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

Corporate Acquisition and Joint Ventures Commission

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National Report of Denmark

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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

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.

Interests of equity holders

1. Startup

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?

We believe entrepreneurs choose business association in order to attract investments from third parties. The opinion of the Danish theory on Danish corporate law is that entrepreneurs often chose business association based on the various business associations level of trustworthiness among third parties such as potential debt holders and investors. Another relevant but rather irrational reason for entrepreneurs choice of business association is the corporate legal tradition in Denmark.

We also believe that tax reasons and the avoidance of the personal liability are crucial reasons for entrepreneur's choice of business association.

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

Danish corporate law offers the following business association structures:
Public limited companies, private limited companies, entrepreneurial companies, partnerships and owner-managed companies.

Other corporate structures are available but these are of theoretical interest only for entrepreneurs.

- ***What are the most crucial differences between these business association structures from an equity holder's perspective?***

  The main difference between public limited companies, private limited companies and entrepreneurial companies (from now on just "limited liability companies") on the one hand and partnerships on the other hand is the personal liability. However, the personal liability is often only theoretical because financial debt holders in most instances require personal guaranties from the equity holders in public and private limited companies especially in the startup phase.

There are also important differences in the tax regulation for respectively limited liability companies and partnerships. Participants to a partnership are subjects to personal taxation on their proceeds from the partnership because partnerships are not subject to corporate taxation as an autonomous legal entity. However, participants to partnerships can be taxed on the same basis as corporations under certain circumstances, see the Danish Business Taxation Scheme.

The main difference on the different limited liability companies is the required amount of share capital. A public limited company is required to have a registered share capital on DKK 500.000, a private limited company is required to have a registered company capital on DKK 50.000 while the entrepreneurial company is required to have a registered company capital on DKK 1.

There is an important distinction between limited liability companies and partnerships when it comes to the source of regulation. Partnerships are mainly regulated by the partnership contract while the limited liablity companies are regulated by the Danish Companies Act and by the articles of incorporation.

- ***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?***

No statistics available on the subject. We believe that private limited companies and owner-managed companies are the most commonly used business association structures for start-ups.

- ***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?***

In few instances we also see sorts of convertible debt obligations.

- ***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)?***

The board of directors must keep a register of all shares in the company, in which any transfer or pledge of shares is recorded. For companies that have not issued share certificates, or whose shares have not been issued through a securities centre, the register of shareholders must also contain information on all holders of shares and charges, the date of acquisition, disposal of or charge over the shares, and the voting rights attached to the shares.

In companies issuing bearer shares a shareholder may nevertheless request that his shares be-registered in his name. The register of shareholders is not available to the public, but must be available for inspection by public authorities. The articles of association can entitle shareholder availability. In private limited companies the register of shareholders must also be available for inspection by all shareholders.

Public and private limited companies are required to keep a register listing shareholders holding 5 per cent or more of the share capital or voting rights. Such information is public and must be disclosed in the company's annual report.

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?***

FFF investments do not make a substantial part of investments in start-ups.

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

The road to exit.

- ***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)?***

Not in general.

2. Growth

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)?

We believe the focus of the equity holders is the same through the growth phase as in the start-up phase.

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

  n/a

- ***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?***

  Investors typically accepts dilution, but often want to participate in further capital rounds along with new investors. Investors from the start-up phase do typically not cash out at this point.

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?

The Danish Companies Act contains rules protecting equity holders from dilution in the instance of a capital increase occurring as a part of a financing round during the growth phase. In general, The Danish Companies Act operates with a double majority requirement on general meetings, which requires that relevant thresholds are met by the votes cast as well as the share capital represented at the general meeting.

In order to prevent dilution of existing shareholders the Danish Companies Act provides that existing shareholders are entitled to subscribe for a proportionate number of new shares[1].

In cases of directed issuings towards third parties as well as existing shareholders at par value two third of the votes cast as well as the share capital represented at the general meeting must vote in favour of the capital increase[2].

In order to prevent dilution of the shareholding an investor needs to ensure that the concerned investor's shareholding exceeds one-third of the company.

In cases of directed issuings towards third parties below par value 9/10 of the vote cast as well as the share capital represented at the general meeting must vote in favour of the capital increase[3].

[1] See section 162, subsection 1 of the Danish Companies Act

[2] See section 162, subsection 2 of the Danish Companies Act

[3] See, section 107, subsection 2, paragraph (i) of the Danish Companies Act

In cases of directed issuing's toward existing shareholders below par value every shareholder must accept the capital increase[4].

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?

Information is generally only disclosed after execution of non-disclosure agreements. Usually existing investors accept that reasonable disclosure is required to obtain new funds.

3. Maturity

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?

In the start-up and growth phase, the investor portfolio usually consists of business angels and venture capitalists. During the phases, larger investors such as institutional investors will be a part of the investor portfolio in the company.

When the company reaches the maturity-phase, it is easier for the company to obtain bank financing instead of basing its financing solely on equity contributions.

Focus for the main part of the investors is medium to long term and on distribution of earnings.

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?

Not in general.

The Danish Companies Act contains some provisions on the formal and substantive governance structures of a company. There are some differences on the formal requirements to the government structure of a public limited company and a private limited company.

[4] See section 45 of the Danish Companies Act

The main difference on the substantive corporate governance regulation occurs if the company is listed on a regulated market. Listed companies must comply or explain non-compliance to the Corporate Governance Recommendations, issued by the Corporate Governance Committee, when issuing their financial statements.

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.

A shareholder has a duty of loyalty towards the other shareholders of the company insofar as The Danish Companies Act forbids the general meeting to pass a resolution, which is clearly likely to provide certain shareholders or others an undue advantage over other shareholders or the limited liability company[5].

Under Danish corporate law equity holders have a wide margin to pursue their own interests before the interest of the company when exercising their voting rights on the general meeting. Equity holders must vote in accordance with the general clause in the Danish Companies Act section 108 in order to prevent wrongful advantages at the expense of both other shareholders and the company itself.

Though there are some discussions in the corporate legal theory, Danish corporate law does not contain a written nor an unwritten duty of loyalty for shareholders towards the company.

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)?

The Danish Companies Act contains two possibilities for the Board of directors of the company or the shareholders to control the circle of equity holders.

Firstly, the act determines that the articles of incorporation can contain a right of first refusal for shareholders or others in case of a transfer of shares[6]. The article must contain provisions on the price and time limit for exercise of the right of first refusal.

Secondly, the articles of incorporation can contain a provision that provides that the transfer of shares is subject to a consent from the board of directors or other shareholders[7].

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[5] See section 108 of the Danish Companies Act

[6] See, section 67, subsection 1 of the Danish Companies Act

[7] See section 68, subsection 1 of the Danish Companies Act

4. IPO / Listed Phase

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?

Some smaller investors may capitalize on the increased liquidity due to the listing but most of the larger investors hold long-term investments why their focus is on the distribution of earnings.

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?

There are no publicly available records on the identity of shareholders in listed companies.

However, the Danish Securities Trading Act contains a rule on the disclosure to the target company as well as the Danish Financial Supervisory Authority (FSA) from the acquirer of shareholdings in listed companies meeting certain thresholds. After the disclosure to the target company and the FSA the target company is required to disclose the holdings to the market[8].

The thresholds are similar to the thresholds in the Danish Companies Act regarding the duty of disclosure to the company described in section 1.2 in this report.

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.***

  The Danish Securities Trading Act contains a provision on the publishing of price sensitive information. The provision contains an ad hoc publicity duty.

  Under the the provision all listed companies must make inside information public as soon as possible after the occurrence of the inside information if the information affects the company directly[9]. Any changes in disclosed inside information must be disclosed to the market.

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[8] See section 29, subsection 1 of the Danish Securities Trading Act

[9] See section 27 of the Danish Securities Trading Act

The definition of inside information derives from the Directive on insider dealing and market abuse[10], article one and has the following wording:

'Inside information' shall mean information of a precise nature which has not been made public, relating, directly or indirectly*, to one or more issuers of financial instruments or to one or more financial instruments and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments*, see the Danish Securities Trading Act, section 34, subsection 2.

A listed company can on its own liability delay the disclosure of inside information if the disclosure will harm the company's lawful interests and if the inside information is kept confidential[11]. Examples of information which is suited to harm to company's lawful interest fixed by the Securities Trading Act could be ongoing contract negotiations.

If the listed company acknowledges that non-disclosed inside information has been revealed to a third party the listed company is obliged to disclose the relevant inside information.

- ***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?***

- The Danish Securities Trading Act contains provisions on insider dealing and market abuse. The provisions derive from the Directive on insider dealing and market abuse.

  Purchase, sale or recommendation to buy or sell a given security may not be performed by any person with inside information, which could be of importance to the transaction in question[12]. The prohibition applies both to insiders from inside the company and for persons outside the company sphere whom are in the position of inside information.

[10] DIRECTIVE 2003/6/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 28 January 2003 on insider dealing and market manipulation (market abuse) -

http://europa.eu/legislation_summaries/internal_market/single_market_services/financial_services_transactions_in_securities/l24035_en.htm

[11] See section 27, subsection 6 of the Danish Securities Trading Act

[12] See section 35, subsection 1 of the Danish Securities Trading Act

Price manipulation or attempts at such manipulation may not take place[13]. Companies buy back programs are not subject to this provision if they fulfil the requirements set forth in the Safe Harbour Regulation[14].

5. Acquisition

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.)?

The acquisition of shares in a Danish company with shares listed on a regulated or alternative market in Denmark is subject to the rules of the Danish Securities Trading Act and the Danish Executive Order on Takeovers, which among other things implement most of the EU Takeovers Directive.

The executive order no. 562 2014 on takeover bids provides a duty for the board of directors to draw up and make public a document setting out its opinion on the bid. The provisions of the executive order derive from the takeover bids directive and especially article 9[15].

The board of directors can take into account both the shareholder interests such as the price and other stakeholder interests such as the employees position post-merger as well as the interest of the community surrounding the target company. The board of directors does not have a statutory obligation to take other stakeholder interests than the employee's position post-merger into account. The statutory obligation of the board of directors is to draw up an objective opinion.

[13] See section 39, subsection 1 of the Danish Securities Trading Act

[14] COMMISSION REGULATION (EC) No 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments

[15] DIRECTIVE 2004/25/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 April 2004 on takeover bids

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?)

The provisions on public tender offers on listed companies in Denmark are based on the takeover bids directive. The Danish rules comprise of provisions in the Danish Securities Trading Act and the executive order no. 562 2014 on takeover bids.

In general, a distinction is made between voluntary bids and mandatory bids. The distinction is especially relevant for the bid price.

If a legal or natural person acquires shares in a company and by its acquiring obtains a controlling interest in the company the acquirer is obliged to make a mandatory bid on the rest of the shares in the company.

The mandatory bid needs to fulfil the requirements set forth in the executive order no. 562 2014 on takeover bids. As general rule, the purchase price must be the highest price paid for shares in the company by the investor within the last six months prior to the offer, but there may be circumstances (e.g. corporate restructuring) in which an exemption from this requirement can be possible.

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?

The Danish Securities Trading Act contains a provision that protects equity investors from the delisting of a company[16]. Under the provision, the relevant market will delist the requesting company unless the delisting will cause sufficient damage to the interests of minority shareholders. The wording of the provision give raise to the thought that the operator of the relevant market in most cases is required to delist a company upon its request.

Decisions and the rules for issuers of shares on the Copenhagen Stock Exchange show that the interest of the minority shareholders e.g. liquidity is prioritized when a delisting request is submitted.

[16] See in general the Danish Securities Trading Act, section 25

Under the rules for issuers of shares on NASDAQ OMX Copenhagen A/S[17] submitted delisting submissions will be accepted without further ceremonies when an investor holds a 100 % of the shares. In situations where the submitting company has more than one investor the issuer rules provides, that the concentration of the shareholdings must meet the thresholds in the Danish Companies Act to entitle the minority shareholders to a compulsory redemption, which also seems to be the general position in the legal theory. A majority shareholding on 9/10 of the votes cast as well as the share capital represented at the general meeting entitles the majority shareholders to a compulsory redemption[18].

Interests of debt holders

1. Startup

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?

FFF investments do not make a substantial part of investments in start-ups.

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?

In general, few investors or banks act as debt holders in start-ups. Typically investors only make equity investments or convertible debt investments in start-ups.

In the rather rare coincidence of a bank loan, we believe personal security is the most common security in order to carve in shareholder personal liability.

2. Growth

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

In general, we believe that debt investments are rarely seen in this phase of a company.

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[17] Rules for issuers of shares NASDAQ OMX Copenhagen A/S 1-6-2013 - can be found on this link

[18] See section 73 of the Danish Companies Act

- ***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?***

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?

In the rare case of a debt investor in this phase, we believe debt holders request collateral in the form of a floating company charge and/or personal guarantees.

The floating company charge enables companies to create a so-called "floating charge" secured on non-specified groups of assets, including inventory, raw materials, vehicles, outstanding accounts and certain intellectual property rights. The downside of the floating company charge is the transaction cost related to the act of perfection.

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?

Usually, only the entrepreneur will subordinate his debt.

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?

Convertible loans are commonly used instruments for debt investors in order to keep the possibility to participate in the potential valuation upside.

3. Maturity

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

Banks, pension funds and mezzanine investors.

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

  Yes they are, as it will be much easier to attract debt providers in the maturity phase.

- ***If there is a difference, how may this be reflected in the contractual relationship?***

  It will affect the terms of the loans.

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?

The Danish Business Authority manages a company registration system. The company registration system is fully computerised and a fair amount of information is, upon payment of a fee, available online to any interested party. This information includes summary extracts of the full list of board members, managers, auditors, rules of signature, financial year, and the filing date of the latest annual report.

Copies of annual reports are also available online whereas copies of articles of associations, minutes of general meetings etc. may be available by ordinary mail within a few days (or by fax the same day on payment of an additional fee).

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?

No, only large industrial publicly-held companies commonly issue notes.

4. IPO / Listed Phase

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?

Yes.

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.

The listing of company notes is subject to the provisions in the Danish Securities Trading Act on listed securities and the rules for issuers of bonds on the relevant market - in Denmark the Rules for issuers of bonds NASDAQ OMX Copenhagen A/S 01-06-2013.

An issuing of company notes exceeding EUR 1.000.000 but not exceeding EUR 5.000.000 is subject to a prospectus requirement unless the notes are only offered to qualified investors or less than 150 natural and legal persons or if the issuing is subject to a minimum investment requirement per investor on EUR 100.000[19]. The provisions are Danish national rules.

An issuing exceeding EUR 5.000.000 is subject to a prospectus requirement unless the notes are only offered to qualified investors or less than 150 natural and legal persons or if the issuing is subject to a minimum investment requirement per investor on EUR 100.000[20]. These provisions derive from the prospectus directives.

The prospectus is subject to approval from the Danish FSA. Post FSA approval the issuing must meet the requirements from the relevant market.

For tax and administrative reasons, company notes of Danish companies are commonly listed in Norway or Luxembourg.

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?

Not in general.

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

Not commonly used.

Interests of management / employees

1. Startup

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?

Yes. Warrants are the most common used mean to ensure that key employees and the executive management stays through the prefatory phases of the company's lifetime.

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19 Se part 12 of the Danish Securities Trading Act

20 Se part 6 of the Danish Securities Trading Act

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?

It is common to grant stock incentive schemes and warrant programs to the executive management and employees but combined with ordinary salary payments.

2. Growth

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?

The Danish Stock Options Act significantly affects the enforceability in Denmark of customary provisions in share option plans purporting to restrict employees' right to exercise share options following termination of their employment. Most importantly, it follows from the Act that an employee who is terminated by his employer for any reason but misconduct will retain all rights to share options already granted, whether vested or unvested.

Executive management warrant programs are not subject to the Danish Stock Option Act and bad leaver conditions are subject to regulation in the contract between the board member or executive director and the company.

Usually executive management bad leaver provisions are formulated as misconduct clauses but sometimes the provisions are formulated more widely. In these clauses a member of the executive management is considered a bad leaver if the actions of the member has given the company a reasonable cause to terminate the contract.

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)?

It is common to apply a continuous vesting period through the relation between company and employee in order to keep the executive management and employees in 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?

No, this is generally not the case in Denmark.

3. Maturity

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?***

The board of directors and the executive management must act in the best interest of the company. There are various theories in the corporate legal theory on the interest of the company. The most common definition or idea of the interest of the company is that the interest shifts on a certain time of the lifetime in case of liquidity problems and insolvency from the shareholder interest to a stakeholder interest with a special focus on company creditors.

Both long-term and short-term interests can be taken into consideration.

- ***"fiduciary duties" or a duty to treat equity holders equally? How are these defined?***

Under Danish corporate law members of the board of directors or the executive management are not fiduciaries in the sense that such members are under English and American corporate law. Hence, the Danish Companies Act does not impose such "fiduciary duties" on the board of directors and the executive management. However, the members of the board of directors and the executive management are obliged to act in the best interest of the company as well as in the best interest of the shareholders, see the answer just above.

The management of the company is obliged to treat equal shareholders equally[21].

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?

The Danish Companies Act regulates the issue of conflicts of interests. The act applies to both listed and non-listed limited liability companies.

The Danish Companies Act contains a provision on the Board of directors and the executive management's conflict of interests with the company interest. Under the provision a member

[21] See section 45 of The Danish Companies Act,

of the Board of directors or the executive management who has a material interest in a business that may conflict with the interests of the limited liability company may not participate in that business.

The rules have not become more rigid the recent years but the trend is that stakeholders tend to focus more on compliance with the provisions.

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?

Both cash bonuses and incentive schemes such as warrant programs are common in the later phases of a company. In the earlier phases, only warrant programs are common because of the cash shortness.

In order to obtain a tax advantage provided by an incentive scheme generally all employees must benefit from the incentive scheme and not just the executive management or certain divisions of the company. The tax advantage does not apply to cash bonuses but only to warrant programs.

4. IPO / Listed Phase

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.)?

The main change for the executive management and the employees is the duty to disclose inside information in section 27 of the Danish Securities Trading Act.

Because companies in the prefatory phases of a company operate with a combination of warrant and ordinary salary payments as remuneration for both the executive management and especially employees, compensation structures do not change substantially in this phase of a company.

However, the listing implies that there is a market to divest the shares once listed, which may entail certain changes.

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?

The Danish Companies Act provides that members of the Board of directors and the executive management can receive fixed and variable remuneration.

When a company is listed, the company needs to comply or explain non-compliance with the recommendations on corporate government issued by the Danish Corporate Governance Committee.

The recommendations include provisions that address the strategic problem related to short-term and long-term incentives in relation to management remuneration.

The recommendations recommend that members of the Board of directors are not remunerated with warrants or stock options unless allocations are on arm's length conditions.

If members of the executive management are remunerated with warrants or stock options, the recommendations suggest a revolving vesting period with an exercise period on three years upon the allocation.

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, not a mandatory lock up period. Usually, members of The Board of directors and the executive management owning a substantial part of the shares are subject to a contractual lock up period for up to 12 months.

5. Acquisition

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?

The Board of directors needs to obtain and make public an *objective* opinion of the takeover bid. The potential adjustment of the management of the company is not an interest to take into consideration when obtaining that opinion.

The Board of directors may take such steps necessary to ensure the highest price for the current shareholders - also soliciting third parties. Any defence measure should be conducted in this context.

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

Warrant programs and salary payments.

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)?

Yes, it is common to include non-solicitation provisions in the share purchase agreement on the seller. The non-solicitation provision is enforceable upon the seller for 6 months.

Interests of advisors / lawyers

1. Startup

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)?

Fixed fees.

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)?

Kromann Reumert does not accept warrants.

2. Growth

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)?

Fixed fees or estimates depending on the scope of work.

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?

Yes.

The board member is compensated through a director's fee as the other members of the Board of directors.

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?

The expected lifetime and capital requirements of the company.

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?

Danish Corporate law entitles the shareholders to a high level of freedom of contract when the parties organize their rights in the articles of association. Companies can have different classes of shares with certain preferential rights e.g. voting rights and dividend rights. It is also possible to include drag along and tag along rights in the articles of association.

According to a Danish study on 72 articles of association and shareholders agreements (43 from public limited companies and 29 from private limited companies) none of the articles of association included tag along or drag along clauses while 25 per cent of the shareholders agreements included tag along clauses and 15 % of the shareholders agreements included drag along clauses.

Shareholders agreements are only binding between the relevant shareholders. The shareholders agreement is not enforceable against the company in which the parties to the agreement hold shares[22].

3. Maturity

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)?

Depending on the scope of work, it may be estimates, caps or fixed fees.

3.2 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)?

Yes.

3.3 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)?

No.

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

No.

4. IPO / Listed Phase

4.1 How do you structure your fees for an IPO?

Depending on the scope of work estimates or capped fees.

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)?

Prospectus requirements.

[22] See section 82 of The Danish Companies Act

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)?

No.

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

Not in general.

5. Acquisition

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

Share purchase deal.

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 limited access to information in the case private companies.

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?

The delisting provisions described under 5.3 under Interests of equity holders.

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)?

Fixed fees or estimates depending on the scope of work.