

Back on track

Eversheds' Claudine Maeijer and Rob Faasen assess the latest M&A trends and developments in the Netherlands

When looking back on 2015, most people will agree that it was a busy time for merger and acquisition activity and a good year from different economic perspectives. This applies to the US, Asia Pacific region and Europe including the Netherlands.

Although the number of transactions was not spectacular, the deal value strongly increased. 2015 was a year of 'mega deals' and saw an increase in deal activity for spin-offs and corporate divestments; although at the very end of 2015, we saw a rising price of debt having consequences for mid-market M&A deals.

The majority of the deals involved strategic transactions, however private equity-led deals surfaced as an available source of financing. Indications from the market were that the appetite for transactions had upward pressure on prices, which was not always appreciated by private equity.

Companies looked at deals to strategically strengthen and protect their positions in the increasingly competitive market. The European M&A market was attractive to foreign acquirers also given the relatively advantageous value of the euro and low interest rates.

Most M&A deals in the Netherlands also had an international component. Some of the major acquisitions announced (and some not yet completed) in 2015 involving a Dutch buyer were: (i) British Gas taken over by Royal Dutch Shell; (ii) the merger between Koninklijke Ahold and the Belgium Delhaize that will create one of the biggest food retailers in Europe and the US; and, (iii) a merger between Semiconductors and Freescale Semiconductor. In December 2015, announcements were made on the intention of AstraZeneca to acquire a majority stake in Acerta Pharma, a privately held cancer drug developer with operations in the Netherlands and California.

Deal expectations for 2016

Given the high levels of cash available on corporate balance sheets combined with low interest rates and rising confidence, the M&A market is expected to stay healthy and we can remain optimistic.

A further rise in cross-border transactions is expected. US companies are showing an

interest in buying middle-market European businesses and being involved in carve-outs to strengthen competitiveness. We also believe that private equity exits will grow and that there will be a further focus on distressed industries.

We expect activity in the healthcare, telecommunications, financial, technology, pharmaceuticals, energy and oil and gas sectors, also given the competitive elements. M&A has proved to be a more effective tool than organic growth.

However, despite the positive signals during 2015 and an optimistic expectation for 2016, M&A activity appears to have slightly decreased in early 2016. The volatile stock market, the economic stagnation in China and the developments in certain BRIC countries may be to blame. Other possible reasons for the apparent downturn include the lack of stability in Europe's political situation; concerns about the eurozone and especially the Brexit; and the fact that we are confronted with a humanitarian crisis in the world. Therefore, sellers should not be overconfident.

Acquiring a Dutch company

A private company acquisition is often structured as a share transfer. Asset deals will be entered into if there are specific reasons to do so, like the wish to take over only certain specific assets or to exclude certain liabilities (for example, for tax reasons). Another mechanism to acquire control is through a (cross-border) legal merger whereby one entity acquires all of the assets and liabilities of the other (disappearing) entity; or a new legal entity is established, during which process the assets and liabilities will be transferred under universal title.

A publicly listed company can be taken over through a public takeover bid or through a legal merger. Often a bid process begins with an 'announcement of intention'. This announcement is usually in the form of a press release. However, a bid process can also start with the publication of 'concrete information' or a 'mandatory bid', or through the 'put up or shut up' rule. The latter is where a target company requests the Dutch Authority for the Financial Markets (AFM) to impose a requirement on a potential offeror to state its intentions regarding a possible public

takeover bid. A mandatory bid means that any person or entity, acting alone or in concert, that holds 30% of the voting rights at a general meeting of shareholders is required to launch a public bid for all the remaining shares. If such holder of at least 30% of the voting rights does not make such a bid, it can be forced to do so by the Enterprise Chamber of the Amsterdam Court of Appeal (Ondernemingskamer). If a target company is not interested in being acquired, but the offeror still wishes to make a public bid, the offeror will have to adopt the so-called 'hostile approach'.

Public M&A legislation is included in the Financial Supervision Act (*Wet op het financieel toezicht* or *Wft*), the Public Takeover Bids Decree (*Besluit openbare biedingen Wft* or *Bob*), in sections of the exemption regulations under the Financial Supervision Act (*Vrijstellingsregeling Wft*) and the Takeover Bids Exemption Decree (*Vrijstellingsbesluit overnamebiedingen Wft*) (more information is available at www.afm.nl/en).

Dutch M&A considerations for foreign investors

Because of its strategic location in Europe, foreign companies often use the Netherlands to cover several European markets. Moreover, the Dutch government promotes foreign investments.

The Netherlands has one of the most extensive tax treaty networks in the world. The Dutch tax system has many advantages for holding companies (see 'Doing Business in the Netherlands, 2016' by PwC and the Netherlands Foreign Investment Agency (*NFLA*)). However, global companies are keen on their tax policies and practices in order to avoid public debate and this may also have an impact on the Dutch business climate.

There are no specific restrictions in relation to investments made by foreign parties in the Netherlands. However, there are some considerations for foreign investors to take into account (especially) when involved in the acquisition of a private limited company (*besloten vennootschap met beperkte aansprakelijkheid* (*BV*)).

Freedom to contract, reasonableness and fairness, and good faith

The basic principle under Dutch law is that parties have freedom of contract (*contractsvrijheid*), which means that they are free to determine the terms of their agreement. This freedom is limited by the concept of 'reasonableness and fairness', which demands that parties to an agreement treat each other in a reasonable and fair way.

This also means that the interpretation of acquisition agreements, as well as certain legal actions that are taken with respect to such an agreement (for example, giving notice, and taking recourse) is also subject to the rules of reasonableness and fairness. It is important to note that, due to the good faith principle, 'subject to contract' clauses will not always have the effect that parties normally expect in relation to these types of clauses.

Dutch law does not provide for one code regulating acquisition agreements. Most corporate legislation can be found in Books 2, 3, 6 and 7 of the Dutch Civil Code (*Burgerlijk Wetboek*), the SER Merger Code 2015 (*SER-besluit Fusiegedragsregels 2015*), the Dutch Works Councils Act (*Wet op de Ondernemingsraden*) and the Dutch Competition Act (*Mededingingswet*). Case law also has an impact on the content of acquisition agreements.

However, there are only limited areas where Dutch law will override the express terms of an acquisition agreement. An exception to this is legal mergers, for which the Dutch Civil Code contains detailed and statutory requirements.

Dutch Flex BV Act

Since October 1 2012, we have much more flexibility in structuring BVs. Rules are laid down in the so-called Flex BV Act. The new legislation has abandoned a number of mandatory provisions. For example, some of the existing requirements as to share capital have been abolished, and tailor-made transfer restriction clauses are now possible.

Dutch M&A legal (and tax) professionals and cross-border transactions benefit from this new legal entity. For example, for financing transactions, an important change is the abolition of article 2:207c of the Dutch Civil Code, also known as the financial assistance prohibition. This article limited the financing of acquisitions by, for example, a target company. We are seeing a trend for changing the articles of association of a target company to bring them in line with the Flex BV Act.

The acquisition agreement and deed of transfer

When it comes to cross-border transactions, the content and clauses in acquisition agreements are inspired by the Anglo-Saxon style and common law jurisdictions.

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

There are fundamental differences between a share purchase and an asset purchase. In a share transaction, all of the

About the authors



Claudine Maeijer

T: +31 20 5600 650

F: +31 20 5600 502

E: claudinemaeijer@eversheds.nl

Claudine Maeijer started her career in 1991 and was one of the founders of Eversheds Netherlands, in April 2001. She is a partner in the corporate, M&A and restructuring group. She has a strong emphasis on cross-border M&A, restructuring and alliances of various kinds. She also advises on corporate governance issues. Claudine is recommended (2010-2016) in the

Corporate and M&A submissions of *Chambers Global*, *Chambers Europe*, *Legal 500* and *IFLR1000*.



Rob Faasen

T: +31 10 2488 027

F: +31 10 2488 098

E: robfaasen@eversheds.nl

Rob Faasen is one of the founders of Eversheds Netherlands, a partner in the corporate, M&A and restructuring group. Rob advises on many mid-market transactions (in the range of €5-€250 million) to sellers, and strategic and financial buyers. He is recommended in the most recent editions of *Chambers Europe*, *Chambers Global*, *Legal 500* and the *IFLR1000*.

EVERSHEDS

assets, liabilities and obligations of a company are acquired whether the buyer knows about them or not. If assets are transferred, all assets need to be identified and transferred in line with the requirements applicable to the assets.

A seller is obliged to disclose information that may be important for a buyer before entering into a transaction. On the other hand, the buyer must carry out its own investigation into the transaction. The relationship between the buyer and the seller is determined by the good faith concept and may depend on specific circumstances. The warranties in an acquisition agreement cannot fully ensure that a buyer can rescind a transaction at all times without consequences.

Dutch governance structure

We recognise a one-tier board, consisting of executive (*uitvoerende*) and non-executive (*niet-uitvoerende*) directors, and a two-tier board consisting of a management (executive) board and a supervisory (non-executive) board (*raad van commissarissen*). The traditional governance structure in the Netherlands is the two-tier board.

The main task of the non-executive directors is to advise and supervise the executive directors. The non-executive directors participate in various committees. In the two-tier board structure, the management board is charged with the company's daily

business. The position of the management board can be compared with that of the executive directors in a one-tier board. The supervisory board is charged with supervising (and advising) the management board; their position is comparable to the non-executive directors in a one-tier board. In a two-tier board structure, each board has its own powers, responsibilities and duties.

The duties and obligations of directors arise from statutory provisions, the articles of association, board rules (if applicable) and the good faith principle. The directors must act in the interests of the company which include the interests of all stakeholders, thus the shareholders, employees and even the creditors of the company.

Generally, directors are jointly (and severally) liable for mismanagement. An exception to this rule may exist if there is a clear allocation of duties and a specific director has not failed in his/her duties including the prevention of mismanagement. Also, a supervisory board member can be held jointly (and severally) liable if the supervisory board failed.

The Dutch Corporate Governance Code (Code) contains principles and best practice provisions that govern relations between the management board, the supervisory board and the shareholders. The Code contains principles and best practice provisions which aim to strengthen the structure of the checks

and balances and to provide for transparent and accountable corporate decision-making (for good corporate governance). In cases of non-compliance, a well-founded explanation must be given in the annual report. The code is based on the principle that a company is a long-term form of collaboration between the various parties involved.

Recently, the Corporate Governance Code Monitoring Committee drafted a consultation document to present proposals for a revision of the Dutch Corporate Governance Code.

The revision proposals can be summarised in seven themes:

- More focus on long-term value creation;
- Risk management reinforcement;
- New accents in effective management and supervision;
- The introduction of culture as an explicit element of corporate governance;
- Remuneration: cleaned up and simplified;
- Relationship with shareholders; and,
- Clarification of requirements regarding the quality of the explanation.

All stakeholders and interested parties can respond to the consultation document and take part in the public debate on the revision. The consultation period runs up to and including April 6 2016.

The Dutch Corporate Governance Code applies to companies with registered offices in the Netherlands and shares, or depositary receipts for shares, admitted to listing on a stock exchange, or to trading on a regulated market or a comparable system. It also applies to large companies with registered offices in the Netherlands, that is, those with a balance sheet value of greater than €500 million (\$547.5 million) and shares or depositary receipts for shares admitted to trading on a multilateral trading facility or a comparable system (more information is available at commissiecorporategovernance.nl/dutch-corporate-governance-code).

Enterprise Chamber of the Amsterdam Court of Appeal

The Dutch legal system provides for the possibility of initiating legal proceedings before the Enterprise Chamber of the Amsterdam Court of Appeal. This chamber has the authority to decide on a number of issues, including public offers or claims arising out of disputes between shareholders and/or management relating to management actions, for example, or disputes with the Work Council.

Necessary approvals

Works Council – employees have a say in M&A
Under the terms of the Works Council Act (*Wet op de Ondernemingsraden*), a Works

Council must be established for any enterprise that comprises a workforce of at least 50 persons. Article 25 WOR mentions the power to advise an entrepreneur on intended decisions related to, for example:

- important changes within the enterprise, including transfer of powers within the enterprise and termination, reduction or extension of activities;
- providing important investments or taking on credits with regard to the enterprise; and,
- mergers and acquisitions.

The entrepreneur must submit the proposed decision in writing to the Works Council for its advice. This advice must be requested at a time when it can still meaningfully affect the decision to be taken. If the Works Council's advice is not followed, the Works Council can lodge an appeal. Thus, employees have a say in M&A transactions through the Works Council.

Trade unions and SER Merger Committee

The SER Merger Code 2015 (*SER-Fusiegedragsregels 2015*) is primarily aimed at protecting employee interests in the event of a proposed merger. The SER Merger Code 2015 applies in the event of a change of control of a company, or part thereof, and if an enterprise or a group employs more than 50 people in the Netherlands.

Under the SER Merger Code 2015, the trade unions and the SER Merger Committee must be informed in a timely manner of a merger to enable them to share their views and to influence the intended merger and the conditions thereof.

Antitrust and filing thresholds

If the EU has no exclusive jurisdiction, a transaction may fall within the scope of local regulatory review. Notification to the Dutch Competition Authority (*Authority for Consumers and Markets, ACM*) is subject to the merger control provisions of the Dutch Competition Act. A notification must be made if, in the previous calendar year both:

- the aggregate worldwide turnover of the undertakings concerned exceeded €150 million; and,
- the individual turnover in the Netherlands of each of at least two of the undertakings concerned exceeded €30 million.

Lower thresholds apply in the healthcare sector. In the case of banks and financial institutions, the ACM turnover is calculated in a different way (the sum of a number of assets). Parties are required to notify the ACM as soon as possible, often as soon as there is an intention between the parties involved to pursue the concentration.

Concept of 'European deal'

According to recent data from the University of Groningen, Dutch buyers are less active globally and the overwhelming majority of Dutch deals remain in Europe (see the reports of January and February 2016 of researchers Killian J McCarthy, assistant professor in the economics of strategy at the University of Groningen, and Magdalena Langosch, research assistant at the University of Groningen).

As stated by Robin Johnson of Eversheds in his article 'The M&A Market and Approach to Dealmaking in Europe (Global Mergers and Acquisitions Guide 2015)', as far as M&A is concerned, often, Europe, and in particular the EU, is seen as one region by North American commentators. In addition, the statistics support this concept of a 'European deal'.

In reality, the process and documentation can vary depending on the particular European country in which a transaction is taking place and you cannot assume there is a fixed 'one EU Law' kind of concept.

The cloud, technology innovation, integration, IP and data protection

Bringing services 'to the cloud', independent of a specific location, is playing an increasing role. Operating in the cloud brings about acquisitions more easily and quicker, both within and outside the Netherlands.

We also believe that an increased focus on integration and cultural alignment to achieve synergies will continue to be a key factor in cross-border deals.

Furthermore, the value of intellectual property and data protection will become more and more important.

Although at the moment the M&A market is relatively strong, the legal climate has changed and will further change over the coming years. Companies, including those in the Netherlands, will seek a combination of cost-cutting possibilities, efficiency enhancements and high quality, more so than in the past. This will also further stress the need to focus on technology innovation and to make use of digital tools and data to analyse potential risks associated with a transaction and post integration issues. Even though it is not always easy to implement in all M&A transactions, where they can M&A lawyers will need to be more creative and further embrace existing and new technology.

The authors would like to thank Sayibe Yildiz-Shirbaz for her contribution to the preparation of this article