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The TMG Case

Adding standards to Dutch public takeover law

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Last year, the public takeover market in The Netherlands was largely dominated by the bidding war on TMG, the Dutch Euronext Amsterdam listed media company. The fight resulted in the suspension of the entire management board of TMG and the supervisory board taking over control over the bidding process.

TMG's supervisory board subsequently negotiated and concluded a Merger Protocol with one of the bidders, Belgian Mediahuis, which paved the way for Mediahuis' successful bid on TMG. The course of action by the supervisory board was upheld by the Enterprise Chamber of the Amsterdam Court of Appeals in the litigation which was initiated by Talpa Holding, the unsuccessful competing bidder.

We assisted TMG's supervisory board throughout the bidding process both on the transactional side as well as on the litigation side.

The TMG case and the litigation resulting therefrom provide further standards and guidelines for the Dutch public takeover practice, more in particular on the position of the supervisory board of the target company.

Key reflections

1. The consideration of an (unsolicited) public bid is a joint responsibility of the management board and the supervisory board of the target company.

2. In addition to the financial considerations of the bid, the management board will have to assess the strategic considerations of the bid. The supervisory board will have to monitor this process carefully and it will have to approve the outcome thereof.

3. The management board and the supervisory board of the target company have an obligation to act jointly and in a collegiate manner in the bidding process. If the management board clearly refuses to act in accordance with these standards to the extent that the supervisory board is not able to adequately fulfil its responsibilities in the bidding process, the supervisory board may decide to assume the control of the process.

4. If there is structural disagreement between the management board and the supervisory board of the target company on the policies to be pursued by the company following an unsolicited public bid and this to the extent that this prevents the company from acting adequately and efficiently in the bidding process in the interest of all stakeholders, then the supervisory board is obliged to take over the control of the process. In such situation, the policies of the company in the context of the bid are determined unilaterally by the supervisory board.

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1. Introduction

Telegraaf Media Groep NV (TMG) is a media company listed at Amsterdam Euronext. TMG's core is its newspaper business. The group publishes inter alia the largest Dutch national newspaper De Telegraaf. Over the past years, TMG was confronted with serious difficulties, reflected in a structural declining growth. In 2001 TMG still realized a turnover of EUR 822 million compared to a turnover of just EUR 421 million in 2016. In 2014, new management was brought in.

The new management developed a 24/7 "digital" strategy and invested heavily in new media. In this context TMG entered into a strategic partnership with Talpa Holding NV (Talpa). The strategy (print vs. electronic media) of the company was a recurring subject of discussion between the management board and the supervisory board. In this context, there was also discussion on the stand alone strategy of the company.

TMG is a company formed under Dutch law with a two tier board structure. TMG initially had two core shareholders: Van Puijenbroek Exploitatie N.V. (VPE) with a 41% shareholding and Talpa with an (indirect) shareholding of approximately 20%. There is dissatisfaction at shareholders' level on the structural weak financial performance of the company.

2. Interest from Mediahuis

Mediahuis is a Belgian privately owned newspaper group. In the Netherlands, it inter alia owns the leading national newspaper NRC Handelsblad. Mediahuis wants to strengthen its position on the Dutch market. It approaches VPE with the view to join forces and to acquire TMG. Mediahuis and VPE form for such purpose a consortium (the Consortium).

In August 2016, the Consortium approaches the management board and the supervisory board of TMG to discuss the terms of a public offer which has the support of the boards of TMG. The reaction of the management board of TMG is cool and reticent. In the view of TMG, the offer price is too low and the strategic rationale of a takeover by the Belgian newspaper group (through the Consortium) is doubted. What follows is an exchange of letters for over a period of more than three months. In this lengthy correspondence which moves at a glacial pace, TMG's management board stresses the lack of synergies and the low offer price. The management board shows no interest in entering into discussions with the Consortium.

Subsequently, there is increasing tension between the management board and the supervisory board. Early December 2016, the chairman of the supervisory board strongly criticizes the management board for its procrastination and for the lack of progress made in the discussions with the Consortium. The chairman makes clear that the management board is rapidly losing the supervisory board's support.

3. Public offer Consortium

By mid-December, the press catches knowledge of the discussions at TMG. Pursuant to the bidding rules, the Consortium is obligated to announce its bid (EUR 5.25 per share). Also, TMG has to go public. In its press statement, TMG stresses that the bid of the Consortium is unsolicited. Equally, TMG refuses to confirm in accordance with article 5 paragraph 2 Public Takeover Decree that it is in consultation with the bidder. As a consequence, the strict statutory time limits for the making of a public bid take effect directly (as of the day of the Consortium's public announcement).

Mid-January, Talpa announces a competing bid of EUR 5.90 per share. Just before Talpa announced its competing bid, the Consortium had advised the management board and the supervisory board of TMG confidentially that is was willing to raise its bid from EUR 5.25 to EUR 5.50. In its subsequent press statement, TMG advises that it will create a level playing field and that the company will enter into discussions with both bidders.

On 5 February 2017, TMG receives a first draft merger proposal from the Consortium. Five days later, on 10 February 2017, TMG receives a first draft merger proposal from Talpa. In the Talpa merger protocol it is stated that the composition of the TMG management board will remain unchanged after completion of the bid. Following receipt of the Talpa bid, the management board invites the Talpa management and its legal counsel for negotiation of the draft merger protocol presented by Talpa. The management board feels that it is not appropriate to enter at this stage into negotiations with the Consortium as the board is still in discussion with the Consortium on the scope and terms of the due diligence to be carried out by the Consortium into TMG. This action by the management board is heavily criticized by the Consortium.

4. Transaction committee TMG

Early February, it is decided by the chairman of the supervisory board to set up a transaction committee for purpose of the assessment of both bids. Both members of the management board and the chairman of the supervisory board will serve on the committee, whereby the chairman of the supervisory board (in its capacity of chairman of the committee) will have a decisive vote. In this context the supervisory board chairman and the supervisory board's legal counsel explain that the creation of a transaction committee is customary in a public takeover situation, as it avoids the process being unduly influenced by personal interests of board members.

The board members finally accept such transaction committee albeit reluctantly and half-heartedly. More in particular, the management board members remain opposed to the decisive vote of the chairman of the committee. In the view of the board members, there are no personal interests that might conflict with the interests of the company. Only two days after its creation, the transaction committee is dissolved, as the management board members finally refuse to accept the powers of the chairman in the committee.

Following this, the supervisory board decides that it will increase control over the direction of the take-over process. Over the previous months, the supervisory board felt that the management board was not transparent in its dealings with the supervisory board. Now, the supervisory board has the strong impression that the management board is biased and that it clearly favours the Talpa bid. After strong pressure from the supervisory board chairman, the management board finally allows the Consortium to carry out its due diligence on TMG.

5. Expansion of the Consortium's stake in TMG

Around mid-February, the Consortium is able to acquire the share interests of two other shareholders in TMG. Accordingly, Mediahuis buys all shares held by Delta Lloyd and Navitas in TMG. Following this acquisition, Mediahuis holds around 18% of the issued share capital in TMG. In aggregate, the Consortium now holds nearly 60% of the outstanding shares in TMG. In addition, the Consortium repeatedly advises that its shareholding in TMG is strategic and that it will not offer its shares to Talpa. Also, the Consortium increases its bid to EUR 5.90, matching Talpa's bid. Pursuant to the Dutch bidding rules the Consortium is obliged to make its bid (through the publicly making available of its offering memorandum) no later than 8 March 2017.

Against this background, the Consortium insists that any agreement with TMG on the support of the Consortium's bid (the Merger Protocol) should be reached no later than on 3 March 2017. This would leave a narrow time line for the Consortium to make preparations for a unilateral bid should the negotiations with TMG have failed on 3 March.

6. Negotiations with the Consortium on the Merger Protocol

This new situation leads to heated discussions at TMG. The management board holds the view that the level playing field should be continued while Talpa should be allowed to react in the light of the Consortium's increased bid. The supervisory board makes clear that the level playing field should now be abandoned as the Consortium's bid is solid both from a strategic and financial point of view. In addition, the supervisory board argues that any Talpa bid would be unrealistic and would present no deal certainty, as the Consortium, possessing the majority of the shares in TMG, has emphasised that its shareholding is strategic and that it will not reflect on any bid by Talpa. Accordingly, the supervisory board advises on 27 February 2017 that from now on negotiations with the Consortium should have priority. The management board accepts this reluctantly. Notwithstanding this joint board decision, the management board plans further meetings with Talpa in an apparent attempt to further slow down the negotiation process with the Consortium.

At that point, negotiations with the Consortium are fully taken over by the chairman of the supervisory board. These negotiations prove to be successful. On 3 March 2017 at midnight TMG and the Consortium reach full agreement on the draft text of the Merger Protocol. During the negotiations, the managing board had kept aloof from the discussions. Still, at the end of the negotiations, the management board advises the chairman of the supervisory board that in the view of the management board the outcome of the negotiations is unsatisfactory and that the board is not yet able to define its position. As far as the management board is concerned, no Merger Protocol with the Consortium will be signed at the final date set by the Consortium. This would leave the Consortium with two options: making a unilateral unsolicited bid (with a largely uncertain outcome) or being excluded from the bidding process as a result of the bidding rules.

7. Suspension of the managing board – Signing of the Merger Protocol

In private discussions with the chairman of the supervisory board in the weekend of 4 and 5 March 2017 the management board adamantly maintains its position. It will not sign the Merger Protocol on behalf of TMG. In the view of the chairman of the supervisory board the management board's position is totally irresponsible since it will lead to a situation whereby TMG is deprived from all benefits from the Merger Protocol and will be exposed to unsolicited bids from the Consortium and Talpa. This would put TMG into total disarray.

As the management board members show no sign whatsoever to incline to the chairman's views, they are advised that the supervisory board has no other choice than to proceed to a suspension. On 5 March the supervisory board effectively suspends both members of the management board with immediate effect. In accordance with statutory law and the company's articles of association, the management over TMG is now provisionally entrusted to the supervisory board. In this new capacity, the supervisory board signs later that day the Merger Protocol with the Consortium.

8. Legal action by Talpa and TMG's suspended management

Following the execution of the Merger Protocol with the Consortium, Talpa initiates legal proceedings before the Enterprise Chamber of the Amsterdam Court of Appeals. In this context, Talpa requests the Court to order an inquiry into the policy and affairs of TMG in relation to the bidding process. In addition the Court is requested to order immediate measures, including (i) the appointment of an additional member of the supervisory board with exclusive powers in relation to any issue concerning the bidding process and (ii) the immediate termination of the suspension of the members of the management board. In support of these requests, Talpa argues that the supervisory board has de facto carried out a coup and that it exceeded its statutory powers by side-lining the management board in the bidding process and by subsequently suspending the management board, thus clearing the way for the signing of the Merger Protocol on behalf of TMG.

The Court rejects the request for an inquiry as well as the request for immediate measures.
The key considerations of the Court are as follows.

Concerning the bid price:

"Although Talpa announced a higher bid (of €6.50), it is unlikely that this bid, should it effectively be made, will be declared unconditional by Talpa, since Talpa has consistently stated that any bid will only be declared unconditional upon minimum acceptance by either 95% or 80% of the shareholders and taking into consideration that the members of the Consortium are not willing to offer their shares to Talpa and that they have in principle no legal obligation to do so."

Concerning the level playing field:

"In the given circumstances –more particularly the fact that from February 26, 2017 the Consortium had more than 59% of the shares and the Consortium's announcement that it would submit its bidding memorandum to the AFM on March 8, 2017, in line with the statutory time limits- it is in the view of the Enterprise Division understandable that from February 28, 2017, TMG focused its attention primarily on reaching agreement with the Consortium on the Merger Protocol."

Concerning the contents of the Merger Protocol:

"The Enterprise Division holds the preliminary view that on the basis of the result of the negotiations on the Merger Protocol there was no reason for TMG for not recommending the Consortium's bid."

Concerning the suspension:

"From these facts, the Enterprise Division concludes that an increasing difference of views had arisen between the supervisory board and the management board on the position to be taken by TMG in the bidding process. Initially, this did not prevent the management board and the supervisory board from reaching agreement on the position of TMG vis-à-vis the Consortium (…). Later however, after Talpa Holding presented itself as a competing bidder, the relationship became increasingly complicated.

An attempt to improve TMG's effectiveness in the bidding process by setting up a strategic committee did not succeed because of the differing opinions of the supervisory board and the management board on the responsibilities of such committee and the controlling power of the two boards therein. At a later stage, this lead to a deterioration of the relationship between the boards and a growing distrust, fed by mutual doubts about the motives of the individuals involved and suspicions about the influence of personal interests on the policies to be pursued by TMG. This effectively precluded TMG from taking an adequate stance in the bidding process.

In the light of the course of affairs as set out above, the Enterprise Division understands that the supervisory board's patience was exhausted and that the supervisory board was obliged to secure the signing of the Merger Protocol in the interest of TMG by making use of its power to suspend the members of the management board."

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