(New) Legislation With Respect To Acquisitions In The Netherlands

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On 1 July 2002 new pension legislation was introduced in the Netherlands with respect to acquisitions. This new legislation has a number of consequences for the Dutch transaction practice. Before going into the details of the new pension legislation I propose to familiarise the reader with a few important basics of the pension system and transaction practice in the Netherlands.

Basics Of The Dutch Pension System And Transaction Practice

In the Netherlands each employee is entitled to a small state pension. There is no general obligation for an employer to offer his employees a supplementary pension scheme. However, the majority of the employers do. These employers are obliged to provide security for their employees' pension entitlements. Pursuant to the Pension and Savings Funds Act [*Pensioen- en Spaarfondsenwet*] employers have the following options for the administration of their pension schemes: (a) a Company Pension Fund (a pension fund incorporated for that specific company); (b) an Industry Pension Fund; or (c) a Pension Insurance Company.

Pursuant to the Industrial Pension Funds (Obligatory Participation) Act 2000 [*Wet betreffende verplichte deelneming in een bedrijfstakpensioenfonds 2000*], the Minister for Social Affairs and Employment has the power to determine that participation in a specific Industry Pension Fund is compulsory for all employees working in that sector of industry. There are a considerable number of Industry Pension Funds in the Netherlands, such as the Metal Industry Pension Fund (PMI), the healthcare Sector Pension Fund PGGM, etc. A large part of the Dutch workforce participates in these Industry Pension Funds.

The majority of acquisitions in the Netherlands are effected through an acquisition of the shares in the target company (a "Share Transaction") or an acquisition of all assets and liabilities of the target company (an "Asset Transaction"). A share transaction does not affect the relationship between the target company and its employees (the "Transferring Employees"). The Transferring Employees remain with the same company as their employer. Contractual relationships with third parties, such as insurance companies, also remain unchanged, unless such a contract contains a change of control clause. In an Asset Transaction the employment contracts of the Transferring Employees with the old employer are terminated and replaced by new contracts with the new employer. Any contractual relationships with pension insurance companies for example remain with the selling company, unless such contracts are transferred to the acquiring company.

New Legislation

The Dutch Civil Code contains some provisions with respect to the rights of Transferring Employees ("Acquired Rights") in the event of an Asset Transaction. On 1 July 2002 these provisions of the Dutch Civil Code were amended in accordance with EC Directive 98/50. Pursuant to the old legislation an acquiring company was obliged to accept all Acquired Rights of the Transferring Employees. There was, however, one exception. The acquiring company was not obliged to accept pension entitlements of the Transferring Employees. Therefore, the old legislation allowed an acquiring company to terminate the pension scheme of the Transferring Employees.

The new legislation no longer provides for this exception. An acquiring company is now obliged to accept the Acquired Rights of the Transferring Employees, including their pension entitlements. However, a new exception has been introduced. The acquiring company is not obliged to accept the pension entitlements of the Transferring Employees, if the acquiring company itself has a pension scheme which will apply to the Transferring Employees. As a result of this new legislation the Transferring Employees will either remain entitled to their accrued pension rights or participate in the pension scheme of the acquiring company. The acquiring company is no longer allowed to terminate the pension scheme of the Transferring Employees, without giving them the possibility to participate in the acquiring company's pension scheme.

Under the new legislation the acquiring company may take the position that if the Transferring Employees have no pension entitlements, it will not be obliged to offer them a pension scheme. In this scenario, the position of the Transferring Employees would remain the same. However, the legislator's every intent was to avoid this situation, so he introduced a new section into the Dutch Pension and Savings Fund Act. Pursuant to this section, the acquiring company is obliged to offer the Transferring Employees the same pension as its own employees, even if the Transferring Employees had no pension entitlements prior to the transaction.

Due Diligence Investigation

Before any transaction is effected, a proper due diligence investigation must be conducted with respect to the target company, including the pension situation. It has to be established whether the pension fund is fully funded, whether the pension scheme is administered in accordance with all applicable laws and does not contain any unlawful discriminatory provisions, etc. In addition to the usual due diligence investigation, a few issues are of particular importance in the Netherlands.

Obligation To Participate In An Industry Pension Fund

In each case, it needs to be verified whether the target company is obliged to participate in an Industry Pension Fund pursuant to the Industrial Pension Funds (Obligatory Participation) Act 2000. If a Pension Insurance Company administers the pension scheme of a company, although the obligation exists to participate in an Industry Pension Fund, this Industry Pension Fund might claim payment of pension premiums. In most cases the amounts involved are considerable. Pension Insurance Companies are usually reluctant to redeem the pension premiums paid.

If an exemption is granted from the obligation to participate in an Industry Pension Fund, the Industry Pension Fund might also claim payment of the pension premiums if the conditions of the exemption are not met.

Continuation Of The Participation In A Company Pension Fund

A considerable number of large companies in the Netherlands have their own Company Pension Funds. A Company Pension Fund administers the pension scheme, which applies to all the employees of the company and its subsidiaries. If a subsidiary of such a company is sold to a third party, the employees of this subsidiary are usually not allowed to continue their participation in the Company Pension Fund. Therefore, after the transaction, the pension scheme is to be administered by a new Company Pension Fund or a Pension Insurance Company.

The Acquiring Company's Pension Scheme

The new legislation requires that the terms and conditions of the acquiring company's pension scheme be examined. Accordingly, in the event of an Asset Transaction the acquiring company should check whether the Transferring Employees remain entitled to their pension rights under their "old" pension scheme or whether they are to participate in the acquiring company's pension scheme after the transaction.

The Consequences Of A Transaction For The Pension Situation

As indicated above, an employer has the option to have the pension scheme administered by: (a) an Industry Pension Fund; (b) a Pension Insurance Company; or (c) a Company Pension Fund. The consequences of each of these options are determined by the nature of the transaction.

Pension Scheme Administered By An Industry Pension Fund

Share Transaction

If the Transferring Employees participate in an Industry Pension Fund, they will be entitled to a pension on the basis of the pension scheme of the Industry Pension Fund. The target company will be obliged to pay the pension premiums to this Industry Pension Fund. In most cases this participation is compulsory pursuant to the Industrial Pension Funds (Obligatory Participation) Act 2000. Therefore it is usually not possible for the Transferring Employees to leave this Industry Pension Fund after the transaction. It follows that a Share Transaction will usually not affect the pension situation of the Transferring Employees.

If the acquiring company is exempted from participating in the Industry Pension Fund, it may extend that exemption to the Transferring Employees. In that case the Transferring Employees have to agree to the terms and conditions of the acquiring company's pension scheme. The Transferring Employees will remain in the employ of the same employer and can therefore claim that they remain entitled to their "old" pension, unless they agree otherwise. Furthermore, a value transfer from the Industry Pension Fund to the Company Pension Fund of the acquiring company must be considered.

Asset Transaction

The situation sketched above also applies to Asset Transactions, with one exception. The new pension legislation provides that the Transferring Employees are entitled to pensions under the acquiring company's pension scheme. The new pension legislation does not require that the Transferring Employees approve the pension scheme of the acquiring company.

Pension Scheme Administered By A Pension Insurance Company

Share Transaction

If the Transferring Employees are entitled to a pension on the basis of a pension scheme that is administered by a Pension Insurance Company, this situation can simply be continued after the transaction. Since the relationship between the target company and the Transferring Employees remains unaltered no action is required. The relationship with the Pension Insurance Company does not change either.

If the acquiring company wishes to start a new pension scheme for the Transferring Employees, the Transferring Employees have to approve the new scheme for the same reason as indicated above. Where a new pension scheme is introduced a value transfer from the Pension Insurance Company to the pension fund or Pension Insurance Company of the acquirer needs to be considered.

Asset Transaction

If the acquiring company wishes to continue the existing pension scheme and the existing relationship with the Pension Insurance Company, the rights and liabilities under the pension insurance agreement have to be transferred to the acquiring company. Under the new legislation the pension entitlements of the Transferring Employees are transferred to the acquiring company by operation of law.

The acquiring company can also choose for the option that the Transferring Employees participate in the acquiring company's pension scheme. This requires no approval from the Transferring Employees as indicated above.

Pension Scheme Administered By A Company Pension Fund

Share Transaction

If the pension scheme is administered by a Company Pension Fund, the consequences of the transaction are comparable to the situation where a Pension Insurance Company administers the pension scheme. If the Company Pension Fund is incorporated to administer only the pension scheme of the target company, the acquiring company may decide also to "acquire" the Company Pension Fund. In that case the representatives of the selling company have to resign from the board of the Company Pension Fund and the acquiring company has to appoint new representatives to the board of the Company Pension Fund.

If a subsidiary is acquired from a larger group of companies having a single Company Pension Fund, the Transferring Employees are probably obliged to leave that Company Pension Fund as indicated above. However, they must be offered a new pension scheme, the terms of which must be equal to their old pension scheme. The Transferring Employees remain with the same employer and can therefore claim that they remain entitled to their "old" pension entitlements. Consequently, a new Company Pension Fund or Pension Insurance Company has to be found to administer this new scheme. In relation thereto a value transfer needs to be considered.

Asset Transfer

The same consequences apply to an Asset Transfer, except that the new legislation does not require the approval from the Transferring Employees for entering into the acquiring company's pension scheme.

Conclusion

The new pension legislation has improved the position of the Transferring Employees in the event of Asset Transactions. However, in Share Transactions their protection is still better. In that case their approval is required if the acquiring company wishes to introduce a new pension scheme.

If the acquiring company wishes to introduce the pension scheme of its own company, an Asset Transaction might be preferred since in that case the Transferring Employees' approval for this pension scheme is not required. Under the new legislation an acquiring company does not, however, have the option to terminate the existing pension scheme of the Transferring Employees, without giving them the possibility to participate in the acquiring company's pension scheme.

Furthermore, a transaction may have no consequences at all for the pension situation of the Transferring Employees. However, there is also the possibility that a new pension scheme needs to be implemented and that a new pension fund or Pension Insurance Company has to be found to administer this new pension scheme and that a value transfer is required. In that case negotiations with all parties involved, such as employees, pension funds, actuaries and, of course, the seller and the purchaser should be started at as early a stage as possible to avoid the pension situation from becoming a show stopper for the transaction. ◆