



Dutch corporate trends 2021:

a look back & ahead

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Despite the enduring COVID-19 pandemic, 2021 was marked by global record-breaking M&A activity. In this publication, we have bundled our trend reports of the past year and take a look at how the booming M&A market has impacted the trends and developments identified. Looking ahead, we share our expected impact on the Dutch corporate practice in the long(er) term.

Looking back: the impact of the record-breaking M&A market on the trends and developments identified

In our first 2021 trend report, we addressed the use of board observers in Dutch companies. Typically, board observers are investor representatives that take on a monitoring or advisory role at board level without being formally appointed as statutory director or officer of the company. The more well-established these board observers become, the more likely this is to impact Dutch corporate governance standards. We expect to see a further increase in the use of board observers in the Netherlands, especially by private equity and venture capital investors, which in turn will likely lead to a more established market practice and doctrine on the role and composition of board observers in Dutch companies.

In our second 2021 trend report, we addressed shareholder disclosure requirements for related party transactions in privately held Dutch companies. Under Dutch law, a company's duty of care towards its shareholders may require that such shareholders are duly and timely

informed of conflict transactions. We identified a broadening scope of conflict of interests' doctrine in case law, as well as more clarification on the scope of such duty of care towards shareholders. We expect this development to continue this year and the years to come as parties explore the limits of such doctrines and courts will further clarify its scope.

In our third 2021 trend report, we addressed a number of recent transactions in which foreign companies were redomiciled in the Netherlands upon completion of a successful public bid. Following redomiciliation, these companies implemented pre-wired back-end measures that are typically seen in the Dutch market. Back-end measures may offer a path to 100% ownership even if such measures would not be available in the relevant jurisdiction of origin. We expect this trend to continue, as more non-Dutch companies look to obtain additional comfort on deal certainty and become aware of the possibilities that Dutch law offers.

Looking ahead: the impact of record-breaking M&A activity in the longer term

General consensus among M&A professionals appears to be that M&A activity will continue to thrive in 2022. Notably, we expect that de-SPAC transactions will make up a significant part of activity in the high-end M&A market. Fueled by general availability of capital, US and European capital markets saw a renewed interest in SPACs over 2020 and 2021. As the SPAC life cycle typically lasts for 18 to 24 months, a number of these SPACs will either need to find a suitable target company with which to form a business combination or return their capital to investors in this calendar year. As the first de-SPAC transactions are already completed in the Netherlands, this de-SPAC boom is expected to leave its mark on Dutch practice in 2022, whereby the trends identified over the past year will continue to play an important role.

In a typical de-SPAC transaction, the existing shareholders of the target business retain a majority stake in the listed entity after the business combination has been completed, whilst the SPAC sponsors (and potentially other SPAC investors) will also hold a significant stake. We expect to see a particular increase in instruments used by each of these types of shareholders to secure control and information rights in respect of the target business following completion of the de-SPAC transaction. This may prove to be an important catalyst driving the use of board observers as a way to monitor target businesses without taking on board responsibilities and exposure to director liability, especially for those investors who will come to hold a less significant but still a large stake (i.e. somewhere between five to ten per cent).

Similarly, we expect such parties to enter into relationship agreements with the de-SPAC business combination, granting such investors (among other things) access to certain information that might not be available to public shareholders or at least not in the same level of detail or at the same time.

We further expect that the de-SPAC wave will result in a significant number of companies reforming their governance and corporate structure to better suit a listed environment. Dutch company law provides significant freedom to parties in structuring their governance and profit rights, among other things through dual share class structures, loyalty schemes and well-established protective measures to ward off unsolicited shareholder activity. As such, similarly to how Dutch back-end measures may assist non-Dutch companies to ensure a clean post-bid structure, Dutch company law may also facilitate quick and easy listing and integration of business combinations following a successful de-SPAC transaction.

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Board observers in Dutch companies

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Investors commonly seek board representation to monitor the companies in which they participate. We are seeing an increase in the use of so-called ‘board observers’ in Dutch companies, i.e., investor representatives that take on a monitoring or advisory role at board level without being formally appointed as a director or officer of the company. In this trend report, we share our views on the use of board observers in the Netherlands and expected developments.

Board observers in the Netherlands

Dutch companies are free to structure their governance to suit their specific needs within the constraints of applicable law and constitutional documents. Absent a statutory basis for board observers, parties have significant freedom in determining the role and position of board observers on boards of Dutch companies. Dutch doctrine on board observers has not (yet) seen significant development and, consequently, limited guidance is available. In our experience, parties tend to take inspiration from the more developed US or UK precedent when installing a board observer in Dutch companies.

The use of board observers in Dutch companies does not require a basis in constitutional documents. Rather, they will typically be installed pursuant to a contractual agreement to that effect between the company and a third party (e.g., an investor). Such contractual agreement would then set out the role and involvement of the board observer, including appointment and dismissal mechanics. Board observers tend to be given (a) an observational role, allowing their principal to monitor the board more closely, and/or (b) an advisory role, ensuring that their principal's interests are duly observed in the board process.

Dutch law allows board observers to attend and participate in board meetings. Depending on what is agreed upon, the board observer may take a purely observational role, but may also take a more advisory role during such meetings. Board observers may also be copied in on internal correspondence within the company. Dutch law does not provide for a concept of board privilege or confidentiality. As such, the board observer is in principle free to share information with the party having appointed that observer. In sharing such information, the board observer will, however, need to observe any applicable market abuse regulations and any (other) statutory or contractual limitations.

During board meetings, board observers may provide their input and advice. Whereas managing and supervisory directors of Dutch companies are held to observe all of the company's stakeholders' interests, board observers may in principle act solely in the best interest of the party having appointed that board observer. Statutory conflict of interest rules and fiduciary duties, strictly speaking, do not apply to board observers, providing for more significant discretion. While this may allow for extensive involvement of the board observer, that board observer should take care to avoid qualifying as a shadow director, as this would lead to the board observer being subject to the same responsibilities and

liability regime as the formal directors. At the same time, while directors may consider advice and input provided by board observers, they should be mindful of the partial position of such board observers.

Accordingly, board observers may grant investors a relatively informal way to monitor their portfolio companies and ensure that their interests are duly addressed. This may also be an attractive instrument for companies, given that board observers, typically, will not have formal control rights and, therefore, have limited direct control over the company and its business. This means that the appointment of a board observer may constitute a less intrusive alternative to granting a board seat.

Board observer use cases

Board observers can be used in a wide array of cases, ranging from purely observational roles in order to decrease information asymmetry between the company and an investor to a closely-involved trusted advisor who may be called upon by the board if needed. For illustrative purposes, we have set out three such use cases below:

- a. **Investment monitoring.** By observing board meetings, the board observer will likely obtain information that investors, typically, would not obtain otherwise. This may also be a more efficient way to obtain information than (contractual) shareholder visitation or inspection rights. Accordingly, board observers may play an important role in allowing investors to monitor their portfolio companies.
- b. **Indirect board representation.** Board observers may provide advice and give views that can be considered during board deliberation. The board observer may thus help ensure that its

principal's interests are duly observed, without requiring direct board representation.

- c. **Board mentor.** Experienced investors may also use board observers to supplement inexperienced boards. Experienced venture capitalists may thus install board observers to mentor young and promising start-ups, helping to professionalise their business and practices.

Considerations for the use of board observers in Dutch companies

Given the significant freedom Dutch company law offers, and absent clear case law or scholarly doctrine, there is no established standard for board observers in Dutch companies. When opting to use board observers, parties should in any case consider the following:

- i. **Clear agreements.** Parties should take care to draft clear provisions regulating the position of the board observer. This may help prevent disputes and uncertainty on crucial matters concerning the board observer, including its involvement in board matters and appointment and replacement mechanics. These provisions can be laid down in a contract, such as a shareholders' agreement, or the articles of association, possibly supplemented by board regulations.
- ii. **Scope of involvement.** Given the lack of statutory governance provisions, attention should be given to the scope of the board observer's involvement. For instance, parties should consider (a) whether the board observer may attend all board meetings, or only those relating to certain reserved matters; (b) if any measures should be taken to address (potential) conflicts of interest rules between the company on the one hand and the board observer or its principal on the other; (c) under what circumstances the board meets / can meet

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without the board observer being present; and (d) how and in what way the board observer may provide input on the board process (if at all).

- iii. **Confidentiality.** Given that the board observer may obtain significant and potentially sensitive information on the company that would otherwise not be available to an investor, the company should consider including clear and enforceable confidentiality provisions in the relevant contractual framework.

Expectations for the future

We expect to see a further increase in the use of board observers in the Netherlands, especially by private equity and venture capital investors. The more well-established these board observers become, the more likely this is to impact Dutch corporate governance standards. This may help develop a more established market practice and doctrine on the role and composition of board observers for Dutch companies.



**Shareholder disclosure requirements
and related party transactions in
privately held companies**

Shareholder disclosure requirements and related party transactions in privately held companies

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How to deal with shareholder disclosure requirements when entering into related party transactions in privately held Dutch companies?

Recent Dutch case law has clarified the scope of shareholder disclosure requirements in the context of related party transactions. In this trend report, we flag this development and provide practical guidance to help mitigate exposure to litigation and prevent related party transactions from being challenged due to shareholder disclosure requirements not being met. This trend report specifically focuses on privately held companies so does not take into account the market abuse regulation (as implemented in Dutch law) in relation to related party transactions.

Developments in the clarification of shareholder disclosure requirements

Dutch law only provides limited information rights to individual shareholders. Notably, contrary to certain other jurisdictions, shareholders of Dutch companies do not have a right to inspect the company's books and records and cannot invoke visitation rights, unless such rights are granted in a shareholders' agreement or the company's articles of association (the latter being relatively uncommon). While there is a body of case law suggesting that shareholders may need to be informed of (among other things) related party transactions, these judgments provided limited guidance and were not entirely consistent. Recently, however, the Enterprise Chamber of the Amsterdam Court

of Appeal, a specialized court handling certain corporate disputes, rendered several judgments offering important clarifications to disclosure requirements for Dutch companies towards their shareholders outside of shareholders' meetings. These cases mostly concerned related party transactions in private companies.

In sum, the Enterprise Chamber has held that a company's duty of care towards its shareholders may require that such shareholders are duly and timely informed of conflict transactions. This may require that the company must proactively inform its shareholders prior to entering into the relevant transaction, even if the shareholders have not (yet) posed any questions. These cases related to transactions concluded between the company and its majority shareholders(s), which majority

shareholder(s) were represented at board level. The duty of care applied by the Enterprise Chamber was intended to protect minority shareholders without board representation, who otherwise would not – or, at least, not timely – be informed of these transactions that could arguably prejudice their position.

Developments on conflicted directors when undertaking related party transactions

Related party transactions may lead to conflicts of interests between the company and one or more of its directors. If it is established that a director is conflicted, as a matter of Dutch statutory law, such director is prohibited from participating in the deliberation and decision-making on the conflicted items.

Additional standards of care have been established in consistent case law, including (i) exercising due transparency towards fellow directors and, potentially, shareholders; (ii) clearly demonstrating that the interests involved are separated; and (iii) if appropriate, seeking advice from outside experts on the related party transaction (e.g., by means of a fairness opinion or valuation report to support the terms of the transaction). Dutch statutory law provides that a conflict of interests may arise when a director has a direct or indirect personal interest that is contrary to the interests of the company.

That criterion is further set out in landmark Supreme Court case law, providing that such a conflict is deemed to arise if, in all reasonableness, given all relevant facts and circumstances, it is considered doubtful whether a director could be deemed to be guided solely by the interests of the company.

However, in recent years, the Enterprise Chamber has sought to further broaden the scope of the conflict of interests doctrine beyond these statutory boundaries, including in relation to related party transactions. In these cases, heightened standards of care have also been imposed on such (potentially) conflicted directors.

Furthermore, additional limitations on director conduct may apply, such that conflicted directors not only need to abstain from the deliberation and decision-making on conflict items, but should also not be involved in the preparation of such decision-making and the implementation thereof, despite this not being strictly required by statutory law.

Considerations when dealing with related party transactions

What would a Dutch board need to consider when dealing with related party transactions and the position of the resulting (actually or potentially) conflicted directors? As the tendency is shifting towards broadening the scope of conflict of interests doctrine regarding related party transactions, generally a more prudent approach should be taken. Failing to do so could lead to the relevant resolutions being challengeable and could expose the company and its directors to litigation. In relation thereto, we suggest taking into account:

- i. **Due board disclosure.** Directors should inform their fellow board members of conflicts of interests with regard to the related party transaction. This matter may then be discussed amongst board members to establish whether or not the transaction constitutes a (sufficiently material) conflict.

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ii. Due shareholder disclosure. In case of a related party transaction, it is generally advisable to proactively inform (minority) shareholders (in particular in case of shareholders without board representation) of the transaction prior to implementation thereof. This may also require the board to answer certain clarifying questions posed by shareholders regarding that transaction. The company does not need to disclose information if that would cause serious harm to the company, for instance where it concerns competitively sensitive information.

iii. Abstain from involvement. In case of an actual conflict of interests, conflicted director(s) should in any case abstain from the deliberation and decision-making on any relevant topic. While not strictly required by Dutch statutory law, it is generally also advisable to, where possible, abstain from other involvement on such topics, including in the preparation and implementation of resolutions adopted, or at least adopt clear internal procedures that provide at which point in the decision-making the conflicted director steps out. Especially when dealing with sensitive matters, the same also applies in case of a *potential* conflict of interests.

iv. Expert advice. It may be advisable to obtain expert advice. Such expert advice is typically used to support the terms of related party transactions (*e.g.*, through fairness opinions, valuation reports or market research), but could also be sought to help establish whether a given situation constitutes a (potential) conflict of interests and how to deal with it accordingly.

v. Due documentation. Finally, it is especially important to duly document the full board considerations with regard to the related party transaction. Such documentation should demonstrate that appropriate care was observed, in particular to the items listed here, for instance by setting out the nature of any (potential) conflicts of interests and how they were addressed, how the relevant interests involved were kept separated and why the related party transaction is in the interests of the company and its business.

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The use of Dutch pre-wired back-end measures by foreign companies

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The use of pre-wired back-end measures has become a well-established part of transaction structures when a public bid is launched for a Dutch listed company. If carefully structured, pre-wired back-end measures can offer a clear path to 100% ownership and successful post-merger integration of a target company. As demonstrated in recent precedent, such measures may also be available to listed companies incorporated in other jurisdictions, providing a strong incentive to consider post-bid redomiciliation to the Netherlands.

The use of pre-wired back-end measures by Dutch listed companies

Takeovers of Dutch listed companies are commonly structured as public bids. To increase deal certainty and accommodate post-merger integration of the target company, it has become market practice in the Netherlands to incorporate in the transaction structure certain reorganizations that are implemented following completion of the bid. These so-called 'back-end measures' are typically pre-wired, meaning that shareholder approval is obtained prior to completion of the bid from a neutral general meeting.

Importantly, such pre-wired back-end measures can be used to effectively create a minority shareholder exit. In doing so, such measures offer a path to 100% ownership, which may *inter alia* (i) allow for simplification of the target company's governance to better adapt it to suit a privately held setting; (ii) open up certain consolidation possibilities; and (iii) provide certain tax advantages, while increasing

deal certainty. The most common pre-wired back-end measure is the sale of (substantially) all assets held by the target company (usually the shares in the sole direct subsidiary) to an affiliate of the bidder, followed by a distribution of proceeds to shareholders and subsequent liquidation of the target company. Typically, however, transaction documentation will also provide for several other options, including variations to legal (de)mergers and/or a combination of various such transactions.

Pre-wired back-end measures are generally assumed to be permitted under Dutch law, provided that (i) such measures are duly disclosed to shareholders in transaction documentation; (ii) minority shareholder interests are duly observed (*i.e.*, such interests are not disproportionately prejudiced); and (iii) there is a legitimate business rationale for the reorganization. Available case law, while limited, confirms that carefully structured pre-wired back-end measures are resilient to shareholder challenge. The risk of a successful challenge can be further mitigated by ensuring approval by a neutral pre-completion shareholders' meeting and

obtaining fairness opinions confirming that the terms of the envisaged pre-wired back-end measure are at arm's length.

Post-bid redomiciliation of foreign target companies to the Netherlands

Historically, the Netherlands has been an important jurisdiction for international holding companies. Among other things, such companies have been attracted to the Netherlands by the possibilities offered by Dutch corporate law, the quality of Dutch courts, the stability of the Dutch political climate and the availability of appropriate infrastructure (including sophisticated banking services, legal and financial advisors and auditors). As such, it is not uncommon for 'foreign' (*i.e.*, non-Dutch companies) to migrate to the Netherlands.

Recently, we have also seen a number of transactions in which foreign listed companies were redomiciled to the Netherlands upon completion of a successful bid. In addition to other features of moving to the Netherlands, the availability of the aforementioned pre-wired back-end measures can be a relevant consideration in deciding upon such redomiciliation. Such measures may offer a path to 100% ownership even if these measures would not be available in the relevant jurisdiction of origin.

Relevant considerations for foreign target companies

Post-bid redomiciliation followed by the implementation of pre-wired back-end measures may offer important advantages to foreign target companies. Among other things, relevant considerations include the following:

- i. Post-merger integration.** Pre-wired back-end measures may facilitate post-merger integration of the target company into the bidder group. Typically, pre-wired back-end measures can be implemented quickly upon the redomiciliation being effective. At such time, the target company's corporate governance can be simplified without the need for complex and time-consuming court proceedings or filings, accommodating tight timelines.
- ii. Deal certainty.** By offering a clear path to 100% ownership, without requiring 100% of shares to be tendered to the bidder, pre-wired back-end measures may accommodate lower minimum acceptance thresholds. This in turn may help increase deal certainty and serve as a deterrent to hostile hold-out shareholders.
- iii. Business climate.** The Netherlands is recognized internationally for its attractive business climate, helping the Netherlands to become an important jurisdiction hub for international companies. Redomiciliation to the Netherlands may therefore offer significant advantages to international companies.

Looking forward

As global deal activity continues to thrive, we expect that more foreign listed companies will look to post-bid redomiciliation to the Netherlands and implementation of pre-wired back-end measures. This may grant important advantages to such international companies, including increased deal certainty, swift and easy post-merger integration and access to other advantages offered by a redomiciliation to the Netherlands.

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