The pursuit of a company's interest over the life of a company

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General Reporters:

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Introduction

The typical lifecycle of a company consists of various phases, as for example, startup, growth phase, maturity (mid- to large-size privately held company), IPO and listed phase, and finally the acquisition by another company.

The various stakeholders in a company – understood in a very broad sense including equity holders, debt holders, management, employees, advisors and public – have expectations in the company. According to the stakeholder-value-theory all these expectations of the stakeholders form the company's interest.

Undoubtedly, the expectations of the various stakeholders and, therefore, the company's interest change and develop over the life cycle of the company.

The general report and the working session focus on these changes and developments, how they are reflected resp. influenced by the rules of the various jurisdictions and what the consequences are for us, the legal advisors. For efficiency reasons, the general report is limited to the developments of certain stakeholders' expectations (see A to D in the below matrix)

The following matrix provides an overview of the stakeholders (A to D) and the phases (1 to 5) that are covered by this general report. At the same time it provides an overview of the structure of this questionnaire (chapters A to D, each having sub-chapters 1 to 5). Our goal is to shed light on one or several aspects of a specific stakeholder's interests in each phase so that, as a result, the entire questionnaire provides an overview of the development of the interests of the various stakeholders over the life cycle of the company and, thus, shows the development of the company's interest as such.

	1. Startup	2. Growth	3. Maturity	4. IPO / Listed	5. Acquisition
A. Equity holders	A.1	A.2	A.3	A.4	A.5
B. Debt holders	B.1	B.2	B.3	B.4	B.5
C. Management / Employees	C.1	C.2	C.3	C.4	C.5
D. Lawyers	D.1	D.2	D.3	D.4	D.5

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A. Interest of equity holders

1. Start-up phase

In the start-up phase, an entrepreneur or third parties may wish to invest in a business idea as equity holders in a business association. In this context:

1.1 In your opinion, what is an entrepreneur's typical reasoning for setting up a specific business association? Attract investments by third parties? Avoidance of personal liability? Tax reasons? Protect IP rights and technology?

The reason for an entrepreneur for setting up a specific business association can be diverse. Some entrepreneurs have the know-how but lack financial means. By setting up a business association they can attract the required financial means to start up the business. Other entrepreneurs have the financial means but no know-how and are looking for good investment opportunities. Any entrepreneur will be inclined to set up a business through a limited liability company in view of avoiding personal liability, especially in high-risk endeavors. The incorporation of a company will allow to carry forward any accumulated losses and set off those losses with any future profits (under specific conditions) and will thus allow tax optimizing. Most often company tax rates, combined with specific deductions, will result in a more profitable tax regime than the personal income tax regime.

1.2 What kind of business association structures does your jurisdiction offer to equity holders (e.g., partnerships, corporation, LLC, etc.)?

- ***What are the most crucial differences between these business association structures from an equity holder's perspective?***
- ***If statistics on the use of business association structures are available in your jurisdiction: which are the most commonly used business association structures for start-ups? Do you see a particular reason for the dominance of one specific structure?***

Belgian company law recognizes the commercial company in various forms. The most common forms of commercial companies are: the Public Limited Liability Company ("*naamloze vennootschap/société anonyme*"), the Private Limited Liability Company ("*besloten vennootschap met beperkte aansprakelijkheid/société privée à responsabilité limitée*") the Co-operative Company ("*Coöperatieve vennootschap/société coopérative*") and the European Economic Interest Grouping. All of the aforementioned companies have, however, distinct legal personalities. Belgian company law also recognizes three types of enterprises without legal personality: the partnership ("*maatschap/la société de droit commun*"), the temporary commercial company ("*tijdelijke handelsvennootschap/la société momentanée*") and the company in participation ("*stille handelsvennootschap/la société interne*"). The Public Limited Liability Company and the Private Limited Liability Company are however most often used and this article will be limited to these company forms.

The most crucial differences between the Public Limited Liability Company and the Private Limited Liability Company can be summarized as follows.

(i) Public Limited Liability Company ("*naamloze vennootschap/société anonyme*")

The minimum capital requirements and the minimum amount of the paid-up capital will depend on the form the company will take. In the case of a Public Limited Liability Company, the minimum share capital of 61,500 EUR must be fully subscribed. Upon incorporation, the share capital should be paid up to at least EUR 61,500 and each share should be paid up at least to one fourth. The share capital can also be subscribed in kind, but this requires a valuation report from an authorized auditor. The shares are freely transferable.

The Public Limited Liability Company requires a minimum of two shareholders, who may be natural persons or legal entities (Belgian or foreign).

The General Shareholders' Meeting shall appoint at least three Directors, except when there are only two shareholders in which case there can be only two Directors. These Directors do not have to be shareholders. There are also no residence or nationality requirements. All management powers, except these which are assigned by law or by the articles of association to the General Shareholders' Meeting of the company, are in the hands of the Board of Directors. The term of office of the Directors is granted by the General Shareholders' Meeting and may not exceed six years. The Directors may be re-elected by the General Shareholders' Meeting but also dismissed by it at any time and without justification.

The day-to-day management of the company's affairs may be delegated by the Board of Directors to one or more Directors or even to one or more persons who are not members of the Board of Directors, such as managers or employees.

(ii) Private Limited Liability Company ("*besloten vennootschap met beperkte aansprakelijkheid/société privée à responsabilité limitée*")

The Private Limited Liability Company is formed by one or more natural persons or legal entities. The shares are also transferable but under certain specific conditions. The minimum capital amounts to 18,550 EUR and must be fully subscribed to and, upon incorporation, paid up to the extent of a third (i.e. 6,200 EUR). This form of company allows that only one general manager is appointed. The general manager is appointed by the shareholder(s) and no maximum term of the general manager's mandate is determined by law. In case the general manager's mandate is limited to a specific duration, he may always be re-elected. If the general manager is appointed in the articles of association, he can only be dismissed by unanimous decision of the shareholders or for serious case, unless the articles of association determine differently. If the general manager is not appointed in the articles of association, he can be dismissed at any time by a majority decision of the shareholders, unless the articles of association determine differently.

In summary, companies that require a lot of capital will most often be incorporated as Public Limited Liability Companies. Those companies also allow a diversity of financial instruments and the transfer of shares is less formal than the transfer of shares in the Private Limited Liability Company which is preferred by financing parties.

Furthermore, the Private Limited Liability Company is often used by US shareholders in order to comply with the US check-the-box requirements. Also, the more strict transfer of shares regime will be the preferred option for certain stakeholders. For instance, an engineer with a high-value know-how will try to preserve control by having his appointment as general manager stated in the articles of association and simultaneously by preserving a 25% share in the company and thus preventing his dismissal while still allowing external financers to take a 75% share in the company and provide liquidity.

- ***In case of a corporation or LLC (in the following we simply refer to the "company"): are there any equity instruments other than common shares that are typically used for equity investments? Non-voting shares? Other forms of participation rights?***

The Public Limited Liability Company can issue shares (with or without voting rights), profit shares, obligations, convertible obligations and warrants.

The Private Limited Liability Company can only issue obligations and (registered) shares (with or without voting rights).

To promote equity investments, apart from “regular” shares, use is made of non-voting shares (entitling its holder to dividends, if any, without having any voting rights unless under very specific conditions), profit shares (entitling its holder to dividends) and convertible obligations (which will only be converted into shares if the financing party to whom such obligations were granted, can generate additional profits by doing so; mMeanwhile, the issuing company will have to pay interests to the financing party subject to the conditions of the obligation/loan).

- ***Can equity investors remain anonymous (for example by the use of bearer shares)? Anonymous towards the company, other investors, the public? In the event equity investors cannot remain anonymous when holding shares, is there any alternative scheme that can be implemented to participate on an anonymous basis (for example, silent partnership schemes)?***

In Belgium, there is no public register of shareholders. As such, the shareholders of Private and Public Limited Liability Companies are unknown to the public. Under Belgian law, bearer shares only existed for Public Limited Liability Companies. The law of 21 December 2013, however, sets out the last phase of the dematerialisation process of bearer securities (which process was implemented by the law of 14 December 2005 on the abolition of bearer securities that stated that bearer securities were supposed to be converted by their owners into dematerialised securities or registered securities at the latest by 31 December 2013). As from 1 January 2014, non-converted bearer securities were supposed to have been converted, automatically and by law, into dematerialised or registered securities and registered in the shareholders’ register (for registered securities) or in an account (for dematerialised securities) in the name and for the account of the company that issued the securities. As such, bearer shares of the Public Limited Liability Companies are no longer an option to remain anonymous vis-à-vis other shareholders, the company or the public.

Belgian law recognizes two other company forms in which a certain degree of anonymity is preserved, but which are less interesting due to their incomplete legal personality (and thus personal liability of some of the shareholders): the limited partnership ("*gewone commanditaire vennootschap/société en commandite simple*") and the partnership limited by shares ("*commanditaire vennootschap op aandelen/société en commandit par actions*").

The limited partnership is formed by one or more partners which are jointly and severally liable for the debts of the partnership (the managing partners) and one or more partners which only invest in the partnership and are only liable for the amount which they have agreed to invest (the silent partners). The limited partners can take no part in the management of the partnership nor can their name appear in the name of the partnership. If the silent partners do take part in the management or their name appears in the name of the partnership, they will be held jointly and severally liable with the managing partners for the liabilities of the partnership.

The partnership limited by shares is a company with two types of shareholders. The first type of shareholder is jointly and severally liable for the liabilities of the partnership and manage the partnership (the managing partners).The liability of the second type of shareholder is limited to the capital contribution made to the partnership (the silent partners). The silent partner must refrain from involvement in the management.

1.3 Once the entrepreneur has set up a company: what could be a typical focus of third party equity investors when they invest in a company in this phase?

- ***What could typically be the friends', family's and fools' ("FFF") focus? Helping the entrepreneur to get his / her business going?***

A starting entrepreneur will generally first turn to friends and family to gather the required funding for the start-up. This can either be realized by making them shareholder in the company or by asking them for a loan. The entrepreneur will be inclined to convince the FFF to acquire shares since this limits the entrepreneurs' financial risk (compared to a loan for which interests have to be paid in any event, whereas dividends will only be distributed to shareholders if the company makes a profit).

In case the entrepreneur enters into a loan agreement in view of obtaining the necessary financing, it is not uncommon for the loan to be made subordinate to any other financing arrangements entered into by the company/entrepreneur. In effect, loans will be considered by other creditors as being equity insofar the loan is subordinated vis-à-vis the other liabilities of the company since subordinated loans will only be reimbursed once all other liabilities/loans have been reimbursed in the event of a liquidation of the company. Subordinated loans will ensure that financial institutions will be less reluctant to grant a "regular" bank loan.

- ***What could typically be the professional investor's focus?***

In the start-up phase, the professional investor will try to limit as much as possible the financial risk while maximizing the potential profits. In that context, they will be less inclined to acquire shares in the company but prefer to provide a loan by means of an obligation. If the company

does well, the convertible obligation will be converted in shares allowing the investor to maximize dividends. If the company struggles, the investor will receive the interests on the obligation.

- ***If there is a difference in focus among the various equity investors, how is this typically reflected in the legal relationship (be it corporate or contract law)? Are there legal instruments that are only used by certain investors (e.g., only by professional investors)?***

The start-up phase is a phase wherein typically few contractual arrangements are made. The founders of the company will have control of the company and they will rely upon previous arrangements which are most likely not formalized in written agreements. Similarly, any arrangements with FFF are not likely to be formalized and no specific instruments are used in the start-up phase with respect to co-founders and FFF. Should business angels get involved in the company, then written agreements will be entered into but such involvement is less likely in the start-up phase.

2. Growth phase

In the start-up phase a business idea comes into existence: the idea is put into a business plan, a company is set up, first steps relating to production, service, distribution, sales etc. are made. The growth phase allows potential new investors to better assess not only the viability of business idea, but also the commitment of the people involved. In this phase, the new investors are usually not FFF, but professional investors. As a result, the FFF who invested in the start-up phase are faced with more demanding and skilled potential new co-investors. Against this background:

2.1 In your opinion, does the focus of the equity holders (e.g., the FFF or professional investors) shift in the growth phase (as compared to the start-up phase)?

- ***If so, what could be a particular focus for equity holders in the growth phase? Protection from dilution?***

- ***In your experience, do the equity investors from the start-up phase participate in further capital rounds in the growth phase? Do they usually accept dilution? Do they usually cash out at this point in time?***

As the company matures from a start-up into an early-stage growth company the amount of working capital required to run the operational business as well as the need for new investments to expand the business increases. Consequently, equity holders who initially self-financed their businesses will start looking for additional external sources of financing. The self-financing supplied by the entrepreneurs themselves or FFF had the advantage of being fast and straightforward. Moreover the founders of the start-up were free to take decisions autonomously in their company. On the downside, the initial FFF financing is generally limited and does not offer much in terms of knowledge or network. In order to facilitate the further growth of their company ambitious business owners will want to replace the FFF by more sophisticated investors, who not

only strengthen the balance sheet but also take a hands-on approach in the supervision of management and the amelioration of the company's business strategy.

As the company grows and undertakes further capital rounds, the few remaining FFF may not be interested in participating in these capital rounds. Generally, they will not fight against being diluted or forced to exit the company at this stage of the company's life cycle either, for most FFF's investments are mainly driven by personal motivations rather than by pure business reasons. The founders on the other hand will not be too eager on giving up control over their company at this stage. Typically, they will only allow professional investors seeking to obtain a minority participation in the capital of the company for a limited period of time, in order to realise their growth plans. Most business angels and venture capitalists focus on portfolio diversification and risk management, so they do not have a problem with this as it allows them to invest smaller amounts in a wider variety of businesses. In order to protect their minority position professional investors will demand anti-dilution protections to be incorporated into shareholders' agreements. The founders will typically be granted similar anti-dilution rights.

2.2 *In your jurisdiction, does the company law provide existing equity holders protection from being diluted in further financing rounds in the growth phase? If so, how are they protected? Is there a need for equity holders to seek protection on a contractual basis?*

Company law protection against dilution

Belgian Company law provides various protections against dilution in further financing rounds, of which the most important ones are listed below.

First, in both Private Limited Liability Companies and Public Limited Liability Companies, each shareholder's economic and voting rights are protected against dilution by a preferential subscription right pro-rata to the number of shares held prior to a new round of financing. This allows the shareholders to subscribe to newly issued shares. However, the law only foresees in a preferential subscription right if new shares are issued following a capital increase in cash.

Second, as the law prescribes a special majority of 75% of the votes for the capital of a company to be increased, each shareholder holding at least 25%+1 of the votes has the power to block such capital increase. In spite of such general veto right for the shareholder with a blocking majority, this right cannot be exercised in a way that is manifestly against the '*corporate interest*' of the company.

For the sake of completeness, the economic position of shareholders is also protected through the common use of share premiums. In case the company's market value has increased and thus the market price of a company's share has become larger than the par value of a company's share, a share premium can be used to prevent the new shareholders from obtaining undue economic benefits from an increase in market value of the shares that actually stems from the undertakings of the initial shareholders. For this reason a share premium should be considered as a correction mechanism to compensate the initial shareholders for their activities and as a way to protect them against "*economic dilution*".

Contractual protection against dilution

Business angel investors and venture capitalists share in the business risk and invest time and energy in the strategic management of the company while not always owning a controlling or even blocking interest in the voting-capital of the company. Neither are they involved in the day-to-day business of their investment. Therefore, they will require comprehensive contractual protection mechanisms to safeguard their inherently vulnerable minority position. This could be particularly important if dilution would cause the investors' minority position to fall below a blocking minority threshold. Typically these protections are granted in shareholders' agreements of which some provisions are also incorporated into the articles of association to ensure enforceability vis-à-vis third parties.

The most common contractual protections mechanisms are the following:

- Issuance of anti-dilution warrants. This type of warrant must, under Belgian law, be exercised within a period of five years from the date of issuance and allow the beneficiary to survive one or several capital rounds, as the case may be;

- Veto rights or qualified majorities at the general assembly or the board of directors, e.g. giving a shareholder a right to block a capital increase. Shareholders are not allowed to abuse their veto solely to protect their own interests as they have the duty not to act against the company's '*corporate interest*'. The fiduciary duties of the directors, even those who were appointed at the proposal of certain type of shareholders, go even further. They have certain fiduciary duties and must always act within the '*corporate interest*' of the company and thus they are even less in a position to protect the individual rights of shareholders.

- Call options allowing a shareholder to expand its participation upon the occurrence of certain events.

- Issuance of other contractual securities, such as convertible shares, preferential shares, profit shares with voting rights, etc. As some of these types of securities are contested among legal scholars and as the rights attached to them will depend on what is contractually provided, we will not further elaborate on them.

2.3 When new potential investors offer to come on board during the growth phase, the existing equity holders may be reluctant to provide the information required to satisfy the potential new investor's need for valuation. The reason for the existing shareholders' reluctance may be, for example, that the required information contains (still) unprotected intellectual concepts, knowledge or ideas. In your experience, which legal instruments are used to find a balance between the potential new investor's need for information and the existing equity holders' wish to keep such information confidential? Do existing equity holders have legal means to prevent management from disclosing such information?

Entrepreneurs might fear that sharing information with potential investors also involves the risk that somebody will walk away with their best ideas or still unprotected intellectual property. However, this fear is not always entirely founded for several reasons.

At the initial stage of soliciting for financing, business angels and venture capitalists will rarely ask entrepreneurs to send the entire business plan, customer data base, patent filings, or other detailed knowledge concerning unprotected intellectual property. Furthermore, growth companies typically do not have many clients, assets, or contracts, and their turnover is still limited. Therefore, investors will only perform a due diligence to the extent it confirms the economic potential of the company sought by the investor as a business opportunity. At this stage, investors will primarily base their decisions on ideas, human motivation, and hopes for innovation, potential for optimisation of the company's structure and an increase in operational efficiency.

In the rare case that investors do ask for detailed information that should be kept confidential, the existing equity holders could protect themselves through the use of confidentiality agreements, also known as non-disclosure agreements (NDA). Under Belgian law, it is important to give "teeth" to the NDA by inserting liquidated damages in order to avoid difficulties regarding the quantification of the damage suffered, especially damage for loss of profits, which is very difficult to prove.

However, even without being legally prohibited from sharing information received from solicitors for funding, professional venture capitalists and business angels will not quickly pass the information they receive from one company on to another company because this could affect their reputation, which is key for success in the private equity industry. Furthermore ethical standards and the Code of Conduct of the Belgian Venture Capital & Private Equity Association (BVA) prescribe confidentiality regarding the information investors receive from the companies soliciting for capital. Also, as a general rule, venture capitalists investors will not be interested in becoming a competitor of the company. Their core activity is to fund high-potential companies, not to manage them. Astute investors will allow the entrepreneurs to work hard to build up a sound business and to create a valuable company that can be sold with a high return on investment.

Finally, most employees and managers of high-potential growth companies, especially those of which the most valuable assets are intellectual property, will be bound by confidentiality obligations, which will not allow them to share confidential information with potential investors without prior consent of the founders. Contractual arrangements aside, under Belgian law also directors have a legal obligation to act in the '*corporate interest*' of the company and will have to take this into account when sharing information with investors. If there is a fear that certain directors could jeopardise the company, not only can they be held liable, the shareholders will also be able to dismiss the directors with immediate effect and without further motivation, notice period or payment.

3. Maturity

During the various capital rounds in the growth phase, the circle of equity investors in a company typically becomes larger and the atmosphere may become less familiar. Also, in the maturity phase the management of the company may become more professional in the sense that there is a management in place which is not, or not significantly, invested in the company (i.e., intensification of the principal-agent-conflict). As a consequence, legal concepts that govern the relationship between equity holders (such as fiduciary duties of majority equity holders) as well as legal concepts that govern the relationship between management and equity holders (such as

fiduciary duties of the board members / management, duty of loyalty, principle of equal treatment) may become more important. In other words, corporate governance may become more important. Against this background:

3.1 In your opinion, how does the equity holder base change between the start-up phase, the growth phase and the maturity phase? How does the focus of the equity holders change? Focus on fair distributions of earnings?

As a company passes through the different stages of development various sources of private financing become available. It is hard to link one type of private equity financing to one phase in the lifecycle of a company, for each company and each investor is unique; besides there are huge benefits in finding the optimal mix of the various sources of private financing. However, in an oversimplified manner one could say the following. In the start-up phase the equity holder base typically encompasses entrepreneurs and FFFs. Many start-ups also attract business angel funding but it remains rare at this stage to obtain funds from a venture capitalist. For growth companies business angel funding will become even more readily available and some high-potential growth companies even manage to raise capital from venture capitalists. When a company enters the mature phase the venture capitalists are often replaced by highly funded private equity houses; furthermore some founders who put in enormous amounts of time and effort, not to say a significant sum of their personal money, might feel that they have reached a suitable stage to cash out.

The focus of these different kinds of equity holders varies widely depending on their investment strategies. Private equity funds and venture capitalists, for example, resemble each other in that they both offer equity to companies and aim at buying low and selling high. Nonetheless their strategies and thus their focus vary widely.

Venture capitalists invest in early stage high-potential and sometimes even pre-revenue, growth companies, which is higher risk investing. They make smaller investments in the amount of several millions to acquire a minority position in multiple companies at the same time, expecting that several of these companies will fail, some of them will turn into a sound business that can be sold with a small profit, and one investment will be the grand-slam. Private equity funds, on the other hand, invest bigger amounts of hundreds of millions in an underperforming company with existing portfolio and client base. Typically they will buy 100% of the shares of the company through a mix of equity and debt (leveraged buyout) and will try to generate value through optimisation of the company's structure. As the investment size is huge, private equity firms prefer to invest in mature companies where the chance of failing within a medium term period is much lower than in growth companies.

Therefore, the focus of a private equity fund will, contrary to a venture capitalist, usually not be on excessive value generation nor on a fair distribution of earnings. Private equity funds will target the optimisation of the existing structure so it can realise an exit with moderate profits. Venture capitalists will also aim at realising an exit, however, they will aim at super normal returns as they accept the failure of some of the companies they have invested in.

3.2 In your jurisdiction, does the law provide for stricter corporate governance rules for large (privately-held) companies as compared to small companies? If so, what exactly triggers the application of the stricter corporate governance rules? In which sense are the corporate governance rules different / stricter?

The Belgian companies code makes a distinction for certain governance provisions for structures between listed or non-listed companies. On the contrary, the Belgian legislator does, in principle, not differentiate between small and large privately-held companies. However, there is one exception with regard to the obligation to appoint a statutory auditor. Small companies are allowed to prepare less extensive annual accounts and are exempt from the requirement to appoint a statutory auditor, who is under the obligation to perform an audit over the company's annual accounts and issue an auditor's report. A small company is defined as a company not exceeding more than one of the following thresholds during either the last financial year or the last financial year but one:

- Average number of employees: 50;
- Net annual turnover (excluding VAT): EUR 7,300,000;
- Value of assets according to the balance sheet: EUR 3,650,00.

Belgian company law also knows two corporate governance codes. As typically is the case with corporate governance codes, neither of them has binding force as the codes are considered soft law. On the one hand there's the '*Code Lippens'* for listed companies and on the other hand there's the 'Code Buysse' for privately-held companies. The first version of the Code Buysse has been published in 2005; a revision of the Code took place in 2009.

The Code Buysse provides in guidelines and suggestions concerning the development of a business and the prevention of major checks and conflicts. It expressly stipulates awareness of the diversity of non-listed companies and the importance "*to take into consideration the characteristics of each individual firm when developing its governance*". It furthermore states that "*particular attention should be paid to the nature, size and the growth phase of the enterprise*". All this is translated into differing *recommendations* for large and small privately-held enterprises with regard to the combination of the function of chairman and managing director, the disclosure of directors' fees, the appointment of independent directors and the creation of board committees.

3.3 In your jurisdiction, do (certain) equity holders (e.g., majority shareholders) have obligations towards (certain) other shareholders or the company (e.g., duty of loyalty)? Please explain such obligations.

Unless shareholders of a company entered into a shareholders' agreement they do not have any direct obligations towards each other. This does not mean that (i) a shareholder would exercise its rights in a manner which is manifestly jeopardising the interest of another shareholder, as this could be perceived as abuse of rights, and (ii) a shareholder does not have any obligations towards the company itself.

Shareholders of a company exercise their rights through the shares they hold. The two most important rights linked to these shares are dividend rights and voting rights, the latter being the right to participate in the decision-making process concerning a number of matters falling within the powers of the company's shareholders' meeting. The shareholders' meeting is a corporate body of the company, and as any of the company's corporate bodies, it must always act within the '*corporate interest*' of the company.

As opposed to directors, shareholders are not jointly liable for decisions of the shareholders' assembly and individual shareholders do not have fiduciary duties vis-à-vis the company. However, shareholders cannot exercise their voting rights exclusively in their own interests, as they are prohibited to disregard the company's '*corporate interest*'. Disregarding the company's '*corporate interest*' is considered to be an abuse of voting right, which could be a ground for a court to render a decision of the shareholders' meeting null and void, and to grant additional damages if the nullification of a decision did not entirely restore the damage that has been done. With regard to abuse of voting rights it does not matter whether the shareholder concerned held a minority or a majority shareholding.

3.4 Does the company have any means to control the circle of its equity holders (i.e., can the articles of incorporation prevent competitors from holding shares in the company?) or have such restrictions to be agreed among the other equity holders (e.g., shareholders' agreement)?

Most mature companies in Belgium are incorporated under the legal form of the Public Limited Liability Company. One of the key characteristics of this kind of company is that its shares are, in principle, freely transferable. Whereas free transferability might be one of the reasons to opt for this type of company, equity holders might prefer to limit this transferability of shares.

The transferability of shares might be restricted in the articles of association or in a shareholders' agreement by way of standstill provisions, pre-emption clauses, rights of first approval, tag along rights and drag along rights. In principle, these kind of provisions are valid in Private Limited Liability Companies but must drafted with great care when dealing with Public Limited Liability Companies as they cannot fundamentally undermine the public character of this type of company and the free transferability of its shares. Furthermore Belgian law prescribes a few binding rules regarding the use of these provisions. First, standstill provisions must be limited in time and justified by the company's '*corporate interest*', at all times. Furthermore, pre-emption and right of approval clauses and may not cause a delay in the transfer of these shares exceeding a period of 6 months.

In practice, most investors often enter into shareholders' agreements with the existing shareholders and additionally incorporate certain provisions from these agreements into the articles of association of the company. This way the shareholders' agreement will become enforceable vis-à-vis third parties and the company, which means that the company may refuse to recognise a transfer of shares which, is not in accordance with the articles of association.

4. IPO / Listed phase

Following the IPO, a company enters into a new phase of being listed. The listing has potentially a great influence on the equity holder: the sale of their interest becomes easier. Against this background:

4.1 How does the focus of the shareholders change through the going public as compared to the maturity phase? Does the fact that a shareholder may at any time sell the residual value in its share (ideally) at a fair price in your opinion soften the focus on distribution of earnings? Does the focus shift from long term to short term?

The main reason for a company to become listed is increasing and strengthening its liquidity. As a result of the listing, the company's shareholding structure will significantly change.

First of all, a number of shareholders/sponsors (e.g. private equity and/or venture capital investors) will decide to exit the company as they have no interest in participating in listed companies and thus cash out their participation.

At the same time, a significant number of new shareholders will enter the company's capital. The type/focus of the shareholders entering the share capital will generally depend on the company's distribution policy during its listing (which the company is required to set out in its prospectus). The distribution policy can either be (i) distribution oriented, i.e. annual dividends, or (ii) value oriented, i.e. incorporating profits resulting in a share value increase. An entity that is distribution oriented will in principle attract shareholders that are mainly short term focused and who seek a steady income stream, whereas value oriented entities mainly attract shareholders who seek long term investments resulting in an increased share value. The fact that a shareholder can sell its shares at any given time, will in our opinion not impact such shareholder's focus.

Thirdly there are the shareholders who are/remain part of the company before and after the listing (e.g. the founders, wealthy families backing the company or shareholders who have always believed in the company's future). In general these shareholders want to ensure the company's liquidity and are generally the driving force behind the IPO. Their focus will in principle not shift and will generally be long term and value oriented.

Finally, note that the focus of the shareholders may (in part) also be tax driven due to the different tax regimes in Belgium for dividend distribution (in principle 25%) and the capital gain on shares (in principle no taxation if the shares are held for at least 1 year).

4.2 In your jurisdiction, are there publicly available records on the identity of (certain of) the shareholders in a listed company? If so, does this in your opinion influence the shareholders' focus?

Information on shareholders of Belgian entities (including their identity and shareholdings) is generally not publicly available.

One exception exists for the holders of securities or voting rights in Belgian entities listed on a regulated market of the European Economic Area, as they are required to notify (i) the issuer and (ii) the Belgian Financial Services and Markets Authority (FSMA) if their securities' holding or voting rights exceed, or fall below, certain thresholds, e.g. as a result of an acquisition, transfer, the entering into or terminating of an agreement to act in concert or even in case a threshold is crossed in a passive or indirect way.

A notification is required every time a threshold of 5% of the actual or potential voting rights is crossed (i.e. at 5%, 10%, 15% etc.), irrespective of how long the threshold is exceeded (e.g. day trading) or whether it is crossed in a passive way. Note that the articles of association of the issuer may include more stringent thresholds (i.e. 1%, 2%, 3%, 4% or 7.5%). Any fluctuations in the holding of securities or voting rights between the respective thresholds will not need to be notified.

The issuer must make this information publicly available (press release on its website) and, likewise, the FSMA will also publish the information on its website. The purpose of these notifications is (i) obtaining transparency in the shareholding structure of listed entities and (ii) preventing that significant changes occur in the shareholding (and the control) of listed entities without the other investors/shareholders being aware of this.

In our opinion, knowing which investors hold a stake in a listed entity may certainly influence how other potential investors will invest (e.g. if a certain (major) shareholder has a good reputation or only invests in entities which tend to generate major profits).

4.3 An efficient allocation of resources requires a most accurate pricing of the shares.

- ***In this regard, are companies that are listed in your jurisdiction under an obligation to publish price-relevant information (ad hoc publicity)? If so, please provide a short overview of the respective rules including the exemptions from such obligation.***

Belgian law includes specific rules in relation to insider information, which is in line with the European regulation on the topic. In general, issuers are required to make insider information[1] which directly relates to the entity, publicly available as soon as the issuer becomes aware of this (including (significant) changes to information that is already public). This information should also include financial data insofar available to the issuer and the issuer must indicate the impact thereof on its financial situation. The necessity to make the information immediately available to the market is to ensure that such information reaches all market participants.

In any case, it is up to the issuer to decide whether there is insider information, which will depend from situation to situation, e.g. in case of an acquisition or sale of an entity, the issuer will need to assess when the information will be considered insider information (e.g. at the moment of signing the letter of intent, during negotiations, at closing etc.). It should however be noted that a confidentiality clause does not release the issuer of its obligation to notify the market.

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[1] Insider information is defined as any "non-public" information which is accurate and which relates to one or more issuers of securities which, if made public, may have a significant impact on the exchange rate of the securities.

However, the issuer has the option, at its own responsibility, to postpone making the inside information public, if it believes that such information will harm the company's legitimate interests, under the condition that withholding this information will not mislead the market, and insofar the issuer can guarantee the confidentiality of the information. For example, this may be the case when the company is in financial duress and is negotiating the financial recovery. If the issuer opts to postpone the publication of the inside information, it will need to notify the FSMA thereof immediately, which will allow the FSMA, if need be, to closely monitor the financial movements of the issuer's securities on the market.

- ***It can be assumed that no jurisdiction requires listed companies to publish all price sensitive information. If this is correct in your jurisdiction, how does the law protect the market and its participants (including, the equity holders in the company) from market abuse? Are there insider trading and market manipulation prohibitions? If so, please provide a short overview and, if you can, provide certain peculiarities about them?***

Belgian law sets out a number of prohibitions with a view to protecting the market and its participants from market abuse and insider trading, such as, but not limited to:

(a) anyone who is aware (or is supposed to be aware) of inside information cannot (i) use such information to acquire/sell securities for its own account or that of third parties and (ii) communicate to and/or recommend third parties to acquire/sell securities related to such information;

(b) no person may execute transactions and/or place orders (i) which (may) give(s) the wrong or misleading impression as to offer, demand or exchange rate of securities, (ii) uses fictive constructions, or (iii) with the intention to keep the exchange rates at an artificial level; and

(c) no person may knowingly spread information or rumors which may give wrong or misleading impressions as to securities.

In case of a breach, the sanction committee of the FSMA may impose administrative sanctions. The decisions of the sanction committee will in principle be disclosed in full on the FSMA's website.

With a view to prevent market abuse, the following preventive measures are taken:

(a) issuers are required to prepare lists of persons who possess inside information, which are to be kept for at least 5 years. These lists are not public, but will need to be provided to the FSMA at their first request (in principle if an investigation on the abuse of insider information is ongoing);

(b) persons with managerial responsibilities within an issuer, as well as any persons closely related to them, are required to notify the FSMA of all transactions they make for their own account in the issuer's securities;

(c) persons or entities who give investment advice with respect to securities need to take reasonable steps to guarantee that the information they provide is correct and they are required to provide the FSMA with a copy of all the advice they make in relation to securities; and

(d) qualified intermediaries[2] are required to notify the FSMA as soon as they reasonably presume that a transaction is made with insider knowledge or aims at market manipulation with regard to the securities involved.

5. Acquisition

In its life cycle, the company may itself become the object of an acquisition and integration into the acquirer's structure. At this point the life cycle of the company ends. For the purpose of the remainder of this questionnaire, we assume the acquirer proceeds via a public tender offer. Against this background:

5.1 In case a listed company (target) is approached by another company (bidder), the board of the target will have to decide whether it supports the offer (friendly offer) or not (unfriendly offer). What are the interests that the board of directors needs to take into consideration for this decision? Shareholders' interests only (e.g., offer price only)? The interests of other stakeholders (employees, community etc.)?

When assessing the offer, the Board of Directors needs to consider the interests of the company, the shareholders, the creditors and the employees (including the impact on the employment).[3]

5.2 In case of an acquisition of the listed company (target) by another company (bidder), the shareholders' are at a disadvantage as they cannot communicate efficiently or act in concert (for example, regarding the rejection of a low offer). A rational bidder should try to use this disadvantage of the shareholders to his benefit. In your jurisdiction, how does the law protect shareholders of the target in case of public tender offers? (for example, is there a specific process for public takeover offers which provides protection? Does the bidder need to treat target shareholders equally? Are there, for example, minimum price rules and/or best price rules?)

In general, when making a public tender offer, the bidder is required to treat all shareholders equally (which may result in a retroactive price adjustment – see below) and, in order to be successful, it will need to offer a price which is sufficiently attractive to the shareholders[4]. The Belgian regulation on public tender offers is in line with the European regulation and sets out stringent rules which provide protection to the company and its shareholders against unwarranted offers.

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[2] This includes, among others, Belgian credit institutions and foreign credit institutions that may provide investment services in Belgium and Belgian investment firms and foreign investment firms that may provide investment services in Belgium.

[3] See art. 28, §1, 1° of the Royal Decree of 27 April 2007 in relation to public takeover bids, *B.S.* 23 May 2007, p. 27736.

[4] As such, there are no specific minimum/best price rules, with the exception that if the bidder is the controlling shareholder of the listed entity, the price of the shares (and of the bid) will be valuated by one or more independent experts who are appointed by the independent directors of the company.

First of all, if a bidder makes a public tender offer, it needs to prepare a prospectus setting out the conditions and the price of the bid. This prospectus needs to be approved by the FSMA and, even though the FSMA does not opine on the opportunity and quality of the bid, the FSMA will generally ask the bidder how it came to the bid price. Following the approval of the prospectus by the FSMA, the Board of Directors will also review the prospectus and will be able to comment on the conditions set out therein (which will be published). As such, if the Board of Directors does not agree with the price offered, it will generally not approve the prospectus. However, the Board of Directors will only be able to reject the offer for valid reasons, as the FSMA needs to approve the Board's reply to the offer. It should however be noted that the rejection by the Board of Directors does not prevent the shareholders from accepting the offer made by the bidder. Nonetheless, both the comments of the FSMA and the Board of Directors will generally result in the bidder adjusting its price for the shares accordingly.

If, after the initial tender offer the bidder is not able to acquire all the shares, it may decide to increase its offer price in view of acquiring the additional shares (this may require the re-opening of the bid or a new public tender offer). Considering all shareholders need to be treated equally, the price increase will work retroactively, meaning that the bidder will also be required to pay the shareholders who previously sold their shares the difference between the initial price offered and the new price. It should also be noted that after the bid period, and this during a one year period following the end of the bid period, the bidder is not allowed to acquire shares of the remaining shareholders at a price higher than the bid price, unless the bidder also pays the difference between the bid price and the new price offered to all shareholders that sold their shares during the bid period.

5.3 As mentioned above, a listing provides (ideally) liquidity for the company's shares and ensures a high level of information for a potential new investor. In fact, equity investors may invest in listed companies exactly for these reasons. In your jurisdiction, how is an equity investor protected from a delisting? Does the delisting require (qualified) shareholder consent? What are the deadlines for the delisting? Do issuers need to provide for an off-exchange trading for a certain period following delisting?

In practice, a delisting only occurs in Belgium in the following instances: (i) following a public tender offer resulting in a free float which is less than 5%[5], (ii) if the decision is made to list an issuer, which is multi-listed, on only one stock exchange, or (iii) in case there is hardly any trading of the issuer's shares (no free-float). In each case, the role of the FSMA cannot be denied as it will generally have the final say as to whether an issuer may/can delist.[6]

As the decision to delist an issuer falls within the powers of the issuer's Board of Directors, no (prior) consent of the shareholders is required. However, the request to delist must be approved by the FSMA, which may oppose. In practice, the FSMA will refuse a request to delist if there is still at least 5% free float. Furthermore, the FSMA will generally make the delisting subject to certain conditions (e.g. the requirement to offer the shareholders a reasonable compensation).

[5] Note that if, as a result of a public tender offer, a shareholder holds 95% of the shares, it can initiate a squeeze out procedure in view of acquiring the remaining shares (which will result in a delisting).

[6] Note that in case of a squeeze out as a result of which a shareholder obtains all shares, the FSMA generally automatically delist the issuer as there will be no more free float.

There are no specific time periods and/or deadlines within which an issuer must be delisted and/or the delisting must be finalised. This will depend from case to case. Also, there are no legal requirements to provide for an off-exchange trading platform following the delisting, but may be requested by the FSMA to allow the remaining shareholders to still trade their shares for a certain period, allowing them to receive a higher price. Please note that an off-exchange trading platform is not standard market practice in Belgium.

B. Interest of debt holders

1. Start-up phase

In the start-up phase, the entrepreneur may ask the so called "FFF" (friends, family and fools) for a loan. In other words the entrepreneur asks them to invest in a business idea as debt holders. In this context:

1.1 In your experience, what could be the typical focus of the FFF in this phase? Helping the entrepreneur to get his / her business going? How is this focus reflected in the legal relationship? For example, will such debt holders be likely to refrain from asking for security? Is the agreed interest rate likely to correctly reflect the risks for the debt investor?

When a starting entrepreneur asks friends and family to financially support his business, such friends and family, could provide financial means by way of a loan. In such case, it is not uncommon for the loan to be made subordinate to any other financing arrangements entered into by the company/entrepreneur.

In effect, loans will be considered by other creditors as being equity insofar the loan is subordinated vis-à-vis the other liabilities of the company since subordinated loans will only be reimbursed once all other liabilities/loans have been reimbursed in the event of a liquidation of the company. Subordinated loans will ensure that financial institutions will be less reluctant to grant a “regular” bank loan.

In our experience, FFF will in effect refrain from asking security interests and the agreed interest rate shall often be lower to market practice in order to provide additional financial support.

Sometimes loan agreements between FFF and the entrepreneur will even contain a claw back clause (“*clause de retour à meilleure fortune*”) whereby the entrepreneur will only have to reimburse the loan when the financial situation of the entrepreneur allows such reimbursement.

1.2 In your experience, is it common for professional investors to act as debt holders in this phase? If so, how is the different focus of professional investors typically reflected in the legal relationship? What are the legal instruments commonly used in your jurisdiction to protect their interests? For example, is it common for the professional investors to request a personal security by the entrepreneur in case the company does not yet have (a lot of) assets to secure a loan?

It is uncommon for professional investors to act as debt holders in the start-up phase. Should they be inclined to invest, they will surely ask for significant security interests (for instance a personal guarantee of the entrepreneur or even members of his family, or a mortgage over real estate property owned by the entrepreneur or members of his family).

2. Growth phase

2.1 In your experience, who provides debt in this phase and what could typically be their focus (e.g., high return on investment)?

- ***Are the debt holders and their focus in the growth phase typically different from the ones in the start-up phase? Is it now mostly professional investors (and no FFF)?***
- ***If there is a difference, how could this be reflected in the contractual relationship? For example, do the interest rates or the security for the debt change?***

A wide range of professional lenders provide debt to growth companies, ranging from banks and specialised mezzanine funds, venture capitalists and business angels, to crowdfunding platforms, university incubators and governmental co-investment funds, all of them using an even wider variety of debt instruments. Typically at this phase the company will no longer seek debt from FFF.

To provide a complete overview of the different focus strategies of the various debt providers goes beyond the scope of this contribution. That is why we have limited ourselves in what follows to a some features typical to debt provision on the Belgian market.

Banks will provide debt to growth companies but they will always ask it to be on a secured basis, mainly under the influence of the Basel III leverage ratios. The other debt-providers will lend on a subordinated and often unsecured basis, typically at higher interest rates. An exception to this rule are the mezzanine providers who might have their loans secured, but always second ranked to bank debt.

Venture capitalists and angel investors typically regard debt as a way to complement their equity input. These debt providers also differentiate themselves from the others in such way that they add financial expertise and supervision of the management to the company. In order to manage the risk some business angels and venture capitalists make use of convertible debt instruments as it involves a lower risk than equity; it allows an investor to enjoy a modest interest rate as a debtor along with the upside potentials of a shareholder upon conversion.

Crowdfunding could be a valid alternative to cover the equity gap that affects many companies in the initial growth face. However, it is less widely used in Belgium than in other European countries such as e.g. the United Kingdom, the Netherlands, or France. This is mainly due to crowdfunding-restricting elements of prospectus and banking law. Recently an amendment has been made to the prospectus legislation to raise the threshold for the prospectus approval by the FSMA from EUR 100,000 to EUR 300,000.However, even the latter limit remains a clear impediment on the realisation of the full potential of many start-ups.

Last but not least, there are several public investment funds active in Belgium. Some of the main (partial) governmental firms are ParticipatieMaatschappijVlaanderen (PMV – active in the Flemish Region), Société régionale d´Investissement de Wallonie (SRIW – active in the Walloon region), Federal Holding and Investment Company (SFPI/FPIM –the federal participation and investment firm), Regional Investment Company of Brussels (SRIB/GIMB – active in the Brussels region), Gewestelijke Investeringsmaatschappij voor Vlaanderen (Gimv – a listed private equity fund with a leading role among Belgian private equity funds and increasingly active on the international market) and Limburgese Reconversie Maatschappij (LRM – seeking investments both inside and outside the province Limburg). Although these investment funds have a (partially) public character they do not all provide subsidies or advantageous loans. Furthermore they operate in a highly selective manner and do not compromise on quality; they absolutely cherry pick their investments and ask for high interests, often at the same level as the ones asked for by business angels and venture debt providers

2.2 What kind of security is commonly request by debt holders in this phase? For example, rather collateral (pledge, etc.) or personal guarantees by the entrepreneur? What is the reason for the preference of a specific kind of security?

Personal guarantees are typically a way of safeguarding investments in the start-up phase. In the growth phase entrepreneurs will use alternative ways of granting security to avoid exposure of their personal assets on liquidation of the company.

During the growth phase, investors will make use of the whole package of the available real security rights (*rights in rem*) to secure their lending. Nonetheless some of the real security rights have more stringent perfection requirements than others and some even require the payment of a registration fee. The following list ranks several commonly used real security rights, ranging from simple and straightforward to expensive and burdensome, without claiming that these will always be granted in this order as different investors and different companies have different needs:

- Pledge on the entrepreneurs' securities in the company. This type of pledge is one of the most widely used pledges as perfection of a pledge requires little effort; registered securities must only be recorded in the company's share register and dematerialised securities must be credited to a specially designated account;

- Security on contractual claims and receivables. This security is usually created by way of pledge, by means of a private deed. In order to be perfected against (i) the debtors of the pledged contractual claims or receivables or (ii) *bona fide* creditors with a concurrent right over the same claims, the security requires notification or acknowledgement by the debtor of

the pledge.

- Pledge on a bank account. The creation of security over a bank account does not have any specific formalities additional to those of the creation of a pledge on receivables. Thus, in practice the pledgee of the bank account will commonly seek consent of the account-providing bank to waive certain contractual rights in connection with the account, such as set-off rights.

- Pledge on the commercial business. A pledge on the business may under Belgian law comprise all constituent parts of the business, with only very few exceptions. A pledge on the business has the benefit that it does not require dispossession of the assets, so it allows the pledgor to continue its use of the pledged assets for the operation of its business. The pledgee can only be a EU financial institution. The biggest downside of this security right is the burden of registration tax, which amounts to 0.5 % of the amount of the claims secured. In order to reduce this burden, parties could agree to pledge only part of the business and to grant a pledge mandate for the balance. However, such mandate does not create a right *in rem* over the assets as it only entails a right for the holder of such right to create and perfect an additional pledge.

- Possessory pledge on tangible movable assets. One of the upsides of the possessory pledge is the fact that it does not require the payment of a registration tax. On the other hand, a big disadvantage of this type of security is the requirement that the underlying asset needs to be removed from the physical control of the pledgor to the benefit of the creditor. Therefore the underlying assets can no longer be used in the course of business of the pledgor, which might seriously impede the development of a growth company.

- Security on immovable property. This security must be created by way of mortgage, commonly on land, buildings and immovable real property rights. A mortgage is created by a public deed drawn up by a notary public. In order to ensure enforceability of the mortgage, it requires subsequent registration with the tax authorities and recording in the register of the relevant mortgage keeper's office. In addition to notary fees, the filing with the tax authorities triggers a 1% registration duty and the recording at the mortgage keeper's office a 0.3% mortgage inscription duty; both duties are calculated on the amount of the secured claims. To avoid registration duties, parties often agree to only create a mortgage on a portion of the total credit amount and to grant a mandate to create and perfect a mandate for the balance.

2.3 During the growth phase, the burn rate of the company may be quite high and the company may continuously be at the verge of over-indebtedness. Will investors usually be willing to subordinate their debt? Usually only the entrepreneur / FFF from the start-up phase or also professional investors?

It goes without saying that growth companies have high financing needs as they will have lots of expenses, such as rent, costs of goods and, especially in technology companies, labour expenses. To deal with these expenses while facing a lack of income at this stage, entrepreneurs usually take extra loans with one or more banks. As mentioned above, banks nowadays need to meet Basel III leverage ratios; therefore, once the banks get involved, both professional investors

and the entrepreneur will be asked to subordinate their debt towards the bank debt. For this reason, subordination of debt is a settled debt market practice.

2.4 Investors providing debt in this phase may wish to keep the possibility to participate in the potential valuation upside. How could this wish be accommodated in your jurisdiction? For example, are profit-participating loans or convertible loans commonly used instruments?

Yes. Profit-participating loans, convertible loans and other hybrid finance instruments that combine certain characteristics from equity and debt are used to manage the investment risk and meet the needs of professional investors. However, as these are complicated instruments that are often difficult to understand, investors and entrepreneurs, at this stage of the lifecycle of a company, often prefer lowering transaction costs by making a clear choice between either debt or equity.

Furthermore it should be pointed out that debt and equity are treated differently for tax purposes. Interests, being remunerations for debt, are, in principle, tax deductible; whereas dividends, being remunerations for equity, are not deductible. Furthermore, dividends and interests are treated differently with regard to withholding taxes. Once hybrid finance instruments are used, it is important to realise that for tax purposes the hybrid instrument will be treated either as debt or as equity and that classifications given under general contract law are not always similar to tax law classifications. Moreover, in cross-border situations, the classification of a hybrid instrument may be different in the country of residence of the investor and the company of residence of the company (so-called hybrid mismatch).

In some situations, such mismatches lead to the deductibility of interest paid by the company (because of the classification as debt) and non-taxation of the income for the investor (because of its classification as profits from equity) at the same time. In order to prevent these double non-taxation situations, an amendment to the Parent-Subsidiary Directive 2011/96/EU was adopted in July 2014. Under the adopted amendment, the (European) member state of the investor should refrain from taxing profits distributed by the company only to the extent that such profits are not tax deductible for the company. Belgium is required to implement the amendment in its tax legislation by December 31, 2015, at the latest.

3. Maturity

After having reached maturity, the structure of debt holders may change fundamentally. Against this background:

3.1 In your jurisdiction, who is usually the debt holder in the maturity phase (e.g., banks)?

- ***Are the debt holders and their focus in the maturity phase typically different from the ones in the start-up or growth phase?***

In the maturity phase, venture capitalists are often replaced by highly funded private equity houses. However, venture capitalists and private equity funds both offer equity to companies and aim at buying low and selling high, thus the focus bears a certain resemblance.

Venture capitalists invest in early stage high-potential and sometimes even pre-revenue, growth companies, which is higher risk investing. They make smaller investments in the amount of several millions to acquire a minority position in multiple companies at the same time, expecting that several of these companies will fail, some of them will turn into a sound business that can be sold with a small profit, and one investment will be the grand-slam. Private equity funds, on the other hand, invest bigger amounts of hundreds of millions in an underperforming company with existing portfolio and client base. Typically they will buy 100% of the shares of the company through a mix of equity and debt (leveraged buyout) and will try to generate value through optimisation of the company's structure. As the investment size is huge, private equity firms prefer to invest in mature companies where the chance of failing within a medium term period is much lower than in growth companies.

Therefore, the focus of a private equity fund will, contrary to a venture capitalist, usually not be on excessive value generation nor on a fair distribution of earnings. Private equity funds will target the optimisation of the existing structure so it can realise an exit with moderate profits. Venture capitalists will also aim at realising an exit, however, they will aim at super normal returns as they accept the failure of some of the companies they have invested in.

3.2 Before providing debt to a company, the potential debt holder may require information about the company's financial status to assess the default risk. What financial information is publicly available for potential new investors who wish to invest in a privately-held company? Are financial statements available from public registers? Excerpt from the debt enforcement register? Tax returns? Do companies have means to influence the amount of publicly available financial information?

In Belgium, the following information is publicly available (for specific company forms, including the Public Limited Liability Company ("*naamloze vennootschap/société anonyme*"), the Private Limited Liability Company ("*besloten vennootschap met beperkte aansprakelijkheid/société privée à responsabilité limitée*"):

- The statutory accounts which are filed with the Belgian National Bank (please note that not all companies are required to file statutory accounts and that some companies are allowed to file only abbreviated statutory accounts). Please note that, when a company is required to appoint a statutory auditor, it must also file the annual statutory auditor's audit report and, when it is required to establish an annual board report in relation to the statutory accounts, such report must also be filed together with the statutory accounts.
- A mortgage certificate to be obtained from the mortgage registry indicating whether or not the company owns real estate and whether or not a mortgage in relation to the real estate has been granted to a financial institution;

- A pledge on the business certificate indicating whether or not the company has pledged its business, for which amount the business was pledged and the identity of the financial institution (pledgee). Such pledge is most often granted to secure specific obligations under financing arrangements with the financial institution;

- Via an attorney-at-law, it is possible to verify in a register held with the Court of First Instance, among others, whether or not seizures have been applied to the (im)movable properties of the company, the amount of the claim for which the seizure was applied and the identity of the creditor;

It is not possible to publicly access tax returns. When companies are legally required to file statutory accounts or when a mortgage or pledge of the business are put in place, the company will have to comply with mandatory obligations in relation to the information made public. As such, they have no influence on the publicly available financial information.

3.3 In your jurisdiction, is it common for privately-held companies to issue notes? Could you provide a short overview of the requirements and the procedure relating to the issuance of notes? Is the focus of note-holders any different from other debt holders?

It is not very common for a Private Limited Liability Company ("*besloten vennootschap met beperkte aansprakelijkheid/société privée à responsabilité limitée*") to issue notes ("obligaties"/"obligations"). It can however only issue registered notes. The identity of the owner of the notes will be noted in a register.

Public Limited Liability Companies ("*naamloze vennootschap/société anonyme*") issue notes more often and can issue "regular" notes and notes that can be converted into shares. It can issue bearer notes and registered notes of which the latter are noted in a special register. A similar procedure applies.

The focus of note-holders is identical to other debt holders. However, the focus of holders of convertible notes (only possible in the Public Limited Liability Company), will align their interests sometimes with the interests of the shareholders if they plan to convert their notes into shares of the company.

4. IPO / Listed

4.1 Once a company is listed, the debt holders have a considerably higher level of information regarding the company's financial situation. One could expect that this reduces the risk for the debt holder. Thus, in your jurisdiction, do listed companies usually have to pay lower interests?

No. Belgian entities mainly rely on bank financing, in which case the same information is generally requested from listed and non-listed entities. The only underlying factor for assessing

the interest rate, is linked to the entity's credit rating (the higher the rating, the lower the interest rate generally will be).

This may be different should a listed entity obtain the necessary financing through a bond issue, in which case listed entities may offer lower interest rates than non-listed entities. However, much will always depend on the entity's debt/equity ratio, as a listed entity with a high amount of debt, will generally be less credit worthy, resulting in the need to pay a higher interest rate on the bonds issued.

4.2 *In your jurisdiction, is it possible to list notes? Could you provide a short overview of the requirements and the procedure relating to the listing of notes? In your opinion, is the focus of holders of listed notes* any different from the focus of other debt holders?

Yes, notes may be listed in Belgium. The procedure to list notes is identical to the listing of shares, as the issuer will also need to prepare a detailed prospectus setting out the conditions, pricing, etc. of the notes. However, the prospectus requirements for an issuance of financial instruments other than shares (e.g. notes, bonds, etc.) are less stringent and are thus easier for an issuer. Nonetheless, the prospectus must still be filed with and approved by the FSMA. As notes offer better protection to the investors (considering the capital is (partly) guaranteed), obtaining an approval of the prospectus by the FSMA will generally also be easier.

In our opinion, the focus of the holders of the notes will generally not differ from the focus of other debt holders. As was the case for the holders of shares, a lot will depend on the actual intention of the note holders. Generally speaking, an investor in notes will be more prudent and willing to take less risks. As is the case with traditional bank financing, the note holders will want to recover (at least) their initial investment (hence the capital guarantee), increased with an interest. Among the holders of the notes there are those who consider the notes as a long term investment, which will generate a certain interest and an increased total value, and on the other hand there are those holders who intend to trade/sell their notes during their lifespan (short term investment), with a view of cashing in at the best possible time. These types of investor profiles are common for all types of debt instruments.

5. Acquisition

5.1 *In your jurisdiction, what is commonly the effect of a public tender offer on listed notes. Do they have to be redeemed? Can holders of listed notes interfere in the process of a public tender offer? If so, by which means?*

The Belgian law on public tender offers applies to all public tender offers made, irrespective of the type of financial instruments to which the offer relates, i.e. shares, bonds, notes, etc. In practice, when a bidder initiates a public tender offer, it will generally target all types of financial instruments issued, even though this is not required (e.g. a bidder may decide to only acquire all the shares and not the notes).

In case the bidder makes a public tender offer on all or part of the notes, and the offer is successful, the bidder will be in no way required to redeem the notes. In view hereof, the bidder must also prepare a prospectus (although the requirements are less stringent) which must be reviewed and approved by the FSMA. Subsequently, the issuer's Board of Directors may review the prospectus and, if justified, reject the offer. However, the rejection by the Board of Directors does not prevent the holders of the notes from accepting the public tender offer.

The note holders as such will not be able to interfere in the process of the public tender offer on their notes. However, in accordance with the applicable regulation, the bidder will be required to treat all note holders equal, meaning that they all need to receive the same price for their notes (which can be retroactively should there be an increase of the offer price, as the bidder will need to pay the difference between the initial price offered and the new price to the note holders who already sold their notes).

Finally, there is one major difference between a public tender offer on shares and notes: in case the bidder owns 95% or more shares of the issuer, if can initiate a squeeze out bid, which will generally result in the delisting. Holding 95% of more notes of the issuer, however, will not allow the bidder to initiate a squeeze out.

5.2 In your jurisdiction, what is the typical influence of a public tender offer on existing credit facilities?

This will depend solely on the covenants that are included in the underlying credit facility agreements. In case one or more of these covenants are triggered as a result of the public tender offer, the financial institutions will be entitled to terminate the credit agreements, requiring the issuer to immediately repay all outstanding debts, to be increased, when applicable, with breakage costs. In such case, the issuer, the bidder and the financial institution will generally enter into negotiations.

C. Interest of management / employees

1. Start-up phase

In the start-up phase, it is essential that the key management is committed towards the development of the business idea or project. In this context:

1.1 Which are the most commonly used means to ensure that the management / key employees will not leave the company until the company reaches the growth or maturity phase? Are warrants or similar incentives granted during this stage?

To ensure that management or key employees will not leave the company prior to the company's maturity phase, several instruments could be used. In the start-up phase it is not uncommon to grant them shares, call options to acquire shares or warrants. These will incentivize them to maximize the company's profitability in the long term insofar the conditions to benefit from these incentives have been met. Also, a system of earn-out or bonus is often put in place whereby

management/key employees commit to remain with the company for a specific time or whereby they are granted a bonus when certain thresholds have been met. Alternatively, certain members of management will sometimes require a certain level of financial stability during the start-up phase and will therefore prefer management agreements or services agreements containing a monthly fee over the aforementioned incentives. Of course, sometimes management agreements are combined with a form of call options to acquire shares or other incentives. The possibilities are numerous.

1.2 It is likely that at this stage, there are not sufficient funds for remuneration of management / key employees. Is it common to grant warrant or stock incentive schemes in your jurisdiction? Is there any other scheme to liaise with this issue?

See reply to the question above.

2. Growth phase

The management plays a crucial part in order that a company achieves going from a start-up phase to a growth phase and tend to assumes considerable risks by devoting to such project. Therefore, it would seem reasonable to protect the management in further financing rounds during the growth phase.

2.1 In case new investors come on board in the growth phase and such investors request replacement of the current management: in such replacement, does the current management usually lose rights granted under an incentive plan? How broad are "bad leaver" provisions usually formulated?

Incentive plans are often being set up at the growth phase under the influence of new professional investors. Sometimes these plans grant a call option to the investors on the shares held by the management on their departure, with the share price and exit conditions being more favourable on an exit under "*good leaver-circumstances*" than under "*bad leaver-circumstances*". Nonetheless, such "*good leaver/bad leaver-provisions*" are typically more likely to be used at the mature phase.

The definition of "*good leaver*" typically envisages the departure of the manager in mutual agreement with the company, the retirement of the manager, or departure for reasons of illness or disability. '*Bad leaver*' clauses on the other hand usually refer to the termination of the management agreement for fraud or serious fault, or the termination of the management agreement at the sole decision of the manager, without consent of the company.

"*Good leaver/bad leaver-provisions*" could also be used in employment agreements. Especially in such case "*good leaver/bad leaver-provisions*" should be drafted with great care as Belgian employment law considers all clauses in employment agreements that result in increased obligations or decreased rights for the employee, null and void. On this basis a minority position in the legal doctrine is of the opinion that "*bad leaver*" clauses which define '*bad leaver*' as

employees leaving the company at their sole decision without consent of the company are null and void.

2.2 Upon implementation of an incentive plan, the rights related to the shares that the management will be entitled to receive are usually subject to vesting. Is there any specific vesting period that is applied in your jurisdiction or is the vesting period usually linked to a liquidation event (such as an IPO)?

General contract or employment law does not set any limitations on the use of warrants or share options.

Nonetheless, in practice there are certain conditions to be met if one wants to implement a tax-beneficial stock option scheme. A stock option plan that grants stock options to employees or directors benefits from a tax-beneficial regime only if the following conditions are cumulatively fulfilled:

- The exercise price of the stock option is definitively fixed at the moment the option is granted;
- The option cannot be exercised either before the end of the third year or after the tenth year following the year in which the option was granted;
- The option is not transferable;
- The risk of reduction of the value of the underlying shares is not covered, directly or indirectly, by the company granting the option or by an affiliated company thereof; and
- The underlying shares are shares of the employee's or manager's company or a parent company thereof.

Often incentive plans for the management of a company grant rights relating to the shares subject to vesting. In practice these vesting schemes are typically set up by granting warrants to the management that can only be exercised under certain conditions, e.g. if certain performance related objectives and targets have been achieved at a certain date. Not all vesting schemes require the reaching of certain objectives; some vesting schemes give the managers the right to acquire shares merely based on the duration for which they remain with the company.

2.3 In certain jurisdictions the management may fall out of labor relationship since it is developing executive duties for the company and/or may hold certain stock of the company (it might fall in a special labor relationship or corporate relationship). Is this the case in your jurisdiction? If so, is the loss of labor rights compensated by special laws or by contractual means?

Belgian law draws a clear distinction between a labour relationship and a corporate relationship. An employee performs his activities under the authority of the employer, thus necessarily in

subordination to the employer. The mandate of a director on the other hand, is performed without any kind of authority as there is an unrefutable presumption that directors exercise their mandate on a self-employed basis. This, however, does not exclude the possibility to combine the function of employee and director. To that end two prerequisites must be met: (i) on the one hand, the employment agreement must relate to functions different from those performed in the framework of the director's mandate; and (ii) on the other hand, the director must perform the employment services in subordination to the company. In the event that the function of employee and director is combined, respectively labour law and company law will need to be applied, depending on the function. This is particularly relevant with regard to rules on liability and dismissal.

Directors of a Public Limited Liability Company, and managers of Private Limited Liability Company whose appointment is not incorporated in the articles of association, can be dismissed at any time, without cause, and without any notice period or severance fee (*ad nutum*). It is impossible to deviate from this binding rule by e.g. imposing special majority requirements on the shareholders' meeting deciding on the dismissal or subjecting dismissal to severance payments. It should be stressed that the fact that a director is dismissible *ad nutum* only applies to the mandate of the director and not to its labour relationship, which is of particular importance in case a director combines its director mandate with an employment agreement. The termination of the employee relationship is regulated in the employment contract and should still be subject to severance payments or the performance of a notice period. A similar reasoning applies if the director entered into a management agreement with the company.

3. Maturity

After having reached maturity, the business activity and the relationship between the shareholders and the management / key employees tend to become more complex (in particular, intensification of the principal-agent-conflict). The increasing complexity triggers certain hindrances or deterrents for the ongoing activity of the company. In this context:

3.1 In your jurisdiction, do the various corporate bodies (e.g., board of directors, directors, management) have

- ***an obligation to "act in the best interest of the company"? If so, how is the "interest of the company" defined? Is it the interest of all stakeholders (including the interests of all equity holders (e.g., holder of non-voting shares), debt holders, management, employees and public) or just the shareholders? Are only long term interests taken into account or also short term interests?***
- ***"fiduciary duties" or a duty to treat equity holders equally? How are these defined?***

Yes, in principle, all acts of the management of the company should be in the best corporate interest of the company, not the shareholders. There is no definition of the "company's best interest" in the Belgian Companies' Code. The definition thereof has been determined by case-law. The company's best interest does in effect not always align with the best interest of the debt holders, employees, etc. No distinction is made between long term and short term interests, the company's best interest is the criterion to be applied. Shareholders cannot exercise their voting

rights exclusively in their own interests, as they are prohibited to disregard the company's 'corporate interest'. Disregarding the company's 'corporate interest' is considered to be an abuse of voting right, which could be a ground for a court to render a decision of the shareholders' meeting null and void, and to grant additional damages if the nullification of a decision did not entirely restore the damage that has been done. With regard to abuse of voting rights it does not matter whether the shareholder concerned held a minority or a majority shareholding.

In principle, all equity holders (shareholders) are treated equally, unless they agree not to be treated equally (with the exception of mandatory equality rules which can not be waived by the shareholders). For instance, there can be different classes of shares in a company with different rights attached to each class of shares. Amending of such rights will imply a special procedure with special attendance and majority requirements in each class of shares. Furthermore, for example, in case of a capital increase in cash, each shareholder has a preferential subscription right which can however be waived.

3.2 In your jurisdiction, how are conflicts of interest addressed by the law? Are the rules on conflicts of interests for listed companies applied to non-listed companies? Have the rules on conflicts of interests become more rigid in recent years?

A conflict of interest arises when the direct or indirect patrimonial interest of a member of the management body conflicts with a decision to be taken by the management body.

The Belgian Companies' Code provides for a procedure to be applied in such case.

The member of the management body of a non-listed company shall inform the management body of the conflict before the management body takes the relevant decision. The conflicted members' statement and justification grounds have to be included in the board minutes. If a statutory auditor is appointed, the statutory auditor must also be informed by the conflicted member of the conflict of interest. The management body shall describe the nature of the decision and the patrimonial consequences in the board minutes and shall include this also in the annual management report.

The procedure is listed companies is more strict. The conflicted member is not allowed to participate in the deliberation proceeding the decision and has no vote. There are however exceptions to this rule. For intra-group transfers relating to Belgian listed companies and conflicts of interests related thereto, a special procedure applies.

The rules on conflicts of interests have been in place for a while and not recently been made more rigid/formalistic.

3.3 In your jurisdiction, is it common to put in place incentive plans for key management and employees or are they only entitled to receive a cash bonus (usually based on individual and overall performance)? Do incentive plans provide tax advantage for the company?

It is common to put in place incentive plans for key management and employees. Cash bonuses are possible, but also other incentive plans (group insurance, issuance of (convertible) warrants) are often used. Some incentive plans will result in a more beneficial taxation for the company.

4. IPO/ Listed phase

Reaching an IPO is often the pinnacle of private companies which have reached certain growth and have an attractive equity interest. Obviously, the management and employees play a significant role in the IPO / listing process. In this context:

4.1 It is our understanding that when a company goes from a private to a public setting it implies considerable changes for management and employees. In your experience and within this framework, what is the most significant change for management and employees? Does going public usually increase the total amount of the compensation and/or does it usually change the structure of the compensation (cash, shares, warrants, etc.)?

In practice, the most important changes will be felt at management level, as, due to the listing, management will need to comply with (i) a significant number of regulatory requirements (e.g. extensive reporting requirements, both to the market and to the FSMA) and (ii) the guidelines set out in the Belgian corporate governance code, requiring, amongst others, a clear division between the board of directors and the executive management (CEO), the addition of independent directors and the setting up of specialized committees. Basically, as a result of these extensive compliance obligations, management loses a significant part of its maneuvering room within the company and needs to give up a part of its “managerial freedom”.

With respect to compensation, it is not unthinkable that, at least at management level, higher remunerations and/or bonuses are granted in return for the additional workload and responsibilities which stem from the increased regulatory and compliance obligations. Nonetheless, note that, mainly due to the recent financial crisis, the “*golden era*” of exuberant remunerations and severance fees (‘*golden parachutes*’) which were typically offered to the top tier management of listed entities has ended, as the extent/size of the remuneration/severance fee needs to be justified by the remuneration committee. Also, in case of a severance fee which exceeds 12 months’ pay, the approval of the general meeting will be required.

Aside from the traditional remunerations, listed entities may also implement stock option plans for their employees and management, allowing them to acquire shares in the company at a favorable price. However, a stock option plan will generally come with a specific set of requirements (e.g. a vesting period during which the option cannot be exercised or, once the shares are obtained, the requirement to hold on to the shares for a certain period of time before cashing in), making these types of remuneration schemes less popular.

4.2 Following the IPO the management is constantly assessed by the performance of the share price. Also the management's pay may to large extent depend on the share price performance. One could expect that management may abstain from taking any steps that are likely to weaken the share price – even if such steps are beneficial to the company in long term. In your jurisdiction, are there any measures that are commonly taken to address this conflict (i.e., incentives for long term strategies)? Is, for example, by law or by agreement a part of the pay paid in mid- to long term options?

It should be noted that the management of a company (whether or not listed) should always act with the company's interest in mind. As such, it should always act in line with the long term goals of the company. However this is not always evident, especially if the managers themselves own shares in the company.

To address this risk, the company will generally incentivize its managers for long term strategies (e.g. bonuses linked to the company's growth over a number of years, etc.). In this respect, it is advised that the company indicates what the incentives will be for the coming 3-4 years (which typically should increase every year), to ensure the motivation of the management.

Finally, the managers who hold shares in the company, will generally be subject to certain restrictions on the shareholding, in order to prevent that the managers would simply aim to strengthen the share value within the shortest time possible. For this reason, the managers are generally prohibited from cashing-in on a certain percentage of their shares within a certain period of time.

4.3 Is the management and/or employees bound by a mandatory lock up period upon the IPO? In the event the lock up period is not mandatory, please explain the common standards in your jurisdiction towards implementing a lock up period.

No, Belgian law does not provide in a mandatory lock-up period. In practice, however, a lock-up period is always included in the Underwriting Agreement and/or the prospectus prepared in relation to the IPO. In accordance with this requirement, each manager holding shares in the issuer will need to declare that it will keep a certain percentage of its shares in the company for a certain duration before cashing in. Generally, 50% of the shares held are to be kept for a period of 12 to 18 months following the IPO.

5. Acquisition

In the scenario of the acquisition, it is frequent that the management is essential towards the subsequent development of the company. In this context:

5.1 The focus of the board of directors of a listed company may be set to a large extent on the share price performance. Usually, this should be in line with the corporate interest. However, in case a listed company is being approached by a potential bidder, the board of directors and the management of the potential target may face a conflict of interest: an acquisition that may be beneficial to the shareholders of the potential target, may at the same time require replacement or adjustment of the target's board of directors and

management. In your jurisdiction, how is this conflict of interest addressed? For example, are there limits to the defense measures that the board of directors of the target may take?

As it is up to the shareholders of the listed entity to decide whether or not they will accept the offer made for their shares, the company (i.e. board of directors) has no power/authority to decide on the matter. As such, the conflict of interest-procedure set out in the Belgian companies code does not apply. Indeed, the fact that the members of the board of directors are "conflicted" (i.e. the fact that they may lose their position in the company), is independent from the shareholders' decision to sell their shares.

However, the directors may try to influence the shareholders in not accepting the offer, as the board of directors must prepare a reply (*memorie van antwoord*) to the prospectus published by the acquiring entity. In this reply, the board of directors must give its reasonable opinion on the takeover bid and the impact thereof for the future of the company. It should however be noted that indicating in the reply that the board of directors declines the offer for the simple fact that the members of the board of directors are "conflicted", will not be construed as a valid justification for declining the offer. Bear in mind that the FSMA will also need to approve the reply.

Finally, it should be noted that in case of a hostile takeover bid, the Belgian companies code and/or the company's articles of association (may) provide some defense mechanisms by means of which the board of directors could indeed prevent the hostile takeover of the company. By means of example, and without going further into detail, the following mechanisms could be considered: transfer restrictions (such as prior approval by the board of directors), capital increases and the acquisition of own shares. In any case, these defense mechanisms do not apply in case of a friendly takeover.

5.2 Which are the common alternatives in order to keep management / key employees focused and keen to continue in the company?

The most common methods of keeping management/employees interested in the company is by offering them "attractive" incentives, such as: (i) an increase in remuneration and/or the possibility to receive bonuses, (ii) a share-based compensation in the company (or in the acquiring entity) and/or the possibility to receive additional shares in the future, or (iii) the possibility/opportunity to "grow" in the company and/or the acquiring entity (e.g. promotion to a new function or position, etc.).

5.3 In parallel, is it common to reinforce non-competition and confidentiality undertakings of the management / key employees upon acquisition? Is it common to regulate a non-solicitation by the Seller and that it is enforceable (for which period)?

Generally speaking, in case the managers and key employees remain active in the company following its acquisition, there will be no need to reinforce the non-compete, non-solicitation and confidentiality obligations, as these will typically already be included in the employment/services agreements. However, should these not suffice, it is common that the acquiring entity will require the amendment of the existing non-compete, non-solicitation and confidentiality obligations prior to the acquisition.

Secondly, leading up to the acquisition, the buyer and seller will generally enter into a "Head of Terms"-agreement which will generally also include non-competition, confidentiality and non-solicitation obligations for all persons involved in the acquisition process (this will typically also extend to all members of management and the key employees). The actual transfer agreement itself will also include the necessary non-competition, confidentiality and non-solicitation obligations.

On the other hand, if, as a result of the acquisition, the acquiring entity would dismiss certain members of management or key employees, it should revise the non-competition, non-solicitation and confidentiality obligations in place, and, if need be, reinforce such clauses should the ones in place be inadequate. In return for the non-compete/non-solicitation, the managers/key employees will in practice receive a compensation.

Finally, in practice, a non-solicitation clause often goes hand-in-hand with a non-compete clause, although a non-solicitation clause is mainly of importance for the members of higher management. The duration of such non-solicitation clause will generally be in line with the duration of the non-compete clause, which will differ insofar there is an employment or services agreement. As to employees, Belgian law explicitly states that a non-compete clause must be limited to 12 months[7] following termination of the agreement. In a services agreement, the parties will mutually agree on the period, which generally lies between two to three years following termination.

D. Interest of advisors / lawyers

1. Startup

During the startup phase, it is one of the most difficult stages to advice companies and/or projects since the company does not have the resources (funds) to implement an appropriate legal scheme and the management/equity holders tend to think in the short term rather than the long term.

1.1 Which are the common difficulties you liaise with during this stage? How do you tend to structure your fees (for example, do you go below your standard rates and agree to have this difference compensated at a later stage when the company has become more successful)?

It is not uncommon for companies in the start-up phase to have limited resources for implementing an appropriate legal scheme. Management and shareholders sometimes tend to think in the short term rather than the long term. It is however the task of the company's legal counsel to use whatever limited resources available to ensure that the structure put in place protects the company/shareholders/other stakeholders from the most recurrent pitfalls (protection of IP rights, covering of directors' and/or shareholders' liability, tax optimization, etc.). Law firms can agree to provide initial assistance with the incorporation of the company and drafting of, for instance, shareholders' agreements for a fixed fee whereas for subsequent legal work, higher

[7] Note that this may be longer in case of international groups.

rates are applied. The most important issue is to transparently communicate and agree with the client on how the legal services will be charged in the start-up and subsequent phases.

1.2 In case you accept warrants / rights to shares as compensation for professional services rendered: how do you set the amount or the value of such warrants and rights? Do you rely on valuations of the company? If so, whose valuations? Is it common for an advisor in this situation to request that the company has previously successfully completed a minimum viable product ("MVP") stage which reduces the risk of failure (i.e., as part of the lean startup methodology it is advisable to diminish uncertainty for the project by means of developing an MVP to validate the project)?

We have no knowledge of any legal services rendered by Belgian legal counsel that would have been remunerated with warrants or rights to shares.

2. Growth

Commonly, it is important to provide appropriate legal advice when the company intends to achieve going from the start-up phase to a growth phase. The role of lawyers and advisors would likely enhance the possibilities to effectively reach a solid growth phase. In this context:

2.1 How do you tend to structure your fees during this stage (in particular, is there a difference in the fee structure as compared to the start-up phase)?

Hourly fee structuring remains the most common way of structuring fees at any phase in the lifecycle of a company. Nonetheless, legal advisors are more than ever willing to enter into a discussion with clients around fee structuring and sometimes try to meet the client's needs in a more pro-active manner by suggesting alternative fee arrangements themselves.

2.2 Is it common for advisors (in particular, lawyers) to take board positions during this phase? If so, how is such board member compensated? In cash? Or with exclusivity for providing legal services to the company?

Belgian lawyers are quite hesitant to take board positions in commercial companies in the growth phase, or as a matter of fact in any of the phases of a company's lifecycle.

Some examples in the past have proven that taking part in the decision-making process of a company as a professional advisor can be riskful (e.g. Lernout & Hauspie). Furthermore, certain deontological rules condition the acceptance of a mandate in a commercial company, as this might be regarded as a complementary trade activity, which potentially could jeopardise the independence of the lawyer.

In those rare cases that lawyers do accept an appointment as a director of a Belgian company they typically will accept it on a non-remunerated basis, and as independent director, in order to avoid any conflicts of these activities with their activities as a lawyer. In order to further protect themselves against infringing any deontological rules regarding the independence of the

profession, the law firm of the lawyer/director will rarely offer legal services to this company, although this is not expressly forbidden.

2.3 As the lawyer you may be asked by the entrepreneur to render advice on the division of equity (in particular to FFF)? What is the basis for your advice regarding the division of equity?

Legal advice should always be rendered on a case by case basis, so it is impossible to make any specific statements in regard to the optimal division of equity in a growth company. Therefore, we have limited ourselves in providing a non-exhaustive list of questions that may be relevant in assessing the optimal division of equity:

- Is the equity provider going to take an active role in the company? If so what is the level of experience/expertise of the equity provider/manager and what kind of activity is this person going to provide for the company? Is there a good match among the shareholders and a willingness to actively cooperate?

- What kind of means does the equity provider have at its disposal? What will be contributed and how is this going to be valorised?

- Is the equity provider risk-averse or risk-seeking?

- What is the exit plan of the equity provider? Does one wants to exit after a short-term, mid-term or long-term period?

- Do the founders still want to keep control over the company?

- Would the equity-provider accept dilution on further capital rounds?

- Does the equity provider just provide equity or does it provide a mix of equity and debt?

- What are the company's prospects for future growth?

2.4 In certain jurisdictions corporate law is rigid and does not allow to regulate certain rights of the shareholders in the by-laws of the company (such as, preferential preemptive rights, drag along or tag along rights). Please explain (succinctly) which is corporate legal scheme that applies in your jurisdiction. Is the shareholders agreement enforceable against third parties in your jurisdiction or is only binding between the relevant shareholders?

It is common practice that shareholders with conflicting interests set out the terms of their relationship in a shareholders' agreement, especially with regard to the company's governance and the regulation of the transfers of the company's shares. Under Belgian law, the relationship between shareholders can also be organised in the articles of association of the company. Both instruments have different characteristics, so, depending on the circumstances or preferences of

the parties, it will be more or less appropriate to regulate certain arrangements in the articles of association whereas others should only be the subject of a shareholders' agreement. In practice many arrangements are both regulated in a shareholders' agreement and the articles of association of the company.

The choice to make arrangements, e.g. on the management of the company, the transfer of shares, or the distribution of profits, in the articles of association of the company or by way of a separate shareholders' agreement depends on a number of considerations, that should be based on a case by case basis:

- Shareholders' agreements can only be entered into and be changed by way of unanimity of the parties to the agreement, whereas in order to include arrangements (such as limitations on the transfer of shares) in the articles of associations, unanimity is only required at the incorporation of the company and not at subsequent modifications thereof;

- Shareholders' agreements do not necessarily have to involve all shareholders or the company as such, whereas the articles of association have a binding effect upon all shareholders and the company;

- Shareholders' agreements are necessarily concluded for a limited period of time, whereas the articles of association of a company remain, by their nature, applicable for the duration of the company, which can be, and often is, indefinite;

- In principle, shareholders' agreements do not create any right or obligation vis-à-vis third parties, or vis-à-vis the company in case the latter did not become a party to the agreement. The articles of association on the other hand, bind all shareholders, the company and is enforceable vis-à-vis third parties. As such the shareholders' agreement is often considered not to be the appropriate instrument for the creation of limitations on the share transfers. In order to create enforceability against third parties these limitations should (also) be inserted in the articles of association of the company;

- The articles of association of a company are a public document which needs to be deposited with the clerk's office, where it can be consulted by each interested person. Furthermore, many provisions require publication in the Annexes to the Belgian State Gazette. Sometimes the publicity of the articles of association is a benefit (for instance ,when dealing with the enforceability and sanctioning of limitations on the transfer of shares against third parties). In other cases the private nature of some arrangements and the need for discretion necessitates the conclusion of a shareholders' agreement.

- Modifications to the articles of association require the involvement of a notary public, which causes extra expenses and formalities. Shareholders' agreements can be entered into and modified more easily, i.e. by way of a private agreement.

3. Maturity

After having reached maturity, the business activity is much more complex and the interests of the company become more intricate. In this context:

3.1 How do you tend to structure your fees during this stage (in particular, is there a difference in the fee structure as compared to the start-up or growth phase)?

Hourly fee structuring remains the most common way of structuring fees at any phase in the lifecycle of a company. Nonetheless, legal advisors are more than ever willing to enter into a discussion with clients around fee structuring and sometimes try to meet the client's needs in a more pro-active manner by suggesting alternative fee arrangements themselves.

3.2 Is it common for advisors (in particular, lawyers) to take board positions during this phase? If so, how is such board member compensated? In cash? Or with exclusivity for providing legal services to the company?

Belgian lawyers are quite hesitant to take board positions in commercial companies in the growth phase, or as a matter of fact in any of the phases of a company's lifecycle.

Some examples in the past have proven that taking part in the decision-making process of a company as a professional advisor can be riskful (e.g. Lernout & Hauspie). Furthermore, certain deontological rules condition the acceptance of a mandate in a commercial company, as this might be regarded as a complementary trade activity, which potentially could jeopardise the independence of the lawyer.

In those rare cases that lawyers do accept an appointment as a director of a Belgian company they typically will accept it on a non-remunerated basis, and as independent director, in order to avoid any conflicts of these activities with their activities as a lawyer. In order to further protect themselves against infringing any deontological rules regarding the independence of the profession, the law firm of the lawyer/director will rarely offer legal services to this company, although this is not expressly forbidden.

3.3 Are you able to become member of the board of directors of the companies? Do you tend to render more unique advice to companies (while the corporate counsel provides the typical ongoing corporate advice)?

Please refer to the reply to the above question.

3.4 From a lawyers' perspective, how is the conflict of interest of the management liaised with (are there any mandatory provisions that apply in your jurisdiction)?

Should a lawyer take up a board position, the conflict of interest procedure shall be applied rigorously. No special mandatory provisions, other than those set out previously apply.

3.5 Does the anti-money laundering provisions in your jurisdiction have changed the form your render advice?

The anti-money laundering provisions have not changed the form advice is rendered. However, lawyers will be more attentive to identify their clients. Should the client be a legal entity, the ultimate beneficial owners of the legal entity will be identified.

4. IPO/ Listed phase

Reaching an IPO is often the pinnacle of private companies which have reached certain growth and have an attractive equity interest. It is unlikely that the process of becoming a listed company will be successful without the proper advice. In this context:

4.1 How do you structure your fees for an IPO?

When an IPO is contemplated, fees will generally be structured in accordance with the different tranches of the IPO-procedure. For instance, a separate fee estimate (and in principle by setting out a range) will be provided for (i) the due diligence exercise on the issuer, (ii) the preparation of the draft prospectus, (iii) the negotiations with the underwriters, (iv) the negotiations with the FSMA and (v) the actual listing of the shares and the events leading up to the IPO.

4.2 From a lawyers' perspective, which are the main regulatory aspects of offering equity to the public? Is it common that companies reach this stage (in certain jurisdictions becoming a listed company is less rigid)?

The main regulatory challenges of initiating a public offer concern (i) the drafting of the prospectus and the subsequent approval thereof by the FSMA and (ii) getting the corporate governance of the issuer “in shape”, as this is subject to stringent rules.

In Belgium, the listing of a company is rather uncommon. By means of example, there are only about 150 Belgian entities listed on Euronext Brussels, and the number of IPOs on an annual basis is very limited (3 or 4 per year). This is mainly due to the stringent and burdensome regulation in view of becoming a listed company.

4.3 Is there any specific secondary market in your jurisdiction that allows early startup companies to become listed with the aim of obtaining more equity (given the complexity of becoming a public company in certain jurisdictions a startup company can become listed in a specific market which is less rigid and allow it to obtain other sources of financing, among others)?

Yes, Belgium knows the following secondary markets:

- Alternext Brussels, which is a stock exchange organised by EuroNext and is specifically intended for small and medium enterprises;

- EasyNext Brussels, which is a multilateral trading facility organised by EuroNext for simple and structured warrants;

- Free Market (*Marché Libre*), which is a trading facility organised by EuroNext, and mainly focusses on trading shares of Belgian (family) companies which are not yet large enough to be listed on EuroNext Brussels; and

- EuroNext Expert Market, which trades, once a week, shares, real estate certificates, bonds or saving bonds which are not, or no longer, listed on any Belgian stock exchange.

The principle goal of these secondary markets is to provide entities who want to grow and raise additional equity, with an alternative trading facility, without being subject to the stringent and burdensome regulatory requirements which apply to entities listed on the primary stock exchange (e.g. no prospectus is required, no need to comply with the corporate governance code, the accounts do not need to be prepared in accordance with IFRS, etc.). The main idea is that these markets are a gateway to the primary market and that the entities listed on a secondary market will initiate an IPO once they have obtained the necessary equity and notoriety.

In practice however, we note that these secondary markets are all but successful as there are only a handful of companies listed thereon (e.g. 12 listings on Alternext Brussels); the trading itself is very limited.

4.4 Does the fact of becoming a listed company imply that the lawyers and/or advisors adjust rates their rates accordingly?

No, the fact that a company becomes listed does not warrant a change of the rates of the law firm. However, it is not unthinkable that, should the law firm receive additional work as a result of the listing (e.g. due to the regulatory requirements), fee arrangements are made between the issuer and the law firm.

5. Acquisition

In the scenario of the acquisition, it is frequent that lawyers and advisors are highly involved. In this context:

5.1 Which is most frequent scheme of implementing an acquisition (asset deal vs share purchase deal)?

A listed entity is commonly acquired by means of a share purchase deal (in accordance with the public tender offer regulation). Only in very exceptional instances, an asset deal is used (e.g. the sale of the assets in Fortis Bank NV).

5.2 From a lawyers' perspective, which are the main differences within the process of acquiring a stake in listed companies versus private companies?

The main differences stem from the significant regulations and legislations to which listed companies are subject. For instance, if an entity acquires a stake in a listed entity, it will, among others, need to comply with (i) the transparency regulations (requirement to notify the issuer and the FSMA in case a threshold is exceeded) and (ii) the public takeover regulation (need for a prospectus, etc.). Furthermore, there is generally little negotiation room as the FSMA may review every action taken by the entity acquiring the shares.

Acquiring a stake in a private company, on the other hand, is much more straight forward and is commonly the result of negotiations between the parties. In this case, the acquiring entity will be able to negotiate a price for the shares on the basis of different valuation methods, whereas this will be more difficult in a listed entity as the value of the shares is public information.

5.3 From a lawyers' perspective, which are the main steps in your jurisdiction in order that a public entity becomes a private entity as a consequence of an acquisition?

There are three main steps which need to be distinguished in order for a listed entity to become a private entity:

1) The acquiring entity will need to initiate a public takeover bid, which will require the preparation of a prospectus. If, as a result of the public takeover bid, the acquiring entity does not yet own 95% of the shares, it can either re-open the bid (e.g. by offering a higher price) or initiate a new takeover bid at a later time (which will require a new prospectus).

2) If, as a result of the public takeover bid(s), the acquiring entity owns 95% or more of the shares, it will generally initiate a squeeze out bid with a view to acquire the outstanding shares. In respect of this squeeze out bid, the acquiring entity will need to prepare a new prospectus.

3) Once the acquiring entity holds all the shares in the listed entity, it can proceed with the delisting of such entity, as a result of which it will become a private entity.

5.4 How do you tend to structure your fees during this stage (in particular, is there a difference in the fee structure as compared to other phases)?

The fees will be structured in the same way as in the IPO phase. More specifically, a law firm will give separate fee estimates (ranges) for each of the main steps in the acquisition process. In principle, the fee structure will be structured as follows: (i) a due diligence exercise on the issuer, (ii) preparation of the prospectus for the takeover bid, (iii) the negotiations with the FSMA in relation to the takeover bid, (iv) the actual public takeover bid and events related therewith, (v) preparation of the prospectus for the squeeze out bid, (vi) the negotiations with the FSMA in relation to the squeeze out bid, (vii) the actual squeeze out bid and events related therewith, and (ix) the delisting of the listed entity.