

Amendments to the Dutch public offer rules

On 1 July 2012 the long-awaited amendments relating to the Dutch public offer rules will enter into force. These amendments are the result of a legislative and consultation process that lasted more than two years and they are the first amendments to the Dutch public offer rules since the major revision of these rules in October 2007. Key changes are: (i) the introduction of a "put up or shut up" rule, (ii) the possibility to "stop the clock" in case of a leak announcement, (iii) additional flexibility in terms of increasing the offer price, and (iv) additional exemptions to the mandatory offer requirement. These changes, together with the applicable grandfathering rules, are discussed in more detail in this client briefing.

Put up or shut up

One of the main features of the amendments is the introduction of the put up or shut up rule. The idea behind this rule is that a potential offer should not be pending too long to protect the interests of the target company. This is in line with the EC Directive on Takeover Offers.

At the request of a listed company, the Netherlands Authority for the Financial Markets ("AFM") can oblige a party that has made public statements which could suggest that it is considering making a public offer for this listed company, to either publicly announce a public offer, or alternatively, to publicly confirm that it will not make a public offer for this listed company. This statement is to be made public within six weeks from instruction by the AFM. If a party confirms it does not intend to make a public offer, it will be prohibited from making a public offer for a period of

six months from making such announcement. The AFM has discretion to act upon the request of a listed company to enforce the put up or shut up rule and will do so if the listed company is negatively affected by the uncertainty in the market around the possible offer. Should the "potential bidder" not comply with the instruction from the AFM to confirm its intentions, it will be prohibited from making a public offer for the relevant listed company for a period of nine months (instead of six) from the end of the six week period commencing on the date of the instruction by the AFM. However, should a third party make a public offer for the same listed company during that six or nine months period, the "potential bidder" is released from the prohibition to make a public offer.

The new rules also provide in various instances that if after the initial announcement of a public offer the bidder withdraws its offer, the bidder

Key issues

- The introduction of the put up or shut up rule.
- "Stop the clock" in case of a leak announcement.
- Multiple increases of the offer price during the acceptance period.
- Several mandatory exemptions from the mandatory offer requirement.
- Grandfathering of public offers that were announced prior to 1 July 2012.

is prohibited for a period of six months to announce or to make a new offer for the same listed company. This is for instance relevant where a bidder, after having made an initial announcement of a public offer, within four weeks thereof announces that it will not proceed with its envisaged offer. Under the current rules such

bidder can re-launch the process at any time thereafter, whereas under the new rules it will be prohibited to make a public offer for a period of six months. Also here the exemption in case of a public offer for the same listed company by a third party applies; the first bidder will in this scenario be released from the prohibition to make a public offer.

Initial announcement

The mandatory timeline for a public offer commences on the date on which the bidder and/or the target company publicly announce the envisaged public offer. This announcement should ultimately be made at the moment at which the bidder and target company have reached (conditional) agreement on the terms of the offer, often laid-down in a merger protocol. However, if the discussions between the bidder and the target company leak before they have reached an agreement, they will in principle be obliged to respond to this leak by making a public announcement and thus triggering the mandatory timeline for a public offer.

In the consultation process, various parties identified the need to be able to "stop the clock" if the bidder and/or target company would find themselves obliged to respond to a leak, whilst having not yet reached an agreement. The new rules cater for such a situation by introducing an exemption to the automatic start of the mandatory public offer timeline if in or immediately after the publication of such a "leak statement" by the target company and/or the bidder, the target company confirms that it is in discussions with the bidder but has not yet reached agreement on the terms of the offer.

Increasing the offer price

Under the current rules, the bidder is only allowed to increase the offer price once during the acceptance period. In practice (for instance in the context of Staples' public offer for Corporate Express and the competing public offers by Gilde and Eriks for Econosto) this has proven to be a rule that is not helpful in a bidding process and that can be circumvented relatively easily.

The new rules allow for multiple offer price increases during the acceptance period of a public offer and at the same time introduce some additional requirements in relation thereto. If the offer price is increased when the remainder of the acceptance period is less than seven working days, the acceptance period is by virtue of law extended so it will run for seven working days. During this extended acceptance period, no additional price increases are allowed.

Additional mandatory offer exemptions

The new rules provide for four additional and/or changed exemptions to the mandatory offer requirement. First of all the voting threshold for the "whitewash" procedure is reduced from 95% to 90% of all votes cast by all parties other than the bidder and its possible concert parties. Secondly a new exemption is introduced for underwriters of a share issue, whereby the underwriters find themselves left with shares representing more than 30% of all voting rights. In such scenario, the underwriters have a year to reduce

their stake, provided that they do not vote their shares during such period. Thirdly the new rules confirm the view of various parties that the voting commitments typically included in irrevocable undertakings obtained by a bidder from large shareholders should not be qualified as a form of acting in concert. This only applies if such voting commitments are: (i) limited in time, (ii) conditional on the offer being declared unconditional, and (iii) directly related to the offer or aimed at frustrating the offer.

Finally, an exemption for parties acting in concert since 29 October 2007 (the exact date on which the current rules came into force) is introduced, pursuant to which it is under certain circumstances allowed for a third party to enter the concert, provided amongst others that it cannot exercise a majority of the voting rights held by the concert parties jointly.

Other changes

The new rules contain various other, smaller changes; the most relevant are listed below:

- The obligation to publicly disclose stakebuilding activities from the moment of initial announcement of the offer (also applicable to regular market trading on Euronext Amsterdam and to cash settled instruments such as contracts for difference).
- An extension of the minimum acceptance period to eight weeks, to allow the target company to convene an extraordinary general meeting within such period (as convocation should be made 42 days before the date of the extraordinary general meeting).

- Additional requirements for certain funds statement in case of a consideration in kind.
- The announcement of a mandatory offer should also substantiate the "fair price" the bidder will offer to shareholders.
- The possibility to convert a voluntary offer to a mandatory offer in case a bidder crosses the 30% threshold during the acceptance period (for instance as a result of stakebuilding).
- A position statement by target company's boards is also required in case of a mandatory offer.
- The acceptance period should commence ultimately three business days after making the approved offer memorandum publicly available.
- The minimum acceptance threshold for a full voluntary offer is set at 50%; if a full voluntary offer is settled at less than 50%, the bidder will be required to make a mandatory offer for the remaining shares.

Grandfathering

The new rules will apply to all public offers in respect of which an initial public announcement is made on or after 1 July 2012. Any public offer publicly announced before that time will be governed by the current rules. Should after 1 July 2012 but during the course of a public offer that benefits from these grandfathering requirements a competing offer for the same target company be launched by a third party, such offer will also be governed by the current rules. This will ensure that both bidders benefit from a level playing field.

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