the offer by a minimum percentage (usually 70–95 per cent) of shares;
- no material adverse change;
- no default by a party during the offer process;
- no competing offer by a third party;
- shareholders to approve post-completion restructuring and board changes;
- waiver by anti-takeover foundation of share option;
- no withdrawal of irrevocables; and
- approval of the competition authorities has been obtained.

The financing in a cash acquisition may not be conditional as the bidder must provide a certainty of funds statement by the time the offer memorandum is filed with the AFM for approval (see question 13).

Financing

13 | If a buyer needs to obtain financing for a transaction involving a public company, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

The bidder in a public offer has to provide a certainty of funds statement by the time the offer memorandum is filed with the AFM for approval. In this statement the bidder has to elaborate on the financing of the offer and provide information on how the payment for the shares is ensured.

If the bidder wishes to (partially) finance its offer through the issuance of new shares or if the bidder wishes to offer newly issued shares instead of cash as consideration for the target shares (eg, in case of an exchange offer), the general meeting of shareholders of the bidder may have to resolve on such issuance. In that case, the bidder has fulfilled its certainty of funds obligation if, ultimately by the time the offer memorandum is filed with the AFM for approval, the bidder has made a public announcement that a general meeting will take place.

Minority squeeze-out

14 | May minority stockholders of a public company be squeezed out? If so, what steps must be taken and what is the time frame for the process?

The Civil Code provides two squeeze-out mechanisms for shareholders of Dutch companies. The first is a general mechanism that enables a shareholder who holds at least 95 per cent of the shares of a company to institute proceedings against the other shareholders jointly for the transfer of their shares to the claimant. The proceedings must be brought before the Enterprise Chamber of the Amsterdam Court of Appeal. The Enterprise Chamber will reject the claim against all defendants if, notwithstanding compensation, one of the defendants would suffer serious tangible loss by such transfer. The procedure cannot be started if shares with special voting rights are outstanding (eg, golden share or priority shares). The price for the shares is set by the court, usually – but not necessarily – on the basis of the offer price.

The second provision is only available to parties who hold at least 95 per cent of the shares of a company as a consequence of a public offer. This provision follows from the implementation of the EC Takeover Directive and only applies if the target company is listed on a market within the European Economic Area. The squeeze-out claim must be filed with the Enterprise Chamber of the Amsterdam Court of Appeal within three months of the expiry of the term for acceptance of the offer. The court will usually set the price for the shares at the offer price unless less than 90 per cent of the shares held by the claimant were acquired in the offer.

If the 95 per cent threshold is not satisfied, bidders may resort to alternative options to acquire full control over the business. This control can be achieved, for example, by transferring the business of the target company to a special purpose vehicle owned by the bidder after completion of the offer. In recent years, it has become increasingly common to pre-wire these alternative options as much as possible, for example by negotiating the relevant agreements between the bidder and the target company in advance and by acquiring shareholder approval for the restructuring before completion of the offer. This could save valuable time following completion of the offer and increases deal certainty. However, none of the alternative structures is free from the risk of being challenged by minority shareholders. Furthermore, these alternative structures require careful tax review and tax structuring in light of potential tax consequences (eg, withholding taxes and availability of tax relief).

Cross-border transactions

15 | How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

A public offer for a Dutch listed company by a foreign bidder is not structured differently from an offer by a domestic bidder. A foreign bidder will usually incorporate a Dutch special purpose vehicle, usually a private limited liability company. Tax considerations, such as interest deductibility on acquisition debt and efficient repatriation of future profits to the bidder, are relevant for the acquisition structure, which may include – for example – a holding company located in a Dutch tax treaty jurisdiction.

Specific rules apply to a cross-border legal merger, however, this is not a particularly common business combination. The rules for a cross-border merger apply when a Dutch limited liability company merges with a limited liability company incorporated under the laws of another European Economic Area member state. The shareholders of a Dutch entity ceasing to exist who voted against the merger, as well as holders of shares without voting rights, may request to be compensated in cash rather than shares. An independent expert will determine the amount of the cash compensation. Such cash compensation payments may be subject to 15 per cent Dutch dividend withholding tax, depending on the structuring.

Waiting or notification periods

16 | Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations or acquisitions involving public companies?

Apart from legal mergers, there are no general waiting or notification periods for completing business combinations or acquisitions involving public companies.

In a legal merger, a merger proposal must be filed with the trade register of the chamber of commerce and the company's office. Subsequently, the merging entities must publish a notice of the filing in a daily newspaper with national circulation. After the filing and announcement by all the merging companies, there is a mandatory one-month waiting period. During this period, each creditor of the merging companies may object to the merger in the event none of the companies has provided the creditor with sufficient safeguards for payment of its receivable. The court will reject the objection in the event the creditor fails to demonstrate that the financial position of the acquiring company after the merger provides less certainty of payment to the creditor. Once an objection to the merger has been made, the deed of merger may only be executed after the objection has been withdrawn or lifted. In practice, objections against legal mergers are rarely made.

OTHER CONSIDERATIONS

Sector-specific rules

17 | Are companies in specific industries subject to additional regulations and statutes?

Companies operating in certain specific industries are subject to notification and approval procedures with regard to business combinations.

Energy sector

In the energy sector, the Minister of Economic Affairs must be notified of any change of control over a power station with a production capacity above 250 megawatts. The business combination can be prohibited for reasons of national security or supply security.

Healthcare sector

In the healthcare sector, approval of the Dutch Healthcare Authority is required for a business combination involving a healthcare provider if the healthcare provider involved has more than 50 employees.

Financial sector

In the financial institutions sector, a declaration of no-objection from the Dutch Central Bank is required before acquiring an equity or voting interest of 10 per cent in a financial institution. In the event the financial institution is a bank, a declaration of no-objection from the European Central Bank is required. The decision to grant a declaration of no-objection is based on, among other things, the integrity, suitability and financial soundness of the prospective purchaser. Increases in the interest held by the purchaser above certain thresholds and decreases below those thresholds must be notified to the Dutch Central Bank.

Tax issues

18 | What are the basic tax issues involved in business combinations or acquisitions involving public companies?

The tax issues involved depend on the type of business combination involved.

Public offer

A public offer for the shares in a Dutch listed company is done either directly by a foreign entity or indirectly through a wholly owned Dutch acquisition corporate entity. If the shares are acquired through a Dutch acquisition corporate entity, a fiscal unity may be formed by the acquiring entity together with the Dutch target entities, provided that certain criteria are met (notably that the acquiring entity holds at least 95 per cent of the legal and economic ownership). If a fiscal unity is formed, the interest expenses on acquisition debt at the level of the acquisition entity may in principle be offset against the profits of the Dutch target entities (subject to applicable interest deduction limitations limiting, among others, the deductibility of the fiscal unity's net borrowing costs up to the higher of 30 per cent of its adjusted Dutch taxable profit (the EBITDA for tax purposes) or €1 million). Share deals are in principle not subject to value added tax in the Netherlands. It is important, however, to be aware of the corporate income tax anti-abuse rules in respect of foreign shareholders. According to these anti-abuse rules, a foreign shareholder with a substantial interest (ie, generally a shareholding of 5 per cent or more) in a Dutch resident company may under certain circumstances be subject to Dutch corporate income tax (statutory rate of 25 per cent) as a non-resident taxpayer in respect of dividends received or capital gains realised. Generally, these anti-abuse rules do not apply in the case of active investment in Dutch targets. A tax treaty may shelter shareholders from these anti-abuse rules.

Other business combinations

Subject to certain conditions, there are rollover provisions available for certain business reorganisations (eg, legal mergers and demergers). Under these rollover provisions, the transfer of assets or shares takes place on a non-recognition basis to the extent that the transferee records those items for the same value in its tax books.

Real estate transfer tax

With respect to publicly listed real estate investment companies, real estate transfer tax at a rate of 2 per cent (residential real estate) or 6 per cent (commercial real estate) could be levied on the acquisition of shares or similar rights if the buyer obtains, directly or indirectly, an interest of at least one-third in a real estate investment company (including shares and rights already in possession). This is the case if the assets of the resident or non-resident real estate investment company consist of more than 50 per cent of real estate assets and at least 30 per cent of the real estate is situated in the Netherlands provided the real estate, as a whole, is or was mainly used at that time for the acquisition, sale or exploitation of the real estate. There are certain exemptions available.

Labour and employee benefits

19 | What is the basic regulatory framework governing labour and employee benefits in a business combination or acquisition involving a public company?

Works Council Act

Employees of Dutch companies are represented within the company through the works council. Companies with more than 50 employees are obliged to establish a works council. The rights of the works council are determined by the Works Council Act.

The works council must be given the opportunity to advise on intended economic, organisational and financial decisions of the company (eg, the decision by the board of the target company to recommend a public offer). The advice must be requested at such a point in time that the works council's advice can (still) influence the actual decision. This means that the advice is to be requested when the content of the contemplated decision has been sufficiently determined, but before the decision is actually taken. The works council is usually consulted after signing of the merger protocol. When seeking advice, the reasons for the intended decision will have to be explained, as well as any consequences for the employees.

If the advice of the works council is neutral or positive, the company may start implementing the decision. If the advice of the works council is negative, the company is obliged to postpone the implementation of the decision for one month. Completion of the works council consultation procedure is often included as a pre-offer condition in the merger protocol.

During the aforementioned one-month waiting period, the works council may file an appeal with the Enterprise Chamber of the Amsterdam Court of Appeal. During the postponement period and as long as the proceeding continues, the company may not implement its decision. The works council may also appeal to the Enterprise Chamber if the company implements its decision without seeking advice.

There is no specific time frame for completion of the advice process. The entire process generally takes a few weeks (four to eight), but may take longer if the transaction has serious consequences for the employees.

Merger Code

Under the Merger Code, the Dutch Social and Economic Council and the relevant trade unions may need to be notified of a transaction and the trade unions may need to be given the opportunity to share their views on the transaction.

Restructuring, bankruptcy or receivership

20 What are the special considerations for business combinations or acquisitions involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

In the Netherlands, bankruptcy and insolvency proceedings are governed by the Bankruptcy Act. The Bankruptcy Act does not contain any special considerations for business combinations or acquisitions involving a bankrupt target company. If a company is in financial difficulties and heading towards insolvency, it is possible to pre-wire a restart of the company through a pre-pack transaction. There are currently no regulations on pre-packs, but proposals are pending to regulate pre-pack transactions through special legislation.

If a company is declared bankrupt, the court will appoint a bankruptcy trustee. The bankruptcy trustee is charged with the administration and liquidation of the bankruptcy estate and has power of disposal over the assets of the company. As a consequence, transactions, including a transfer of assets or shares in a subsidiary of the bankrupt company, require the consent of the bankruptcy trustee. Furthermore, several actions of the bankruptcy trustee require the prior approval of the bankruptcy judge – who supervises the bankruptcy trustee – or a special creditors' committee.

Anti-corruption and sanctions

21 What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations with, or acquisitions of, a public company?

There are no specific rules on anti-corruption, anti-bribery and economic sanctions in connection with business combinations with, or acquisitions of, a public company. The Criminal Code prohibits corruption and bribery of both government officials (public sector bribery) and non-government officials (private sector bribery). Under the Criminal Code, both the giver and the receiver of a bribe can be held criminally liable. Both individuals and companies can be held criminally liable in certain situations. If a company is prosecuted, individuals, for example directors or other executives, can also be held criminally liable with regard to offences attributed to the company.

UPDATE AND TRENDS

Current trends and proposals for reform

22 What are the current trends in public mergers and acquisitions in your jurisdiction? What can we expect in the near future? Are there current proposals to change the regulatory or statutory framework governing M&A or the financial sector in a way that could affect business combinations with, or acquisitions of, a public company?

Partly in response to a series of (attempted) unsolicited public offers for iconic Dutch companies, there is an ongoing debate in the Netherlands (and also in the EU) on the protection of companies against hostile takeovers and the protection of vital sectors. In the coalition agreement of the government (published in October 2017), three measures have been included aimed at reducing short-termism and stimulating value creation in the long term:

- public companies that are faced with proposals for a fundamental change of strategy at the general meeting or unsolicited takeover bids will have the opportunity to call a reflection period of 250 days;
- companies within certain vital sectors (eg, telecoms, energy, IT, drinking water, nuclear sector, financial sector, defence) can only be acquired – subject to materiality thresholds – following government approval, which approval may be subject to certain conditions;
- public companies with an annual turnover of more than €750 million will have the opportunity to ask a shareholder who holds more than 1 per cent of the shares to register with the AFM as a major shareholder. This registration is currently mandatory for shareholders with an interest of 3 per cent or more (see question 6).

Note that the coalition agreement reflects principles of policy of the government and that these measures still need to be formalised in legislation. Legislative proposals are being prepared for the 250 day reflection period and the protection of the Dutch telecoms sector.

250-day reflection period

It is proposed to grant the management boards of public companies the opportunity to call a 250 days reflection period if – in short – a shareholder proposes to appoint, suspend or dismiss a management or supervisory board member or if a public offer is announced or made without agreement with the company, and the board is of the opinion that such proposal or public offer conflicts with the interests of the company and its business. If the management board invokes the reflection period, the board has to collect all information necessary for a careful policy determination and consult the significant shareholders (ie, holding more than 3 per cent of the shares), the supervisory board and the works council of the company. The proposal is still in the form of a preliminary draft.

Protection of companies within vital sectors

The government is currently analysing certain vital sectors to identify any risks for national security that may arise in case of takeovers by foreign parties. On the basis of the analysis the government will determine whether the existing instruments provide sufficient comfort in that respect.

In anticipation of the aforementioned vital sector analysis, a draft legislative proposal to prevent undesirable acquisitions or exercises of control over Dutch telecoms providers was published by the Department of Economic Affairs in February 2017. The proposal introduces a duty of disclosure for a party that wants to take over a Dutch telecoms provider and as a consequence would acquire relevant influence in the telecoms sector. The planned acquisition must be reported in advance to the Department of Economic Affairs, and the Minister of Economic Affairs subsequently has the authority to prohibit the acquisition or exercise of control. The proposal is still in the form of a preliminary draft.

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