NautaDutilh

5 things you need to know about Dutch Corporate M&A in 2022

Intro

In 2022, we believe you may be faced with certain material developments in the area of Dutch 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 enhanced focus on compliance, notably in the area of whistle blowing and inappropriate behaviour

#2 expected SPAC M&A activity

#3 continued focus on ESG

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

#5 new filing obligations for certain transactions related to national security and telecom

#1

Increased focus on compliance, notably in the areas of whistle blowing and inappropriate behaviour

The focus on compliance is a worldwide trend which will most likely only gather steam. This is particularly true in the financial sector with regard to anti-money laundering legislation and sanctions regulations and when it comes to compliance by corporates with anti-bribery rules and regulations. Part of this trend is to encourage people to speak up and report possible misconduct.

Whistleblowers in the Netherlands have been entitled to enhanced protection since the Whistleblowers Act entered into force in 2016. This protection will increase yet again when the EU Whistleblower Directive, which should have been implemented by 17 December 2021, finally becomes effective. New rules to provide whistleblowers with greater protection against retaliation, even if they report misconduct outside their organisation, are expected to be introduced shortly.

Fuelled by current events, the focus now extends to the area of inappropriate or unacceptable behaviour (*grensoverschrijdend gedrag*). In the Netherlands, multiple people recently accused the television programme "The Voice of Holland" of overlooking sexually inappropriate behaviour by persons in positions of power. In terms of M&A, this trend will undoubtedly have an impact on due diligence and deal terms.

Due diligence
Specific areas for due diligence driven by this trend include: (i) reports of possible misconduct, including inappropriate behaviour, (i) policies implemented by the target to ensure protection for whistleblowers and a safe (meaning harassment-free) working environment (including protection against inappropriate behaviour) as well as compliance with these policies, and (ii) measures taken by the target to address past incidents.

Contract terms
The pre-closing covenants may include specific clauses on the need to continually ensure a safe working environment (i.e. one that is free from harassment and inappropriate behaviour), whereas the warranties may cover group policies in this area, compliance with these policies, a safe working environment in general, and possible damages/compensation for past misconduct.

#2

Expected SPAC M&A 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 subsequently spread across Europe, as evidenced by the 40 SPAC listings in Europe in 2021. That year, 16 SPACs were listed on Euronext Amsterdam and the local regulator confirmed receiving over 40 applications for a SPAC listing, some of which are still pending. This trend appears to have peaked, for the time being, as we are no longer seeing an increase in SPAC listings.

In short, a SPAC first raises capital from investors in the form of a "blank check" IPO. Once the capital has been raised, the SPAC's management seeks a target with which to merge. For the target, this route to going public can create more valuation certainty, which can be particularly helpful when accessing the European capital markets. A merger with a US SPAC may be somewhat faster and less expensive than a traditional US IPO and is a possibility to be considered when market conditions are volatile and an ordinary IPO might be more difficult to achieve. 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 subject to a post-closing holding period.

Given the large number of SPACs established recently, in both the US and Europe, we expect noticeable SPAC activity on the M&A market in the coming year since such companies typically need to do a business combination within a period of 18 to 24 months. A liquidation of an unsuccessful SPAC at the end of its lifecycle leaves initiators with no return on investment and significant expenses to be settled against their own 'skin in the game". In the current sellers' market, the desire of SPAC initiators to avoid such a scenario is likely to give rise to an even more competitive environment.

#3

Continued focus on ESG

New regulations and legislative proposals at the EU level and in various EU Member States relating to ESG reporting and due diligence requirements and responsible business conduct will require companies to focus more on integrating ESG best practices into their compliance policies and practices. The judgments in recent climate change lawsuits brought by Urgenda against the Dutch government and Friends of the Earth against Shell are illustrative of a broader trend towards rendering

compliance with ESG requirements enforceable, even against companies. Similar lawsuits have been brought in many other countries as societal pressure on companies to take into account the social and environmental impact of their business and supply chain mounts. These developments indicate a need to consider widening the scope of M&A due diligence and reveal potential risks in relation to non-compliance with responsible business conduct principles.

The pressing need to mitigate climate change and its impact on the planet will drive more and more capital to companies and businesses that offer solutions to environmental challenges. The transition to a low carbon economy will create opportunities which will require vast amounts of capital and resources. At the same time, geo-political uncertainty is raising awareness of the topic of security of supply. With this in mind, we expect an increase in corporate transactions by which traditional energy companies seek to realign their business and create joint ventures with new players. We believe these considerations will contribute to increased deal volumes in 2022 and beyond.

#4

A lessening of the impact of COVID-19 on M&A deals

Covid-19 pandemic had a substantial impact on companies and their business in 2020 and 2021 and disrupted economies worldwide. Contrary to initial expectations, however, we saw a record number of M&A deals in the past two years. These transactions were partially driven by the huge amounts of "dry powder" available in private equity circles. Despite the economic disruption caused by the pandemic, we have not (yet) seen an increase in distressed M&A. Nonetheless, deal terms now customarily include certain Covid-inspired provisions, which we expect are here to stay.

Material adverse change
Since the start of the Covid-19 pandemic, the "no material adverse change" or "no MAC" clause has come back into fashion. Specific attention is paid in these clauses to pandemics and whether they are captured by the definition of material adverse change. Buyers typically push to have them included, whereas sellers try to avoid the same.

Ordinary course of business
Negotiations tend to focus on the question of whether measures to address the effects of Covid (or other business disruption events) fall outside the ordinary course of the target company's business and thus require the buyer's consent. Companies typically wish to have freedom to take the measures they believe are necessary without undue delay, whereas purchasers wish to establish that the proposed measures are indeed the right ones,

are proportionate, etc. When drafting such clauses, antitrust restrictions should be taken into account.

#5

New filing obligation for certain transactions related to national security and telecom

In 2022, the Investments, Mergers and Acquisitions Screening Act (*Wet veiligheidstoets investeringen, fusies en overnames*) is expected to enter into force. This legislation was initially scheduled to become effective in 2021, but was delayed. The new law is based on the Foreign Direct Investment ("FDI") Screening Regulation and introduces a filing obligation for certain types of 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. While the details are still being worked out, the following are currently considered to provide vital services: companies active in specific sectors, including the transport of gas and electricity, the provision of nuclear energy, air transport, port services, banking services, financial market infrastructure, renewable energy and gas storage. The category of sensitive technologies currently includes products intended for military or dual use.

An exemption applies when a sector-specific test is provided for by Dutch law (for example, pursuant to the new Telecommunications Act).

Although the FDI legislation is not yet effective, we recommend already taking it into account in merger filing assessments. If the legislation enters into force before a transaction closes and the parties meet the applicable thresholds, a notification will be required and a standstill obligation (i.e., an obligation not to complete the transaction before approval is obtained) will apply. In addition, when it enters into force, the law will apply with retroactive effect as from 8 September 2020 to all transactions falling within its scope that give rise to a reason for investigation from a national security perspective.

The new law was preceded by an amendment to the Dutch Telecommunications Act, introducing a merger filing obligation for the telecommunications sector. The FDI rules in the Telecommunications Act apply to companies that provide any of the following services:

- Telecoms: telephone services, Internet access services or electronic communications network access to more than 100,000 end users;
- Internet hubs: provision of an Internet node to which more than 300 autonomous systems are connected;
- Data centres: data centre services with a power capacity in

excess of 50 MW or hosting services for more than 400,000 domain names with an .nl extension;

- Trust services: provision of a qualified trust service, such as electronic signatures, stamps, time stamps, registered electronic delivery services and website authentication certificates;
- Services for certain institutions: companies that offer an electronic communications service or electronic communications network, data centre service or trust service to the Dutch General Intelligence and Security Services (AIVD), the Dutch Ministry of Defence, the Dutch Military and Security Services (MIVD), the National Coordinator for Security and Counterterrorism or the Dutch National Police.

As indicated above, transactions that fall under the Telecommunications Act will not need to be notified under the new legislation.

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