

Legal Alert

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New Dutch rules on public offers in force as of 28 October 2007. A comprehensive overview.

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Introduction

1. In previous Legal Alerts we have discussed earlier stages of new legislation regarding public offers for listed securities. This legislation is required to implement the 13th EC Directive on Takeover Bids (the "**EC Directive**"). A significant part of the legislation was enacted earlier this year. Entry into force, however, was subject to the issuing of a new Decree on Public Offers (the "**Decree**").
2. In recent weeks the Dutch Parliament had the opportunity to suggest amendments to the draft Decree. Parliament has refrained from doing so; as a result the new rules are now definitive and can (finally) be introduced. It has been announced that 28 October 2007 will be the date of entry into force. All public offers announced after that date will be subject to the new rules. Public offers pending as of that date (as well as competing offers, even if launched at a later stage) will continue to be governed by the pre- 28 October 2007 rules.
3. In this Legal Alert we present an integrated overview of the new set of rules that will apply as of 28 October 2007. We discuss key

provisions stipulated by the new act, the Decree and other relevant rules as well as the relationship between them. For those who are interested in reviewing the underlying texts, these documents are posted on our website (www.debrauw.com) and can be downloaded free of charge from the "*public offers*" section.

Highlights

Mandatory offer

4. The harmonisation contemplated by the EC Directive includes alignment of the various EU Member State rules relating to minority shareholder protection. For instance, the EC Directive requires shareholders who (individually or jointly) obtain control of the company to make a mandatory bid for all shares held by the remaining shareholders. Under the Dutch rules a shareholder is deemed to have obtained control if it can exercise (individually or jointly) 30% or more of the voting rights in a Dutch public company whose securities are admitted to trading on a regulated market in the EU (an "**N.V.**").

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Optional restriction of takeover defences

5. The EC Directive also sets forth rules which aim to restrict the use of takeover defences. It is at the discretion of each individual EU Member State, however, to decide whether and to what extent defensive measures are allowed. The Dutch legislature has chosen to impose certain restrictions (in particular with respect to the issuing of protective shares as a takeover defence) but has generally opted to allow N.V.'s to decide for themselves whether their articles of association facilitate or prevent defensive measures by the board (see paragraph 35 and further).

Revised offer rules

6. In addition the new legislation entails a revision of the Dutch offer rules. Although the basic rules remain largely the same, a number of specific rules and applicable terms have changed. These are detailed in paragraph 15 and further below, together with an illustration of the resulting timeline. The Netherlands Authority for the Financial Markets (the "AFM") continues to be the competent authority for supervision of the bidding process.

Public offer: announcement of intentions and other statements

7. A contemplated public offer must be announced not later than when the bidder and the target have reached an agreement on the offer. The announcement should be made by way of a press release. It must also be announced if the offer is conditional upon certain legal requirements, such as antitrust approval, consultations with trade unions and if applicable the advice of the works council of the target company. The last should in principle be obtained if the target board supports the offer. Also, the SER Merger Code requires that if target employees are member of trade unions, such unions are consulted. These consultations should take place at such point in time and in such manner that their views may have a meaningful effect on the (terms of the) contemplated offer.

8. A formal announcement of the intention to launch an offer is also deemed to have been made if the bidder discloses certain concrete information regarding the contemplated offer, such as the name of the target company in combination with the contemplated offer price or an indication of this price, or an anticipated timeline in respect of the offer. Other statements may also qualify as concrete information regarding the offer for these purposes. A potential bidder will thus need to manoeuvre with appropriate caution to prevent triggering applicability of the offer rules at a premature stage.
9. However, public statements regarding a contemplated offer can be, and sometimes should be (see below), made prior to the formal announcement referred to in the preceding paragraphs.
10. Disclosure prior to reaching agreement may be obligatory based on the rules on inside information, which stem from the EC Market Abuse Directive. These may require a public announcement for instance if confidentiality can no longer be ensured or if a leak may have occurred.
11. A potential bidder may also announce, prior to (or without) reaching agreement with the target company, that it is contemplating an offer for example because the potential bidder is unable or does not intend to reach agreement with the target company. In contrast to the pre- 28 October 2007 rules there is no obligation to discuss an unsolicited ("hostile") offer with the (board of the) target company prior to publicly announcing the intention to launch the offer.
12. Pursuant to the SER Merger Code (see also paragraph 7), the board of the target company must however be informed of the launch of an unsolicited (hostile) offer at least 15 days in advance. Given that the background to this obligation is that the SER Merger Code assumes discussions between the target board on the one hand and trade unions and the Works council on the other hand, as a practical

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matter this is likely to entail that the bidder provides the target board with the relevant information reasonably in advance of filing of the draft offer memorandum with the AFM (see paragraph 15).

13. In relation to the foregoing a potential bidder should take into account that such notifications may have a significant impact on the target share price and can, in certain circumstances, be wrongful or can otherwise have negative legal consequences. If the notification gives or is likely to give a false or misleading signal, it may constitute market abuse.
14. Finally, contrary to the pre- 28 October 2007 rules, it is no longer necessary to clear press releases and other statements concerning the offer with the AFM prior to publication. It suffices to submit such statements to the AFM simultaneously with publication. Any such statements should also be published on the website of the target company.

Timeline upon announcement of the offer (see graph in Annex I)

15. As of the moment the intention to launch an offer has been publicly announced in terms of paragraph 7 and 8 above, the following obligations apply to the bidder and the target company (unless the AFM grants an exemption due to special circumstances):

- The bidder and the target company must report all transactions in the target securities (except regular trading on the stock exchange, but including stock lending, repo's etc.) promptly to the AFM.
- Not later than 4 weeks after the initial announcement the bidder must announce by way of a press release whether it will prepare an offer memorandum (which will be subject to approval by the AFM or another competent EU Member State regulator) or whether the contemplated offer is renounced.
- If the bidder announces that it will prepare an offer memorandum, the request for AFM

approval of the offer memorandum must be filed with the AFM not later than 12 weeks after the initial announcement.

- The draft offer memorandum must comply with detailed requirements. It may be prepared in the Dutch or English language or possibly in a different language. An offer memorandum in English requires a summary in Dutch; a different language requires a translation.
- Not later than at the time of requesting approval of the offer memorandum from the AFM, the bidder should be able to demonstrate 'certain funds'. In the case of a cash offer, the bidder must be able, at such point in time, to produce the amounts required (although a bank statement is not necessary). In the case of an offer consideration consisting (in part) of securities, it suffices if all reasonable preparatory measures have been taken to enable payment of the consideration (such as the preparation of shareholder resolutions authorising the issuing of shares). The resolutions concerned, however, need only be passed not later than 7 business days prior to expiration of the offer period.
- In the absence of approval by the AFM (or another competent EU Member State regulator) an offer memorandum may not be published and thus the offer cannot be made. In principle, the AFM should grant approval within 10 business days, but this period may be extended if the AFM requests additional information.
- The offer is formally launched by making the offer memorandum available to the public and by making a public announcement to that effect. This must be done not later than within 6 business days after the AFM has approved the offer memorandum, unless the bidder publicly announces to renounce the offer within the same period. The information should also be promptly submitted to the works council of the target company.
- The offer may be contingent on the fulfilment of certain conditions, such as a minimum percentage, e.g. 95%, of tendered shares. Conditions the satisfaction of which is dependent on the will of the bidder are not permitted.

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- Once the offer is launched, all transactions by the bidder and the target company in respect of the securities concerned (including stock lending, repo's etc.), except for regular trading on the stock exchange, must be publicly disclosed at least daily.
- If in connection with any of the aforementioned transactions which must be disclosed (therefore not comprising regular stock exchange trades) the bidder pays a higher price than the offer consideration, the bidder will be obliged to pay such higher price to all holders of the relevant securities: the “*best price rule*”.
- The initial offer period is at least 4 weeks and at most 10 weeks. The bidder is allowed to extend this period once for a period of at least 2 weeks and at most 10 weeks. In case of such extension, shareholders who have previously tendered their shares will have the right to withdraw their tenders.
- Additionally, if a third party launches a competing offer, the bidder may extend the offer period up to the end of the offer period of the competing offer.
- The bidder is permitted to increase the offer price once during the offer period (as may be extended).
- At least 6 business days prior to the end of the offer period the target company is required to hold a shareholders' meeting to discuss the offer on the basis of a reasoned opinion regarding the offer by the board, which should be available at least 4 business days prior to the meeting. In the case of a recommended offer the reasoned opinion will usually already be included in the offer memorandum.
- Not later than 3 working days after the end of the offer period the bidder must announce by means of a press release whether or not the offer is declared unconditional or that the offer period is extended. If the offer is declared unconditional the bidder may opt to allow for a subsequent offer period of maximum 2 weeks. During such subsequent offer period shareholders who have tendered their shares do not (or do no longer) have any withdrawal rights in respect of previously tendered shares. Settlement of these shares will take place as

planned (usually 3-5 days upon declaring the offer unconditional).

- For a period of 1 year after the offer is declared unconditional the bidder is not permitted to acquire shares at a price which exceeds the offer price except in case of regular trading on the stock exchange.

Mandatory offer in case of obtaining control

16. The new legislation requires a shareholder who (individually or jointly) obtains control to make an offer to all other shareholders. Such control is deemed present if a (legal) person is able to exercise, alone or acting in concert, at least 30% of the voting rights in an N.V.'s general meeting of shareholders.
17. It is important to note that the acquisition of control does not require an act of the person who obtains control. An illustrative example is when an N.V. purchases shares in its own share capital as a consequence of which the relative stake of a major shareholder increases (and may result in control having been obtained). If a person is acting in concert with one or more other parties, an increase in the size of the shareholdings of another party (as a result of which the parties acting in concert collectively reach or exceed the 30% threshold) may also trigger the obligation to launch a mandatory bid.

Acting in concert

18. As indicated before, control may also be deemed to exist if a stake representing voting rights of at least 30% is controlled together with concerting parties. Such acting in concert will have to be aimed at (i) obtaining control or (ii) thwarting an announced takeover of the company in cooperation with the target company. Whether this is indeed the case will depend on the prevailing circumstances. As long as the acting in concert is aimed at a dialogue or at initiating changes in corporate governance the obligation to launch a mandatory offer generally may not be triggered.

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19. Acting in concert within the meaning of the relevant statutory provision does not require a written agreement to be in place. Oral agreement and even tacit, coordinated actions may suffice for these purposes. In addition, certain relationships are always deemed to constitute acting in concert (for example when shares are held by different group companies, spouses or in case of kinship).

Consequences

20. In the event control is acquired, whether or not by acting in concert, two options exist: (i) either a mandatory offer is launched or (ii) within 30 days the relevant stake is decreased below the 30% voting rights threshold, provided the voting right has not been exercised during this period and the shares are not sold to a controlling shareholder. The Enterprise Chamber of the Amsterdam Court of Appeal may extend this period by an additional 60 days.

Shares and depositary receipts

21. The 30% voting rights threshold may seem to suggest that only the acquisition of shares is relevant for purposes of the mandatory bid rule. This is not the case. Depositary receipts for shares which have been issued with the cooperation of the N.V. and which are traded on a stock exchange are in principle treated similarly to shares in this regard. Consequently, the acquisition of depositary receipts for shares may also trigger the obligation to launch a mandatory bid and a mandatory bid should extend to depositary receipts. In this respect it is relevant to note that, pursuant to the statutory provisions currently in place, holders of depositary receipts of shares in listed companies are in principle entitled to vote the underlying shares and to receive a power of attorney from the administration office to this end.

22. An exception to this principle that depositary receipt holders may vote applies if the administration office exercises its statutory power to refrain from granting a power of attorney in the event of an unsolicited

("hostile") offer or to otherwise fend off a perceived threat. In this scenario the holder of 30% or more of the depositary receipts is not required to make a mandatory bid until the power of attorney has been granted to him. Incidentally, this entails that a holder of depositary receipts may be obliged to launch a mandatory offer subsequent to which the administration office could refuse to grant a power of attorney to vote the underlying shares. Ultimately the courts will have to decide on the merits of such conduct by the administration office.

Offer price and other terms of the mandatory bid

23. In contrast to a voluntary offer the completion of a mandatory offer may not be subject to the fulfilment of offer conditions.

24. The bidder is required to offer a fair price as consideration in the mandatory bid. Such fair price may consist wholly or in part of securities, provided these are liquid and admitted to trading on a regulated market. However, if the bidder has acquired voting rights in excess of 5% in the preceding year against a cash consideration (which may be the case if the shares were acquired on a stock exchange), an all-cash alternative must be offered as consideration in the mandatory bid.

25. Under Dutch law in principle the fair price will be deemed equal to the highest price paid by the bidder (or parties acting in concert with the bidder) for the relevant securities in the year preceding the offer. If the bidder has not acquired any securities during such year (and acquires control due to, for example, cancellation of shares or a legal merger with another entity), the average share price during that year will be deemed a fair price.

26. Nevertheless, each interested party may request the Enterprise Chamber to verify that the aforementioned presumptions result in a fair price and to determine whether the price should be set higher. Such request should be filed within 2 weeks of the offer having been

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launched. This statutory term might be further limited in the future. The Enterprise Chamber will deny the request if the price referred to in the preceding paragraph (no. 25) deviates less than 10% from the average share price as quoted on the stock exchange during the 3-month period preceding the request. In the event the deviation is greater, the Enterprise Chamber will need to assess whether the applicant's interests have been prejudiced disproportionately. In the affirmative the Enterprise Chamber has the authority to set a different price. The offer period will then be suspended until the Enterprise Chamber has decided what the price should be.

27. Finally, we note that the best price rule also applies in respect of the mandatory bid (see paragraph 15 above). Accordingly, if subsequent to making the mandatory bid the bidder acquires target shares at a higher price than the offer price, each shareholder will be entitled to the same consideration. After the offer has been declared unconditional also the 1-year moratorium applies, meaning the bidder will be prohibited from acquiring shares at a higher price (see also paragraph 15).

Exemptions of the mandatory offer

28. The new legislation contains a substantial number of exemptions to the duty to make a mandatory offer. Particular reference can be made to the following examples:

- a person who already holds control over an N.V. on 28 October 2007, the date of entry into force of the new act, is not under an obligation to make a mandatory offer. This also applies if pre-existing control is increased ("grandfathering");
- a person who, without having the intent thereto obtains control (for example due to a lack of attentiveness or an action by a third party (see paragraph 17)) is granted a period of 30 days to reduce his interest, provided his voting rights are not exercised in the meantime (see nr. 20);
- the mandatory offer obligation does not apply to an independent legal person (in the Netherlands this will generally be a foundation or *stichting*) which after the announcement of a public offer (see paragraph 8), obtains protective shares (*beschermings aandelen*) for a period of, at the maximum, 2 years (see paragraph 36);
- an administration office is also exempt from the obligation to make a mandatory offer if depositary receipts have been issued for the shares;
- the mandatory offer obligation does not apply in respect of an N.V. that is an investment fund (*beleggingsmaatschappij*) of which the shares are purchased by such fund itself, at the request of the shareholder (an "open end fund");
- a person who acquires 30% or more of the voting rights in a listed company is exempt from making a mandatory bid if the general meeting of shareholders of the target company has given prior approval within the 3 months preceding the acquisition. Such approval requires a 95% majority of the votes cast by shareholders other than the acquirer or parties acting in concert with the acquirer. This exemption may for example be of use if a large block of target shares is acquired in exchange for the sale of an asset to the target company;
- an exemption applies in respect of group companies who jointly acquire a stake representing 30% or more of the voting rights, provided one of the group companies is designated as the party who will make the mandatory offer;
- a custodian is exempted provided it has no discretionary power to exercise the voting rights attached to the shares held by it;
- a person who obtains control through succession or marriage with a person who holds control is not obliged to make a mandatory bid;
- an exemption also applies if control is established over an N.V. which is subject to a court-ordered suspension of payments (*surséance van betaling*) or is declared bankrupt; and finally

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- the Enterprise Chamber may, at the request of the target company or its shareholders, exempt a party from making a mandatory bid if the financial situation of the target company gives rise thereto.

Sanctions

29. If a person who is under an obligation to make a mandatory offer refrains from doing so, the Enterprise Chamber may take provisional measures or issue other orders. The Enterprise Chamber has the power to order the party that has control to make an offer and it may also suspend voting rights, order the reduction of the shareholding of such party or suspend or nullify resolutions by the general meeting of shareholders which have been passed after the obligation to make a mandatory bid arose.

Supervision on public offers

30. It follows that the Enterprise Chamber is competent to decide on a number of issues, including, if at issue, the determination of the existence of an obligation to make a mandatory offer. However, once an offer is made, be it voluntary or mandatory, supervision of the bidding process is exercised by the AFM.

31. A starting point for the AFM's supervision is that an offer, voluntary or mandatory, for securities of a listed company may only be made subsequent to the approval of the offer memorandum by the AFM (or another competent regulator of an EU Member State) (see paragraph 15).

32. The AFM is first and foremost competent to approve the offer memorandum when the target company has its corporate seat in the Netherlands and its securities are admitted to trading on a regulated market in the Netherlands. The AFM is, amongst others, also competent when the target company has its corporate seat outside the EU and its securities are admitted to trading on a regulated market in the Netherlands.

33. In respect of offer memoranda which have been approved by the competent regulator of another EU Member State, the main principle is that the Dutch offer rules do not apply. The AFM does, however, have the authority to request additional information and require disclosure for example when it concerns information which relates specifically to the Dutch financial market. It also has the authority to impose additional requirements (for example, that a Dutch translation be included).

Non-regulated markets

34. The new rules entail that Dutch offer rules will not apply to public offers for securities which are not admitted to trading on a regulated market (such as an officially recognised stock exchange) in the Netherlands, but are traded regularly in the Netherlands. The same applies with respect to public offers for securities of Dutch companies whose securities are admitted to trading on a Dutch non-regulated market such as Alternext. Such offers may, however, be subject to other Dutch securities laws.

Defensive measures

35. Initially the purpose of the EC Directive as well as the draft Dutch rules implementing the EC Directive was to significantly restrict the use of defensive measures. However, the outcome of the political debate both at EU level and at the Dutch national level is that the use of defensive measures is restricted only to a limited extent, but that the key principle is that listed companies have discretionary power in deciding whether and to what extent their articles of association facilitate defensive measures.

36. An important restriction is that the issuing of (preference or other) protective shares enabling the exercise of 30% or more of the voting rights is only allowed after a public offer has been announced by a third party (see paragraphs 7 and 8). In addition, the holding of such a block of shares is restricted to two

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years. As a consequence the size of the protective stake, as a practical matter, will need to be decreased below the 30% voting rights threshold before the 2-year period lapses. In this regard one should however take into account that the courts (in particular the Enterprise Chamber) may scrutinise defensive measures and could further restrict the use thereof in particular instances. Whether the Enterprise Chamber will indeed do so will depend on the prevailing circumstances; a discussion of this would extend beyond the scope of this Legal Alert. This matter will, however, always require tailored legal advice.

The unprotected company: the passivity rule

37. A second restriction is optional. In terms of the new rules it will be possible for N.V.s to explicitly set out in their articles of association that after the announcement of a public offer the board of the N.V. may not take any defensive measures unless the general meeting of shareholders explicitly approves such measures at such point in time (the "passivity rule").

38. The articles of association may further contain restrictions which go beyond the passivity rule. The new statutory provisions allow for the articles of association of the target company to stipulate that any restrictions of the transfer of securities or the exercise of voting rights provided for in the articles of association or in contractual arrangements do not apply once an offer has been announced and that each share then would entitle the holder to one vote at the general meeting of shareholders which decides on any defensive measures. However, contractual rights which originated prior to 30 May 2004 (the day the EC Directive came into force) will not be affected.

39. If and to the extent a shareholder suffers damages as a result of such a restriction (for instance due to the fact that he will only be able to sell his shares at lower value or because he loses certain benefits or powers), the shareholder will be entitled to equitable compensation. It is however unclear whom

should provide such compensation. The legislature seems to assume this burden should be borne by the other shareholders or the bidder. Ultimately it will be up to the courts to provide clarity on this matter.

40. Presently it is an open question whether and to what extent the aforementioned restrictions on the board of the target company would also affect the possibility of issuing protective shares (see paragraph 36). In Dutch market practice this device is typically construed such that a call option is granted to an independent entity (commonly a foundation), which decides at its sole discretion whether and under which circumstances it exercises its option right; hence the target board is by definition passive.

The unprotected company: breakthrough

41. Furthermore, under the new rules the articles of association of an "unprotected" company can stipulate that after a public offer has taken place and the bidder has acquired at least 75% of the share capital, the bidder will be allowed to convene a general meeting of shareholders in which it can put the dismissal of the management and supervisory board and the appointment of new board members on the agenda. In this meeting special rights of shareholders included in the articles of association regarding the appointment or dismissal of members of the management or supervisory board (e.g. the right to make a binding nomination) would then be set aside ('breakthrough'). Also, at such meeting each share would entitle the holder to one vote and other contractual restrictions or restrictions deriving from the articles of association would not apply.

42. Again, if a shareholder were to suffer damages by the adoption of such regulations, he would be entitled to equitable compensation. Here too ambiguity remains as to the question of who is liable for such compensation (see paragraph 39).

43. The breakthrough provision cannot be included in the articles of association of N.V.s to which

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the Dutch special structure regime (*structuurregime*) applies. Generally this regime will not apply to Dutch companies with substantial international activities. Key feature of the special structure regime is that the right to appoint and dismiss managing directors is vested in the supervisory board. Shareholders however have the right to dismiss supervisory directors collectively. They also have the right to veto appointment of supervisory directors but supervisory directors can only be appointed upon nomination of the supervisory board.

44. A remarkable element is that the EC Directive, and therefore also the new act, enables "unprotected" companies to take defensive measures in the event that the bidder is a company that can take anti-takeover measures itself. Imposing such measures would, however, require the approval of the general meeting of shareholders. Such decision could be taken before the announcement of the offer (but not more than 18 months prior to such announcement).

Impact of the new legislation on existing anti-takeover devices

45. As described above the effect of the new legislation on defensive measures currently available is more limited than contemplated by preliminary versions of the EC Directive. This is illustrated by the fact that the new legislation does not restrain the possibility to allow for issuing of (ordinary or preference) protective shares as a defensive measure. It does, however, impose certain limitations. Obtaining protective shares will in principle only be allowed up to 30% of the voting rights. Voting power in excess of this may only be obtained after an offer has been announced and such stake may not be held longer than 2 years. As noted above, courts may, depending the circumstances, shorten this time period significantly.

46. As far as depositary receipts for shares are concerned the situation remains as is. Accordingly, an administration office will continue to be able to make use of its statutory power to refuse granting (or revoke) a power of attorney to holders of depositary receipts in case of a (pending) hostile bid. Notably, such refusal is not in line with the Dutch Corporate Governance Code (Tabaksblat Code). However, the new legislation will prevail in this situation although one should realise that judicial review is always possible.

Additional information requirements for listed companies

47. The EC Directive requires that listed companies publish additional information providing insight into defensive structures and mechanisms which they apply. The relevant provision has already been implemented in the Netherlands by means of a decree of 5 April 2006. Pursuant to the decree, an N.V. is required to include information in its annual report on a number of issues which are deemed relevant in the context of corporate governance and the ability to take defensive measures. This includes information on change of control clauses in major contracts. For a more detailed discussion of disclosure items, we refer to our Legal Alert of 17 July 2006.

Squeeze-out and buy-out of minority shareholders

48. Based on the EC Directive, the new act further supplements the squeeze-out provisions under existing law. Pursuant to present Dutch law a squeeze-out of minority shareholders is possible in the event one or more (cooperating) shareholders provide 95% of the share capital. The new act simplifies this procedure for cases where the 95% stake is acquired as a result of a public offer. The basic principle is that the price offered in the public offer will also have to be accepted by the

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minority shareholders. This is particularly true if 90% of the shares have been acquired in the offer. Notwithstanding the above, the Enterprise Chamber does have the power to order that one or three experts assess whether the consideration is indeed fair. The claim for a squeeze-out needs to be filed with the Enterprise Chamber within 3 months after the end of the offer period.

49. If subsequent to a successful offer the bidder refrains from initiating a squeeze-out, the EC Directive also entitles minority shareholders who have not previously tendered their shares to the right of a buy-out. This option was previously unavailable under Dutch law. It is conditioned on the fact that the bidder has acquired 95% of the share capital and at least 95% of the voting rights. In regard to price, the same principles apply as stated in paragraph 48. Again, the claim needs to be filed with the Enterprise Chamber within 3 months after the end of the offer period.

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Timeline Under New Dutch Offer Rules

(expected to be effective as of 28 October 2007)

