Top 5 Legal Due Diligence Findings in Dutch M&A Transactions

A practical guide for purchasers, sellers and target companies and their advisors

September 2026

Your goal.Our drive.

BUREN
LEGAL | TAX | NOTARY

Contents

Introduction

Why these five findings

In the complex and changing reality of mergers and acquisitions (M&A) in the Netherlands, the legal due diligence investigation remains one of the most critical phases of any transaction. During this stage, the information provided by the seller is thoroughly validated, potential risks are identified, and the deal value is confirmed – or sometimes fundamentally reassessed. A comprehensive due diligence process does more than safeguard the purchaser by identifying risks and shaping negotiation strategies: it also benefits the seller and the target company by clarifying obligations, identifying operational improvements and aligning expectations.

How this guide came about

For this guide, we performed an in-depth analysis of the due diligence reports prepared for our recent Dutch M&A transactions and identified five topics with red flags that occur repeatedly. The result is our Top 5 Legal Due Diligence Findings in Dutch M&A Transactions: five recurring themes that, in our experience, most frequently affect transaction timing, deal certainty and deal value. This guide was written by Friederike Henke and Deniz Xinyi Bussing of our Corporate M&A team, drawing on input from our employment, intellectual property, real estate and notarial specialists.

These five recurring themes were first published as a series of articles. We have brought them together here as a single guide, with each theme forming a chapter:

- **Change of control clauses:** the “boilerplate” provisions that can hand a counterparty decisive leverage over your deal.
- **Red flags in the articles of association:** how a target company’s constitutional documents can restrict, delay or even block a share transfer.
- **Employment red flags:** requalification risk, undocumented management arrangements, missing covenants and works council codetermination.
- **Intellectual property red flags:** defects in title, unprotected unregistered rights and restrictive licences.
- **Real estate red flags:** undocumented leases, unauthorised subleases and change of control provisions in lease agreements.

Each chapter sets out the peculiarities of the red flag finding, provides relevant background information and discusses how such a red flag may affect a Dutch M&A transaction, where relevant from the perspective of the purchaser, the seller and the target company alike. Every chapter closes with our practical tips for your next due diligence review.

Although the chapters are written to be read in sequence, each can equally be consulted on its own. Where topics overlap – change of control clauses, for example, recur in the intellectual property and real estate chapters – we have cross-referred rather than repeated.

Chapter 1

Change of control clauses

Change of control clauses are one of the most commonly underestimated aspects of contract due diligence. At first glance, they can appear routine, but as a transaction progresses, they often emerge as critical risk points that can affect the target company's contractual relationships, its continuity and even the closing of the transaction. Understanding not just where these clauses appear, but how they influence leverage, timing and counterparties' behaviour, is crucial to a smooth M&A process.

This chapter discusses the content and impact of change of control clauses under Dutch law and concludes with our top five tips for reviewing them.

What is a change of control clause?

A change of control clause is triggered when a target company's ownership or leadership undergoes a significant shift following a merger, an acquisition or a change in the governance structure of the target company. Upon such an event, specific rights and obligations may arise under the clause. Typically, these clauses grant a contract party – for instance a customer, supplier, financier or landlord of the target company – the right to:

- be notified of the envisaged change of control over the target company;
- terminate, amend or renegotiate the underlying contract with the target company, either immediately or under certain conditions; or
- provide prior (written) consent, without which the underlying contract with the target company may be terminated.

In addition, a change of control clause often imposes an obligation on the target company to inform the relevant contract party, or to obtain that party's prior (written) consent, in order to ensure continued performance of the underlying contract.

When reviewing contracts in a due diligence investigation, change of control clauses in key customer contracts are frequently flagged. At first glance, they may look like standard boilerplate, but in the context of an acquisition they can translate into very different kinds of transaction risk: the potential loss of a key contract, the need to renegotiate favourable terms, delays in closing, or a negative impact on the target company's post-acquisition value.

Impact on Dutch M&A transactions

From both a purchaser's and a seller's perspective, the presence of change of control clauses in a target company's commercial contracts can have a material impact on the course – and sometimes even the feasibility – of an M&A transaction. Because these clauses grant the target company's counterparties rights triggered by changes in ownership or control, they introduce an element of third-party dependency into a deal. Where third-party consent is required, this can delay the transaction timeline.

Beyond timing, change of control provisions can also raise commercial and confidentiality considerations. In practice, neither party may wish to notify counterparties of the impending transaction, especially in a competitive market. That is particularly so where the underlying commercial relationship is strategically sensitive for the target company, or depends on personal trust between the management teams of the parties involved.

Below, we take a closer look at the implications from the perspective of the target company, the purchaser and the seller in turn.

Target company perspective

From a target company's point of view, not obtaining a third party's consent to a transaction may affect not only the deal, but also the target company's position in the market. Obtaining that consent is a balancing act, particularly if the target company's business depends heavily on the commercial contract containing the change of control clause. Revealing a pending transaction may draw the contract party's attention to contractual rights that it can then use to exploit its position, seek improved terms, or reconsider the relationship in its entirety.

All of this may have an enormous impact on the target company's business and thus affect its value, even if the deal is ultimately not pursued. Addressing these issues therefore requires not only a robust legal strategy but also a thoughtful communication strategy with counterparties, which may involve early engagement to manage expectations and safeguard key relationships.

Purchaser perspective

From a purchaser's viewpoint, the stakes are particularly high where change of control clauses are found in key customer, supplier or licensing agreements. Business continuity risk arises if a critical counterparty exercises its change of control rights after closing. That risk can extend beyond the purchaser and the target company themselves: the loss of a key contract may adversely affect the entire purchaser group, particularly where the acquisition is intended to strengthen the group as a whole.

During the due diligence review, the purchaser is therefore advised to assess whether the relevant agreements are essential to the target company's operations and, if so, to raise these findings promptly with the seller. If the ongoing benefit of such a key contract depends on obtaining counterparty consent, the purchaser will often insist on making that consent a condition precedent to closing, ensuring that the transaction cannot be completed until it has been secured. This protects the purchaser against acquiring a business that could lose a key contract, or a vital revenue stream, immediately upon closing.

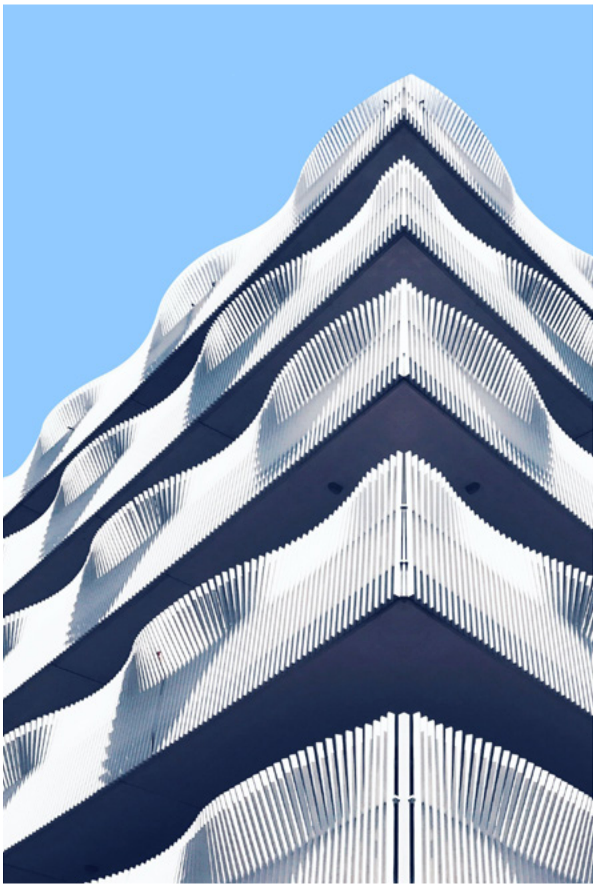
Seller perspective

For the seller, early awareness and proactive management of change of control clauses are equally important. Identifying and addressing these clauses before entering into a sale process can prevent unpleasant surprises during the deal process and protect deal value.

A purchaser that discovers a termination risk in a key contract may seek a price reduction, demand additional protections or even walk away from the deal. By contrast, a well-prepared seller who has already mitigated these risks – for example by obtaining consents in advance or engaging counterparties to clarify their position – demonstrates control and transparency. This helps to preserve momentum, maintain purchaser confidence and ultimately contributes to a smoother negotiation and transaction process.

Change of control clauses are not merely technical provisions; they can directly influence valuation, transaction timing and deal certainty. Both purchasers and sellers benefit from identifying and addressing them early in the M&A process.

This chapter also serves as a call to attention for commercial contracting lawyers: although change of control clauses are generally considered boilerplate, it may well be worth negotiating their terms carefully, particularly where a consent requirement is involved.



Top 5 tips: change of control clauses

1. **Do not treat change of control clauses as standard boilerplate:** assess each clause individually, including its potential legal and commercial consequences, in the context of the transaction, the target company, the sector in which it operates and the parties' position in that sector's market.
2. **Prioritise key contracts:** focus the legal due diligence review on revenue-generating, strategically important or operationally critical agreements, especially where the transaction is under time pressure.
3. **Balance confidentiality and timing:** plan carefully when and how counterparties are informed, so as to avoid confidentiality breaches and commercial disruption.
4. **Consider conditions precedent:** if consent from a key counterparty is required, include it as a condition precedent (*opschortende voorwaarde*) to closing.
5. **Prepare early:** obtaining counterparty consent often takes longer than expected. Early identification and mitigation of change of control risks can improve both deal certainty and deal outcome.

Chapter 2

Red flags in the articles of association

The articles of association (*statuten*) form the constitutional backbone of every Dutch legal entity. They typically set out the governance structure, internal decision-making procedures, shareholder rights and, as applicable, share transfer mechanisms. The provisions of Book 2 of the Dutch Civil Code (*Burgerlijk Wetboek*) (DCC) may, to the extent permitted under Dutch law, be deviated from, which allows for tailored arrangements per legal entity. Because the articles of association ultimately determine the practical framework within which the target company and its corporate bodies may operate, they form a crucial component of any legal due diligence investigation.

This chapter discusses a number of recurring findings encountered when reviewing the articles of association of Dutch limited liability companies. For each finding, we provide background information and explain how it may affect a Dutch M&A transaction.

As a general takeaway: provisions in the articles of association that are not identified in time or properly assessed during legal due diligence may disrupt transaction planning, give rise to unexpected transfer obligations, or even affect deal certainty.

The findings discussed in this chapter are:

- outdated articles of association;
- quality requirements (*kwaliteitseisen*);
- blocking arrangements (*blokkeringsregeling*);
- mandatory offer provisions (*aanbiedingsverplichtingen*);
- restrictions on pledging shares; and
- shareholders' agreements (each an SHA).

Outdated articles of association

On 1 October 2012, the Flexibilisation of BV Act (*Wet vereenvoudiging en flexibilisering van het bv-recht*) came into force. This legislation introduced a number of changes for private companies with limited liability (*besloten vennootschappen met beperkte aansprakelijkheid*) (each a BV) in the Netherlands. Its principal aim was to increase flexibility in corporate structuring and governance, to reduce formalities and to enhance the freedom of shareholders in structuring the rules governing BVs. Subsequently, on 1 July 2021, the Management and Supervision of Legal Entities Act (*Wet bestuur en toezicht rechtspersonen*) entered into force. Among other things, this legislation substantially revised the conflict of interest rules (*tegenstrijdig belang-regeling*) for directors and supervisory board members, clarifying when a conflict of interest exists and introducing stricter procedural requirements for dealing with such conflicts.

During due diligence, we frequently encounter outdated articles of association. Although there is no statutory obligation to amend articles of association predating 1 October 2012, it is generally advisable to do so in order to ensure full alignment with current legislation. Companies may otherwise be unable to benefit fully from the simplifications introduced, or from the possibility of including tailor-made arrangements in their articles of association.

In the context of an M&A transaction, outdated articles of association may limit a purchaser's post-closing plans. Purchasers should therefore assess whether any amendments are desirable or required as part of the overall transaction and for the purposes of the future corporate governance of the BV and of the group as a whole. In that context, we note that even a simple name change – which frequently occurs following an acquisition – already requires a formal amendment.

By way of illustration, the following changes have been introduced since 2012:

- a notice convening a general meeting may be given electronically, unless the articles of association provide otherwise (article 2:223 paragraph 2 DCC);
- the statutory notice period for convening a general meeting has been reduced to eight days (article 2:225 DCC);
- written resolutions adopted outside a general meeting no longer require an explicit statutory basis in the articles of association (article 2:238 DCC);
- a general meeting may be held at a specific location outside the Netherlands (article 2:226 paragraph 1 DCC); and
- the concept of authorised share capital (*maatschappelijk kapitaal*), which determines the maximum amount of share capital a BV can issue, has been abolished (article 2:178 DCC).

Where articles of association contain outdated provisions – such as references to authorised share capital, or an unnecessarily extensive balance sheet test (*balanstest*) for distributions – those provisions remain in force and may impose unnecessary limitations. Moreover, pre-2012 articles of association will typically not reflect the statutory distribution test (*uitkeringstest*) introduced under the Flexibilisation of BV Act, which requires management board approval for distributions.

As noted above, Dutch law also offers considerable scope for tailor-made arrangements in the articles of association. For example:

- a BV may issue different classes of shares in order to allocate varying rights to shareholders (article 2:228 DCC). The law expressly allows for the issue of non-voting and non-profit shares. In addition, the articles of association may grant the holders of a specific class of shares the right to appoint, suspend and dismiss certain directors, thereby enabling a differentiated governance structure aligned with the interests of a particular shareholder;
- shareholders are free to determine that no transfer restriction applies to the transfer of shares, or to include tailor-made transfer restrictions, provided that any restriction does not render the transfer of shares impossible or excessively onerous (article 2:195 DCC);
- the articles of association may stipulate, in respect of all or certain classes of shares, that shareholdership is subject to specific quality requirements (*kwaliteitseisen*) (article 2:192 DCC); and
- the articles of association may provide that shareholders are obliged, in certain circumstances, to transfer their shares (article 2:192 DCC), and non-compliance with such transfer obligations may be sanctioned through measures such as the suspension of voting rights or profit rights.

Quality requirements (*kwaliteitseisen*)

A recurring due diligence finding concerns the inclusion of quality requirements in the articles of association (article 2:192 DCC). Quality requirements restrict the holding of shares in the capital of a company to persons meeting the specifications listed in the relevant provisions. These specifications are not subject to specific statutory requirements and may be freely tailored to the preferences of the shareholders. Quality requirements may, for example, provide that only holders of a specific permit or members of a certain association may become shareholders, or that a person cannot become a shareholder if another person sharing the same ultimate parent company already holds shares in the company.

The impact of quality requirements in an M&A context can be significant. If a purchaser does not meet the stipulated criteria, a share transfer may not be permissible without first amending the articles of association – potentially delaying closing and necessitating additional conditions precedent to protect the purchaser and make the transaction legally possible. Some articles of association allow shares to be transferred to a purchaser that does not meet the quality requirements, provided that the management board or the general meeting grants a dispensation (*ontheffing*) from those requirements.

Such dispensation provisions typically require the management board to assess whether the transfer would be in the company's interest, and may be subject to conditions or time limitations.

Finally, a purchaser should determine not only whether it satisfies the quality requirements, but also whether prior share transfers met them. A share transfer in violation of quality requirements creates a defect in the seller's legal title to the shares, meaning that the seller may not have validly become a shareholder. As a result, historical corporate resolutions may be called into question. Depending on the circumstances, remedying such situations may involve the ratification of defective share transfers, where legally possible, and the adoption of corrective corporate resolutions. In addition, the transaction documentation should specifically address any residual risk, for example through specific warranties, indemnities and conditions precedent.

Blocking arrangements (*blokkeringsregeling*)

The articles of association of a BV may include share transfer restrictions, generally referred to as blocking arrangements (*blokkeringsregeling*) (article 2:195 DCC). These arrangements restrict or condition the transferability of shares in order to prevent existing shareholders from being confronted with an unwanted third-party shareholder. As a result, shares in a BV are not necessarily freely transferable.

Blocking arrangements typically take the form of either a right of first refusal (*aanbiedingsregeling*) or an approval requirement (*goedkeuringsregeling*). Under a right of first refusal, a shareholder intending to transfer shares must first offer those shares to the other shareholders, usually on the same terms and conditions as agreed with the intended third-party purchaser. Under an approval requirement, the transfer of shares is subject to the prior consent of a designated corporate body, such as the general meeting or the management board. The articles of association may also provide that shares are freely transferable and not subject to any blocking arrangement. Where the articles of association are silent on the transferability of shares, the statutory default rule of article 2:195 DCC applies, pursuant to which a right of first refusal in favour of the other existing shareholders is in place.

From a due diligence perspective, it is important to assess not only the existence and scope of any blocking arrangements, but also whether they have been complied with in the past. As with non-compliance with quality requirements, described

above, a share transfer effected in violation of applicable blocking arrangements results in a defect in the seller's title to the shares.

In an M&A transaction, it is therefore essential to identify blocking arrangements at an early stage and to determine how they can be addressed within the transaction timeline. This may involve obtaining waivers or consents from the relevant shareholders or corporate bodies, or ensuring that the procedural steps prescribed by the blocking arrangements are properly followed prior to closing. If not identified and managed in time, blocking arrangements can delay signing and/or closing or, in more adverse scenarios, undermine deal certainty where shareholders use these mechanisms strategically to prevent or obstruct the deal.

Mandatory offer provisions (*aanbiedingsverplichtingen*)

The articles of association of a BV may contain mandatory offer provisions (*aanbiedingsverplichtingen*) (article 2:192 DCC). These provisions require a shareholder, upon the occurrence of certain predefined events, to offer its shares for transfer to one or more of the other shareholders or to the company itself. Common trigger events include the bankruptcy (*faillissement*) or suspension of payments (*surseance van betaling*) of a shareholder, a change of control, or a shareholder ceasing to meet applicable quality requirements. Mandatory offer provisions typically specify to whom the shares must be offered, the applicable pricing mechanism and the timeframe within which the offer and the subsequent transfer of shares must be completed. The articles of association frequently attach sanctions to non-compliance, which may include the suspension of voting rights or dividend rights.

From an M&A perspective, mandatory offer provisions are a critical due diligence focus area. It is essential to assess whether the contemplated transaction, or events occurring in connection with it, may trigger a mandatory offer obligation and, if so, to obtain the necessary waivers in good time.

Restrictions on pledging shares

Some articles of association restrict or even prohibit the pledging of shares (*het verpanden van aandelen*). This may pose an immediate transaction risk if acquisition financing, other deal structures or post-closing plans require a pledge over the shares in the target company.

Where such restrictions exist, an amendment to the articles of association may be required, potentially prior to closing, in order to permit the contemplated pledge. Depending on the transaction timeline and the cooperation of existing shareholders, this can introduce delays, additional transaction costs and execution risk. Purchasers and their financing parties should therefore identify any pledge restrictions at an early stage of the due diligence process, factor the required steps into the transaction timeline and, where necessary, include the amendment of the articles of association as a closing condition.

Shareholders' agreements

Where a company has more than one shareholder, the relationship between the shareholders is in practice often further governed by an SHA. While the articles of association constitute the company's formal constitutional framework, an SHA allows shareholders to agree additional arrangements or to elaborate further on provisions set out in the articles of association. SHAs commonly contain provisions relating to, among other things, pre-emption rights, tag-along and drag-along rights, non-compete obligations, deadlock mechanisms and dividend policy arrangements.

Provisions included in an SHA may give rise to risks similar to those associated with the articles of association, such as approval requirements for share transfers or obligations triggered by the contemplated transaction. SHAs should therefore be reviewed alongside the articles of association, so that all transaction-relevant restrictions, obligations and approval rights are identified and appropriately addressed. It is furthermore essential to assess the interaction between the articles of association and the applicable SHA. In practice, inconsistencies between these documents are not uncommon, and the hierarchy between them may not be immediately apparent. A careful and structured analysis is therefore required to determine their respective scope and to assess the potential impact on the contemplated transaction. Finally, the parties to an M&A transaction should assess whether the SHA is to be amended or terminated following closing.

Top 5 tips: assessing articles of association

1. **Align the articles with the deal structure and post-closing plans:** consider whether the existing articles of association and, if applicable, the SHA are compatible with the intended deal structure (for example, whether the share pledges required for acquisition financing are permitted) and with the purchaser's intended post-closing plans for the target company and the group's governance, or whether an amendment of the articles of association and/or the SHA is required.
2. **Identify transaction-triggered provisions:** analyse whether the contemplated transaction, or events occurring in connection with it, may trigger mandatory transfer obligations or other consequences under the articles of association and, if applicable, the SHA.
3. **Obtain the required documentation:** establish which waivers, approvals and corporate resolutions are required and from which parties, engage with the relevant stakeholders and start the process of obtaining the necessary documentation at an early stage.
4. **Review the SHA alongside the articles of association:** check whether an SHA is in place and, if so, analyse its provisions alongside the articles of association to identify potential conflicts or transaction-triggered obligations.
5. **Involve the civil-law notary early:** liaise at an early stage with the civil-law notary involved to confirm the required documentation and corporate actions.

Chapter 3

Employment red flags

This chapter explores some of the most common red flags that arise during employment law due diligence and their potential impact on a Dutch M&A transaction.

We highlight the risks associated with:

- the requalification of service agreements as employment agreements;
- engaging management through informal or undocumented arrangements;
- gaps in contractual protections, including missing restrictive covenants, confidentiality clauses and intellectual property (IP) provisions; and
- the critical role of works councils (*ondernemingsraden*) in M&A transactions.

As in the other chapters, we conclude with our top five tips for your next due diligence review.

Requalification of service and freelance agreements

Dutch companies frequently engage individuals – often senior executives, consultants or other specialised professionals – through service or freelance agreements rather than employment agreements. Companies may prefer service agreements for a variety of reasons; this structure offers, for example, greater flexibility in defining the scope of services and the compensation payable.

Under Dutch law, however, the formal label of a "service agreement" does not determine the legal nature of the relationship. A working relationship must be assessed holistically, taking into account both the contractual arrangements and the actual conduct of the parties – substance over form. If the working relationship exhibits the characteristics of employment rather than genuine independent contractor status, the agreement may be requalified as an employment relationship, regardless of the parties' intentions. Key factors examined in this regard include the provision of work, the payment of remuneration and the existence of a hierarchical relationship or degree of control.

Requalification of a service agreement as an employment relationship has significant consequences for both the company and the individual:

- the individual may acquire full employment rights under Dutch law, such as protection against dismissal, continued remuneration during illness, statutory holiday entitlement, holiday allowance and severance pay;
- requalified individuals may also gain access to the company's pension scheme, potentially giving rise to claims by the pension fund or insurer;
- the Dutch Tax Authority (*Belastingdienst*) may hold the company responsible for unpaid payroll taxes and social security contributions, potentially increased by interest and fines for late payment; and
- in certain situations, requalification can have retroactive effect. A court may rule that the engagement was in fact an employment relationship from the outset, giving rise to claims for back pay, holiday pay and other employment benefits for the entire preceding period.

In the due diligence phase, a purchaser must therefore carefully review all service agreements to assess the likelihood of requalification, as potential claims may create significant contingent liabilities for the target company. Given the substance over form assessment, a thorough due diligence investigation requires not only a review of the agreements themselves, but also of the Q&A process and management interviews.

Absence of written employment or service agreements

A surprisingly frequent finding in Dutch employment law due diligence is the complete absence of a written employment or service agreement between the target company and one or more of its directors, or the existence of an agreement at a different level – for instance between the shareholder of the target company and the director.

While Dutch law does not require employment or service agreements to be concluded in writing, and oral agreements are generally valid, the absence of formal documentation creates significant uncertainty regarding the terms and conditions governing the relationship. Under article 7:655 DCC, employers are obliged to provide employees with written particulars of the main employment conditions within one month of commencement. In practice, however, and particularly in cases involving founder-managers or long-tenured executives who moved into formal management roles over time, companies may operate for years without formalising these arrangements in comprehensive written agreements.

The absence of a written agreement with management creates multiple layers of risk for a purchaser. Without written agreements, there is no comprehensive record of the agreed salary, bonus entitlements, pension arrangements, notice periods or other employment benefits. This may give rise to disputes or claims after closing, potentially increasing the target company's liabilities. Furthermore, without written agreements, there are no enforceable non-competition, non-solicitation or confidentiality obligations. This becomes particularly problematic if key managers leave the target company after closing, as they may be free to compete with the purchaser's group – which will include the target company as of closing – or to solicit employees, clients or other contacts of the target company immediately after closing, which could materially and negatively affect the value of the business.

Missing covenants

When reviewing (template) employment or service agreements, we often find that they lack standard protective provisions that would typically appear in well-drafted documentation. This is particularly common with agreements that were drafted years ago and never updated, with outdated precedents, with documentation for employees who transitioned from other roles, and with standardised templates sourced online. We also anticipate that a similar trend will emerge with AI-drafted documentation in future due diligence investigations.

The most commonly missing provisions are:

- restrictive covenants, that is, provisions prohibiting employees and contractors from engaging in competing activities and/or soliciting customers, suppliers or employees of the target company;
- confidentiality clauses, that is, provisions obliging employees and contractors to maintain the confidentiality of, among other things, trade secrets and business information of the target company; and
- intellectual property clauses, that is, provisions governing the assignment of intellectual property rights created during employment or engagement.

The absence of these protective provisions creates significant vulnerabilities for the target company and for any potential purchaser. Without enforceable restrictive covenants, former employees and contractors can immediately compete or solicit customers, suppliers or employees of the target company. This is particularly problematic where a key contact of the target company is involved. It is important to note that, under Dutch law, restrictive covenants are only enforceable if they meet specific requirements: they must be in writing, cannot exceed a certain period, must be reasonably necessary to protect legitimate business interests, and must be sufficiently specific as to scope and geography.

The absence of clear IP assignment provisions can create significant uncertainty as to the ownership of inventions, software or other creative works developed by employees or contractors for the target company. Under Dutch law, IP rights in principle vest in the employer where the nature of the employment entails that the employee uses their special knowledge to make inventions or copyrightable works. To prevent uncertainty, however, it is preferable to agree clear provisions on the ownership of IP with employees involved in generating inventions or other IP-protected works. Ownership of contractor-created IP must generally be established by contract; in the absence of an explicit agreement, such rights in principle vest in the contractor. Even where contractual clauses exist, the scope of the employer's ownership may depend on whether the creation of the invention or work falls within the employee's actual job responsibilities. Inventions unrelated to the employment, made by the employee in their private time and without using the employer's resources, normally vest in the employee. We examine IP ownership and defects in title in more detail in Chapter 4.

A typical scenario is that the founders of the target company, working on the basis of a management agreement, developed software or created designs that are essential to the target company's business. If the founders did not transfer their IP rights to the target company by written deed, the company is likely to be using those rights on the basis of an implied licence, which the founders may be able to terminate. Ensuring that IP ownership is properly documented and, if necessary, that the relevant IP transfer deeds are executed prior to closing is therefore essential. Addressing these issues can affect transaction timing, as it may take considerable effort to identify all relevant IP, confirm ownership and obtain the cooperation of the relevant individuals. If the target company does not own the necessary IP and, in the worst case, cannot continue its business without it, this may result in a reduction of the enterprise value of the target company, or significant remedial measures may be required prior to closing.

Finally, the lack of an explicit confidentiality clause in an employment agreement may materially weaken the protection of the target company's sensitive business information. Although the Dutch Trade Secrets Act (*Wet bescherming bedrijfsgeheimen*) provides statutory protection for information qualifying as a trade secret – provided it is secret, has commercial value and is subject to reasonable protective measures – reliance on that framework alone places a relatively high evidentiary burden on the employer. Moreover, while employees are subject to implied duties of confidentiality under Dutch law, the scope and duration of those duties may be disputed in the absence of specific contractual arrangements, particularly after termination of employment. Well-drafted confidentiality clauses help to identify confidential information clearly and offer more predictable and enforceable protection.

Works council codetermination

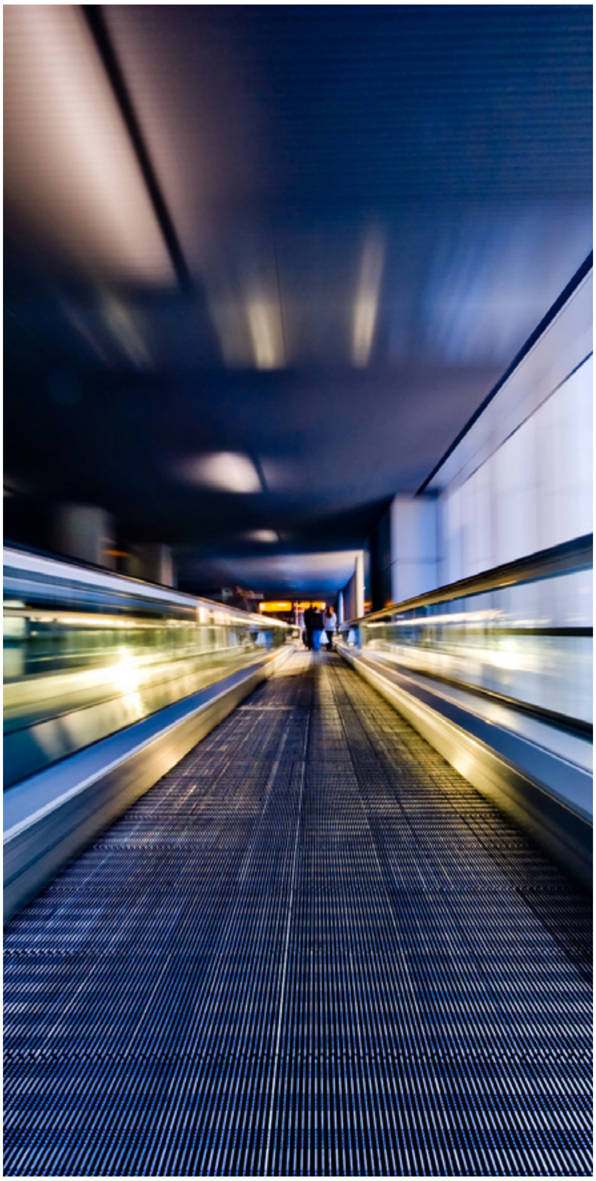
Under article 2 of the Dutch Works Councils Act (*Wet op de ondernemingsraden*) (WOR), companies that regularly employ at least 50 employees in the Netherlands are obliged to establish a works council (WC). Once established, the WC is vested with extensive statutory rights, including rights to information, consultation and consent in relation to a broad range of corporate and organisational decisions, including decisions relating to an M&A transaction. Common findings during employment law due diligence include:

- failure to comply with the statutory procedures for informing or consulting the WC;
- failure to obtain the WC's advice or consent where required; and
- in some cases, the complete absence of a WC despite the statutory obligation to have one.

From an M&A perspective, WC issues can materially affect both the timing and the legal certainty of a transaction. Article 25 WOR contains an exhaustive list of proposed decisions in respect of which the WC has a right of consultation. These include, among others:

- decisions relating to the transfer of control over the company or part thereof;
- the acquisition or disposal of control over another company;
- material changes to the organisation of the business or to the allocation of powers within the company; and
- the appointment of external advisers in connection with such decisions.

As a result, in an M&A transaction in which the purchaser, the seller and the target company each have a WC, all three parties may be subject to consultation obligations. Furthermore, these obligations may arise at an early stage of the transaction process, even before the transaction documentation is negotiated – as early as the moment an M&A adviser is engaged to provide advice in relation to the transaction.



When requesting advice, the target company must provide the WC with a detailed explanation of the rationale for the proposed decision, the anticipated consequences for employees, and any measures envisaged in response to those consequences. The advice must be requested at a point in time at which it can still meaningfully influence the decision-making process. In practice, the consultation process typically takes at least four to six weeks, and may take longer if the WC requests additional information or clarification.

Failure to consult the WC in accordance with the WOR, or proceeding in material deviation from a negative WC opinion, entitles the WC to initiate proceedings before the Enterprise Chamber of the Amsterdam Court of Appeal (*Ondernemingskamer*). At the request of the WC, the Enterprise Chamber may:

- order the entrepreneur to withdraw the decision in whole or in part;
- reverse the consequences of the decision; or
- prohibit acts aimed at implementing the decision.

This means that a deal can be blocked, or an obligation to reverse it can arise. While successful challenges to the validity of an M&A transaction remain rare in practice, WCs can and do seek injunctive relief that may delay closing and, in some cases, use their position as leverage to influence transaction-related governance arrangements or employee safeguards.

Finally, where due diligence reveals that a target company should have established a WC but failed to do so, this presents additional risks. Under the WOR, any interested party may request the subdistrict court (*kantonrechter*) to order the establishment or continued existence of a WC. In practice, employees – sometimes encouraged by trade unions – may request the establishment of a WC during the transaction process, which can lead to unexpected delays and tensions. From a purchaser's perspective, inheriting a company with a history of non-compliance with the WOR may also signal broader governance deficiencies that warrant closer attention.

Top 5 tips: assessing employment issues

1. **Engage works councils as early as possible:** involve works councils at the outset of the transaction process and build adequate time for consultation into your deal timeline. Statutory advice and consent obligations can materially affect transaction timelines, and early engagement reduces the risk of delay.
2. **Identify and secure IP:** identify all IP relevant to the target company's business and confirm ownership well before closing, so that any necessary IP transfers can be executed promptly and efficiently. Early planning helps to prevent delays in the transaction timeline.
3. **Consider conditions precedent:** if the target company does not own intellectual property that is critical to its business, make the transfer of that IP a condition precedent to closing in order to safeguard the value of the business.
4. **Expand your review beyond standard templates:** carefully review the agreements for key personnel and, where necessary, obtain confirmations through the due diligence Q&A and management interviews. Agreements for key personnel may deviate from the templates provided, or contain diverging terms that are not immediately apparent.
5. **When reviewing restrictive covenants, focus on enforceability:** ensure that restrictive covenants comply with Dutch statutory requirements, as non-compliant covenants may be void and unenforceable, leaving the target company without the protection it assumed it had.

Chapter 4

Intellectual property red flags

This chapter examines common red flag findings encountered during legal due diligence review on intellectual property rights (IP rights) in Dutch M&A transactions. The topics covered are:

- unclear ownership and defects in title;
- missing IP rights provisions in agreements with employees or contractors;
- trade secrets, unregistered rights and pre-filing disclosure risks; and
- restrictive provisions in licence agreements.

Throughout, we highlight the importance of tailoring the due diligence review to the nature of the target company's IP rights, and explain how an IP rights review often reveals issues that can materially affect valuation and even deal certainty.

What to cover during IP rights-focused due diligence

There is no "one-size-fits-all" approach to IP rights due diligence. The appropriate scope, depth and methodology must be tailored to the specific nature of the IP rights used in the target company's business. In practice, IP rights due diligence is often confined to verifying ownership of registered rights – such as patents, trade marks and designs – and a high-level review of software licences. Unregistered rights and the adequacy of the target company's IP protection measures are frequently overlooked.

Unregistered IP rights

Unregistered IP rights include, most notably, copyright, unregistered designs and confidential know-how such as trade secrets and R&D data. The legal protection of such rights is inherently conditional upon the implementation of adequate protective measures by the rights holder.

Where protection and commercialisation through patents is contemplated, strict confidentiality of the relevant invention prior to filing is essential. Any disclosure of the invention before the filing date may destroy its novelty and thereby jeopardise patentability. Under applicable patent law, an invention is considered to lack novelty if it has been made available to the public before the filing date in such a way that it forms part of the "state of the art", that is, all information made available to the public anywhere in the world, in any form, before that date. This includes any disclosure that enables a person skilled in the art to access or derive the technical teaching of the invention.

A comparable principle applies to registered design rights under Benelux and EU law. As a general rule, a design must be new and possess individual character at the filing date. Novelty is lost if the design has been made available to the public prior to filing, subject to limited grace periods under EU design law. A design is deemed to have been made available to the public if it has been disclosed in such a way that it could reasonably have become known, in the normal course of business, to the circles specialised in the sector concerned operating within the European Union, irrespective of where the disclosure originally took place. Accordingly, a disclosure in, for example, China or the United States may equally destroy the novelty of a Benelux design if that disclosure could reasonably have become known within the relevant sector in the European Union.

Inadequate control over pre-filing disclosures – whether through publications, marketing activities, customer interactions or internal leakage – can therefore materially impair the availability and enforceability of both patent and design protection, and should be a key point of attention in any due diligence exercise.

While premature disclosure may jeopardise patent and design protection, the position is even more stringent for trade secrets, where protection depends entirely on the existence of secrecy in the first place. Under article 1 of the Dutch Trade Secrets Act (*Wet bescherming bedrijfsgeheimen*), information qualifies as a trade secret only if it:

- is secret, in the sense that it is not generally known or readily accessible to persons within the circles that normally deal with such information;
- has commercial value because it is secret; and
- has been subject to reasonable steps, under the circumstances, by the person lawfully in control of the information to keep it secret.

This legal framework creates a fundamental methodological difficulty for due diligence purposes. Unlike registered IP rights, trade secrets cannot be assessed through traditional "title due diligence". Their very existence and enforceability depend on whether the target company has implemented appropriate confidentiality policies, access controls and contractual safeguards vis-à-vis employees, contractors and business partners. Where such measures are absent or insufficient, trade secrets may not benefit from legal protection at all, irrespective of their commercial importance or the investment made in developing them.

Unclear ownership and defects in title

One of the most frequently encountered findings in an IP rights due diligence investigation is that the target company is not the legal owner of all IP rights that are material to, or appear to be used in, its business. This finding can take several forms:

- IP rights may be registered in the name of an affiliated company or person, such as the founder of the target company, rather than in the name of the target company;
- assignment agreements may be absent or invalid; or
- the chain of title may be unclear or inadequately documented.

A particularly problematic issue arises where IP rights have been developed by multiple parties over time without proper documentation of the transfers at each stage. This scenario occurs frequently in relation to software. By way of illustration, a software application may initially have been developed by a founder, subsequently modified by employees, and later further enhanced by external third-party contractors. If written assignments have not been duly obtained from each contributor for each phase of development, the chain of title may become fragmented and uncertain. In such circumstances, it may be practically impossible to determine which party owns which elements of the relevant IP rights, and whether the target company has legal title to use them.

This risk is further amplified in the context of AI-assisted development. Increasingly, content, code and other outputs are generated with the assistance of AI systems. However, recent case law and the prevailing view among IP scholars indicate that such outputs may fall outside the scope of copyright protection. Copyright protection requires that a work constitutes the author's own intellectual creation, reflecting free and creative choices attributable to a human author. Where output is generated through the operation of (semi-)autonomous algorithms, the resulting content will in many cases not qualify as a copyright work of the user providing the input, as the final form of the output is not sufficiently determined by human creative control.

Accordingly, even where the input provided to an AI system is highly original, creative and commercially valuable, this does not necessarily result in output that qualifies for copyright protection. This gives rise to a structural risk in transactions involving AI-assisted development, including uncertainty as to the ownership, enforceability and exclusivity of key outputs. In such circumstances, protection may need to be secured through mechanisms such as contractual arrangements and trade secret protection. Consideration may also be given to evidentiary or quasi-protective tools, such as the i-DEPOT system of the Benelux Office for Intellectual Property, rather than reliance on traditional copyright regimes.

This risk is especially pronounced for software and other works that are subject to continuous development and iteration. Under Dutch copyright law, derivative works are protected independently of the underlying work. However, both the creation and the exploitation of a derivative work require the consent of the owner of the underlying work. As a result, deficiencies in the chain of title at any stage may materially impair the target company's ability to exploit its IP rights lawfully.

Under Dutch law, ownership of IP rights does not automatically vest in a company simply because it commissions, pays for the development of, or uses those rights. Ownership of IP rights is acquired either originally, through creation by the rights holder, or derivatively, through a valid transfer from the original rights holder as assignor to an assignee. Different categories of IP rights may be governed by distinct legal frameworks with fundamentally different requirements for their creation, protection and enforcement. The following applies across the main categories of IP rights.

- **Copyright.** Under article 7 of the Dutch Copyright Act (*Auteurswet*), unless agreed otherwise, the employer is deemed to be the maker of works created by an employee in the course of employment. This statutory allocation does not extend to the employee's moral rights (*persoonlijkheidsrechten*), which remain with the natural person. Moreover, the exception does not apply to works created by independent contractors, consultants or other third parties, irrespective of whether their activities were commissioned and remunerated by the target company. Consequently, for the target company to acquire full and undisputed ownership of copyright in commissioned works, or in works created by non-employees, an explicit written assignment is required.
- **Patents.** Under the Dutch Patents Act 1995 (*Rijksoctrooiwet 1995*), the right to apply for and own a patent initially vests in the inventor. An important statutory exception applies where an employee makes an invention in the execution of an employment agreement that includes an obligation to perform inventive activities; in that

case, the employer has the right to the patent (article 12 of the Dutch Patents Act 1995). In practice, several issues frequently arise. First, it may be unclear whether the employee's role and employment agreement indeed include an obligation to perform inventive work. Second, the statutory allocation does not apply to inventions created by independent contractors, consultants or other third parties. Third, even where the employer is entitled to the patent by operation of law, it is generally advisable to have formal assignment documentation in place in order to avoid disputes and, in the context of M&A, to satisfy the documentary requirements of potential purchasers.

- **Trade marks and designs.** Trade mark and design rights are established through registration or, in certain cases, through use (in the case of trade marks) or disclosure (in the case of unregistered Community designs). Registered rights offer significantly greater legal certainty and enforceability, and the person or legal entity recorded in the relevant register is presumed to be the owner of the right. If a trade mark or design is registered in the name of a person other than the target company, such as the founder, the target company will generally lack enforceable rights against third parties, even where there is an informal understanding that the founder holds the rights on behalf of the target company. A valid assignment must therefore be executed in accordance with the applicable formalities and recorded in the relevant register in order to be effective against third parties. Registered IP rights also require ongoing maintenance, including the timely payment of renewal fees and, in the case of trade marks, genuine use. Failure to comply with these requirements may result in the lapse or cancellation of valuable rights.
- **Internet domain names.** In a strict legal sense, internet domain names are not IP rights. A domain name is not owned in the way a copyright or patent is owned; rather, it involves a contract with a registrar – such as ICANN or, for the Netherlands, SIDN – for the exclusive right to use the name for a specified period. Given the importance of the internet for information and sales, domain names may nevertheless be extremely valuable to a company's business. Typical problems encountered in IP rights due diligence include domain names registered by and in the name of the founder, of other group companies, or even of individual employees such as the IT manager. It is also frequently found that the identity of the registrant is not publicly disclosed by the registrar.
- **Trade secrets and confidential know-how.** Trade secrets and confidential know-how are protected under Dutch law through a combination of contractual arrangements, the Dutch Trade Secrets Act (which implements the EU Trade Secrets Directive) and general principles of tort law (*onrechtmatige daad*). Unlike registered IP rights, "ownership" of trade secrets is a less clearly defined concept. Where trade secrets or know-how have been developed by employees or third-party contractors, the target company's rights depend on the existence of adequate confidentiality policies and assignment provisions. In the absence of such policies and provisions, it may be difficult for the target company to establish exclusive rights to that know-how.

The impact of unclear ownership or defects in title will largely depend on the materiality of the IP rights concerned. Where those rights constitute core assets, defects in title may be deal-critical and, in extreme cases, may lead to the transaction being aborted altogether if valid ownership by the target company cannot be established or obtained. Where possible, a purchaser will typically require full remediation prior to closing, commonly achieved through the inclusion of one or more conditions precedent in the transaction documentation obliging the seller to procure valid written assignments from all persons or legal entities that may hold rights to (parts of) the relevant IP rights. Such assignments must identify the transferred rights with sufficient specificity; broad or generic formulations such as "all rights are transferred" may be inadequate to effect a valid transfer. In the case of registered IP rights, any transfer of ownership must also be duly recorded in the relevant registers in order to be effective against third parties.

Even where the affected IP rights are not business-critical, defects in title give rise to residual legal and commercial risks that must be factored into the overall deal assessment and appropriately addressed in the transaction documentation. Third parties may assert (co-)ownership claims, potentially resulting in costly litigation, injunctions restricting the target company's use or exploitation of the IP rights, and claims for damages or other financial compensation.

Resolving title defects can have a material impact on transaction timing and execution. Identifying all relevant IP rights, verifying ownership, tracing historical contributors and securing their cooperation to execute the necessary documentation can be a time-consuming and resource-intensive process that may delay signing or closing. If the target company is involved in IP rights litigation, this may even bring a transaction to an end.

Missing IP rights provisions

Another common finding, which we also touched on in Chapter 3 on employment law due diligence, is the absence or inadequacy of contractual provisions addressing IP rights in agreements with employees, independent contractors, freelancers, consultants and other third-party service providers. While many companies include some form of IP clause in their standard employment and contractor agreements, these provisions are frequently incomplete, inadequate or ambiguous – and sometimes entirely absent.

The absence of clear IP rights assignment provisions can create significant uncertainty as to the ownership of IP rights. As set out above, ownership of employee- or contractor-created IP rights must generally be established by contract; in the absence of an explicit agreement, such rights do not in general vest automatically in the employer or service recipient. Even where contractual clauses exist, the scope of the employer's ownership depends on whether the creation of the invention or work falls within the employee's actual job responsibilities, which can be ambiguous without precise contractual definitions.

The consequences of missing or defective IP rights provisions can be far-reaching:

- the target company may lack clear ownership of critical assets;
- third parties may retain rights to use or commercialise IP rights independently; and
- the target company may be exposed to claims for additional compensation or profit-sharing from individuals who contributed to the development of the IP rights.

Restrictive licences and change of control clauses

Many target companies do not own the intellectual property rights essential to their business operations, but instead rely on licences granted by third parties. Such IP rights licences frequently contain restrictive provisions, including:

- limitations on the licensee's ability to transfer, assign or sublicense the licensed rights; and
- termination or renegotiation rights triggered by a change of control of the licensee.

While licensing arrangements are a common and often efficient feature of modern commercial operations, they inevitably introduce dependencies and vulnerabilities that can materially affect the timing, the valuation and, in some cases, even the feasibility of an acquisition. For the content and impact of change of control clauses generally, we refer to Chapter 1, in which we address these aspects in detail.

Where critical IP rights are licensed rather than owned, restrictive licence terms can give rise to significant transaction risk. In extreme cases, the licensor's right to terminate the licence or to withhold consent to a change of control may grant the licensor a de facto veto over the transaction. As a result, the purchaser's ability to continue the target company's business after closing may become contingent on obtaining third-party consent. Securing such consent can be a time-consuming and uncertain process, potentially delaying the transaction. In addition, licensors who become aware that their consent is required may seek to use that leverage to renegotiate licence terms to their advantage. Finally, restrictions on the transfer, assignment or sublicensing of licensed IP rights may materially limit the purchaser's intended post-closing integration strategy or its future exit options, thereby directly affecting the overall transaction rationale and value.

Top 5 tips: assessing IP rights issues

1. **Tailor the IP rights due diligence to the nature of the target company's IP rights:** assess whether the scope, depth and methodology of the review are appropriate for the type of IP rights used by the target company.
2. **Take the purchaser's post-closing plans into account:** if the target company relies on licences granted by third parties, factor the purchaser's post-closing plans for the target company and its IP rights into the review of those licences.
3. **Identify transaction-triggered provisions:** analyse whether the contemplated transaction, or events occurring in connection with it, may trigger any change of control provisions in IP rights licence agreements or other material contracts.
4. **Include appropriate conditions precedent in the transaction documentation:** if the target company does not own or validly license IP rights that are critical to its business, or if a dispute exists in that respect, make the transfer, assignment or licensing of those IP rights, or the settlement of the dispute, a condition precedent to closing in order to safeguard the value of the business.
5. **Obtain the required documentation early:** establish which assignments, waivers and approvals are required and from which parties, engage with the relevant stakeholders and start the process of obtaining the necessary documentation as soon as possible in order to avoid delays.

Chapter 5

Real estate red flags

In this final chapter, we examine several of the most recurrent real estate due diligence findings and analyse their practical implications for M&A transactions. The focus is on situations in which the target company's right to use key premises is legally or contractually uncertain, including:

- the absence of written lease documentation;
- the existence of unauthorised subletting arrangements; and
- the presence of change of control provisions in lease agreements.

Absence of a lease agreement

The absence of a formal lease agreement is one of the most common findings of our real estate practice in due diligence investigations. This situation arises where a target company uses premises that are essential to its business operations without any written lease documentation in place. There are generally a number of reasons why no written lease documentation exists:

- the parties involved originally relied on an oral arrangement;
- a previously executed lease expired and was tacitly continued; or
- the property is owned by a shareholder or affiliated group entity of the target company and the parties did not consider it necessary to formalise their arrangements contractually.

Particularly in family businesses or long-standing commercial relationships, the parties may operate for years on the basis of mutual trust without considering the legal implications of their arrangements.

Under Dutch law, a lease is not required to be in writing in order to be legally valid. Pursuant to article 7:201 DCC, a lease arises where one party grants another the use and enjoyment of an asset in exchange for consideration, irrespective of whether the agreement is documented. While factual use may therefore constitute a legally enforceable lease relationship even without written documentation, the absence of such documentation gives rise to considerable legal uncertainty. Key commercial and legal parameters of the lease – such as its duration, the grounds for termination, the rent and any indexation mechanism, maintenance and repair obligations, service charge arrangements and insurance responsibilities – are in those cases determined by the conduct of the parties and the surrounding circumstances (*omstandigheden van het geval*). This leads to evidentiary uncertainty and may increase the likelihood of divergent interpretations and potential disputes.

From an M&A perspective, the absence of a written lease agreement for premises that are material to the target company's business constitutes a significant risk. A purchaser will generally require certainty that the target company will continue to have enforceable and clearly defined rights in respect of the premises following closing, together with transparency as to the associated financial obligations. If such certainty is lacking, this must be addressed in the transaction documents prior to closing, typically by making the negotiation and execution of a written lease agreement on terms acceptable to the purchaser a condition precedent. Contacting the landlord in this regard not only affects the timing of the transaction, but may also bring additional risks if the landlord uses the opportunity to negotiate more favourable terms, or even to terminate the lease.

Situations in which the target company does not have a direct lease agreement in place are particularly common in carve-out transactions, where a business unit or division is separated from a larger corporate group and sold. In carve-out scenarios, the target business frequently operates from premises that are leased by, or otherwise held in the name of, a group entity other than the entity being carved out. This may leave the target business with no direct contractual relationship with the landlord, relying instead on informal intra-group arrangements that may never have been formalised or that lack the landlord's prior approval.

For the benefit of the carved-out business, the seller will need to secure an independent right for the business to continue using the relevant premises, which will typically require the negotiation of a new lease agreement directly with the landlord, or the landlord's approval of an existing sublease. In the interim, the use of the premises may be covered by transitional services arrangements, subject to the exact contractual terms of the main lease.

Where a transaction involves a target company that was carved out in an earlier transaction and is now being sold again, careful review of both the target company's lease arrangements and the arrangements implemented in the earlier carve-out will be required.

Unauthorised subleases

A further frequently encountered due diligence finding is the existence of sublease arrangements entered into by the target company without the landlord's consent where such consent is contractually required. These situations arise in a variety of contexts, including where the target company sublets surplus space to third parties, or allows affiliated group companies to use part of the premises without formal approval.

Under Dutch law, a sublease is legally dependent on the main lease from which it derives. The tenant cannot confer more extensive rights than it holds itself, and the continued existence of the sublease is therefore contingent upon the continuation of the principal lease. Lease agreements often contain provisions prohibiting or restricting the assignment and subletting of the leased property, in the latter case frequently requiring the landlord's prior written consent. If a tenant grants a sublease in breach of such provisions, this constitutes a contractual default which may, depending on the wording of the lease agreement, entitle the landlord to invoke certain remedies, including termination of the main lease. Notwithstanding the breach vis-à-vis the landlord, the sublease remains valid and binding between the tenant and the subtenant. This creates a layered legal structure in which the target company, if it is the tenant under the main lease, is simultaneously exposed to enforcement risk under the main lease and contractually bound to the subtenant. Since the subtenant's rights are derivative in nature, termination of the main lease will typically cause the sublease to fall away, thereby undermining the legal basis for the subtenant's occupation.

In the transactional context, unauthorised subletting may have implications for both deal certainty and valuation. From a risk perspective, an ongoing breach introduces the possibility that the landlord takes enforcement action. From a commercial perspective, subleases may represent a material source of income for the target company, or be operationally relevant where affiliated group entities share the premises. If the sublease is material to the continuation of the business, the purchaser will require assurance that it will continue after closing, typically by insisting on a condition precedent in the transaction documentation requiring the landlord to provide explicit consent to the sublease.

Change of control provisions

We often encounter change of control provisions in lease agreements. These can take various forms, ranging from provisions requiring the target company to notify the landlord in the event of a change of control, to more stringent provisions requiring the target company to obtain the landlord's prior written consent, or allowing the landlord to terminate, amend or renegotiate the lease agreement in the event of a change of control over the target company. If the landlord is not adequately informed or asked to provide consent, this may constitute a breach of the lease agreement, potentially allowing the landlord – depending on the drafting of the lease – to terminate it.

For a more detailed analysis of change of control provisions, we refer to Chapter 1, which addresses this topic comprehensively.

Top 3 tips: assessing real estate issues

1. **Formalise undocumented arrangements early in the process:** if the use of the premises is based on informal or historic arrangements, engage with the landlord at an early stage to assess their willingness to formalise the relationship, as late-stage negotiations may lead to delays.
2. **Verify the main lease whenever a sublease is in place:** always review the main lease agreement alongside any sublease, as the subtenant's rights are derivative and cannot exceed those of the tenant, bearing in mind that termination or breach of the main lease may undermine the legal basis of the sublease entirely.
3. **Translate real estate findings into specific contractual protections:** ensure that identified risks are reflected in tailored conditions precedent, warranties or indemnities, rather than relying solely on generic warranties.

In closing

Bringing the five findings together

The five findings in this guide come from five very different areas of law: contract, corporate, employment, intellectual property and real estate. Yet the same three patterns recur across all of them.

Hidden in plain sight: day-to-day arrangements bringing transaction-level risks

Boilerplate change of control wording. A pre-2012 set of articles of association. A management agreement that was never signed. An IP clause copied from a template. Premises used on the basis of a handshake. In day-to-day operations, arrangements such as these may function without any (apparent) issues for years. It is then only in the context of a transaction that such arrangements are placed under close scrutiny; if any arrangements are found not to be legally watertight, they might require remediation before closing, additional protections in the transaction documentation or, potentially, an adjustment to the purchase price.

The full picture: reading documents in context

Findings emerge from the interaction between documents at least as often as from any single document in isolation. This is why, for example, articles of association should be read against the shareholders' agreement, subleases against the main lease and employment templates against the agreements actually signed with (key) employees. Equally important is that each document must be assessed in the broader context of the transaction itself, whereby the due diligence review should pay attention to factors such as the target company's sector, the parties and other stakeholders involved, the dynamics at play, and what the purchaser intends to do with the business after closing. A due diligence review that examines documents in isolation, without regard for their interplay or the wider transactional context, will inevitably leave material risks undetected.

Early identification: why timing is crucial

There are many ways to address a due diligence finding. Where the chosen solution requires a deliverable from a third party, such as a waiver, consent, corporate resolution, notarial deed, works council advice or an IP transfer deed, it is important to note that such deliverables often take longer to obtain than the involved parties expect and a third party's interests might not be aligned with that of the parties involved in the transaction or the deal timetable. If identified early, issues can be remedied and the required deliverables can generally be obtained within the envisaged transaction timeline. If identified late, the consequences may be more difficult to manage: delays to the transaction process, the need for alternative solutions such as (additional) protections in the transaction documentation, adjustments to the purchase price, or, in exceptional cases, potentially the abandonment of the transaction.

Key takeaways for purchasers

A purchaser's due diligence review should be shaped by two perspectives: what the target company's business depends on today, and what the purchaser intends to do with it after closing. Key commercial relationships, the corporate structure, employment and management arrangements, intellectual property ownership and the legal basis for the use of essential premises all need to be assessed – not only on their own terms, but in the context of the transaction as a whole, including the parties involved, the sector dynamics and the purchaser's post-closing integration plans. Material findings should be raised with the seller as soon as they surface, so that issues can be addressed and built into the transaction timeline. Where remediation is required, the purchaser should assess whether a realistic path to resolution exists and, where appropriate, translate findings into specific conditions precedent, warranties and indemnities rather than relying on generic contractual protection.

Key takeaways for sellers

A seller that reviews the target company's key documents before entering into an M&A process, is better positioned to identify and address potential issues upfront and on its own terms. Proactive preparation allows the seller to remediate findings before they surface in a purchaser's due diligence review, to timely engage counterparties and other stakeholders, and to demonstrate control and transparency throughout the process.

How we can help

Talk to our team

Our Corporate M&A team runs legal due diligence investigations on Dutch transactions across every area covered in this guide, working alongside our employment, intellectual property, real estate and notarial specialists. Whether you are preparing a business for sale, assessing a target or working through findings that have already surfaced, we would be pleased to advise you and provide guidance tailored to your situation.

Questions we are regularly asked

- Does a particular situation qualify as a change of control event under Dutch law, and what are the legal implications of a change of control clause in our contracts?
- Does a specific situation give rise to a mandatory share offering obligation, and does a given person meet the quality requirements set out in the articles of association?
- Is there a requalification risk in respect of a particular contract, what rights does a works council have in a specific situation, and must a works council be established at all?
- Are a company's IP rights validly owned or licensed, does certain information qualify as a trade secret, and how does this affect risk allocation in the transaction documents and any post-closing plans?
- What terms and conditions apply to a (sub)lease of certain premises, and might a change of control clause be triggered?

Your contacts

This publication was edited and written by:

Deniz Xinyi Bussing

Friederike Henke

For each chapter, colleagues from the respective BUREN practice group contributed.
Commercial & Intellectual property: Philip ter Burg and Julia Mascini
Employment: Epke Spijkerman
Notarial practice: Jan Greijdanus
Real estate: Ulrich Koeze

Amsterdam

World Trade Center
Tower Seven - level 14
Strawinskylaan 1441
1077 XX Amsterdam
The Netherlands

PO Box 78058
1070 LP Amsterdam
The Netherlands

T +31 (0)20 333 8390

Beijing

Pacific Century
Building C
A2 North Gongti Road
Chaoyang District
100027 - Beijing
China

T +86 (10)8 5235 780

The Hague

Schenkkade 50
2595 AR The Hague
The Netherlands

PO Box 18511
2502 EM The Hague
The Netherlands

T +31 (0)70 318 4200

Luxembourg

5, rue Goethe
L-1637 Luxembourg
Luxembourg

T +352 (0)2644 0919

Shanghai

Room 1661
Building B
North KaiXuan Road 1188
200063 Shanghai
China

T +86 (21)6 1730 388

burenlegal.com

BUREN
LEGAL | TAX | NOTARY