Technology M&A
2022

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LEXOLOGY
Getting The Deal Through

GDR

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Lexology Getting The Deal Through is delighted to publish the fourth edition of *Technology M&A*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Arlene Arin Hahn and Neeta Sahadev of White & Case LLP, for their continued assistance with this volume.

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Getting The Deal Through

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Netherlands

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Van Doorne

STRUCTURING AND LEGAL CONSIDERATIONS

Key laws and regulations

1 What are the key laws and regulations implicated in technology M&A transactions that may not be relevant to other types of M&A transactions? Are there particular government approvals required, and how are those addressed in the definitive documentation?

In the Netherlands, mergers and acquisitions are transacted mainly under Books 2, 3, 5, 6 and 7 of the Dutch Civil Code. Additionally, more so than in certain other jurisdictions, the interests of employees play an important role in Dutch mergers and acquisitions; this is particularly the case for technology transactions in any shape or form. Dutch companies with more than 50 employees typically have a (central) works council, whose advice must be sought in the context of a transaction. Moreover, the works council has additional powers in relation to a company's strategic decision-making process. These powers of the works council and trade unions are transcribed in the Dutch Works Council Act and Social Economic Council's Merger Code 2015 (SER 2015). Generally speaking, the completion of an employee representation body consultation procedure is included in the purchase agreement as a signing or closing condition. Finally, all M&A transactions are subject to Dutch or European competition rules and regulations, as will be discussed in more detail below.

For technology M&A transactions, the following additional legislation – encompassing intellectual property laws as well as information technology and privacy laws – is of particular relevance:

- the Copyright Act;
- the Neighbouring Rights Act;
- the Databases (Legal Protection) Act;
- the Patents Act 1995;
- the Community Plant Breeders' Right Regulation (2100/94/EC);
- the Directive on the Transfer of Undertaking (2001/23/EC);
- the Assessment of Employment Relationships (Deregulation) Act;
- the Telecommunications Act;
- the General Data Protection Regulation (GDPR);
- the Benelux Convention on Intellectual Property (BCIP);
- the Copyright Directive (2001/29/EG);
- the Union Trade Mark Regulation;
- the Trade Secret Act;
- the Community Designs Regulation;
- Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (the Software Directive);
- the Neighbouring Rights Act;
- the Legal Protection of Original Topographies of Semiconductor Products Act;
- the Trade Names Act;
- the Seeds and Planting Materials Act 2005;
- the Directive EU 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (DSM Directive); and
- the Regulation EU 2019/1150 on promoting fairness and transparency for business users of online intermediation services.

In general, no governmental approvals are required to affect a transaction. However, recently a sector-specific investment test was introduced to protect the Dutch telecom sector. Furthermore, all transactions are subject to Dutch or European competition laws. As a result, if a transaction exceeds or is likely to exceed certain turnover thresholds – as defined in the Dutch Competition Act or the EC Merger Regulation (39/2004/EG) – parties must obtain clearance from the Netherlands Authority for Consumers and Markets or the European Commission, or the relevant authorities in certain other member states, or third countries, as the case may be. Moreover, if a company is active in a specific regulated industry – such as the financial sector, the healthcare industry or the IT or telecommunications sector-specific licences or approvals might be required.

Government rights

2 Are there government march-in or step-in rights with respect to certain categories of technologies?

Under current Dutch and European law, no general technology-related governmental march-in or step-in rights exist. Traditionally, European Union policies have been directed towards encouraging mergers and foreign investment. This is illustrated by the Treaty on the Functioning of the European Union, which not only abolishes transfer restrictions on capital and payments between member states, but also between member states and third countries. Moreover, unlike the United States or Australia, the European Union does not have an institution in place to screen incoming foreign investments or to prevent a merger on account of the nationality of the acquirer.

However, in recent years, the European Union has taken a step back from its traditional liberal policy towards mergers and foreign investments. In light of recent controversies pertaining to privacy and security and an increased interest of foreign investors in companies that are crucial to the Dutch and European technology infrastructure, a trend is visible aimed at protecting 'vital technology'. Moreover, at the European level, a framework for the screening of foreign direct investment at the level of the member states as well as a pan-European screening mechanism for foreign investments that threaten European Union interests, has become fully operational as of 11 October 2020.

Finally, closer to home, a sector-specific investment test was introduced for the Dutch telecommunications sector following the attempted takeover of Dutch telecom provider KPN by América Móvil. The Undesired Control in the Telecom Sector Act (UCTA) has entered into force as of October 2020 and applies to the intended acquisition of a controlling interest in a telecommunications provider, when such control results in relevant influence in the telecom sector. If this controlling interest may result in a threat to the public interest, the Dutch Minister of Economic Affairs could prohibit the acquisition or possession of the controlling interest.

Legal assets

3 How is legal title to each type of technology and intellectual property asset conveyed in your jurisdiction? What types of formalities are required to effect transfer?

In technology M&A transactions, the most important IP rights are:

- patents;
- trademarks;
- copyright;
- design or model rights; and
- database rights.

Patents

Patents may be granted for technological inventions that are new, the result of an inventive step and have an industrial application. A patent gives the owner an exclusive right to forbid third parties from using the invention for commercial purposes. Provided that the requirements are met, and a patent is established by registering the invention in the Dutch or European patent registers. The scope of protection is 20 years.

Trademarks

A trademark can be any symbol capable of graphic representation which has a distinguishing characteristic (eg, is not descriptive). Provided that the requirements are met, a trademark is established by registering it with the applicable Benelux, European or international trademark register. The scope of protection is 10 years, but can be extended perpetually.

Copyright

Works of literature, arts and science (including software) are protected by copyright law. Copyright grants the creator the exclusive rights to publish, copy or distribute the work. A product qualifies as a 'work' when it is a personal intellectual creation and bears a personal mark of the creator (as a result of creative choices). Provided these requirements are met, copyright is established automatically. Registration is not required, and there is no copyright register in the Netherlands. The duration of the protection is 70 years after the death of the creator.

Design and model rights

A design or model right protects the external appearance of two- or three-dimensional objects. An object qualifies as a design or model when it is new and has its own character. Design or model rights are established by registration in the applicable Benelux, European or international register. Registration gives the owner the exclusive right to use the design or model. The scope of protection is five years, and can be extended every five years up to a maximum of 25 years. Unregistered designs or models can be protected by a design or model right as well, but the scope of protection is limited and the duration of protection is three years, starting from the date that the model is made publicly available in the EU. There is no possibility of extending this period.

Database rights

Databases, as well as the information contained in the databases, are protected by copyright and database rights, respectively. Database rights are automatically granted to the producer upon the creation of the applicable database. There is no register. A database is a collection of works or data that is methodically structured and shows a substantial investment. It gives the owner the exclusive right to request or reuse (parts of) the databank. The scope of protection is 15 years.

Transferring rights

To affect a transfer of the above-mentioned IP rights, an authentic or private deed of transfer is required that contains all the conditions and reservations to the transfer. If a patent, trademark or design or model right is transferred, it does not bind third parties until the transfer instrument has been registered in the appropriate register.

Domain names

A domain name can be protected through registration with the Foundation for Internet Domain Registration. Although this does not technically qualify as an IP right, once registered, the owner has a contractual right to exclusively use a particular IP address. The transfer of a domain name requires a deed and a subsequent notification of the Foundation for Internet Domain Registration.

Trade secrets and know-how

Finally, trade secrets and know-how do not formally qualify as IP rights under Dutch law, but can be protected by contractual measures. Information qualifies as a trade secret if it is secret, has value, and proper measures have been taken to uphold its confidential nature. Under the new Trade Secret Act the owner of a trade secret can prohibit others from obtaining, using or publishing a trade secret. In some cases, the owner even has the right to demand a recall or order the destruction of the products made using the trade secret.

DUE DILIGENCE

Typical areas

4 What are the typical areas of due diligence undertaken in your jurisdiction with respect to technology and intellectual property assets in technology M&A transactions? How is due diligence different for mergers or share acquisitions as compared to carveouts or asset purchases?

In the Netherlands, due diligence in technology transactions typically focuses on:

- title to shares (if a share deal);
- IP rights owned by the company (eg, trade names, design or model rights, copyrights, neighbouring rights, trademarks, patents, databases, plant breeders' rights, chip rights), which often includes domain names, know-how and trade secrets, although the latter three do not officially qualify as IP rights;
- agreements involving the company's use of third-party IP rights, know-how, or use of IP rights or company know-how (eg, licence agreements and transfer deeds);
- possible notifications of infringements of third-party IP and vice versa and historic and pending litigation involving IP rights, including know-how;
- security interests and encumbrances established on, or prejudgment or executory seizure of, IP rights or company know-how;
- agreements related to the website maintained by the company;
- agreements involving compliance with, or documents evidencing compliance with, statutory privacy provisions;
- privacy statements or policies;
- documentation relating to (adequate) procedures to prevent unauthorised access and the introduction of viruses, worms, Trojan horses, spyware or other disruptive elements into the information technology; and

- employment and/or (management) services agreements, in particular to confirm transfer of IP rights, confidentiality and security undertakings and restrictive covenants.

In a share deal, merger or demerger, all company assets and liabilities are automatically (ie, by virtue of the law) transferred, following the execution of the notarial deed of transfer of shares or execution of the notarial deed of merger or demerger. Therefore, in a share deal, there will be particular emphasis on titles to shares as well as the review of key agreements to confirm the extent to which change-of-control clauses are triggered.

By contrast, in an asset deal or a carve-out (assuming pre-closing restructuring is involved), all assets and liabilities must be separately transferred, taking into account all applicable transfer requirements. As a result, the due diligence investigations conducted in a share deal differ from the investigations conducted in an asset deal in the sense that there is an increased focus on the individual assets concerned. Moreover, depending on the type of assets being transferred and the identity of the buyer, conducting a 'Transfer of Undertakings' (Protection of Employment) Regulations 2006 analysis is paramount. Due diligence must establish whether a transfer of undertaking has taken place, by which certain employees are automatically transferred from the seller to the buyer irrespective of the 'scope' of the assets and liabilities that are transferred by virtue of the asset purchase agreement.

Finally, in recent years, an increasingly popular phenomenon in technology transactions has been the 'acqui-hire', by which companies acquire the company's assets or shares for the sole purposes of hiring its key software engineers. Once the new people are on board, the acquired business is liquidated. In an acqui-hire, a thorough assessment of the engineers and their terms of employment, as well as the applicable internal personnel rules and regulations, work habits and priorities, should be part of due diligence.

Customary searches

5 | What types of public searches are customarily performed when conducting technology M&A due diligence? What other types of publicly available information can be collected or reviewed in the conduct of technology M&A due diligence?

Generally, a buyer and its (legal) advisers will review the information included in the trade register of the Dutch Chamber of Commerce. This register contains information on the target's registered name and address, its directors, annual accounts and other filings, such as past mergers or demergers. Moreover, before the wire transfer of the purchase price to the seller upon completion of the transaction, the central insolvency register is checked to confirm that neither the target company nor its subsidiaries have been declared bankrupt.

In a technology M&A due diligence, it is customary to consult additional registers to confirm, among other things, that all IP rights are owned by the target and to establish what, if any, registered licences are issued. Trademarks and design or model rights – depending on their scope – are registered with the Benelux Office for Intellectual Property, the European Union Intellectual Property Office or the World Intellectual Property Organization, respectively. Each organisation maintains its own register. Patents – depending on their scope – are registered in the Dutch Patent Register or European Patent Register. Finally, domain names – which do not technically qualify as IP rights, but may qualify as trade names – are registered with the Foundation for Internet Domain Registration. Copyright is created by operation of law and is, therefore, not registered in the Netherlands. Therefore, we require an overview of all IP rights and copies of all relevant licence agreements, to verify whether all relevant intellectual property is owned or validly licensed by the target.

Registrable intellectual property

6 | What types of intellectual property are registrable, what types of intellectual property are not, and what due diligence is typically undertaken with respect to each?

In the Netherlands the following types of intellectual property are registrable: trademarks, design or model rights, patents, plant breeder's rights, and domain names. Due diligence typically consists of a review of the registers.

Other IP rights, such as copyrights, database rights, trade names and trade secrets, are not registrable under Dutch law. These rights arise by operation of law or first usage. For due diligence purposes, it is important to review all relevant agreements and other documentation held by the target related to these rights.

Liens

7 | Can liens or security interests be granted on intellectual property or technology assets, and if so, how do acquirers conduct due diligence on them?

Under Dutch law, there is no single legal equivalent to a lien. A lien can refer to an array of Dutch security interests. In practice, the most common security interest vested in respect of IP rights or technology assets is a right of pledge. Under Dutch law, IP rights can be encumbered by a right of pledge, provided that the relevant intellectual property law states that the IP right is transferable. This is the case for copyright, trademarks, design or model rights, patents and plant breeders' rights. The requirements for the creation of a right of pledge differ per IP right; however, in most cases, a right of pledge is established through the due execution of an authentic or private deed. To the extent that the IP rights are registered, the right of pledge is recorded in the applicable register.

Moreover, most technology assets – such as hardware – can be encumbered by a right of pledge, provided that these assets qualify as movable assets. A right of pledge is created by the due execution of an authentic or registered private deed. In these instances, due diligence typically consists of reviewing the relevant deeds and underlying contracts containing the obligation to create a right of pledge. Depending on the nature and motives for the transaction, seller, buyer and creditor can decide to settle all outstanding debts prior to closing or, alternatively, agree that the acquirer will take over (part of) the existing debt after closing. In the first case, the right of pledge will terminate by operation of law prior to closing. In the second case, the creditor will enter into new (finance) agreements with the acquirer upon closing, waive its existing right of pledge prior to closing and establish a new right of pledge post-closing. If a pledgor (debtor) fails to comply with its obligations under the finance agreement, the pledgee (creditor) can dispose of the IP rights as if he or she were the owner.

Employee IP due diligence

8 | What due diligence is typically undertaken with respect to employee-created and contractor-created intellectual property and technology?

Establishing ownership of IP rights created by employees or independent contractors is particularly relevant when copyright-protected works are involved, as these are not formally registered or recorded. According to the Dutch Copyright Act, copyright is vested in the creator by operation of law. However, if the creator is an employee, the Dutch Copyright Act dictates that all copyrights created by an employee vest in their employer, provided that these activities fall within the employee's job description. To avoid confusion and prevent copyrights from automatically vesting with the employee, an IP clause is often included in employment agreements. The same rules do not apply if the person creating the intellectual property qualifies as a contractor rather than an employee. All copyrights created by a contractor automatically vest in the contractor as creator. To avoid having to seek the permission of the contractor each time copyright-protected works are used, companies will typically include an IP clause in their agreements. This clause compels contractors to transfer all copyrights created throughout the course of the assignment to the company.

Unfortunately, the distinction between employees and independent contractors is not always clean cut. Even if an agreement is not formally labelled as an employment agreement, it can qualify as an employment agreement if it satisfies the statutory requirements and vice versa. Earlier this year, a Dutch court of appeal confirmed that the relationship between food delivery company Deliveroo and its deliverers qualifies as an employment agreement. In another case against the cleaning service platform Helpling, a Dutch lower court decided in 2019 that the relationship should not be seen as an employment agreement nor as an agency work employment contract with Helpling, but should be perceived as employment intermediation. Therefore, it appears that the jury is still out on how the contractual relationship between workers and online platforms with similar hiring constructions should be qualified. Since June 2021, a case is also pending between the Dutch Trade Union Confederation (FNV) and Uber on this matter and it will be interesting to see whether the decision of the Dutch courts will be similar to the UK Supreme Court's decision of February 2021 on Uber drivers and their employment agreements.

In light of these rules and case law, due diligence related to employee- and contractor-created intellectual property typically focuses on standard and personalised employment agreements; freelance agreements and (standard) management agreements; agreements involving hiring out and hiring in employees; and proceedings, pending proceedings or other employment-related disputes.

If relevant, due diligence should also focus on employees who contributed to patentable inventions, as they may hold certain rights or be entitled to compensation. Finally, if trade secrets are considered valuable company assets, due diligence should also focus on confidentiality and secrecy undertakings with employees and contractors. Under the new Trade Secret Act, if a company does not have adequate non-disclosure agreements in place, this may prevent know-how from qualifying as a trade secret. If due diligence investigations reveal that the agreements with employees or contractors do not sufficiently protect intellectual property, IP rights must be transferred to the target prior to completion by means of a separate deed of transfer.

Transferring licensed intellectual property

9 Are there any requirements to enable the transfer or assignment of licensed intellectual property and technology? Are exclusive and non-exclusive licences treated differently?

A licence can be granted for all IP rights. A licence is, in essence, an agreement between the owner of the IP rights (licensor) and a third party (licensee), by which the licensor authorises the licensee to use its IP rights. A licence can be limited in, among others, time, scope, territory, type of IP right, exclusivity, sublicences, transferability, royalties, types of goods or services, and duration. Apart from the requirement that consent must be reached between licensor and licensee, no formal requirements exist for the establishment of a licence under Dutch law (except for an exclusive copyright licence that should be done by deed). However, a patent, design or model right or trademark licence does not bind third parties until the licence is registered in the relevant register. In practice, a licence is usually embedded in a written agreement in order to avoid discussions at a later stage. Generally speaking, licence agreements can be transferred. Parties can include a provision in the licence agreement, dictating that the licence cannot be transferred (ie, exclude the right to transfer). Considering that the legal implications of a clause of this nature can be particularly burdensome, this should always be verified during due diligence.

Debate exists on whether the new owner of the IP rights is bound by a pre-existing licence after transfer. The prevailing opinion is that the new owner must respect the licence, provided that the new owner knows or should be aware that a licence agreement exists (eg, by consulting the appropriate register). As not all IP rights are registered in the Netherlands, an essential part of the due diligence investigation is to find out whether the company has entered into licence agreements with third parties.

Software due diligence

10 What types of software due diligence is typically undertaken in your jurisdiction? Do targets customarily provide code scans for third-party or open source code?

In the Netherlands, due diligence typically focuses on the review of:

- agreements relating to the sale, purchase, licensing or licence granting of software;
- agreements relating to IT services;
- agreements relating to technology in escrow and technology escrow for hardware and software;
- reseller, distribution and strategic alliance agreements with other IT suppliers;
- letters of intent with suppliers and customers related to IT;
- general terms and conditions governing the sale or purchase of IT (hardware, software or IT-related services); and
- assignment agreements related to rights on hardware or software offered or delivered to customers (ie, IP transfer deeds).

As part of due diligence the target company usually provides information on whether software it uses is licensed through third parties or it is open source. However, since lawyers (in general) are not qualified to comment on the quality of software, we explicitly exclude this from the scope of our due diligence. If the nature of the transaction requires in-depth software due diligence we advise clients to involve third-party experts.

Other due diligence

11 What are the additional areas of due diligence undertaken or unique legal considerations in your jurisdiction with respect to special or emerging technologies?

In general, most of the aforementioned considerations apply equally to special or emerging technologies, with privacy compliance being a major focus point. Further, depending on the nature of the transaction, specific regulatory requirements may apply, which will constitute part of the due diligence investigation.

In addition, in emerging technologies the decisions regarding an investment are no longer just about returns. The way target companies handle environmental issues, social responsibility and (corporate) governance (ESG) has become an increasingly important item in terms of due diligence. On one side, the due diligence should provide insight into any controversial behaviour of the target company, to ensure that sufficient protection can be included in the transaction documentation. On the other hand, however, it becomes equally important to ensure the benefits of positive ESG actions and programmes within a target company.

PURCHASE AGREEMENT

Representations and warranties

12 In technology M&A transactions, is it customary to include representations and warranties for intellectual property, technology, cybersecurity or data privacy?

In technology M&A transactions, representations and warranties for intellectual property, information technology and privacy are commonplace.

For intellectual property, these warranties and representations are typically aimed at ensuring that the company or group (target) holds full, unencumbered, title (ownership) to all vital intellectual property, that no infringements have occurred or are anticipated to occur related to the company's and third parties' IP rights, that relevant non-disclosure agreements are in place, no trade secrets or know-how have been shared outside the ordinary course of business and that proper measures have been taken to keep these trade secrets or know-how secret.

For information technology, the warranties are aimed at ensuring that the company holds full and unencumbered title to all vital information technology, has sufficient backup, disaster recovery and security plans and procedures in place, has not been subject to any major failures or breakdowns, and has not planned any major IT investments immediately after closing. Finally, privacy-related representations and warranties usually require the seller to declare that the target has complied with and continues to comply with all applicable privacy laws, such as the General Data Protection Regulation and the Telecommunications Act.

Customary ancillary agreements

13 What types of ancillary agreements are customary in a carveout or asset sale?

In the Netherlands, the following ancillary agreements are typically seen in technology M&A carve-outs:

- transition services agreements;
- (limited) licensing agreements;
- cross-licence or (confirmatory) IP transfer agreements or deeds of assignment;
- contract transfer agreements;
- distribution agreements; and
- IP co-existence agreements.

Conditions and covenants

14 What kinds of intellectual property or tech-related pre- or post-closing conditions or covenants do acquirers typically require?

Depending on the background of the transaction, the outcome of the due diligence investigations and the level of intertwinement of the companies involved, several pre- and post-closing conditions can be agreed upon. In practice, the following pre- and post-closing conditions are often included in purchase agreements:

- the obligation to transfer all IP rights to the relevant group companies prior to closing or obtain relevant licences;
- the obligation to enter into any of the following agreements before or after closing:
  - transition services agreements;
  - (limited) licensing agreements;
  - cross-licence or (confirmatory) IP transfer agreements or deeds of assignment;
  - contract transfer agreements;
  - distribution agreements; and
  - IP co-existence agreements;
- a correction of chain title for intellectual property;
- the obligation to obtain a waiver from third parties prior to closing if a (material) agreement contains a change-of-control provision; and
- the obligation to implement measures aimed at full compliance with the applicable data protection or consumer protection laws.

Survival period

15 Are intellectual property representations and warranties typically subject to longer survival periods than other representations and warranties?

In transactions, a distinction is typically made between fundamental warranties (ie, title to shares or assets, organisation and standing and capital structure) and business warranties. As a rule of thumb, fundamental warranties have a significantly longer survival period than business warranties. In Dutch M&A transactions, where intellectual property plays a vital role, IP warranties are typically elevated from the status of business warranty to the status of fundamental warranty, and are, therefore, subject to longer survival periods. Fundamental warranties are typically subject to a survival period of at least five years (but usually longer) while, for business warranties, the survival period is typically somewhere between 12 and 36 months.

Breach of representations and warranties

16 Are liabilities for breach of intellectual property representations and warranties typically subject to a cap that is higher than the liability cap for breach of other representations and warranties?

In general, the cap on fundamental warranties is often 100 per cent of the purchase price and furthermore taking into account an overall maximum liability cap of an amount equal to 100 per cent of the purchase price. The cap on business warranties is usually anywhere between 10 and 50 per cent of the purchase price, depending on the risk appetite and the bargaining power of the parties involved.

If intellectual property plays a crucial role in a transaction, the corresponding warranties are usually labelled as fundamental warranties. As a result, the cap is higher than for business warranties. In practice, it is not uncommon for there to be a separate basket for IP representations and warranties with a separate cap, which is then often on the higher side of the business warranties' cap. If so agreed, the remaining business warranties are then often subject to a lower cap. If, and to the extent risks were identified during the due diligence investigation, which cannot easily be quantified and for which pre- or post-closing conditions are no viable alternative, a seller is typically requested to provide specific indemnities. These specific indemnities are usually not subject to the time and monetary limitations that apply to claims for breach of representations and warranties, save for the overall cap and no accumulation.

17 Are liabilities for breach of intellectual property representations subject to, or carved out from, de minimis thresholds, baskets, or deductibles or other limitations on recovery?

Generally, liabilities for breach of IP representations and warranties are not carved out from the applicable limitations to recovery. However, depending on the nature of the transaction and the importance attributed to the intellectual property, this can differ. Business warranties are subject to time and monetary limitations, as well as subject to or qualified by disclosure. These limitations often do not fully apply to the fundamental warranties. Therefore, if IP representations and warranties are elevated to the status of fundamental warranties, sellers are required to accept only limited carve-outs.

Indemnities

18 Does the definitive agreement customarily include specific indemnities related to intellectual property, data security or privacy matters?

In the Netherlands, technology-related indemnities are included in the final transaction documentation if the due diligence investigation or a subsequent disclosure reveals a specific risk that cannot be easily quantified or resolved through the pre- or post-closing route. Indemnities that are often included are indemnities against any claims from third parties arising out of or related to (the infringement of) their IP rights or the use of corresponding licences; and indemnities concerning the lack of ownership of or title by the target to IP rights, for instance, when different jurisdictions are involved and a transfer of title cannot be established with certainty. Since, generally, most target companies in emerging technologies have some work to do before they are considered compliant with the GDPR that entered into force in May 2018, indemnities for claims made by the Dutch Data Protection Authority are also becoming increasingly popular.

Walk rights

19 As a closing condition, are intellectual property representations and warranties required to be true in all respects, in all material respects, or except as would not cause a material adverse effect?

It is important to note that unlike certain other (common law) jurisdictions, Dutch transactions do usually not contain a bring-down condition. Representations and warranties (especially the fundamentals) are often repeated at closing, but a breach of warranty does not entitle a buyer to put the transaction on hold or walk away altogether, but rather grants the buyer the right to subsequently claim damages.

UPDATES AND TRENDS

Key developments of the past year

20 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

There have been several developments that influenced technology M&A transactions.

Covid-19 pandemic

When providing an overview of the key developments of the past year, the covid-19 pandemic is one item that cannot be left out. Last year, several attempts in Dutch proceedings were made to terminate transactions with targets of which the value had fallen sharply as a result of the coronavirus crisis.

Originally from the Anglo-American legal system, MAC clauses grant a purchaser the right to, in the event of a 'Material Adverse Change', withdraw from the already signed but not yet closed purchase agreement or to assert corresponding guarantee claims. Under Dutch law, the specific rights pursuant to a MAC – or any contractual arrangement for that matter – will depend on the meaning that both parties could reasonably give to the provision in the circumstances of the case and what they could reasonably expect from each other in that regard. In addition, Dutch mandatory law provides for the possibility to (partially) terminate or amend any agreement in case of unforeseen circumstances.

As in most jurisdictions, however, Dutch courts decided that the covid-19 pandemic did not per se qualify as a sufficient material adverse change (MAC) now that target companies should be able to recover and compensate any losses relatively quickly. To qualify as a MAC, the events should have had a significant and structural effect on the results of the target company, at least in the case of a strategic buyer who has a long-term vision. On the same grounds, the mandatory provision for unforeseen circumstances did also not provide any relief for the strategic buyer that saw a significant decline in earnings and profits in the last year.

Telecommunications Sector (Undesirable Control) Bill

On 19 May 2020, the UCTA was adopted by the Dutch Parliament. The Act provides for a notification requirement applicable to any person who has the intention to acquire 'a controlling interest' in a 'telecom party' if such interest results in 'relevant influence' in the telecom sector. In the event that the controlling interest would result in a 'threat to the public interest', the Dutch Minister of Economic Affairs and Climate Policy may even prohibit the acquiring or holding of such controlling interest or impose suspensive conditions.

The purpose of the Act is to prevent the acquisition of controlling interests in telecom parties if this may threaten the public interest in the Dutch telecommunications sector. While the Act was prompted by the attempt to take over KPN by América Móvil in 2013, the Act has wider implications as it affects not only KPN but also other parties. The Act is of relevance to anyone wishing to acquire control in a Dutch telecom provider, hosting service, internet node, trust service or data centre.

Statutory provisions on Social Purpose Companies

On 9 March 2021, a consultation document for a statutory regulation for a private company with limited liability with a social purpose (BVm) was submitted for consultation in the Netherlands.

This initiative appears to cater for an increasing number of investors that are also calling for their money to make a positive impact on society and the world at large. With the BVm designation, it will be clear to business relations in particular, that for the company, sorting social impact takes precedence over distributing profit to shareholders. The proposal states that a social enterprise may use the suffix 'BVm' or 'B.V.m' in its name if it meets the requirements that are to be set by the regulation and will probably be comparable to the Benefit Corporation known in (most of) the United States.

EU Foreign Investment Screening Regulation

As of 11 October 2020, the new EU regulation for the screening of foreign direct investments became fully operational (Regulation (EU) 2019/452). The regulation provides a legal framework for the screening of foreign direct investments in the European Union. In its current form, the regulation only applies to takeovers that could potentially pose a threat to national security or public order. This could be a company that operates in a critical infrastructure sector, such as data storage, or a company that owns or develops critical technology, such as artificial intelligence.

The regulation will, among other things:

- create certain standards for screening mechanisms at the national level;
- establish a system through which member states and the European Commission can exchange information and 'comments' related to certain investments; and
- allow the European Commission to issue opinions, which member states must take the utmost account of, if an investment poses a threat to security or public order or if an investment could undermine a project or programme of interest to the EU.

DSM Directive

On 7 June 2021, the directive on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (DSM Directive) was implemented.

This implementation is part of a larger package of measures proposed by the European Commission as part of its Digital Single Market strategy. In particular, it aims to respond to rapid technological developments that have brought about changes in the way works and other materials are created, produced, distributed and exploited.

The bill brings about several significant changes, such as the possibility to scan large quantities of copyright-protected data or text (also known as data mining) under certain circumstances and the option to prohibit news aggregator website and media monitoring services, such as Google and Facebook, from sharing links to (news) articles. The bill also introduces liability for certain large online platforms that share copyright-protected work without the prior authorisation of the holder of such rights. Platforms are freed from this liability to the extent that they have used their best efforts to obtain the permission of the holders of such rights, have used their best efforts to ensure the unavailability of specific works for which the holders of such rights have provided the relevant and necessary information (ie, filter at the gate) and acted with speed and efficiency to ensure that the relevant works are taken down and stay down after receiving a notification of the rightful owner of the work.

P2B Regulation

On 20 June 2019, the European Union adopted the EU regulation on promoting fairness and transparency for business users of online intermediation services (the P2B Regulation). The regulation aims to restore the balance between online platforms and (small) businesses or 'business users' by imposing obligations on platforms and online search engines. Platforms might, for example, have to amend their terms and conditions, but are also faced with fundamental business decisions, such as how to establish a consistent and conscientious strategy on ranking and differentiated treatment. The P2B Regulation entered into force on 12 July 2020.

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