

Trends on the Dutch M&A Market

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Published in the Expert Guide: Mergers & Acquisitions 2013

The current Dutch M&A market is no exception to the other markets in Europe. Although the number of M&A transactions picked up in 2012 was not so bad, it will be a long time before it reaches the levels of 2007 and earlier years.

The number of M&A transactions reduced over the years, however the deal value attributed to companies has not changed considerably. Due to the changes in the possibilities to finance transactions and the upward pressure on prices, the number of PE transactions did not increase considerably over the last three years, although many PE firms have funds available or should make certain changes in their portfolio. In many cases, PE firms believe the prices for which companies are offered for sale are too high. It is difficult to achieve a return on the basis of the financial parameters that are presented. Increasingly, strategic parties are looking for opportunities. However, Dutch strategic parties appear to be very cautious, probably because of low profitability and the difficulties to attract financial support from banks, especially in the mid-market. This provides chances for non European strategic buyers. Many buyers appear to have deferred their decisions on potential deals, but despite various uncertainties there is a growing appetite amongst strategic partners to have transactions taking place. In addition, expectations are that PE firms will seek opportunities to strengthen their portfolio's and to have movement in their portfolio's, since certain funds are nearing their expiry dates and substantial amounts of committed capital are not invested. In the syndicated/club loans the trend is towards more non- Dutch financial institutions providing financing for transactions. US based financial institutes appear to be more successful on that market than European Banks. Banks who would like to keep their shareholders happy will try to increase their margins and profitability for which supply of credit on the M&A market appears to be still the most favourite.

Although we have the impression that most of the transactions that are completed on the Dutch market are still based on a 100% acquisition of shares, some M&A specialists (probably mid-market) identify a trend that the structure of a transaction is no longer primarily focused on a 100% transaction at completion, but on a "phase out" scenario. Reasons are to ensure that the expectations of the purchaser with respect to the target, the purchase price and other relevant aspects will be realised. If that is not the case, this could affect the level of the deferred consideration that a purchaser is prepared to pay for the remaining portion of the shares.

In any event potential purchasers are more cautious in preparing a transaction and more emphasis is put on due diligence, financial and risk analysis. We experience more potential purchasers who decide not to proceed with a transaction, than some years ago. Purchasers are less prepared to take risks to achieve a return on the investment that they are making. Post completion integration gets more and more attention in an earlier stage of the transaction (preferably while the due diligence investigations are conducted) in order to avoid the disappointment of not fully realising the value of an M&A transaction.

As an alternative for traditional escrow arrangements in M&A transactions also in the Netherlands an increasing number of transactions include W&I insurances taken out by (primarily) the seller. This type of insurance has certain advantages for the seller. The seller will balance the costs of such W&I insurance against the alternative that a substantial part of the purchase price remains reserved in escrow and that, no return or almost no return is made on such escrow (especially because interest rates are almost non existent). Although representations and warranties in an M&A transaction will need to be at “at arm’s length” basis, these types of insurances create a more flexible attitude of a seller towards the number of warranties that a purchaser requires and a seller is willing to give.

Recent Developments in Law Relating to M&A

On 1 October 2012, the Act on the simplification on the corporate law applicable to private companies with limited liability (Flex-BV wet) came into effect. That new legislation did abandon a number of mandatory provisions in Dutch law. Consequently, nowadays articles of association and shareholders agreement can be made much more tailor-made to the wishes of the stakeholders in a Dutch private limited liability company. It is e.g. now possible to have non voting shares. This new legislation creates much more flexibility and adequate opportunities for shareholders to include in their agreements all relevant matters (such as issues as corporate governance, and financing) rather than in the public articles of association of the company.

Furthermore, the Management and Supervision Act (Wet Bestuur en Toezicht) entered into force as of 1 January 2013. Changes include: a new statutory basis for a one-tier board system, limitation of board positions, a change in the conflict of interest rules and restrictions on supervisory positions. The Financial Markets Amendment Act 2013 (Wijzigingswet financiële markten 2013) contains amendments based upon which the Dutch public offer rules changed.

Contracts in The Netherlands are not only interpreted in accordance with the literal wording of a contract, but also on the basis of the intention of the parties and the rules of reasonableness and fairness. The Supreme Court ruled on 5 April 2013 that commercial contracts (which include M&A contracts) should be interpreted applying the so called Haviltex principle; statements made before the entering into an agreement are also relevant to interpret the terms and conditions of commercial contracts besides the contractual wording chosen by the parties. A so called “entire agreement” clause in a contract will not affect that principle. When the transaction meets certain criteria Dutch merger control regulations will apply and the transaction cannot be consummated before it has been notified to the Dutch merger control authority (NMA).

Unlike the NMA argued earlier, a purchaser (and the target company) is required to notify the NMA of an intended concentration before completion. If that obligation is not observed, the NMA can impose a fine on the purchasing party only, but not on the selling party as it did in the Pacton case. This interpretation is in line with European notification rules.

Furthermore the Dutch Consumer Authority, Netherlands Competition Authority and the Independent Post and Telecommunication Authority (OPTA) have combined their forces into the Authority Consumer & Market (ACM) as per 1 April 2013. The ACM is quite active. Recently it has imposed a fine of EUR 500,000 in the the Bulters case, because no notification was made.