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Executive Summary of The Netherlands

Jan-Berend Möller
Gülsüm Aslan
Tyshanti de Jonge
Laura de Jong

Loyens & Loeff N.V. | AKD N.V.
Blaak 31, 3011 GA | Wilhelminakade 1, 3072 AP
Rotterdam, the Netherlands
+31 10 224 67 74 | +31 88 253 53 27
jan.berend.moller@loyensloeff.com | ldejong@akd.nl

General reporters:

Dr. Hendrik Thies (Friedrich Graf von Westphalen & Partner)
Dr Karim Maizar (Kellerhals Carrard)
Mr Robrecht Coppens (Loyens & Loeff)
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In this chapter, we will be providing a global overview of M&A practice in the Netherlands.

1 General Statement

1.1 Introduction

For convenience purposes, we have chosen to follow the list of criteria as included in the various chapters of the template questionnaire and provide an overview of Dutch customary practice in M&A on these matters, where applicable both from sellers' and buyers' perspective.

In addition, taking into consideration the fact that all questionnaires relate to PE deals, we shall, where necessary, clarify if practice is different in strategic M&A.

The industries in the Netherlands with most activity in 2015 are TMT and Oil & Gas. The outlook for 2016 is that the activity in aforementioned industries will continue, but that there are certain upcoming industries in which M&A activity will increase, for example professional services and trade, transport & logistics.

In 2015, the retail industry has taken a serious downturn and recently, a number of big retail groups in the Netherlands have been declared bankrupt and are currently subject to distressed sale by the bankruptcy trustees through large scale auction processes. We shall however not further address distressed M&A in this contribution, such due to the fact that distressed M&A has certain particulars to it that fall outside the scope of the outline on Dutch M&A as provided herein.

Dutch M&A is – mainly – governed by Dutch corporate, contract and property law, as far as the sale, purchase and legal transfer or, as the case may be, issue of shares is concerned. Within these three main areas of law, depending on the relevant industry the target is active in, other areas of law may be more or less relevant, e.g. IP law, employment, environmental law, etc.

It goes without saying that tax law is also one of the main drivers in transaction practice, both upfront, for transactions that are the result of tax structuring where the transaction is required to achieve a certain group structure in order to benefit from tax benefits and/or exemptions, as during the process until completion and afterwards, in order to make sure that the transaction itself (including valuation and/or calculation of consideration, financing of the transaction and allocation of proceeds) is tax proof.

Auctions are a familiar concept in Dutch M&A landscape. Whether or not an auction is a suitable process for each transaction highly depends on specific facts and circumstances and preferences of seller(s). As main comment we would like to point out that size and industry do not make the difference, as auctions are seen throughout the market, both in SME as in mid-market and higher market segments.

In this chapter, two key elements of the transaction are touched upon, being revenue and the number of employees involved, which may impact the transaction and in any event timing for completion due to the fact that depending on the number of employees and revenues involved, certain formalities have to be fulfilled from a merger control perspective and from an employee co-determination perspective.

1.2 Merger Control

The revenue is a very important checkpoint, such due to the fact that depending on the aggregate revenue of target and purchaser (or when setting up a joint venture) of seller's and purchaser's groups as a whole, regulatory clearance from the Dutch or EC competition authorities may be required.

Pursuant to the Dutch Competition Act (Mededingingswet ('**DCA**'), an envisaged transaction is subject to merger control by the Dutch Authority for Consumers and Markets (Autoriteit Consument en Markt, formerly named *Nederlandse Mededingingsautoriteit* or *NMa*) (the '**ACM**') in the event that the aggregate turnover of the entities involved in the preceding calendar year amounted to more than EUR 150 million, of which at least two of the entities involved realized a turnover of EUR 30 million in the Netherlands.

This means, in brief, that in the event the abovementioned revenue thresholds are met in the calendar year preceding the year in which the transaction is effected, a notification to the Dutch Authority for Consumers & Markets (*Autoriteit Consument & Markt*) ('**ACM**') is required.

A notification fee of EUR 15,000.= is due to the ACM for their assessment of the transaction. Subsequently, should the ACM decide that a regulatory clearance is required (so called Phase II of the ACM proceedings), the fees levied by the ACM for completion of this Phase II amount to EUR 30,000.=, exclusive of the fees for expert legal counsel to assist purchaser with the drawing up of the notification and subsequent proceedings with the ACM.

It is difficult to estimate what percentage of Dutch M&A transactions is subject to ACM clearance, but it is not uncommon in the mid-market, assuming that the revenues may – on the average - vary between EUR 5 million and EUR 500+ million.

1.2 Employee co-determination

If there are, on the average (*in de regel*), more than 50 employees working in a business, an entrepreneur (*ondernemer*) has the obligation to establish a works council or actively grant the employees the opportunity to do so. If a works council has been established, either within purchaser or within seller or the target company, the works councils should be given the opportunity to render advice in respect of the transaction. This advice has to be requested at such moment that it can still be of significant influence (*wezenlijke invloed*) on the resolution to effect the transaction. If the works council's advice is negative but the respective parties still want to pursue the transaction, the entrepreneur should give written notice of its decision to the works council, whereupon a one (1) month waiting period has to be observed before putting into effect the resolution to effect the transaction. During the waiting period the works council may file an appeal at the Enterprise Chamber (*Ondernemingskamer*) of the Amsterdam Court of Appeal (*Gerechtshof Amsterdam*), which may issue a prohibition to effect the transaction. Non-compliance with the obligation to obtain the advice of the works council, leads to the transaction being voidable (*vernietigbaar*), in the sense that the works council, after finding out about the transaction and their right to advise, may also request the Enterprise Chamber to rule that the transaction should be

prohibited. The works council may request a meeting with the relevant managers, and even with representatives of purchaser and/or the investor, prior to rendering its advice.

In addition, if there are at least 50 employees involved in the Transaction, the Transaction should be notified to the Dutch Social Economic Council (Sociaal Economische Raad ('**SER**'), such pursuant to applicability of the Dutch Merger Code 2015 (*SER-besluit Fusiegedragsregels 2015 ter bescherming van de belangen van werknemers*) (the '**Merger Code**'). Pursuant to the Merger Code, the Dutch SER, and, if applicable, any trade unions involved (such depending on whether a collective labour agreement (*collectieve arbeidsovereenkomst* or *CAO*) applies, should be notified of the transaction if it entails a change of control over the target group. The notifications should be submitted well in advance and in any event prior to signing of the purchase agreement. It is possible that upon receipt of the notifications the SER (and the trade unions) want to receive additional information. This does not always happen, but there are certain industries in which the trade unions are more active than others. Currently in the Netherlands, there is a lot of activity in shipping practice, as quite some (large) reorganizations and restructurings are happening and social redundancy plans are currently being negotiated, in which negotiations the trade unions play a considerable role.

In most mid-market transactions and jumbo deals, employee co-determination is an important factor, as the target pool mainly consists of corporations with more than 50 employees.

From here on, we will follow the numbering of the executive summary provided.

2 Summary of Transaction Details

The following facts and figures can be derived from the 8 Dutch deals reported:

- Number of deals reported: 8
- Maximum deal size: EUR 234.5 million
- Minimum deal size: EUR 5.3 million
- Average deal size: EUR 119.9 million
- Minimum percentage of shares acquired: 50.1%
- Maximum percentage of shares acquired: 100%
- Average percentage of shares acquired: 75%
- Industries: Industrial/manufacturing, consumer goods, TMT, Transport, Medical / Pharma
- Countries of origin: Netherlands, France, Sweden
- % of deals > 200 employees: 50%
- Percentage of deals with auction: 87.5%

3 Letter of Intent

3.1 Facts and Figures

The following facts and figures can be derived from the 8 Dutch deals reported:

- Percentage of transactions with LoIs: 25%
- Exclusivity clauses: 0%
- Exclusivity clauses more than 1 month: N/A
- Binding character: 0%

3.2 General outline

As opposed to most of surrounding jurisdictions, and particularly in common law / Anglo-Saxon practice, in the Netherlands, the relationship between parties to a transaction until definitive transaction documentation is executed (the pre-contractual phase), is governed only by reasonableness and fairness and a letter of intent mainly aims at determining the playing field in the interim period between execution of the letter of intent and the completion date of the transaction.

A letter of intent will in any event include the main characteristics of the proposed envisaged transaction as these will have been agreed upon in the different stages of the preliminary negotiations, but will in particular set forth the agreements and arrangements between the parties with respect to the time span between the signing date of the letter of intent and the execution of final transaction documentation.

Possible (other) subjects that are usually addressed in a letter of intent are the rights and obligations of the parties in connection with any due diligence exercise to be performed, confidentiality undertakings, exclusivity with respect to the negotiations and a rough timetable for each of the steps to be completed in order to successfully effectuate the envisaged transaction, as well as the rights and obligations of parties in the situation that no agreement is reached in respect of the terms and conditions of the transaction and a party wishes to withdraw from the negotiations and abort the transaction, such in view of Dutch (case) law in respect of pre-contractual liability, which, from a purchaser's perspective, should in our view be explicitly excluded.

However, the above does not provide complete security, as in Dutch case law regarding termination of negotiations (*afbreken van onderhandelingen*) the liability of the terminating party highly depends on – among other things – the stage in which the negotiations are terminated and to what extent the terminating party has given rise to justified expectations of the non-terminating party that the transaction would be effected.

3.3 Exclusivity

As mentioned above, exclusivity or non-circumvention provisions are one of the key elements in letters of intent. From a purchaser's perspective the exclusivity should – preferably – be at least one (1) month longer than the tentatively schedule completion date of the transaction, include an option to be automatically extended unless purchaser decides otherwise and be worded as broad as possible (e.g. prohibition to actively pursue another transaction similar to the transaction discussed with the purchaser and passively do the same (entertain offers from others than the current purchaser for a share sale or sale of (a substantial part of) the target's assets)). From a seller's perspective the exclusivity period should preferably be fixed and expire on the envisaged completion date of the transaction, unless parties agree otherwise.

As the transaction process, from beginning to end, in most events exceeds one (1) month, it is fair to assume that in the majority of the transactions in the Netherlands, the exclusivity period is more than one (1) month.

3.4 Binding character

The binding character can be explicitly expressed in the letter of intent itself.

From a purchaser's perspective, the letter of intent should preferably be non-binding, or, if binding at all, only for a number of provisions and should contain as much 'escapes' as possible, which is mostly achieved by including a number of unilateral conditions precedent (*opschortende voorwaarden*) for completion in the letter of intent.

Examples of provisions that are declared binding in letters of intent are provisions of a protective nature for purchaser (exclusivity, confidentiality, due diligence process, conditions precedent, governing law and applicable dispute resolution forum). Provisions that are typically declared non-binding (or broadly worded or not mentioned to keep certain options open as negotiation strategy) are provisions describing valuation, calculation of the purchase price and payment of the purchase price.

The wording of the letter of intent and recording the intention of the parties at the time of executing the letter of intent can be a powerful tool for parties afterwards in the event of a dispute in respect of the letter of intent. This is due to the fact that although in recent years, Dutch courts tend to rule that in a situation where two professional parties, assisted by expert advisors have negotiated and discussed an elaborate commercial contract, the wording of the contract is an important factor to take into account when a dispute arises in respect of the interpretation or execution of an agreement.

However, the general rule formulated in the early 80s by the Dutch Supreme Court that outcome of an interpretation dispute highly depends on the intention of the parties at the time of executing the agreement, as well as the mutual reasonable expectations of parties in respect of their mutual rights and obligations should not be discarded when assessing any disputes.

A general remark in respect of the binding character would be that notwithstanding the intention of the parties, the wording in the letter of intent may still be a decisive factor when determining the binding character as the credo 'substance over form' is commonly applied when it comes to interpretation of contracts in the Netherlands.

4 Due Diligence

4.1 Facts and Figures

The following facts and figures can be derived from the 8 Dutch deals reported:

- Percentage of transactions with vendor due diligence: 50%
- Percentage of cases where the vdd report was disclosed to the Buyer: 75%
- Percentage of transactions with data room: 100%
- Percentage of transactions with virtual data rooms: 100%
- Percentage of transactions with physical data rooms: 0%
- Percentage of data rooms organized by seller: 12.5%
- Percentage of data rooms organized by investment banker: 25%
- Percentage of data rooms organized by data room provider: 62.5%
- Percentage of formalized Q&A procedure: 87.5%
- Percentage of right to print/copy granted: 100%

4.2 General

In view of Dutch case law in respect of a purchaser's obligation to investigate and a seller's obligation to disclose information, as well as in view of Dutch law in respect of non-conformity (*non-conformiteit*), it is highly recommendable that a purchaser performs a full-scope in-depth due diligence in respect of the target, which due diligence should ideally cover legal, tax and financial matters, and can, to the discretion of purchaser and depending on the industry in which the target operates, be complemented by technical, actuarial, commercial or other due diligence.

However, the tendency on buy side in the Netherlands is to limit the scope of the due diligence as to cover specific areas of law determined by purchaser in consultation with its legal counsel, and that reporting is on a risk/exception base only, as opposed to reports of a more descriptive nature. This is mainly due to the fact that many purchase mandates are issued by purchasers to their advisors subject to internal budgets and having a full-scope due diligence performed is quite expensive.

4.3 Vendor Due Diligence (VDD)

VDDs are commonly seen in auctions and the larger transactions, as the VDD report usually forms the basis for purchaser's independent due diligence, which shall mainly consist of verifying the findings in the VDD report.

A tendency in the Netherlands however is that – particularly – SME and lower mid-market corporations, outside the framework of an auction (probably driven by compliance requirements) have a limited VDD performed and/or engage legal counsel to assist them in "cleaning up" matters and getting corporate housekeeping in order with a view on preparing the target for a sale and anticipating on the DD to be performed by interested buyers.

4.4 Data Room

There are a large number of professional data room service providers active on the Dutch market (e.g. intralinks, merril lynch, imprima) and for auctions requiring a professional management of the due diligence they are usually retained. Apart from that, some firms have developed an in-house platform that can serve as data room, with similar facilities (e.g. Q&A, helpdesk, notifications for new uploads), as have investment banks.

In the SME and lower mid-market though, sellers sometimes choose other ways to make the information requested by the various due diligence teams available to them, whereby file sharing platforms such as dropbox and wetransfer.com are most popular.

Physical data rooms are practically extinct, although occasionally, it occurs that a complete due diligence team has to cross half the country and stay over for the duration of the due diligence. Main reasons for having a physical data room set up are confidentiality purposes, the fees of professional data room providers or the amount or nature of information.

Whether or not printing/saving is allowed, depends on the preferences of seller. Most larger transactions do not provide such option and where necessary, separate substantiated requests are to be submitted to the seller and/or data room manager in order to obtain copies, which can be accepted or rejected to the discretion of seller.

5 Purchase Agreement

5.1 Transaction

5.1.1 Facts and Figures

The following facts and figures can be derived from the 8 Dutch deals reported:

- Percentage of transactions with simultaneous closings: 0%
- Percentage of transactions with non-simultaneous closings: 100%
- Languages of purchase agreements:
  - Dutch: 12.5%
  - English: 87.5%

5.1.2 Elucidation

It is fair to say that in mid-market transactions, the proportion of deals with simultaneous closings and non-simultaneous closing is approximately 50-50.

In view of ever increasing foreign investments in the Netherlands and/or the fact that many Dutch purchasers have holdings that are based abroad, we see that English as standard language is upcoming. However, in strictly Dutch deals with no cross-border elements, the agreements are prepared in Dutch. It is fair to assume that the proportion English-Dutch is also 50-50.

Unless there are circumstances giving rise to a separation of signing from closing, both events can also take place on the same date.

If so, the private (*onderhandse*) purchase or subscription agreement, providing the title for the legal transfer or issue of shares by means of the execution of a notarial deed to that effect before a Dutch civil law notary (*notaris*), is signed and immediately subsequent to that, the notary and parties, or the notary and a proxy holder on behalf of the parties to the deed (usually an assistant of the notary) execute the notarial deed.

One of the main causes for separation of signing date and closing date is the fact that regulatory clearance from competition authorities is required and is included as condition precedent for completion. In addition, the due diligence findings may cause additional conditions to be stipulated, which have to be remedied, but are not deal breakers and/or do not prevent parties from signing the purchase agreement. Examples are obtaining waivers under change of control provisions, pre-completion restructurings, pre-completion transfer of intellectual property right used by the target but not registered to it.

When separating signing from closing, the purchase agreement should include provisions addressing the interim period, during which the purchaser has acquired the business, but is not yet the legal owner. These provisions may - among others – include:

- reserved matters which the management of the target or seller may not decide on without – preferably – prior approval of purchaser, or at least consultation with an obligation to take possible objections from purchaser into account,
- reporting and access arrangements and
- a provision in which seller undertakes to keep carrying out the business consistent with past practice and use all efforts to preserve relationships with customers, suppliers, employees and other relevant stakeholders of the target.

However, these provisions may be in breach of applicable competition law, as it may be argued that by acquiring contractual 'control' over the target company prior to having obtained regulatory clearance, purchaser has 'jumped the gun'. Sanctions on gun jumping include major penalties up to 10% (ten percent) of revenues for the target itself, with a minimum of EUR 450K, and personal liability of the directors.

5.2 Purchase Price

Both cash considerations as considerations in kind (mostly in shares in the capital of purchaser or purchaser's parent company) are allowed in Dutch M&A practice, although most of the considerations are paid in cash.

Both locked box and closing accounts mechanisms are used in the Netherlands, whereby locked box is the most commonly used mechanism in transactions with a retroactive effective date.

Each of the mechanisms impact the purchase agreement, as depending on which mechanism is applied, specific provisions have to be included as to procure that the actual consideration is correct.

As already mentioned in the footnote to the questionnaire, the locked box assumes a fixed equity value at the effective date, based on historical balance sheet / accounts and corresponding balances of cash, debt and an assumed working capital balance, whereby the purchase agreements should include provisions preventing "leakage" (cash or assets distributed, sold or otherwise withdrawn from target's equity to seller or affiliates of seller), and, if leakage has occurred, a mechanism pursuant to which an amount equivalent to the sum of all leakage is deducted from the consideration payable at closing, to the extent leakage is notified to purchaser prior to completion, or a settlement arrangement for leakage prior to closing that has not been notified to seller. Such arrangements usually also include a dispute resolution mechanism by means of binding advice in order to procure that any disputes regarding leakage and settlement of leakage after completion are smoothly and swiftly dealt with in order to avoid year-long court proceedings. Typical leakage is distribution of (interim) dividend for the preceding or current financial year and payment of (excess) management fees, although these items, depending on the negotiations, can also be designated by parties as "permitted leakage", in which event no deductions from the consideration are necessary.

Closing accounts transactions are a bit more challenging from a drafting point of view but also from a process management point of view, such due to the fact that the cash & debt free calculation should be made as per the completion date, which is practically impossible. Consequently, closing and calculation of the closing consideration is done on the basis of preliminary closing accounts, with a verification arrangement included in the purchase agreement on the basis of which purchaser is entitled to verify the closing accounts post-closing and parties reserve the right to mutually settle any deficits or surplus, sometimes in conjunction with an escrow arrangement, but not necessarily. These provisions mostly also contain a binding advice dispute resolution mechanism, for the same reasons as set out above for the settlement of leakage claims, whereby for purchaser's benefit, an undertaking from seller towards purchaser to refrain from challenging the binding advice, unless a manifest error in the advice is established.

For completeness' sake, please be informed that the basis of both calculation methods is the same, as the determination of enterprise value and equity value has to be done in each of the scenarios. However, in the locked box scenario, the calculation is made on the basis of figures already known, and in the closing accounts scenario, on the basis of preliminary figures, verified post-completion.

The variety of payment mechanisms is considerable, varying – as set out in the questionnaires – from payment of the full purchaser price in cash at closing, to an earn out arrangement for a majority of the purchase price.

When cash payments are made at closing, whether for the full amount or part of the purchase price only, a purchaser shall always aim at a holdback for a certain amount in order to remain in control of the money. As you may understand, sellers shall usually oppose to having a holdback in place, mainly due to collection issues abroad, and settle, if at all, for an escrow arrangement whereby the entire closing amount is transferred into the notary's third party account and part of it is transferred into an escrow account of the notary itself, or an external escrow agent, usually the escrow and settlement department of a reputable bank and there are certain trust offices that are exploring feasibility of setting up escrow service divisions as well.

Please note in this context that a seller shall always prefer the escrow account of the notary, as the notary's third party accounts are separate equity and are not affected by e.g. bankruptcy of the firm where the notary is practicing, or attachments (*beslag*) on the accounts.

Earn-out payments are most commonly seen in PE transactions or in strategic transactions where sellers or founders/management remain involved after completion for a certain period of time whereby they are expected to deploy time and effort to the business and cooperate with purchaser to expand the business and achieve certain targets as condition for release of the conditional part of the purchase price. Earn-outs can also vary in nature from objectively measurable EBIT or revenue targets to canvassing a major prospect or successfully completing a post-merger integration process, etc.

What average percentage of the purchase price is conditional and subject to achieving an earn-out or subject to hold back or escrow arrangements is difficult to say, but generally speaking, it is rare that more than 50% of the (closing) purchase price is held back or retained.

Vendor loans are also seen, either with or without security for the benefit or seller, and for varying proportions of the purchase price.

An important remark applicable to all these payment mechanisms where part of the consideration is held back is that a purchaser shall always strive to negotiate a right to set-off damages with the relevant amounts, without prejudice to other security issued by seller.

All forms of financing mentioned in the questionnaire are allowed in the Netherlands, being equity (*eigen vermogen*), debt (*vreemd vermogen*) and hybrid instruments (e.g. mezzanine). In leveraged transactions, mainly in PE, transactions will be mainly debt funded, in order to increase returns.

During the economic downturn, many purchasers used conditions precedent for obtaining the funding for the transaction as escape to walk away from a transaction, but in most recent years, the number of (bank) financing cps is decreasing, as economy is restoring itself and banks seem to be more and more willing to fund, or purchasers have sufficient resources available and do not need (additional) funding at all.

5.3 MAC clause

5.3.1 Facts and Figures

The following facts and figures can be derived from the 8 Dutch deals reported:

- Percentage of deals with/without MAC clause: 37.5%

5.3.2 Elucidation

MAC clauses, both as cps and as back-door MACs are well embedded in Dutch M&A practice and the variety of provisions is almost endless.

The wording and scope of the MAC clause will differ depending on whether one acts as counsel for purchaser or for seller, such due to the fact that a purchaser will always want to have the MAC defined as broad as possible, without thresholds (e.g. any event that may have a material adverse effect on the target and the business carried out by it), whereby a seller will want to specifically pinpoint MAC situations and submit purchaser's right to invoke the MAC clause to a certain materiality threshold (e.g. specific events in relation to the target and its business and/or the industry in which the target operates that have an adverse impact on the target and its business with a monetary value in excess of [amount x]).

5.4 Representations and warranties / specific indemnities

5.4.1 Facts and Figures

The following facts and figures can be derived from the 8 Dutch deals reported:

- Percentage of deals with reps&warranties: 100%
- Percentage of deals with standard reps&warranties: 100%
- Percentage of deals with specific indemnifications: 75%
- Percentage of deals with tax warranties: 100%
- Percentage of deals with tax indemnities: 100%
- Percentage of deals with tax warranties and indemnities: 100%

5.4.2 Elucidation

First of all, for an accurate understanding of the following paragraphs of this section, but possibly superfluous, we would briefly like to address the difference between reps and warranties and (specific) indemnities.

As you may know, warranties and liability of seller for breach of warranties provides for an allocation of risk for breach of warranties between seller and purchaser, and is meant to address liability for matters unknown to both seller and purchaser. This justifies the fact that the liability of seller for breaches of warranty is usually not unlimited, but rather subject to certain limitations, including in time and amount.

Specific indemnities are intended to cover matters that are known to both seller and purchaser and are of such nature that parties agree that the liability for all damages resulting from any matter for which an indemnity is included should remain fully with seller. Consequently, it is prevailing doctrine that no limitations apply to the obligation of seller to indemnity purchaser under any indemnity.

As to the representations and warranties, in most events a longer or shorter set of representations and warranties is included in the purchase agreement, or rather attached as separate schedule. Exception to the rule are divestments or exits of investment funds, such due to the fact that funds are wound-up at the end of their cycle and fund managers are reluctant to assume remaining liabilities.

Most law firms use templates for their purchase agreements and warranty schedules, whereby, as you may understand, the seller friendly set of warranties is far more limited in number and scope than a purchaser friendly set of warranties would be, which would be considerably longer and more detailed. In addition, the seller friendly set would already contain qualifications to the warranties issue, either by sellers' best knowledge, ordinary course or materiality, where the purchaser friendly set would - in first draft version - not contain such qualifications.

In a situation where signing and closing are separated, it is customary that the representations and warranties are confirmed at closing and that, where applicable, the disclosure letter is supplemented as well.

In addition to the warranties, that, as mentioned, serve to allocate the risk of a warranty being untrue, incomplete or misleading between seller and purchaser, as the warranties relate to matters unknown to both seller and purchaser and it is deemed reasonable to apply a certain limitation of liability regime.

However, in most transactions, additional specific indemnities are included in the purchase agreement to cover major, specific risks, e.g. identified by purchaser during its due diligence investigation, of which both parties acknowledge that the risk should remain entirely with seller.

Common indemnities are indemnities for the fact that managers working under a service agreement are not in the possession of a so called independent contractor status declaration (*Verklaring Arbeidsrelati or VAR statement*) issued by the Dutch Tax Authorities, as to avoid that the relationship between the target and the relevant independent contractors is considered to be an employment relationship, triggering potential liability of target for payment of wage tax and social security premiums with retroactive effect as from the commencement date of the relationship between target and the relevant manager. The VAR statements have been abolished though and replaced by different arrangements, but the risk still exists, regardless of what arrangements apply.

Another example: in the event a collective labour agreement applies to a business but it is not or nor correctly applied by the target, the damages relating to the risk that the employees may invoke applicability of the relevant CLA are covered by an indemnity.

Finally, exposure to environmental pollution is also a good example of a matter covered by an indemnity.

Notwithstanding, in recent years, a trend is becoming visible as to more general indemnities being considered standard provisions. The best example would be a general tax indemnity or a general recourse indemnity.

As mentioned, in view of the fact that the indemnities relate to very specific risks, known by both sellers and purchaser, it is not customary to limit the indemnification in any way, so neither in amount, nor time, nor otherwise. Every deal differs and seller's counsel will obviously attempt to include limitations, but it is fairly accepted market practice that certain limitations apply to potential liabilities for a breach of warranties, but not for potential liabilities under the indemnities.

The compensation and claim regime for indemnities is significantly different than the regime for warranties, because warranties serve to allocate the risk for events occurring which were unknown to both seller and purchaser. It is customary to introduce certain limitations to the liability of sellers for a breach of warranties, whereby there are – as for other matters – various approaches, depending on the perspective of the relevant party. The limitations regime when acting on behalf of a purchaser is very different to the limitations regime when acting on behalf of a seller.

Notwithstanding, as a fallback position it is becoming quite usual that a limitation in time on the tax indemnities equal to the time limitation on the tax warranties is acceptable, as any tax liabilities will still be claimable if the duration is the statute of limitation plus e.g. six months, which is approximately 6,5 years, in absolute terms.

If additional compromise is needed, then an overall time limitation on the indemnities (other than tax) could ultimately be considered. This period should however be longer than for the (general) warranties.

It cannot be said that there is much difference in regime in respect of tax related warranties and indemnities than for general warranties and indemnities.

5.5 Limitations on liability

Liability for warranties may be limited in amount, in time, and be subject to certain carve-outs or deductibles. In the following paragraphs we will address market standard limitations in the Netherlands.

As regards time, the limitations - generally - vary from twelve (12) to thirty-six (36) months for 'normal' business warranties. For tax warranties, the liability term is usually set at the statute of limitation plus three to six months. For title warranties, liability may be longer, depending on the outcome of the negotiations, usually varying from 5 to 20 years. In essence, the period of time during which a seller should reasonably be liable towards purchaser should at least be an entire financial reporting cycle. Therefore the common compromise is 18 months.

From a purchaser's perspective however, the purchase agreement should also stipulate that notwithstanding time limitations, in the event a claim is filed prior to expiration of the applicable liability term, the liability will not expire until the moment on which the claim is fully settled or resolve, either in or out of court. If accepted at all, the seller will then want to include wording as to the fact that purchaser should, in addition to submitting its initial claim, initiate proceedings within x period of time after submitting the claim. This period of time can vary from six months to a year, again depending on the outcome of the negotiations and aims at providing a relatively closed end period of dispute between parties before formalizing the dispute and take the matter to court.

As to the minimum claim amounts, please be informed that is highly depends on the nature of the transaction and the purchase price.

Usually, a threshold for individual claims and a basket is included in the purchase agreement, whereby the ratio would vary from 1:5 to 1:10, where the turning point would be a deal size between EUR 50 million and EUR 150 million. We kindly refer you to the questionnaire for "Project Charge" (minor transaction) and "Project Ivory" (large transaction) attached. Depending on whether the documentation is purchaser of seller friendly, the modalities are that the liability extends to the aggregate claim amount (purchaser friendly) or merely to the amount in excess of the basket value, such for obvious reasons.

The higher the purchase price, the higher the thresholds will be, but eventually, the outcome strongly depends on the negotiation power of either of the parties and all other parameters in the transaction documentation determining the liability of seller.

As regards the cap on seller's liability, ranges between 35% and 50% of the aggregate purchase price are considered standard. However, we have seen caps of 10% (seller friendly) and 100% (purchaser friendly) depending on all particulars of the transaction. As you may know, in surrounding jurisdictions and particularly in Anglo-Saxon practice, a purchaser would always aim at a 100% cap, which in pure Dutch transactions would be practically impossible to achieve.

A particular matter that we would want to highlight is the fact that in the Netherlands, the definition – and thus the scope – of 'losses' or better, 'damages' is a heavily debated issue in transactions.

There are two (2) issues that are of particular importance here: (i) the term 'damages' (*schade*), as set forth in the definition of losses; and (ii) whether or not it should include damages incurred by the purchaser, or only by the companies.

From a purchaser's perspective, you would want the amount of the damages compensated as broad as possible, which is equal to such amount as may be required to put purchaser and the companies in the position they would have been in, had – for example – there not been a certain breach of warranty or default under the SPA, due to the fact that in the Netherlands, derivative damages of a shareholder (*afgeleide schade*) are very difficult to claim.

It is however possible to refer to the Dutch Civil Code ('**DCC**') and still include the wording as to the amount having to be equal to the amount aforementioned (required to put the purchaser in a position it would have been in had e.g. a breach of warranties not occurred), such to give – for example – a judge guidance on what the amount should represent if the dispute is taken to court.

Pursuant to the DCC, 'damages' are monetary damages (*vermogensschade*) and any other damages or prejudice, to the extent that the law confers a right to damages for such other prejudice (e.g. immaterial damages). Monetary damages, in turn, comprise both the damages incurred and the profit deprived by the claimant, as well as (i) reasonable costs to prevent or minimize damage which could be expected as a result of the event giving rise to liability (ii) reasonable costs incurred in assessing damage and liability, and (iii) reasonable costs incurred in obtaining extra-judicial payment of the damages. These two latter

amounts are however often nominal amounts, if based merely on the law. In commercial agreements such as the share purchase agreement, parties have contractual freedom to agree on the scope of damages to be compensated. As already indicated, there are quite some parameters that can be moved around for the benefit of either a seller, or a purchaser to come to a balanced definition of 'damages'/'losses'. As follows from the foregoing, there are quite some parameters that eventually decide the scope of the damages.

Regardless of the definition of 'damages' in the purchase agreement, there are certain carve-outs and deductibles that may be included to further limit or entirely exclude liability of seller. These provisions are quite similar to equivalent provision used in other jurisdictions and include recourse under insurance policies or third parties, specific provisions (*voorzieningen*) in the financial statements, fraud, willful misconduct or gross negligence, amendment of accounting principles, legislative changes etc.

5.6 Dislosures

5.6.1 Facts and Figures

The following facts and figures can be derived from the 8 Dutch deals reported:

- Percentage of deals with disclosures against warranties only: 100%
- Percentage of deals with disclosers against specific indemnities: 0%
- Percentage of deals with:
  - full data room disclosure: 100%
  - Q&A log: 75%
  - Disclosure letters/schedules: 87.5%
  - Disclosure of (vendor) due diligence report: 25%
  - Public information disclosed: 25%
  - Update between signing/closing: 12.5%

5.6.2 Elucidation

Disclosures are also allowed to qualify the warranties, and in very specific circumstances, general disclosures, including against indemnities, have been accepted by purchasers, whereby prevailing doctrine is that the disclosures overrule the indemnities.

Within our reference framework, it is very rare that deals without any disclosures are closed within the mid-market segment. Most disclosures are made against the warranties.

All examples mentioned in the template executive summary are fairly common in the Netherlands, such as full data room disclosure, whereby it is usually procured that the Q&A itself is also included in the data room. In purchaser friendly agreements specific carve-outs are made in the event of data room disclosure, including that the disclosures should be apparent from the face of the document, whereby distinction can be made in respect of examination of such document by e.g. a prudent and experienced purchaser, or its advisors and that when a documents refers to another document which is not included in the data room, such missing document shall not be deemed disclosed. Disclosure of the data room can be done either by attaching the data room index to the purchase agreement, or disclose the entire content of the data room by attaching a DVD or CD rom with the data room as schedule.

The same goes for the disclosure letter, whereby, in purchaser friendly wording the provisions allowing disclosures to be made in a disclosure letter, usually stipulate that the disclosures should - among other things - give an accurate description of the relevant facts and circumstances of the disclosure, an estimation of the amount and that any risks should be apparent on the face of the disclosure letter and may not contain omissions which may render such disclosure untrue, incomplete or misleading, whereby items that are not sufficiently disclosed in accordance with the foregoing, are deemed not to be disclosed.

As you may understand, these provisions are also subject of negotiation, as the result may highly impact liability of seller on the one hand and consequently recourse for damages of purchaser and/or target on the other hand.

Public information is usually disclosed, such as trade register information, as well as information in the land registry and IP data bases, if and where relevant for the transaction. However, as follows from the questionnaires, this may differ depending on whether it is a PE transaction or a strategic transaction.

The due diligence reports prepared by purchaser are usually not disclosed, but it is quite common to agree in the term sheet, letter of intent and similar documents that purchaser shall discuss its key findings with vendor as to be able to properly address any findings in the transaction documentation.

Purchasers are usually reluctant to allow information exchanged at management presentations to be disclosed, but if duly managed at an early stage of the transaction, disclosure of such information is acceptable, provided that it is recorded in minutes of the meetings and signed for acknowledgement by parties.

As mentioned earlier in this report, update of disclosed information, e.g. the disclosure letter, to cover the interim period between signing and closing is also acceptable, although mainly a seller friendly provision.

6 Conditions Precedent

6.1 Facts and Figures

The following facts and figures can be derived from the 8 Dutch deals reported:

- Percentage of deals with merger filings as CP: 37.5%
  - The Netherlands: 100%
  - EU: 33.33%
- Percentage of deals with third party consents as CP: 37.5%
- Percentage of deals with certain funds clause as CP: 37.5%
- Percentage of deals with the bring-down of warranties as CP: 0%
- Percentage of deals with MAC clause as CP: 37.5%
- Percentage of deals with seller's legal opinions as CP: 0%
- Percentage of deals with retention of key employees as CP: 0%

6.2 General

Around 30-40% of the mid-market transactions are subject to merger control, depending on the revenues of target.

Third party consents may vary from other regulatory clearance requirements and e.g. obtaining waivers from customers or suppliers of target regarding their change of control rights in the contracts concluded with target, in brief, more business related consents.

For comments on (bank financing) please be kindly referred to the above paragraphs on purchase price and payment of purchase price. For comments on MAC provisions, we also kindly refer you to paragraph 5.3 re MAC clauses.

Bring-down of warranties is usual when signing and closing are separated. However, none of the transactions featured in our questionnaires contained such cp.

Legal opinions may be required, but not standard. As you will see, none of the transactions submitted in the questionnaires required opinions to be issued. Whether or not required highly depends on the financing structure of the transaction.

Retention of key personnel is also an issue in Dutch transactions, but is not always included in the cps, but rather as fact in the closing sequence, which stipulates that in any event prior to execution of the notarial deed of transfer or issue of shares, (new) management/employment agreements are concluded with key personnel. In practice, this has the same effect, as in the event any of the closing actions is not fulfilled, closing will not take place.

7 Non-competition covenants

7.1 Facts and Figures

The following facts and figures can be derived from the 8 Dutch deals reported:

- Percentage of deals with non-compete clauses: 87.5%
- Percentage of deals with non-solicit clauses: 87.5%
- Percentage of deals with non-disparagement covenants: 0%
- Percentage of deals with non-embarrassment covenants: 0%
- Percentage of deals with blue pencil clauses: 0%

7.2 General

Non-competition covenants are known concepts in Dutch M&A practice, provided that in view of EU directives on ancillary restraints, there are certain limitations to the scope of the restrictions, as there are in other jurisdictions that fall under the scope of the directive.

As you may know, the time limitation is 36 six months, provided that in exceptional circumstances, longer duration may still be enforceable if challenged.

The other limitations relates to the geographic area, which should be the countries in which the target obtains its revenues (in brief: where its customers are located), or, if very elaborate plans to access new markets are made and preliminary execution of these plans has started, these can also be included in the geographic scope.

The restrictive covenants cover both non-competition, as well as non-solicitation of customers, suppliers, employees and other business relations of target. Non-disparagement covenants are not too common in the Netherlands, but the concept is familiar.

Non-embarrassment covenants are also a familiar concept, but are quite rare as well. If included at all, it is fair to say that they are more commonly used in PE transactions (and particularly exits) than in strategic ones.

8 Governing law & jurisdiction

8.1 Facts and Figures

The following facts and figures can be derived from the 8 Dutch deals reported:

- Percentage of deals with choice of law clauses: 100%
  - Netherlands: 100%
- Percentage of deals with jurisdiction clauses: 100%
  - Court: 37.5%
  - Arbitration: 62.5%
- Percentage of deals with prior mediation obligation: 0%
- Percentage of deals with initiation of formal litigation procedures: 0%

8.2 General

In view of the uncertainty on the basis of European directives on applicable law, our general remark would be that all purchase agreement and ancillary agreements contain a choice of law provision. Although there is a lot of inbound cross-border M&A activity in the Netherlands, the governing law is mostly Dutch law. It is very rare that a purchase agreement would not have an applicable law provision.

The dispute resolution mechanism differs depending on whether 'overseas' parties are involved, as pursuant to the New York Treaty, arbitral awards can be executed directly in far more jurisdictions than court rulings, provided that within the EU, the latter has been simplified and harmonized during the past decade.

Whether mediation or informal escalation is mandatory, depends on the nature of the transaction, whereby in industries in which confidentiality is very important (IP/software, pharma/medical devices/life sciences), it is more likely that parties will resort to mediation or will try to settle any disputes amicably by escalating them to - for example - the supervisory boards or the board of non-executive directors of either of the parties.

Please be kindly referred to the above paragraphs on various dispute resolution mechanism for breach of warranty, purchase price adjustments etc.

9 General information

9.1 Facts and Figures

The following facts and figures can be derived from the 8 Dutch deals reported:

- Percentage of deals with cross-border element: 37.5%

9.2 General

On the average, we would assume that approximately 40-50 percent of the transaction activity has a cross-border aspect, either because the purchaser is foreign, or because the Dutch target has foreign subsidiaries or otherwise. Although quite a number of fast-growing M&A boutiques have established a position for themselves in the Dutch legal market, still quite some transactions pass through the major Netherlands based law firms, such as Allen & Overy, Stibbe, De Brauw Blackstone Westbroek, Loyens & Loeff, Houthoff Buruma, Jones Day and Nauta Dutilh. However, firms such as AKD, Lexence, De Breij Evers Boon, Janssen Broekhuysen and STEK are climbing the ranks fairly quickly.

To our knowledge, no transactions of either of our firms have been referred by other AIJA members.

10 Final remarks

As you may understand, the amount of transactions reported could never be enough to attach substantiated figures to the percentages requested through the executive summary template provided. The same applies to a number of matters addressed earlier in this report, but particularly in respect of the cross-border element of Dutch M&A activity. Where applicable, we have mentioned whether a certain provision is or is not customary, using terms as 'commonly used' or 'rare' or 'very rare' to provide an rough idea.

We do want to point out that this report does not purport to be exhaustive and is merely intended to provide you with a high-level overview of Dutch M&A practice on all 'line items' in the questionnaire and the executive summary, as is the purpose of the AIJA Deal Points Survey.

If and where necessary, we shall gladly provide any clarification you may require. Please do not hesitate to contact us at your convenience should you wish to discuss.

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