



**COUNTRY
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The Netherlands MERGERS & ACQUISITIONS

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This country-specific Q&A provides an overview of mergers & acquisitions laws and regulations applicable in The Netherlands.

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THE NETHERLANDS

MERGERS & ACQUISITIONS



1. What are the key rules/laws relevant to M&A and who are the key regulatory authorities?

The key rules/laws relevant to M&A in the Netherlands are:

- the Dutch Civil Code, which governs the general aspects of corporate law, contracts, and liability;
- the Dutch Corporate Governance Code, which sets out best practice provisions with respect to corporate governance of public companies and applies on a 'comply or explain' basis;
- the Dutch Financial Supervision Act, which regulates the financial markets and institutions, and imposes disclosure, notification, and approval requirements for public offers and takeovers involving listed companies and financial undertakings;
- the Public Takeover Bids (Financial Supervision Act) Decree, which includes specific regulations and requirements for public offers in the Netherlands;
- the Dutch Competition Act, which provides for Dutch competition rules and prohibits anti-competitive agreements and abuse of dominant positions in the Netherlands, and requires notification to and clearance from the Dutch Authority for Consumers and Markets (ACM) for concentrations that meet the turnover thresholds;
- the EU competition rules, which provide that the European Commission serves as a one-stop-shop for the review and clearance of transactions if the EU merger control thresholds are met (in which case no separate notification to and clearance from the ACM is required);
- the Dutch Works Councils Act, which grants the right of consultation and advice to the works council of companies on certain important decisions affecting the company, such as mergers and acquisitions, restructurings, or taking up significant credit, and requires the management of the company to inform and consult the works council in a timely and adequate manner;
- the Dutch Investments, Mergers and Acquisitions Security Screening Act (Vifo Act), which comprises the general investment screening mechanism in the Netherlands, and requires certain transactions related to (i) vital providers, (ii) companies active in sensitive technology, and (iii) business campuses, to be notified to the Dutch Investment Screening Desk. Parties may only implement a notified transaction after they have received clearance from the Minister of Economic Affairs and Climate;
- the Telecommunications Sector (Undesirable Control) Act, the Gas Act and the Electricity Act, which provide sector-specific legislation for the telecommunication, gas, and electricity markets, and set out notification and clearance requirements for certain transactions in those sectors; and
- the EU Foreign Subsidies Regulation (FSR), which aims to level out the playing field between European and foreign-backed companies active on the EU's internal market.

The key regulatory authorities relevant to M&A in the Netherlands are:

- the Dutch Authority for the Financial Markets (AFM), which supervises the conduct and integrity of the financial markets and institutions, and is the main regulatory body regarding public offer processes;
- the Dutch Authority for Consumers and Markets (ACM) and the European Commission, which enforce the competition and consumer protection rules, and review and clear or prohibit concentrations that meet the applicable thresholds; and
- the Dutch Central Bank (DNB), which supervises the prudential soundness and

stability of the financial system and institutions, and approves or rejects the acquisition or disposal of qualifying holdings in financial undertakings, such as banks, insurers, pension funds, and investment firms.

Additional sector specific rules and laws may apply, depending on the parties involved in the transaction.

2. What is the current state of the market?

The current state of the M&A market is characterized by challenging conditions, including geopolitical tensions and higher interest rates, which have slowed down M&A activity. Nevertheless, with interest rates stabilizing and parties getting accustomed to the current market conditions, the M&A market is showing signs of recovery. Two other current trends are (i) the increased scrutiny of foreign investments in response to geopolitical tensions, with the Vifo Act coming into force in the Netherlands in June 2023 (see Question 1); and (ii) the significant increase of the required non-financial reporting by companies, partly due to the EU Corporate Sustainability Reporting Directive and the European Sustainability Reporting Standards (and further ESG legislation such as the EU Corporate Sustainability Due Diligence Directive being on its way).

3. Which market sectors have been particularly active recently?

Even though 2023 has not seen the same M&A activity levels as in 2022 and 2021, 2023 still generally showed a stable level of M&A activity. The market sectors that have been particularly active are the technology, media and telecom sector and the financial services sector.

4. What do you believe will be the three most significant factors influencing M&A activity over the next 2 years?

As interest rates are stabilizing and the M&A market is showing signs of recovery, we expect the M&A market to be influenced over the next two years by (i) increasing ESG regulations and heightened regulatory scrutiny (which may lead to public companies reconsidering their listing); (ii) increased private equity activity due to unallocated capital; and (iii) an increase of M&A activity with regard to the generative AI market, and the further implementation of AI tools in M&A processes.

5. What are the key means of effecting the

acquisition of a publicly traded company?

Publicly traded companies in the Netherlands are generally acquired by one of the following means:

- a public offer, which can be a voluntary public offer or a mandatory public offer (both of which are subject to statutory procedural rules). A voluntary public offer is usually subject to a variety of conditions (such as competition clearance and a minimum acceptance threshold – see Question 11). A mandatory public offer must be made on the bidder (acting alone or in concert) acquiring 30% or more of the voting rights in the listed company, unless an exception to the mandatory offer requirement applies. The offer memorandum on the basis of which the public offer is made must be submitted to and approved by the AFM before the offer is made.
- A block trade transaction between the acquirer and one or more shareholders of the target company to sell and purchase shares or other securities, which may be followed by a mandatory public offer for the remaining listed shares (see Question 25).
- A legal merger or asset sale, which are less common as a main transaction structure and require the cooperation of the target's board. A legal merger is generally feasible only if the bidder is also a listed company and offers its securities as consideration. Under Dutch law, cross-border mergers are allowed only with companies incorporated in a jurisdiction within the EEA (which restriction can be circumvented in practice). Asset sales are mainly common in the Netherlands as part of a 'pre-wired back-end measure', pursuant to which the bidder acquires the minority stake following a voluntary public offer (see Question 27), but are occasionally also used as the main transaction structure (see Jumbo/Super de Boer (2009) and Major Shareholders/Roto Smeets (2015)).

6. What information relating to a target company will be publicly available and to what extent is a target company obliged to disclose diligence related information to a potential acquirer?

A public company in the Netherlands must publish annual and interim financial reports, as well as other periodic disclosures. These reports and disclosures, which must be made generally available, include

information on the company's financial position, performance, risks, governance, share capital, major shareholders, transactions with related parties, and material events or developments. Details about persons holding an interest of 3% or more in a public company are also generally available (see Question 15).

Governance documentation and information as filed with the Trade Register of the Dutch Chamber of Commerce (e.g., the annual accounts, the articles of association and details about the members of the management and supervisory board) are available for both public and private companies in the Netherlands.

Pursuant to the EU Market Abuse Regulation (MAR), a publicly traded company in the Netherlands must also disclose any inside information as soon as possible, unless it may delay such disclosure (see Question 16).

There is no general legal obligation for a target company to disclose diligence related information to a potential acquirer in the Netherlands. The management board of the target company, under the supervision of the supervisory board, has the authority to determine whether providing due diligence information is in the best interest of the company and its affiliated enterprise.

7. To what level of detail is due diligence customarily undertaken?

The level of detail of due diligence customarily undertaken in the Netherlands depends on various factors, such as the size and complexity of the transaction, the industry and regulatory environment of the target company, the negotiation leverage of the parties, and whether the target is a private or public company. Due diligence in the Netherlands is typically conducted in phases, starting with a preliminary or high-level screening based on publicly available and (in some events) limited non-public information, followed by a more comprehensive analysis based on confidential and detailed information, and ending with a confirmatory review based on updated and additional (sensitive) information.

In the event of a hostile public offer, the bidder will generally be limited to reviewing the publicly available information regarding the target company.

8. What are the key decision-making organs of a target company and what approval rights do shareholders have?

The management board and the supervisory board are the key decision-making organs within a target

company. Their duties are set out below under Question 9.

In the context of a public offer, a target company must convene an extraordinary general meeting of shareholders following the publication of the offer memorandum, to inform the shareholders of the public offer. Such general meeting is often also used to obtain a (conditional) shareholders' resolution for (i) an amendment of the articles of association of the target company; and (ii) the implementation of pre-wired back-end measures (as described under Question 27), to be implemented subject to the public offer being declared unconditional. The shareholders of the target company are free to decide whether to tender their shares in the offer or not.

In the context of a private company transaction, the shareholders of the target company will generally negotiate and enter into a share purchase agreement with the acquirer of the target company. To the extent the management board of a private company, under the supervision of the supervisory board, intends to enter into a transaction that would change the identity or character of the company's business, the approval of the general meeting is generally required.

9. What are the duties of the directors and controlling shareholders of a target company?

Under Dutch law, there is an overarching statutory obligation for the management board and the supervisory board to act in the interest of the company and its affiliated enterprise. This interest is mainly served by promoting the long-term value creation of the target company and its affiliated enterprise. Additionally, the management board and supervisory board have a duty of care towards the interests of the relevant stakeholders, which include shareholders, employees, customers, and creditors. The management board and supervisory board have an obligation to involve and weigh the interests of all stakeholders in their decision making.

In general, shareholders are not required to be guided by the interests of the company and its affiliated enterprise. In principle, they may give priority to their own interests. However, controlling shareholders (e.g., shareholders holding 30% or more of the voting rights in the general meeting) must consider the Dutch statutory principles of reasonableness and fairness in their conduct, which leads to certain responsibilities towards the company and its stakeholders (including the minority shareholders). The extent of these responsibilities will

depend on the circumstances of the case.

10. Do employees/other stakeholders have any specific approval, consultation or other rights?

To the extent the target company has a Dutch works council, and that works council has a right of advice under the Dutch Works Councils Act, the target company must request advice from the works council. Whether a Dutch works council has a right of advice (and to what extent) will depend on the circumstances of the case. Furthermore, if Dutch trade unions are involved with the target company, a transaction will generally also need to be notified to those trade unions.

In the context of a private company transaction, the parties generally either (i) include the completion of the co-determination process as a closing condition in the transaction documentation; or (ii) enter into a 'signing protocol' which sets out that the parties will enter into the agreed form transaction documentation once the co-determination process is completed (taking into account the outcome of that process). In the context of a public transaction, the completion of the co-determination process is generally included as a commencement condition for the offer.

If the works council renders negative advice, the target company will be required to suspend its decision to support the transaction for a month, during which period the works council may initiate judicial proceedings.

Furthermore, if the sale of a business constitutes a 'transfer of undertaking', all employees of the relevant undertaking are transferred by operation of law to the acquirer of the undertaking, while keeping their (financial) rights and obligations.

11. To what degree is conditionality an accepted market feature on acquisitions?

Public offers in the Netherlands are generally made subject to 'commencement conditions' and 'offer conditions'.

The commencement conditions (also referred to as 'pre-offer conditions') must be satisfied or waived before the bidder is required to make the public offer. Common commencement conditions are:

- approval of the offer memorandum by the AFM (which approval is required before the offer can be made);
- no material adverse change;

- no breach of the merger protocol;
- completion of the co-determination process;
- no withdrawal of the support and recommendation of the management and supervisory board;
- no governmental actions or procedures prohibiting the public offer; and
- no suspension of trading of the target company's shares.

Once the commencement conditions have been satisfied or waived, the bidder will make the public offer in accordance with the statutory procedural requirements. Following the acceptance period, during which shareholders can tender their shares, the bidder must declare the offer unconditional unless any of the 'offer conditions' are not satisfied. In addition to some commencement conditions which are commonly also used as offer conditions, common offer conditions are:

- the minimum acceptance threshold being met;
- receipt of regulatory clearances; and
- the adoption of the shareholders' resolutions required for the pre-wired back-end measures (if any – see Question 29).

12. What steps can an acquirer of a target company take to secure deal exclusivity?

In the context of a public offer, the target company will generally be free to discuss potential transactions with other parties until the merger protocol (which generally includes broad exclusivity arrangements) has been entered into. A target company may be open to grant the offeror exclusivity (prior to the execution of the merger protocol), depending on the circumstances of the case, but will in any event try to limit the term of such exclusivity. Due to the management board's and supervisory board's fiduciary duties, the target company will generally request a 'fiduciary out'. Pursuant to such fiduciary out, the target company may terminate the merger protocol and pursue an alternative offer, if that offer meets the agreed requirements (e.g., a bid price which exceeds the original bid price by a specified percentage). As the acquirer will want deal certainty when entering into the merger protocol, it will generally require a right to match the alternative offer before the target company may terminate the merger protocol.

In the context of a private company transaction, a potential acquirer is generally granted exclusivity early on in the transaction process (e.g., once a letter of intent is signed). The terms of that exclusivity arrangement are dependent on the nature of the transaction.

13. What other deal protection and costs coverage mechanisms are most frequently used by acquirers?

Common deal protection and cost coverage mechanisms in public transactions include:

- break fees, which the target company agrees to pay to the acquirer if the deal fails to close due to certain specified events. Such events commonly include the termination of the merger protocol due to a better alternative offer, a change of recommendation by the target company's management board or supervisory board, or a breach of the merger protocol by the target company. Break fees are typically capped at a percentage of the deal value, usually around 1%;
- reverse break fees, which the acquirer agrees to pay to the target company if the deal fails to close due to certain specified events (mainly the failure to obtain the regulatory approvals or a breach of the merger protocol by the acquirer). Reverse-break fee amounts are generally more deal-specific than break fee amounts; and
- irrevocable undertakings by key shareholders of the target company, who agree with the acquirer to tender their shares and vote in favor of the deal, subject to certain conditions and limitations. Shareholders entering into irrevocable undertakings will generally require that they can terminate the irrevocable undertaking in the event of a substantially better alternative offer.

As noted under Question 12, it is common in private company transactions to grant the potential acquirer exclusivity in an early stage of the transaction process. Whether or not additional deal protection or cost coverage mechanisms (e.g., break fees) are agreed is dependent on the nature of the transaction.

14. Which forms of consideration are most commonly used?

In both private company transactions and public offers, the commonly used consideration is cash (even though it is allowed to offer a mix of cash and shares in the acquirer, and solely shares in the acquirer).

15. At what ownership levels by an acquirer is public disclosure required

(whether acquiring a target company as a whole or a minority stake)?

Any person who acquires or disposes of a capital interest or voting rights in a Dutch listed company that reaches, exceeds or falls below the following thresholds, must notify the AFM without delay (which notifications are published on the AFM's website): 3%, 5%, 10%, 15%, 20%, 25%, 30%, 40%, 50%, 60%, 75%, and 95%.

16. At what stage of negotiation is public disclosure required or customary?

Under the MAR, a listed company must make public any inside information as soon as possible, unless it may delay such disclosure. Negotiations regarding a public offer are generally inside information (i.e., any information of a precise nature, which has not been made public, relating, directly or indirectly, to the company or its financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the prices of related derivative financial instruments). The required disclosure can be delayed if (i) immediate disclosure is likely to prejudice the legitimate interests of the issuer or emission allowance market participant; (ii) delay of disclosure is unlikely to mislead the public; and (iii) the issuer or emission allowance market participant is able to ensure the confidentiality of that information.

Under the Dutch bidding rules, the offeror and the target company must announce the public offer (other than a mandatory offer), by means of a public announcement, at the latest as soon as an agreement (whether conditional or not) has been reached between the offeror and the target company. A mandatory public offer must generally be announced within 30 days of acquiring (either alone or acting in concert) 30% or more of the voting interests in the public target company, unless the offeror has reduced its stake to below 30% within that period or another exemption applies.

In a private company transaction, it is customary for parties to have confidentiality agreements in place which restrict any disclosure until after the transaction agreement has been entered into.

17. Is there any maximum time period for negotiations or due diligence?

There is no statutory maximum time period for negotiations or due diligence in the Netherlands. In practice, however, the target company and potential acquirer will want to finalize the negotiations as soon as

reasonably possible, to prevent any leaks that may change the dynamics of the negotiations.

Additionally, the Dutch Financial Supervision Act and the Dutch Takeover Decree regulate public offer processes and impose certain deadlines and obligations on the offeror and the target company, such as (i) the offeror being required to make a public announcement within four weeks of the announcement of the public offer, stating whether the offeror will submit the offer memorandum to the AFM for approval; and (ii) the offeror being required to make the public offer, within six business days after the offer memorandum was approved, by making the offer memorandum generally available.

18. Are there any circumstances where a minimum price may be set for the shares in a target company?

Unless an offeror is required to make a mandatory offer, there is no general rule providing for a minimum price. However, based on the 'best price rule', if between announcing a public offer and declaring it unconditional the offeror acquires shares on the market at a higher price than the offer price, the offer price must be increased to that higher price (unless the transaction was a regular trade on a regulated market). If the offeror has declared its offer unconditional, it is not permitted, for a period of one year after the offer memorandum was made generally available, to acquire securities of the type to which the public offer relates on more favorable terms than under the public offer (except in the case of a regular trade on a regulated market).

When making a mandatory offer for the target company, the bidder is required to offer a 'fair price', which is generally the highest price paid by it (or by a person with whom it acts in concert) for shares of the target company in the 12 months before the announcement of the mandatory offer. The court can also be requested to determine the fair price.

19. Is it possible for target companies to provide financial assistance?

A public limited liability company (N.V.) may not provide security, guarantee the price, or otherwise act as surety, for the purpose of the subscription or acquisition by third parties of shares in its own capital. This restriction also applies to subsidiaries of such a company. In principle, a public limited liability company and its subsidiaries also may not grant loans for the purpose of the subscription or acquisition by third parties of shares in its own capital.

This restriction does not apply if the management board so resolves and certain strict conditions (including the prior approval of the general meeting, which approval is adopted by at least 95% of the votes cast) have been met. These restrictions do not apply to private companies (B.V.s) in the Netherlands.

20. Which governing law is customarily used on acquisitions?

The Dutch bidding rules do not prescribe that a public offer must be governed by Dutch law, only that the offer memorandum specifies the applicable law. Customarily, however, Dutch law is made applicable to public offers regarding Dutch public companies, as well as to private company transactions.

21. What public-facing documentation must a buyer produce in connection with the acquisition of a listed company?

The following public-facing documentation must be prepared by the buyer in connection with the acquisition of a listed company in the Netherlands:

- the offer memorandum, which must be approved by the AFM before its publication and must contain all relevant information that is important for a reasonably informed and diligent person to form a responsible judgment about the public offer. This information includes (i) the offer price; (ii) the minimum acceptance threshold; (iii) the offer period and the manner in which shareholders can tender their shares; (iv) the strategic rationale for the offer; and (v) any other conditions on which the bidder's obligation to declare the offer unconditional depends; and
- certain mandatory press releases, which must be published throughout the public offer process. These include press releases of the offeror regarding (i) its intention to submit the offer memorandum to the AFM for approval; (ii) the publication of the offer memorandum; (iii) the extension of the offer period (if any); and (iv) whether the offeror will declare the public offer unconditional (within three days after the end of the acceptance period).

In connection with the acquisition of a public company, the target company must prepare a position statement, which must include the substantiated position of the target company with regard to the public offer and which at least addresses the target company's view on (i) the

price or exchange ratio; (ii) the considerations and forecasts that co-determined that price/exchange rate; and (iii) the consequences of the public offer for the employment, employment conditions and locations of the target company.

22. What formalities are required in order to document a transfer of shares, including any local transfer taxes or duties?

A transfer of shares in a public company in the Netherlands is generally effected by a book-entry delivery through a securities account or a central securities depository, such as Euroclear Nederland. A notarial deed is required for the transfer of shares in a private company.

No Dutch transfer taxes or duties are payable on the sale of shares in a Dutch company (except in the case of a (direct or indirect) transfer of a qualifying interest in a so-called real estate entity).

23. Are hostile acquisitions a common feature?

Hostile acquisitions are not common in the Dutch market, even though they are not prohibited under Dutch law. Besides the protections directors of a target company have against a hostile approach (as described below under Question 24), bidders generally desire the cooperation of the target company to, among other things, facilitate the due diligence investigation which allows the offeror to make a more substantiated offer.

24. What protections do directors of a target company have against a hostile approach?

Directors of a listed target company have various protections against a hostile approach in the Netherlands. These protections are subject to legal and fiduciary constraints (e.g., pursuant to Dutch case law, protective measures must be proportional, adequate and generally temporary). These protections include, among other things:

- refusing to provide information regarding the target company if the management board and supervisory board do not deem it in the best interest of the company and its affiliated enterprise;
- a defensive foundation. Pursuant to a call option agreement that the foundation enters

into with the target company, the foundation can call for newly issued shares in the capital of the company, diluting the share interest that the hostile offeror has acquired or intends to acquire;

- priority shares with special rights for the holders of such shares (e.g., to appoint directors);
- a foundation that holds all the outstanding shares of the listed company and has issued depositary receipts for those shares that are listed. Holders of such listed depositary receipts for shares are granted a power of attorney by the foundation to vote on such shares, unless the foundation is allowed to restrict such power of attorney (if a hostile public offer is announced);
- as a response to a hostile bidder putting the management board and supervisory board of the target company under pressure (e.g., by initiating a general meeting or proposing resolutions to dismiss non-cooperative directors), a target company may invoke (a) a reflection period (of no more than 250 days) or (b) a response time (of no more than 180 days);
 - Reflection period: if (x) one or more shareholders request the consideration by the general meeting of (i) a proposal to appoint, suspend or remove from office one or more management board or supervisory board members; or (ii) a proposal to amend one or more provisions of the articles of association relating to the appointment, suspension or termination of management board or supervisory board members; or (y) a hostile public offer is announced or made, a company may invoke a reflection period (which does not exceed 250 days). This reflection period, during which certain powers of the general meeting are suspended, enables the management board to collect all information which is necessary for a careful consideration of the company's policy.
 - Response time: If one or more shareholders intend to request that an item be put on the agenda that may result in a change of the company's strategy (e.g., as a result of the removal from office of

one or more management board members) or seek judicial leave to call a general meeting, the management board must be given the opportunity to stipulate a reasonable period in which to respond (which period does not exceed 180 days). The management board should use this period for further deliberation and constructive consultation, in any event with the relevant shareholder.

25. Are there circumstances where a buyer may have to make a mandatory or compulsory offer for a target company?

A mandatory public offer must be made upon the bidder (acting alone or in concert) acquiring 30% or more of the voting rights in the listed company, unless an exception to the mandatory offer requirement applies (e.g., the bidder acquiring more than 50% of the voting rights in the listed company pursuant to a voluntary public offer). A mandatory public offer cannot be made subject to any conditions.

26. If an acquirer does not obtain full control of a target company, what rights do minority shareholders enjoy?

In general, as long as there are minority shareholders, the management board and supervisory board of the target company have a duty of care to take into account the reasonable interests of the minority shareholders. Minority shareholders of a listed company in the Netherlands enjoy, among other things, the right to (i) attend, address and vote at general meetings of shareholders, either in person or by proxy; and (ii)

request information from the management board and the supervisory board on the affairs of the company at the general meeting, unless this conflicts with a material interest of the company. As the existence of minority shareholders will generally limit the offeror's ability to integrate the target company in the offeror's group, the offeror will generally aim to acquire 100% of the outstanding shares (see Question 27).

27. Is a mechanism available to compulsorily acquire minority stakes?

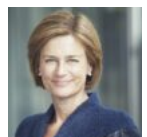
The general mechanism to acquire minority stakes in the Netherlands is the statutory buyout procedure, which allows a majority shareholder who holds at least 95% of the issued share capital of a company to buy out the remaining minority shareholders and obtain full ownership of the company. Following a public offer, an offeror can also initiate (within three months from the expiry of the acceptance period) a buyout procedure that is available to any offeror under a public offer that holds 95% or more of the share capital and voting rights in relation to one or more classes of shares in the target company.

The acceptance threshold of a public offer in the Netherlands is therefore usually set at 95%, with a possibility to lower that threshold to 80% or higher if the resolutions of the general meeting which are required to effect the pre-wired back-end measure are adopted. It is common for the offeror and the target company to agree that if the offeror fails to reach the acceptance level of 95% (as a result of which the offeror is unable to initiate the statutory buyout procedures) but exceeds a certain lower acceptance level (e.g., 80%), the target company will cooperate with the offeror to implement the pre-wired back-end measures, which allow the offeror to obtain full control over the target company's business. Examples of such measures are (i) an asset sale, (ii) a (triangular) legal merger, or (iii) a combination of the previous two.

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