NautaDutilh

5 things you need to know about corporate M&A in 2021

Intro

In 2021, we believe that you, as in-house counsel, will have to deal with five main developments in the area of M&A. By anticipating these changes, you can use them to your advantage and prepare for their impact. The five main developments we have identified are:

#1 the impact of COVID-19 on M&A deals

#2 a new filing obligation for certain transactions related to national security (foreign investment control)

#3 an increase in distressed M&A

#4 expected growth in SPAC activity

#5 a continued focus on ESG

#1

The COVID19 pandemic is expected to continue to have an impact on M&A

Impact of COVID-19 on M&A deals

COVID-19 had a substantial impact on companies and their business in 2020, the ripple effects of which will be felt well into 2021 as the pandemic continues to disrupt economies worldwide. Although the pandemic is expected to abate in 2021, it will most likely continue to affect M&A deals, in terms of both due diligence and contract terms, especially during the first half of the year.

Due diligence: Specific areas for due diligence include (i) potential state aid received by the target group, (ii) COVID-19 policies implemented by the target group to ensure a safe working environment and to facilitate working from home, including special programmes or financial compensation for employees, and (iii) measures taken by the target group to address the consequences of the pandemic on its business.

Contract terms: Since the start of the COVID-19 pandemic, the "material adverse change" or MAC clause has come back into fashion. When drafting such provisions, particular attention should be paid to whether a pandemic such as COVID-19 is covered by the definition of a material adverse change. Other relevant provisions include the pre-closing covenants on continuation of the ordinary course of business (the target company will wish to have freedom to implement measures to adequately address the consequences of the pandemic) and warranties specifically tailored to offer the buyer protection against the pandemic and its consequences.

#2

In 2021, new legislation on the assessment of national security is expected to enter into force

New filing obligation for certain transactions related to national security

In 2021, new legislation on the assessment of the economy and national security (Wet toetsing economie en nationale veiligheid) is expected to enter into force. The new law is based on the Foreign Direct Investment ("FDI") Screening Regulation and introduces a filing obligation for certain transactions. When a target company is active in the provision of (i) vital processes or infrastructure or (ii) sensitive technology, the transaction will need to be notified to the Ministry for Economic Affairs and Climate Policy. An exemption applies when a sector-specific test is provided for by Dutch law.

This new legislation will most likely be discussed in the Lower House in the first quarter of this year. When it enters into force, the law will apply with retroactive effect as from 2 June 2020 to all transactions falling within its scope that give rise to a reason for investigation from a national security perspective. Therefore, we recommend already taking this new legislation into account in the context of merger filing assessments.

The new law on the economy and national security was preceded by an amendment to the Dutch Telecommunications Act. The amendment

introduced a merger filing obligation for the telecommunications sector, including data centres and Internet exchange points. The first merger filings under the Telecommunications Act are expected to be made this year. As indicated above, transactions that fall under the Telecommunications Act will not need to be reported under the new legislation.

#3

The COVID-19 pandemic provides opportunities for mergers with and acquisitions of distressed companies (distressed M&A)

Increase in distressed M&A

Many companies are in financial distress. The COVID-19 pandemic continues to deplete corporate financial reserves, while government assistance is shrinking and lenders are no longer suspending the enforcement of financial covenants. This situation provides opportunities for mergers with and acquisitions of distressed companies (distressed M&A), most notably in sectors such as transport, retail, energy, construction, leisure and hospitality.

Distressed M&A is characterised by fewer possibilities for due diligence, no or more limited representations and warranties, and tight deadlines. Even if the representations and warranties are contractually agreed, the seller may not be able to meet them due to financial difficulties. Moreover, W&I insurers are less likely to provide insurance where there is limited due diligence. Consequently, purchasers are faced with increased liability risks. Asset deals tackle this problem as they prevent certain liabilities from being transferred to the purchaser. A final characteristic of distressed M&A to be taken into account is that since deal speed and certainty are more relevant for the seller, it may be possible to negotiate a lower price.

Opportunities for distressed M&A are further enhanced by the Financial Restructuring Act (the “WHOA”), new legislation in the Netherlands that enables companies in financial distress to bind creditors and shareholders to a restructuring plan, i.e. a cross-class cram down. The WHOA facilitates the restructuring of the liabilities of such companies and provides a statutory framework for distressed M&A deals.

#4

Markets permitting exits using a SPAC will remain hot

Expected growth in SPAC activity

The reverse merger using a special purpose acquisition company (“SPAC”) came into its own in 2020. This alternative to the traditional M&A exit started in the United States and is now growing in popularity in Europe, as evidenced by the number of reverse listings on Euronext Amsterdam. It can be used for a variety of transactions – such as IPOs and corporate spin-offs - by private equity firms, venture capitalists and founders, amongst others.

In short, a SPAC first raises capital from investors in a “blank check” IPO. Once the capital is raised, the SPAC’s management seeks out a target with which to merge. For the target, this route to the public market can be faster and less expensive than a traditional IPO. This

makes SPACs interesting for private equity firms that wish to dispose of portfolio assets as well as for corporates looking to carve out a specific part of their business or to obtain a listing themselves. Like a traditional IPO, a SPAC transaction generally does not lead to a complete exit immediately. In most cases, the deal is not structured as a full cash-out, and the selling shareholders are frequently bound by a post-completion holding period.

Based on what we see on the market and the deals we are currently working on, we expect SPAC activity to continue in 2021, barring unforeseen events affecting the economy and global capital markets.

#5

Continued focus on ESG

Companies need to expand the customary scope of due diligence to include assessment of the climate and reputational risks

Sustainability will remain an important driver of fundamental economic change. The energy transition creates opportunities that require vast amounts of capital and resources, which in turn fuel corporate transactions by which traditional energy companies seek to realign their business and create joint ventures with new players. We believe this will contribute to increased deal volumes in 2021 and beyond. Climate litigation is accelerating and consumers are increasingly demanding transparency by companies regarding their supply chains and business models. This development requires increased boardroom attention to climate and reputational risks in relation to supply chain management.

In terms of M&A activity, the continued focus on ESG means that companies need to expand the customary scope of due diligence to include assessment of the climate and reputational risks associated with supply chains. In the coming year, we expect business integrity due diligence standards to be further developed and to become a more customary part of regular due diligence during M&A deals.

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