



LOYENS & LOEFF

CORPORATE
LITIGATION & RISK MANAGEMENT

Trend Report

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

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.

Your Loyens & Loeff contacts

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