

# M&A trends and developments in the Netherlands from a legal perspective

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**Late 2007 was one of the busiest periods our law firm ever encountered. Then came January 2008 and with it the start of what was to be the worst global credit crisis for decades and everything seemed to come to a grinding halt. Shortly thereafter, the pace picked up again, oddly enough ever so fiercely, but the practice was entirely different. Different deals, different stakes, different momentum.**

As most will recognise, there is a distinct difference between M&A deals now and two years ago. And it will be, as most expect, even more different in the year or years ahead of us. The legal transaction practice and the Dutch legal M&A practice are no exceptions to these trends.

This article will address the trends and developments in the Dutch M&A market over the last period from the perspective of a Dutch transaction lawyer. As such, the article will first look at M&A trends in general. It will subsequently deal with a legal development Dutch law is currently encountering: the more professional the approach to a deal is (including the involvement of qualified and experienced counsel), the more parties can rely on literal texts of the transaction documents (instead of having to rely on an interpretation by a court in an attempt to try and find a solution which it deems reasonable and fair). The article will finally touch on some upcoming legal developments in the Netherlands that will undoubtedly have an impact on the way the practice is conducted in our industry.

This article reflects the personal view of its author and is intended to give a general informative oversight of the M&A developments in the Netherlands from a legal perspective. It therefore does not presume to be anything more than that and certainly not to be of academic or similar standard, nor does it contain any legal advice.

## M&A trends in the Netherlands

Most will agree that 2007 was a good year, from various economic perspectives. If not a good year globally, at least a good year in the Netherlands. But it was also the year that saw the beginning of the credit crunch. And with the beginning of the credit crunch came the beginning of the end of an M&A era. The end of private equity playing a dominant role. The end of a seller's market. The return of strategic takeovers.

This period coincided with the endgame in the battle for the Netherlands' largest bank, ABN Amro Bank. The bank, under pressure from private equity

stakeholders to improve its profitability and find a merger/takeover candidate, was not able to convince its stakeholders that a merger with Barclays Plc would be best. Instead, a consortium of three banks, Royal Bank of Scotland, Banco Santander and Fortis, acquired what at least until then was considered by many to be the financial pride of the Dutch economy with a history dating back to the mid 18th century. The merger did not work, at least not as planned. The financial crisis accelerated events that eventually ended with the Dutch taxpayers bailing out the bank and the Dutch state owning the part acquired by Fortis. How typical to symbolise the change of times. The change of M&A times included.

The next year, 2008, was tough, especially the second half. 2009 was not much better, especially the first half. As a direct result of the credit crunch, private equity firms encountered difficulties when trying to finance their acquisitions. Not only in securing the required funds, but also in getting quick access to such funds, which used be their competitive edge over strategic buyers. Strategic buyers had therefore more success than before when competing for takeover targets, for example in controlled auction sale processes.

The M&A market also changed from a seller's to a buyer's market. To a strategic buyer's market that is, which lead to a difference in deal structuring. After years of having to accept short form purchase contracts, buyers were once again in the position to demand more protection, more representations and warranties, more indemnities, and less limitation of seller's liability. In the years before, buyers were very often forced to accept a limitation of liability on the part of seller for breaches of warranties or indemnity covenants, to as little as 10% of the acquisition value. Now, in these buyer-friendly times, liability was once again capped at the full value of the purchase price for the target company.

Lawyers in the M&A practice also saw a shift in their role as counsel: from deal making support to

deal breaking assistance. Transaction lawyers all of a sudden saw their clients ending up litigating over deals done in the past, over negotiations terminated prematurely, or even improper conduct after such termination. Claiming damages for breach of contract under SPA representations and warranties; claiming unjustified termination of transactions already in full progress or even almost closed; or enforcing non-disclosure covenants pursuant to Letters of Intent or similar early stage documents. Different times indeed.

If we are not going to double dip, or at least not really deep, times may be changing once again, and this time for the better. There have, of course, already been some major acquisitions on the other side of the Atlantic. According to some surveys, 2009 already showed M&A improvement in certain industries in the Netherlands, too. And yet other surveys concluded that M&A transactions in the Netherlands suffered the least of all EU jurisdictions during the last years, creating expectations for a sound and quick full recovery. Furthermore, both PricewaterhouseCoopers and KPMG have recently predicted that M&A activity will pick up during 2010. These predictions seem to be supported by Dutch bankers who claim that Dutch companies, suffering less from financial constraints than their peers in other countries, are getting ready to acquire strategic targets, now that the dust of the financial and economical crisis for the most part seems to be settling.

Perhaps the acquisition by the tiny Dutch motor company Spyker of Swedish carmaker Saab from the much plagued automotive industry mogul General Motors is a confirmation of these predicted or hoped for improvements of the Dutch economy in general and Dutch M&A activities in particular. It is, in any event, a nice dream to replace what is generally referred to as the ABN Amro nightmare and to restore some much needed confidence.

## Legal certainty vs. reasonableness and fairness

As the Dutch legal M&A professionals get geared up for renewed M&A activity, they, and their clients, are confronted with a development under Dutch law that is being welcomed by many.

Dutch law and the Dutch legal and tax system provide for extensive advantages for facilitating international holding structures, financing structures and acquisition structures. The Netherlands is also a country renowned for its focus on international trade and its excellent infrastructure that has proven to facilitate numerous multinational corporations, many of them Dutch or from Dutch origin themselves. Despite the recent global downturn, the Netherlands continues to be successful in attracting international

companies. In 2009, 105 new foreign businesses settled the Amsterdam area alone. Dutch law, and a great number of professionals who practice it, are therefore familiar with and experienced in cross border transactions and working in an international legal environment.

In that context, one of the more challenging aspects of Dutch law is the concept of 'reasonableness and fairness'. This concept, to a certain extent related to the concept of equity in common law, plays a role in many fields of the law, including a significant one in contract law. A contract has, according to the Dutch Civil Code, not only the legal consequences as (explicitly) agreed upon by the parties (albeit that this determines what the consequences are of what has been agreed in the first place), but also (among others) those resulting from the rules of reasonableness and fairness. When contractual parties differ over how they should perform under the contract, reasonableness and fairness dictates that the contract should not merely be interpreted by the literal text of the agreement. It should also be considered how parties, when entering into the contract, acted and what parties had declared to one another and what they may have reasonably expected from each other's behaviour.

Understandably, such concept causes confusion and (legal) uncertainty. What is the value of a contract if the words that it contains can be disregarded or interpreted differently than the literal text would normally determine? Why spend hours on endless draft legal documents if at the end of the day the language of the contract appears to have as much value as any given judge would deem reasonable, regardless of what was laid down in writing?

Given the international focus of the Dutch legal practice, many transactions are done in the English language and English is the predominant language used to draft agreements. With the use of the English language, it has also become customary to include Anglo-American legal concepts in documentation, such as typical boiler plate clauses at the end of the contract. And with this Anglo-Americanisation has come the desire of Dutch legal professionals to accomplish as much as possible that what has been agreed in writing will actually and exclusively determine how parties should act under that agreement.

In recent Dutch Supreme Court decisions, there appears to be an increased consideration for this apparent desire. One of these cases concerned a multi-million acquisition of the shares in the capital of a Dutch BV company. One of the (indirect) selling entities was an English Plc. The deal was documented in English, in an Anglo-American manner; with an

extensive share purchase agreement (SPA) with all the customary schedules, exhibits, annexes and with the typical representations, warranties and indemnities. Governing law, however, was Dutch law.

After the transaction closed, parties argued about the interpretation of one of the tax indemnities. According to buyer and the target company, the corporate income tax over a certain period prior to the effective date should have been for the account of seller, as seller had indemnified buyer and the target company for such tax assessment. The seller, however, argued that the tax assessment concerned was not covered by the indemnity. The literal text of the indemnity read that buyer and the company were right. The seller, however, argued that parties' intentions and expectations were different and that therefore, based on reasonableness and fairness, the indemnity clause should have been interpreted differently. The Supreme Court did not agree. It ruled that in this given case, the literal text of the contract should have overriding importance when interpreting the agreement. The Supreme Court considered that the parties were professional parties, assisted by expert legal specialists, who had exchanged various drafts of the SPA and had negotiated on numerous occasions. The agreed wording, including that of the specific indemnity, was confirmed with an unambiguous 'entire agreement' clause. The Supreme Court also took this typical Anglo-American clause into consideration to support its decision to merely rely on the text of the specific indemnity, without taking too much into account anything that was discussed or agreed prior to the execution of the SPA.

In another matter, the Supreme Court decided similarly. This case concerned a settlement agreement that parties entered into. After signing, the parties ended up arguing about the interpretation of the agreement. The Supreme Court again ruled that, given the nature of the contract (a settlement agreement) and the fact that both parties were professional parties entering into a commercial deal, and were assisted by expert (legal) advisors, the literal text of the contract should primarily prevail when interpreting that contract.

These decisions are a support for Dutch lawyers and their clients who are active in the international M&A practice in the Netherlands. Their hallmark being: 'legal certainty provides for commercial certainty'. And it is indeed a relief to see Dutch courts appreciate how the international and professional legal practice works and what is expected from it. This by no means implies that the courts will never again rule that a professional commercial contract should be interpreted on other grounds than by its mere wording. But it would perhaps be safe to assume that

it will require far more effort and evidence to have a court deviate from the literal text of a commercial agreement entered into by professional parties who were assisted by expert advisors.

## Expected developments

The Dutch corporate legal profession has long been awaiting two Bills that are currently being deliberated over in Parliament: the Bill which aims to create a simpler and more flexible legal framework for Dutch BV companies (private companies with limited liability) and the Bill for a new act on Dutch partnerships.

The envisaged more flexible legal framework for Dutch BV companies will create more possibilities to structure a BV to not only meet the requirements of smaller businesses (which will thereby encounter less burdensome regulations), but also those of holding, acquisition and investment entities as well as joint venture vehicles. The 'flexible BV' can to a much larger extent be incorporated and organised in accordance with the wishes of parties than before. There is no longer a minimum share capital requirement, there is no auditor statement required when paying up capital in kind and financial assistance is no longer prohibited.

Some of the other noteworthy characteristics of the new 'flexible BV' are that the transfer of BV shares is no longer restricted by law (no statutory right of first refusal or approval rights for other shareholders), the introduction of shares without voting rights or without dividend rights and the flexibility to pay out dividends without having to meet certain minimum reserves criteria.

It is expected that the 'flexible BV' will become a practical tool in the corporate law practice and that the Dutch M&A legal (and tax) professionals will also benefit from this new legal entity. The Bill will probably become law within a year or two.

The new act on Dutch partnerships will most likely become law much earlier and perhaps as soon as summer 2010. The act will bring about substantial changes in the rules that currently apply to Dutch partnerships, some of which date back as early as 1838. The most important features of the new legislation are:

- 1 a new distinction between the various types of partnerships is introduced;
- 2 a partnership may become a legal entity; and
- 3 a partnership can be converted into a BV without first having to liquidate the partnership and incorporate the BV as a new entity.

The introduction of the possibility that a partnership has legal personality does not affect the liability of the partners. The partnership with legal personality is liable for its own debts but the partners

(also) remain jointly and severally liable for the partnership's debts. However, the main advantage of legal personality relates to the possibility for the partnership to acquire legal title to assets in its own name. This simplifies both the acquisition and transfer of assets as well as admission and withdrawal of partners.

There remains the possibility to have a partnership with limited liability partners. These partners are protected against liability for the partnership's debt so long as they do not interfere with, and have an influence on, the acts of the managing partner.

The new partnerships will very likely prove to be valuable to the Dutch corporate law practice in general and may become useful vehicles to structure M&A transactions, too.

These new tools and the positive expectations for the M&A practice in the near future will enable the Dutch legal profession to further and better serve its clients in international transactions of every kind and under any circumstances.

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