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# Environmental Issues in Corporate Transactions: The Netherlands

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This Practice Note describes the environmental issues that can arise in acquisitions or other transactions in the Netherlands and what to look for when carrying out environmental due diligence. It provides information on the protection to include in deal documentation to address any environmental risks in the target business, such as warranties and indemnities. It also describes specific environmental regimes and their impact on corporate transactions.

Environmental risks are often difficult to quantify and liabilities can be substantial. In addition, there is the risk of regulatory action in the event of a violation of environmental law. These violations generally also qualify as a criminal offence under Dutch law. This Practice Note considers the environmental risks that can arise in corporate transactions and sets out how these risks can be mitigated.

The DCC means the Dutch Civil Code 1992 (*Burgerlijk Wetboek*). A reference to article 3:63, paragraph 1, DCC, means paragraph 1 of article 63 in Book 3 of the Dutch Civil Code 1992.

## Environmental Due Diligence in Corporate Transactions: Overview

The purchase of a large industrial site or a manufacturing facility will require more extensive environmental due diligence, and consequently more warranty and indemnity protection, than the transfer of a cloud-based computing company. Nevertheless, a computing company could own or occupy property that is located on contaminated land. Particular industry sectors, like waste management, can also be subject to additional specific environmental regimes.

The environmental risks and liabilities of a target business may impact how the transaction is structured (see Transfer of Environmental Risk and Liability: Share or Asset Acquisition?). Early identification of these risks will prevent restructuring issues in the later stages of the transaction.

There will be some overlap between the work of the environmental lawyer and the work of the environmental consultants appointed by the buyer. The lawyer will review any environmental reports from the consultants, in order to determine the legal position of the target company and the risks and liabilities that may fall to the buyer on completion. Any consultants instructed should be required to enter into a non-disclosure agreement to ensure the confidential transaction is not disclosed before signing. Unlike lawyers, consultants generally do not have a statutory obligation to keep client information confidential.

## Transfer of Environmental Risk and Liability: Share or Asset Acquisition?

One of the main determining factors on how environmental risks and liabilities transfer to the buyer in a transaction is whether it is structured as a share or asset acquisition.

### Share Acquisitions

In a share acquisition, all environmental risks and liabilities will be transferred to the buyer of the shares in the target company by operation of law. These can include:

- Contractual environmental risks, such as contractual indemnifications for environmental liabilities towards third parties.
- Risks related to polluted soil, which may result in liability to third parties for contamination and for execution of governmental remediation orders.
- Risks related to environmental non-compliance and governmental enforcement.
- Risks related to subsidiaries or joint ventures owned by the target company.

A seller may prefer a share sale so that it is not left with any environmental risks or liabilities (although it may be providing indemnity protection to the buyer). A share transaction will not require the transfer of any permits from the seller to the buyer.

### Asset Acquisitions

In an asset acquisition, the buyer purchases specific assets and any pre-sale environmental liabilities attached to the acquired business and assets will in principle remain with the seller. An exception is when the buyer agrees to take over the liability. Nevertheless, liabilities that can be relevant for a buyer in an asset transaction include:

- Environmental non-compliance connected to a sold asset that remains after completion (for example, non-compliance with fire safety regulations).
- Contamination risks. The buyer of a contaminated property can under Dutch law be forced to take measures to prevent potential further spread or address immediate contamination risks. If there are hazardous substances present in a property acquired by the buyer (to which humans may be exposed), this may impact and interfere with the running of the future business of the buyer if these need to be removed after completion.

In an asset transaction, environmental permits to operate the business may have to be transferred to the buyer. The general rule in the Netherlands is that environmental permits are connected to the facility for which they were issued. If the facility is transferred to another owner, the new owner will become the permit holder by operation of law. This is different for environmental permits which are person-related (*persoonsgebonden vergunningen*). Examples of these permits are a permit pursuant to the Nuclear Energy Act (*Kernenergiewet*) and permits for permanent residence in vacation homes. Some other permits also need to be transferred through a change of the permit holder's name by the competent authority. An example is a permit pursuant to the Nature Conservation Act (*Wet natuurbescherming*).

Transfer of an environmental permit must be notified to the competent authority four weeks in advance of the transfer by requesting the competent authority in writing to amend the name details attached to the permit. It is an administrative act only and does not entail a new assessment of the permit (*article 2.25, Environmental Permitting (General Provisions) Act* (*Wet algemene bepalingen omgevingsrecht*) (WABO)).

## Environmental Due Diligence

Failure to carry out sufficient environmental due diligence can result in personal liability for the directors of the buyer (*article 2:9, DCC*). It is common for a buyer to instruct environmental consultants to conduct a full environmental survey and report on the business or target to be acquired so that the buyer can assess the risks of acquiring the asset or business and negotiate protections in the deal documentation where necessary.

### Buyer's Duty to Investigate

Under Dutch law, buyers have a general duty to investigate the object of the sale and sellers have a duty to disclose information. Buyers are in principle required to take reasonable measures to ensure they know exactly what they are buying. The extent of the duty to investigate is also determined by the disclosures of the seller and the general rule that buyers can rely on the accuracy of those disclosures pursuant to standard Dutch case law (*Court of Amsterdam, 7 May 2014, ECLI:NL:RBAMS:2014:3086*). If the seller knows certain information that is relevant for the buyer in relation to the acquisition, the seller cannot argue breach by the buyer of the duty to investigate if the seller did not disclose the relevant information (pursuant to standard Dutch case law; see for example *Supreme Court, 16 December 2016, ECLI:NL:PHR:2016:1003*). The buyer bears the risk with respect to certain liabilities if these liabilities could reasonably be known by the buyer after due diligence. If the seller limits the possibilities for the buyer to investigate, this may increase its burden to disclose information (see *Court of Appeal, 16 April 1998, ECLI:NL:GHAMS:1998:AD2864; Supreme Council, 22 December 1995 (Hoog Catharijne, ABP/Friesch Groningse Hypotheekbank) ECLI:NL:HR:1995:ZC1930; Supreme Council, 15 November 1957 (Baris/Riezenkamp) ECLI:NL:HR:1957:AG2023*).

### Scoping the Environmental Due Diligence

The extent and scope of the environmental due diligence that is carried out by a buyer depends on:

- The nature of the target business.
- The information that was provided by the seller.
- The inventory of potential relevant issues.
- The amount of material publicly available.

In larger transactions, the seller will usually provide a vendor due diligence report and reports of environmental consultants. The buyer's lawyer should review the issues mentioned in these reports and should pay attention to the scope of the investigation that was carried out. Any gaps in the scope of investigation should be closed during the due diligence process of the buyer. The buyer should inquire whether the lawyers and consultants that issued the reports will provide reliance

vis-à-vis the buyer or the financing party with respect to those reports, and on what basis.

As a next step, the environmental lawyer of the buyer will usually ask the sellers to provide (additional) environmental information based on the review of the reports of the seller. During the further due diligence process, the lawyer should continue to ask questions on relevant points and ensure that these questions are documented (for example, in a digital Q&A environment). These questions can demonstrate that the buyer has fulfilled its duty to investigate (see Buyer's Duty to Investigate).

Environmental reports by consultants will usually play an important role in the environmental due diligence. In a Dutch context, the English terminology of phase one (being the phase in which a study is conducted according to fixed methods to assess the possible presence of contamination at a property), phase two (being the phase in which a follow up site investigation is done which normally includes soil sampling) and desktop reports are not generally used. There are nevertheless certain standards that apply to the reports that are prepared (known as NEN-standards, which are composed in Dutch). The NEN-standards are composed by the Netherlands Standardization Institute (NNI), which is a member of the international ISO organization. The NNI also recognizes various international (ISO, IEC) and European (EN) standards. If a particular NEN-standard is required by law, the NEN-standard can be obtained free of charge. In transactions, the seller usually provides NEN-reports. This should ensure that objective information regarding certain environmental matters (such as the soil) is provided.

### Common Areas of Focus for Environmental Due Diligence

The following are common areas of focus for environmental due diligence:

- Permits and zoning.
- Soil and groundwater pollution.
- Storage, handling and presence of hazardous substances (including asbestos).
- Disposal of waste.
- Emission rights.
- Past, pending and expected enforcement issues.
- Noise, nuisance and air pollution.
- Energy supply and consumption reductions.
- Impact on environmentally protected areas and presence of environmentally protected species.

Pay attention to new legal developments impacting environmental concerns, as these may not have been addressed by the target business. In the Netherlands, recent legislation and case law has made the presence of nitrogen deposits on environmentally protected areas a potential key obstacle for new developments, as an additional permit pursuant to the Nature Conservation Act (*Wet natuurbescherming*) could be required when an increase of nitrogen deposits on Natura-2000 areas and the (negative) effects on its ecological values cannot be excluded after performing a nitrogen deposits assessment (*Administrative Jurisdiction Division of the Council of State, 29 May 2019 (Stichting Werkgroep Behoud de Peel/het college van gedeputeerde staten van Noord-Brabant) ECLI:NL:RVS:2019:1603*).

In addition, the presence of per- and polyfluoroalkyl substances (PFAS) (which are, in short, manufactured substances used in products like fire-fighting foams, textile impregnation agents and lubricants) in the soil and new guidelines for levels of PFAS that are allowed in soil that is re-used may limit the re-use and lead to significant costs for disposal. On 3 July 2020, the State Secretary for Infrastructure and the Environment laid down the most recent framework.

Buyers should be wary of the risk of unknown environmental liabilities that are also unknown to the seller. These liabilities could include, for example, soil pollution that is not identified during a soil investigation, even if it is carried out in accordance with all relevant standards (because the investigation is always based on sampling of specific spots). The distribution of the legal risk for such unknown liabilities can take place through warranties.

## Environmental Warranties and Indemnities

Regardless of the issues that have been identified during the due diligence, there may also be unknown environmental liabilities. These can be addressed by means of a broad set of environmental warranties that place the liability for such unknown issues with the seller. The topics that are commonly covered by such warranties include:

- Absence of soil pollution, nuisance or air pollution.
- Availability of all governmental permits to carry out its business.
- Permits are in force and irrevocable.
- Compliance with permits and environmental laws.
- No enforcement pending or threatened.

- No litigation (claims, proceedings, notices) pending or threatened.
- No environmental liabilities.
- All environmental information has been disclosed.

The scope and wording of the warranties will depend on the type of transaction and nature of the business that is acquired. These warranties will generally be subject to any disclosures made against them.

The seller may qualify the extent of the warranty protection to the best of its knowledge. In these cases, if such a warranty is breached, the buyer will in principle only be able to recover damages under Dutch law if it can prove that the seller had knowledge to the contrary. Such a warranty can however potentially allow a buyer to argue that there is a non-conformity of the object of sale or that it has erred (*gedwaald*) with respect to the object of sale. Generally, sellers will therefore want to exclude rescission of the purchase agreement as a remedy for breach of warranty and exclude the DCC title that covers non-conformity (Title 1 of Book 7 of the DCC). Dutch case law has not yet clearly answered whether a contract can totally exclude the possibility of rescission for breach.

Specific risks with respect to the above topics are generally covered by specific indemnities with respect to these risks, as it is assumed that warranties do not cover known risks. Buyers will usually seek to broaden the scope of such indemnities as much as possible. Sellers will generally want to limit the scope of such indemnities to specific subject matter, limit them in time and cap the amount covered by the indemnity (see Practice Note, Warranties and Indemnities: Acquisitions (The Netherlands)).

### Insurance for Environmental Warranties and Specific Issues

Warranty and indemnity insurance covers the specific set of warranties for the benefit of the buyer. The liability of the seller is generally limited to EUR1 under the purchase agreement. In the event of a breach of the warranties, the buyer can recover from the insurer unless the policy includes a specific carve-out, or if there was disclosure against the warranty. There is a wide variety of coverage available for environmental warranties, but generally certain environmental liabilities, such as exposure to hazardous substances, are excluded. Pay attention to the scope of the policy and any exclusions with respect to environmental matters.

The seller will also want to ensure that the insurer does not take redress against it after a claim by the buyer has been filed. The policy usually includes a third-party clause (*derdenbeding*) to that effect.

The costs for warranty insurance are set at a percentage of the purchase price. Insurers will require the buyer to have performed full due diligence by reputable firms and consultants. The party taking out a warranty insurance should be aware of Dutch insurance tax and statutory limitations to insurance coverage. One of the main limitations is that, pursuant to the so called "indemnity principle" (*indemniteitsbeginsel*), the insured party cannot be enriched by an insurance payout (*article 7:960, DCC*).

For specific environmental issues, insurance for a potential liability can provide a solution for the allocation of risk in a transaction.

## Specific Environmental Regimes and the Impact on Corporate Transactions

### Liability for Soil Pollution

The Dutch Soil Protection Act (*Wet bodemsbescherming*) (article13) contains a general duty of care for the soil. This duty of care requires everyone to take reasonable measures to prevent soil pollution and, if serious pollution (*ernstige bodemverontreiniging*) is present, to remedy that pollution immediately. The Dutch soil pollution regime distinguishes soil pollution that was caused before and after 1 January 1987. Soil pollution that was caused before 1987 is considered historical soil pollution (*historische bodemverontreiniging*), which in principle must only be remedied if there is a remediation order by the competent authority. A remediation order will generally only be issued if the soil pollution is severe and remediation is urgent given the risks the pollution poses.

Soil pollution caused from 1987 onwards is covered by the duty of care and must therefore be remedied immediately by the polluter.

For commercial areas, the Dutch Soil Protection Act contains specific clauses to ensure that remediation will take place or that cost recovery by any competent authority is possible in the future. This means that the previous owner will remain liable for remediation unless the competent authority has approved the transfer and the new owner has posted surety (*article 55b, Dutch Soil Protection Act*).

Liability for soil pollution can exist both towards the government (for example on the basis of an administrative order to remediate) and towards third parties (for example on the basis of a contract or on the basis of a tort claim because soil pollution has migrated to adjacent plots).

For information regarding specific addresses with respect to soil, see Ministry of Infrastructure and

Water Management: Bodemloket: An initiative of municipalities, provinces and central government.

## Environmental Permits

The Environmental Law (General Provisions) Act (*Wet algemene bepalingen omgevingsrecht*) includes the procedural requirements for most relevant environmental permits. The establishment of an environmental facility (*inrichting*) requires an environmental permit (*article 2.1, Environmental Law (General Provisions) Act*). Generally, only facilities with a substantial environmental impact require a permit. Other facilities must obey general environmental rules and regulations that are laid down in the Activities Decree (*Activiteitenbesluit*).

Operators or facilities performing activities impacting protected species or protected areas or areas governed by the Nature Conservation Act (*Wet natuurbescherming*) will also require an (additional) permit under this Act.

Other permits may be required depending on the type of activities. Facilities using nuclear radiation may, for example, be subject to a permit under the Nuclear Energy Act (*Kernenergiewet*).

The buyer should ensure that the necessary permits have been obtained and are in force to continue the activities carried on by the target business and that the target complies with all permit requirements and conditions attached to a permit. The buyer will not want to be liable for any past non-compliance.

If a transfer of permits is necessary, verify that this is covered in the transaction documents (for example by means of a co-operation obligation for the seller or a pre- or post-completion deliverable).

## Zoning, Noise and Planning Blight

City councils (*gemeenteraad*) in the Netherlands are required to adopt zoning plans for their territory (*article 3.1, Spatial Planning Act* (*Wet op de ruimtelijke ordening*)). In a zoning plan, the permitted use of land is determined. It is in principle illegal to use land contrary to the zoning plan. A building permit application will also be tested against the zoning plan. Deviation from a zoning plan is possible by means of a permit. The municipal executive generally has complete discretion to grant permits, unless deviation from the zoning plan would be contrary to rules of higher law (for example, statutory noise standards). Zoning plans are generally available on the government website (see Ruimtelijkeplannen: The national portal for spatial plans).

Zoning plans may also contain rules on noise levels with respect to industrial sites, pursuant to the Noise Abatement Act (*Wet geluidhinder*). If "heavy noise producers" (*grote lawaaimakers*) are allowed on the basis of a zoning plan, the zoning plan must also include a noise zone (*geluidszone*) outside of which the noise produced by the industrial site is not allowed to exceed 50 dB(A) on so-called "noise sensitive objects" (*geluidsgevoelige objecten*), such as residences and schools. At the time of introduction of the Noise Abatement Act's industrial noise standards, residences were often already present within noise zones and the noise standards were exceeded at those residences. As a result, remediation (*sanering*) of the noise pollution was necessary. Subsequently maximum noise levels were implemented for those residences. These have to be taken into account in permit procedures. Noise remediation of most industrial sites has been completed.

Amendment of a zoning plan can lead to damages for third parties. Affected third parties can then file a planning damage (*planschade*) claim with the competent authority. Such claims can be filed until five years after the zoning plan or permit to deviate from the zoning plan has become irrevocable. When assessing a claim for planning damage, the competent authority will assess whether the planning damage was foreseeable for the third party (*voorzienbaarheid*). For example, in the case of a home owner, the question is whether the possible adoption of the new zoning plan has been announced in municipal policy documents before the house owner acquired the property. In addition, damage within the regular societal risk (*normaal maatschappelijk risico*) may not be claimed by the allegedly damaged party. As a result, a threshold of 2% is generally applied when assessing a claim for planning damage, meaning that the first 2% loss in value of a property due to adaption of the zoning plan may not be claimed by the allegedly damaged third party. In the case of new developments, competent authorities usually require the initiator to indemnify the government for planning damage claims. This may be relevant in a share transaction, where all rights and obligations of the target company are taken over. Parties usually seek indemnity coverage if there is a known risk of planning damage.

## Emission Allowances

The EU Emission Trading System (EU ETS) is mandatory for CO2, N2O and PFC emissions. For CO2 emissions, the EU ETS applies to power and heat generation, energy-intensive industry sectors (such as oil refineries, production of steel, metals, cement and paper) and to commercial aviation. All companies subject to this scheme are granted a number of emission allowances free of charge. If a company wants to exceed the emissions allowance, the company either needs to buy additional rights or reduce its

emissions. Exceeding the emission allowance can lead to administrative fines (*bestuurlijke boete*) of up to EUR450,000 or 10% of the gross turnover of the offender per offence (*article 18.16e, Environmental Management Act* (*Wet Milieubeheer*)).

During due diligence, the buyer should assess whether sufficient emission allowance is available and whether any non-compliance has occurred in the past.

## Hazardous Substances and Safety

The handling and storage of hazardous substances requires an environmental permit and, if certain thresholds are exceeded, compliance with the rules set out by the Major Accidents Risks Decree 2015 (*Besluit risico's zware ongevallen*). This Decree is the Dutch implementation of the EU Seveso III Directive (*2012/18/EU*). Requirements can include the drafting of a quantitative risk analysis (QRA), implementing a safety management system and submitting a safety report. These documents can result in various fire safety measures being required at the facility.

The board of the security region (*veiligheidsregio*), a public body for co-operation in case of crises, disasters and fire safety issues, can also decide that a facility (which poses a specific threat in case of an accident or fire) should have a company fire brigade (*bedrijfsbrandweer*). This decision can include requirements regarding the strength of and material used by the company fire brigade.

During due diligence, pay attention to whether the target company or target assets meet these requirements, as remediation of any non-compliances on this point may be costly.

## Chemicals (REACH and CLP)

The Regulation concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) (1907/2006/EC) is an EU Regulation dealing with the registration, evaluation, authorization and restriction of chemicals. Pursuant to REACH, companies that produce or import chemical substances into the EU are required to register those substances with the European Chemicals Agency (ECHA) (provided the amount exceeds one metric ton per substance). In addition, these companies must share certain information on the substances with the companies involved in the supply chain by means of a material safety data sheet (MSDS). Other parties in the supply chain may also be subject to obligations, depending on their role (for example, distributors, downstream users and formulators of mixtures). Certain chemicals are banned from the market and others need authorization prior to being placed on the market.

The CLP Regulation (1272/2008/EC) sets out requirements for the classification and labelling of chemical substances.

## Waste Handling and Transport

Waste collection, processing and transport is regulated under chapter 10 of the Dutch Environmental Management Act (*Wet milieubeheer*). Household waste is generally regulated in a municipal waste ordinance (*gemeentelijke afvalstoffenverordening*). This ordinance can specify that one specific company is appointed as the waste collector (*inzamelaar*), excluding all others.

The disposal, collection and transport of industrial and hazardous waste is also regulated. Companies that transport, collect, trade or broker in waste are required to register and need to be included on the list of transporters, collectors, dealers and brokers of waste substances (*VIHB-lijst*). Companies that dispose of, or collect, industrial or hazardous waste, must notify this to the National Waste Control Centre (*Landelijk Meldpunt Afvalstoffen*). The waste that is collected or processed by a company should be included in the permit of the company and the specific waste numbers should match to prevent non-compliance. A buyer should check these details during due diligence.

## Reduction of Energy Consumption

In the Netherlands, several measures have been taken to stimulate (and, if required, enforce) parties to reduce energy consumption. Among others, as of January 2023, energy labels of the major part of office buildings in the Netherlands will have to be at least of category C (pursuant to an amendment to the Dutch Building Decree 2012 (*Bouwbesluit*)). As a result, an owner of an office building with label of category D to G (or without an energy label) can be sanctioned by the competent authority by implementing a penalty order (*last onder dwangsom*), an administrative enforcement order (*last onder bestuursdwang*), or administrative fines (*bestuursrechtelijke boete*) up to a maximum of EUR20,250 for legal persons. A buyer of a property should therefore ask for an energy label and assess whether the intended property meets these requirements. If the property does not meet the requirements, the buyer should assess what is required to make the property comply.

In addition, the Energy Efficiency Directive (2012/27/EU) is implemented through the Activities Decree (*Activiteitenbesluit*). As a result, the Activities Decree contains a general energy consumption reduction obligation for companies and various specific rules. For example, companies must perform an energy audit every four years allowing the company to map-out possible energy-saving measures.

## Environmental Nuisance and Tort

The environmental nuisance that is caused by a facility should be covered by a permit. Even if a permit was granted by the authorities on the basis of public law, this does not entitle the owner of the facility to cause unlawful nuisance in a civil law sense to third parties (*article 5:39, DCC*).

Certain activities can lead to strict-liability (*risico-aansprakelijkheid*) under Dutch law (*articles 6:174-6:184, DCC*). In the environmental sphere, this can be the case for:

- Operators of a landfill (if air, soil or groundwater pollution is caused).
- The holders of hazardous substances (if the hazard related to those substances materializes).
- The operators of mining works (for movement of the soil as a result of the construction or operation of the mining works, among other things).

Damage through such activities results in liability without culpability (*verwijtbaarheid*).

## Transfer of Environmental Subsidy Rights

In principle, subsidy rights are transferrable under Dutch private law pursuant to article 3:83 of the DCC, unless the nature of the subsidy right dictates otherwise. In general, environmental subsidy rights tend to be more matter-related, making them more eligible for transfer. An example in this context is the SDE subsidy scheme for the production of sustainable energy.

It is however possible that under public law restrictions regarding transferability apply. The subsidy scheme through which a subsidy right has been granted may include specific rules regarding the transferability of a subsidy right. For instance, conditions can be attached to the transfer of a subsidy right, such as acquiring permission of the competent authority prior to transfer. In addition, transfer of a subsidy can be fully excluded. Such rules and conditions can also be included in the subsidy decision (*subsidiebeschikking*), which is specifically addressed to the applicant and, ultimately, the holder of the subsidy right.