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

Corporate Acquisition and Joint Ventures Commission

London, 2015 – Working Session 5

National Report of Germany

Benjamin Schwarzfischer
GRAF VON WESTPHALEN
Rechtsanwälte Steuerberater Partnerschaft mbB
Ulmenstrasse 23-25, 60325 Frankfurt/Main, Germany
+49 69 8008519-76
b.schwarzfischer@gvw.com

and

Madeleine Zipperle / Dr. Thorsten Kuthe
HEUKING KÜHN LÜER WOJTEK
Partnerschaft mit beschränkter Berufshaftung von Rechtsanwälten und Steuerberatern
Magnusstrasse 13, 50672 Cologne, Germany
+49 221 20 52-476
m.zipperle@heuking.de
t.kuthe@heuking.de

General Reporters:

Christian Leuenberger, Pestalozzi Attorneys at Law Ltd, Zurich, Switzerland
Pablo Vinageras, J&A Garrigues, S.L.P., Barcelona, Spain

2 March 2015

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.

A) Interest of equity holders

1. Start-up phase

In the startup 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?

Based on our experience, the main reasons for choosing a specific business association are:

a. scope of personal liability (e.g. commercial partnership vs. private company);
b. required share capital and costs for incorporating a company (e.g. limited liability company (*Gesellschaft mit beschränkter Haftung - GmbH*) vs. entrepreneur company (*Unternehmergesellschaft - UG*));
c. attractiveness for investors (i.e. is an admission to trading on a public market possible?);
d. formalities and administrative effort (e.g. duty to provide a business report etc.);
e. degree of publicity (e.g. private company vs. listed stock corporation);
f. perpetual succession (i.e. the continuing existence of a company, irrespective of changes in its memberships);
g. borrowing (i.e. a sole trader, being personally liable, would find it easier to raise money by borrowing);
h. taxation (tax considerations play a major role in determining whether the business shall be set up in corporate form or as a partnership).

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

German law offers the following basic types of association:

Name	Abbr.	Particulars	Legal Basis
limited liability company (*GmbH*)	GmbH	no personal liability of the shareholders; minimum share	Limited Liability Companies Act (*GmbH-*

Name	Abbr.	Particulars	Legal Basis
		capital: EUR 25,000	*Gesetz - GmbHG*)
entrepreneur company (*Unternehmergesellschaft*)	UG	special type of GmbH; share capital amounts to less than EUR 25,000	sec. 5a GmbHG
stock corporation (*Aktiengesellschaft*)	AG	Shares can be sold to a significant number of people to cover large capital requirements; often quoted on stock exchange	Stock Corporation Act (*Aktiengesetz – AktG*)
European company (*Societas Europaea*)	SE	form of organisation regulated by EC, SE has to have its company seat in an EC Member State; SEs are legally treated as common national stock corporations	COUNCIL REGULATION (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (*SE-Verordnung*); German act on the implementation of the European company (*Gesetz zur Einführung der Europäischen Gesellschaft – SE-Gesetz*)
civil partnership (*Gesellschaft bürgerlichen Rechts*)	GbR	non-trading partnership; purpose of the partnership can also be of private nature; no registration with the commercial register	ss. 705-740 German Civil Code (*Bürgerliches Gesetzbuch - BGB*)
commercial partnership (*Offene Handelsgesellschaft*)	OHG	trading partnership; registered with the commercial register	ss. 105-160 HGB
limited partnership (*Kommanditgesellschaft*)	KG	special type of commercial partnership; there are general partners and (at least) one limited partner	ss. 161-177 HGB
limited partnership with a limited liability company as general partner*(GmbH & Co. KG)*	GmbH & Co. KG	limited partnership with, typically, the sole general partner being a limited liability company	ss. 161-177 HGB

In addition to these German company types, an entrepreneur may also choose a company incorporated in other member states of the European Community. According to the jurisdiction of the European Court of Justice, the basic principle of freedom of establishment which was introduced by the EC Treaty allows for the use of companies incorporated within the EU. [1] In fact, this ruling led to a significant increase of foreign companies within Germany. Since then, it is not uncommon that a British limited liability company (Ltd) is chosen for German startups.

[1] Court of Justice of the European Union, decision of 9 March 1999 - Rs. C-212–97; Court of Justice of the European Union, decision of 5 November 2002 - Rs. C-208/00; Court of Justice of the European Union, decision of 30 September 2003 - Rs. C-167/01.

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

  The main differences can be summarized as follows:

Type	Liability	Management	Legal per-sonality	Share capital (mini-mum)	Tax	Stock market listing
limited liability company (*GmbH*)	Liability is limited to the capital contribution, additional payments only to be paid if there is a correspondi ng shareholders resolution (sec. 26 GmbHG)	management board (sec. 6 GmbHG), representation vis-à-vis third parties (sec. 35 GmbHG)	Yes	EUR 25,000.00	corpo-ration tax, capital yields tax, trade tax, value added tax	No
entrepreneur company (*UG*)	limited to the capital contribution, additional payments only to be made if there is a correspondi ng shareholders resolution (sec. 26 GmbHG)	management board (sec. 6 GmbHG), representation vis-à-vis third parties (sec. 35 GmbHG)	Yes	EUR 1.00	corpo-ration tax, capital yields tax, trade tax, value added tax	No
stock corporation (*Aktienge-sellschaft – AG*)	No personal liability of stockholders	management board (sec. 77 AktG), representation vis-à-vis third parties (sec. 78 AktG)	Yes	EUR 50,000.00	corpo-ration tax, capital yields tax, trade tax, value added tax	Yes

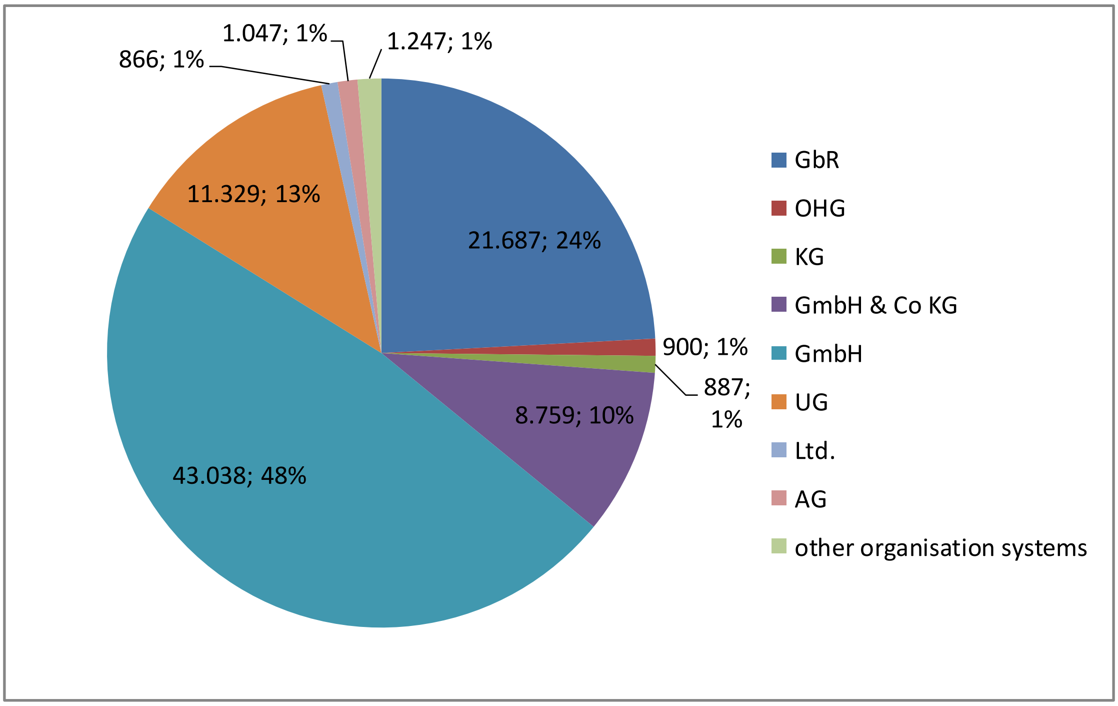
Type	**Liability**	**Management**	**Legal per-sonality**	**Share capital (mini-mum)**	**Tax**	**Stock market listing**
European company (*SE*)	No personal liability of stockholders	Management organ (sec. 39 (1) SE-Verordnung) or administrative organ (sec. 43 (1) SE-Verordnung; representation vis-à-vis third parties (sec. 40, 41 SE-Gesetz)	Yes	EUR 120,000.00	corpo-ration tax, capital yields tax, trade tax, value added tax	Yes
civil law partnership (*Gesellschaft bürgerlichen Rechts - GbR*)	unlimited (sec. 735 BGB)	common management (sec. 709 BGB), other provisions possible in the partnership agreement, the same applies for representation of the partnership vis-à-vis third parties (sec. 714 BGB)	No	No minimum	GbR: trade tax, value added tax; partners: income tax	No
commercial partnership (*Offene Handelsge-sellschaft - OHG*)	unlimited (sec. 128 HGB)	Each partner is entitled to solely exercise management functions (ss. 114, 115 HGB), other provisions possible in the partnership agreement; the same applies for representation of the partnership vis-à-vis third parties (sec. 125 HGB)	No	No minimum	OHG: trade tax, value added tax, partners: income tax	No

Type	Liability	Management	Legal per-sonality	Share capital (mini-mum)	Tax	Stock market listing
limited partnership (*Kommandit-gesellschaft - KG*)	Liability of general partners is unlimited; Liability of limited partner limited to limited partnership share (sec. 171 HGB)	Each partner is entitled to solely exercise management functions (ss. 114, 115, 161 HGB), other provisions possible in the partnership agreement; the same applies for representation of the partnership vis-à-vis third parties (ss. 125, 161 HGB); limited partner is not authorized to represent the partnership (ss. 170 HGB)	No	No minimum	KG: trade tax, value added tax; partners: income tax	No
GmbH & Co. KG	Liability of general partners is unlimited; Liability of limited partner limited to limited partnership share (sec. 171 HGB)	Each partner is entitled to solely exercise management functions (ss. 114, 115, 161 HGB), other provisions possible in the partnership agreement; the same applies for representation of the partnership vis-à-vis third parties (ss. 125, 161 HGB); limited partner is not authorized to represent the partnership (sec. 170 HGB)	Yes/No	EUR 25,000.00	KG: trade tax, value added tax; partners: income tax; GmbH: corpo-ration tax	No

- **If statistics on the use of business association structures are available in your jurisdiction: which are the most commonly used business association structures for startups? Do you see a particular reason for the dominance of one specific structure?**

In the vast majority of cases start-ups will today be formed as a limited liability company (*GmbH*).[2]

The following diagram sets forth the number of newly incorporated companies in Germany between January and November 2014 (excluding registered merchants)[3]:



The most important reasons for the dominance of the GmbH are:

a. The limited personal liability of the shareholders. After the payment of the respective capital contributions and registration of the company in the commercial register they are not liable for any debts of the company.
b. It is not very complicated to establish and incorporate a GmbH.
c. The articles of association of a GmbH can flexibly meet the different demands of the shareholders.
d. Professional PE and VC investors typically do not invest in partnerships such as commercial partnerships (*OHG*).

For these reasons the corporate structure of the UG is also widely used. The UG is a kind of "interim solution" for shareholders who are not able to pay the required share capital of a GmbH at the start of business. In contrast to the GmbH, the share capital of a UG amounts to less than EUR 25,000[4]. Please note in this context that it is possible to transform a UG into a GmbH by way of a capital increase to EUR 25,000 once profit is generated after the start of business.

[2] Eisermann, Die GmbH als attraktive Rechtsform in Europa, p. 18 et seq.

[3] Source: German Statistical Office (*Statistisches Bundesamt*).

[4] Sec. 5a GmbHG.

- **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 general, German statutory law does not provide for different classes of shares. However, this can be modified by dividing the share capital into different classes with different rights attached as to dividends or voting (e.g. veto rights). In practice, the division of shares into classes and the rights attached to each class will normally be set out in an investment and shareholders agreement rather than in the company's articles of association. In this context, it is currently common practice that for each financing round different share classes (with different preference rights attaching to them) are issued (i.e. founder shares, seed shares, A-shares, B-shares etc.).

  With regard to professional VC investments, non-voting shares are typically not used. The reason for this is that most startups are incorporated as GmbH and with regard to this company form it is not possible to issue non-voting shares. This is due to the general principle that voting rights are strictly linked to a share. In listed stock companies (*AG*), however, it is possible to issue non-voting preferred stocks (*Vorzugsaktien ohne Stimmrecht*).[5]

- **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)?**

  If an investor wants to remain anonymous, German law offers the following options:

Type	**Legal rules**	**Participation**
silent partnership (*stille Gesellschaft*)	ss. 230 et seq. HGB	anonymous investment in the business of a entrepreneur; internal partnership
sub participation (*Unterbeteiligung*)	not legally regulated	participation in equity holding of another investor, no direct participation in a partnership or corporation
trustee relationship (*Treuhand*)	not legally regulated	shareholder is trustee, has the share at his disposal only in consultation with the trustor

[5] Sec. 139 et. seq. AktG.

These arrangements are mainly based on contractual relationships rather than corporate structures. All of these arrangements have in common that the investor participates in the profits and losses but is not registered with the commercial register and, therefore, remains anonymous.

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?

In this phase, third party equity investors are usually venture capital funds, family offices and business angels. In Germany, professional VC investors have invested ca. EUR 285,000,000 in start-up companies (during the first half of 2014).[6] Most of these investors mainly look at ROI (return on investment). Investing in this phase is high-risk investing and investors therefore typically search for companies with growth potential.

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

  In most cases, investments by FFF are not based on emotional relationships. FFF sometimes contribute their knowledge and experiences in establishing, starting and growing companies. It is not unusual that FFF are appointed as members of the supervisory board (*Beirat*).

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

  By boosting the business, professional investors intend to earn profits as soon as possible. Most experienced investors will expect no less than 30% annual returns on their early stage and start up investments.

- **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)?**

  FFF investors normally prefer simple and low-cost documentation. In contrast, professional investors usually expect detailed contracts and often use standardized documentation (in particular shareholders agreements).

[6] Source: German Private Equity and Venture Capital Association e.V. (BVK), statistics, first half-year 2014, p. 3, http://www.bvkap.de/media/file/527.20140901_BVK-Statistik_Bericht_H1_2014_final.pdf (data retrieved on 23 February 2015).

In our experience, professional investors would not accept any personal liability. Furthermore, they often accept priority payment promises in the distribution of the exit proceeds.

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)?

Significant changes in the focus of the equity holders cannot be identified. Generally speaking, it would be expedient and necessary for existing equity holders to deposit more equity in the company to keep the business running and promote growth.

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

  Equity holders intend to keep an influence on the further development and retain control over their investments. They also want to be protected from dilution. In practice, however, equity dilution is not unusual during the early growth phase.

- **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?**

  In our experience, professional VC investors usually also participate in further capital rounds during the first growth phases and in the majority of cases do not accept any dilution.

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?

In practice, shareholder agreements usually contain anti-dilution clauses. This is due to the fact that German statutory law provides for a basic anti-dilution protection only which is,

in most cases, not sufficient.[7]
In particular, investors are commonly granted specific veto rights, enabling them to prevent the alteration of the articles of association (i.e. they can prevent any increase of the share capital and are therefore protected against dilution).

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?

Typically, such interests are covered by a non-disclosure agreement (*Vertraulich-keitsvereinbarung*) which needs to be signed by any new potential investor. In most cases, such agreement provides for an efficient protection.
In case that shareholders of a GmbH do not want that information is disclosed to a specific investor, they have the right to issue legally binding instructions (*Weisung*) to the management.[8] In addition, German statutory law provides for strict confidentiality obligations for the management of the company.[9]

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:

[7] Sec. 186 AktG.
[8] Sec. 37 GmbHG.
[9] Sec. 85 GmbHG.

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?

It is likely that more equity holders are interested in investing during the growth and the maturity phase, since the business has become established at that point.

Since first profits are generated, equity holders have to regulate exactly how profits shall be shared among all persons involved. During the startup-phase, these issues seem to be less important, as the main focus is on establishing the business.

Another main focus in later phases is typically the harmonization of interests between the management and the investors (e.g. by means of a stock appreciation programme).

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?

In German jurisdiction, the law does not stipulate stricter governance rules for large privately-held companies as opposed to small privately-held companies. Only for listed stock corporations there are special rules.[10]

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.

Partners in partnerships and corporations have obligations vis-à-vis other partners concerning:

a. paying the deposit[11];
b. compensation for payments concerning the partnership[12];
c. loyalty and fiduciary duties; or
d. legally regulated non-competition clauses for managing shareholders of

[10] Sec. 161 (1) AktG.
[11] Sec. 111 HGB; sec. 14 GmbHG.
[12] Sec. 128 HGB.

OHGs/KGs[13]. This does not apply not to limited partners of KGs.[14] For shareholders of a GmbH non-competition clauses can be contractually regulated.[15]

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)?

German law provides for a large number of means of protection. The most efficient way to control the circle of the equity holders is to stipulate that the transfer of shares be made dependent on additional conditions, in particular the other equity holders' consent.[16] Such restriction is normally regulated in the company's 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?

- For shareholders who are financial investors the focus changes to going public. Before an IPO financial investors have great interest in close control of the company. Thereafter, the focus is more relaxed and strongly exit-driven.

- There is no general changed view or even focus on distribution of earnings influenced through an IPO.

---

[13] Sec. 112 (1) HGB.

[14] Sec. 165 HGB; BGH, decision of 5 December 1983 - II ZR 242/82.

[15] BGH, decision of 3 May 1988 - KZR 17/87; Michalski, GmbH-Gesetz, Vol. 1, sec. 13, para. 191.

[16] Sec. 15 GmbHG.

- Yes, the focus shifts from long term to short term, at least if there was a long term focus and the shareholders are financial investors.
  For financial investors like founders, sometimes the focus changes from long term to short term. In other cases founders intend to control the company in the long term even after an IPO, if they have the majority position or substantial stake**.** This however depends, on the specific situation. Founders with a venture capital financed company are often less long term-oriented than founders who did not have financial investors in their company before the IPO.

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?

- Under the EU market transparency regime and its broad implementation in Germany, shareholders have to disclose shareholdings of companies listed in the EU-regulated market if certain levels are crossed or reached (3%, 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%). Furthermore, rights to buy shares as well as other instruments which give a factual possibility to buy shares, have to be disclosed starting at 5%. Starting at 10% certain additional information like so the source of financing for the stake and intentions to influence board position, have to be disclosed as well.

- For companies in the unregulated market, shareholdings need to be disclosed at 25% and 50% (like in the case of unlisted companies).

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.**

  Listed companies in the EU-regulated market are obliged to disclose insider information (ad-hoc). In the unregulated market, similar provisions are implemented by the Frankfurt stock exchange and other stock exchanges. Ad-hoc disclosure is required for any insider information which affects the company itself. Issuers may postpone the disclosure if (i) this is required to protect the interest of the issuer, (ii) the market is not misled and (iii) confidentiality can be safeguarded.

Insider information is any not public-available information with a certain level of being concrete and which would or could influence the investment decision of an investor. Due to the Geltl decision of the EU High Court of Justice[17], even information at an early stage, like entering into a letter of intent, can qualify as inside information, depending on how investors would use the qualification of such 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?**

  As part of the EU, Germany falls under the EU Market Abuse Directive (in the future, the EU Market Abuse Regulation) which provides regulators with respect to insider trading and market manipulation. Insider trading meaning buying or selling shares to another party which is not aware of the respective insider information (regardless of whether the respective investment or the investment decision is from the perspective of the insider information reasonable or not) is forbidden, unless the trading would have had happened even without knowledge of the inside information. Due to a High Court decision, the insider has to demonstrate the latter.[18] Further, passing on insider information is prohibited, provided this passing on is not justified and required to achieve certain objectives of the company.

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:

[17] Court of Justice of the European Union, decision of 28 June 2012 - Rs. C-19/2011.

[18] Federal Court of Justice (*Bundesgerichtshof - BGH*), decision of 27 January 2010 - 5 stR 224/09.

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 board needs to take into account the interest of the target company itself, neither the shareholder interest nor interest of the community. The interests of employees can be one part of the company's interest.

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 the unregulated market, there is no such protection.

- For German companies listed in the EU regulated market German the Security's Acquisition and Takeover Code (*Wertpapiererwerbs- und Übernahmegesetz, WpÜG*) applies. This regulation provides a strict proceeding to protect minority shareholders. For example, the bidder has to disclose its takeover intention and has to publish a takeover offer, which must contain a wide range of information and has to be approved by the financial supervision authority (*BaFin*). The bidder strictly has to treat target shareholders equally. There is a minimum price rule, meaning that the takeover price may not be below the three months' average price before publication of the decision to make the takeover. Further, it may not be below the price paid to any shareholder for acquisitions in the last six month before publication of the decision to make the takeover bid or during the takeover. Even share acquisitions within one year after the end of the takeover offer cause a retroactive increase of the minimum price if those acquisitions are made outside the stock market. In calculating the minimum price, any types of benefit granted to selling shareholders are to be considered including non-cash compensation.

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?

- Due to a new High Court decision[19], the level of protection against a delisting is rather low. Delisting does neither or requires shareholders' consent nor any kind of offer to the existing shareholders to sell their shares anymore. The only protective measure is that after the application in the regulated market, a period of six months has to be observed before the last trading date for a delisting. No obligations in relation to trading exist after the last trading date. The regulation of one local stock exchange (Düsseldorf) provides that an offer has to be made to the existing shareholders to sell their shares in case of a delisting from all regulated markets. However, this can be easily circumvented by establishing a second listing in the regulated market at another German stock exchange, then first terminating the Düsseldorf listing and thereafter the listing in the other regulated market. This new development has been broadly criticized and market participants want the government to implement protection against this risk.

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?

In most cases, investments by FFF are not based on emotional relationships. Therefore, FFF investors would typically not refrain from asking for security. Only in rare cases, FFF are investing to help a family member or close friend and would therefore provide debt on favourable terms and conditions.

[19] Federal Court of Justice (*Bundesgerichtshof - BGH*), decision of 8 October 2013- II ZB 26/12.

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 Germany, it is very uncommon that professional investors act as debt holders. In the startup phase, companies typically cannot provide for sufficient security and, as a result, the credit costs are too high. In addition, borrowings would also negatively affect the operating cash flow. As a result, debt financing in the startup phase (if any) involves special hybrid forms of financing, e.g. silent partnerships, subordinated loans or convertible loans.

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)?

Based on our experience, in the growth phase debt may sometimes be provided by the following individuals:

a. founders (shareholder loans);
b. federal state banks (promotional loans);
c. conventional credit institutions (only on rare occasions).

In case that debt is provided by professional VC investors or FFF, a special focus typically lies on the possibilities to convert such debt into equity (debt to equity swap).

- **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)?**
-

  In our experience, the focus in this phase only slightly differs from the one in the start-up-phase. In the start-up phase the main focus is on equity financing through FFF and professional investors. During the growth phase, debt financing through conventional banks becomes more and more important (but is still not playing a major role in this phase).

- **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?**
-

  Professional VC investors and FFF would typically:

  a. require less security than conventional banks;
  b. expect that their loan includes the option to convert their loan into equity (convertible loan).

  In contrast, conventional banks (if any) use their standardized documentation and would expect:

  a. a good credit rating;
  b. sufficient security;
  c. covenants as a condition of borrowing.

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 our experience, debt holders are typically requesting:

a. common liens such as liens on moveable objects, real estate, or on outstanding accounts of the company;
b. personal securities or guarantee by the founders;
c. security assignments (e.g. shares in the company).

The debt holder's choice depends on how much risk a security instrument carries in the individual case.

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 startup phase or also professional investors?

Professional investors would normally not be willing to subordinate their debt because of a higher investment risk. This is, however, imaginable for some FFF investors whose investments are based on a different motivation. They might be willing to take a higher risk for the benefit of their family member or close friend. However, this is quite unusual in 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?

As already mentioned, debt financing in the startup and growth phase often involves special hybrid forms of financing, e.g. silent partnerships, subordinated loans or convertible loans.

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)?

In our experience, there is still hybrid debt financing in place. However, the vast majority of debt financing is provided by conventional credit institutions. In addition, there is currently a growing trend towards debt financing through the capital market (so called *Mittelstandsanleihen*).

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

  In our experience, the structure and focus of debt holders significantly differ from the ones in the startup and growth phase (see question above).
- **If there is a difference, how may this be reflected in the contractual relationship?**

  Generally, the contracts in the maturity phase are more uniform and standardized than those in the startup and growth phase.
  Typical focus of conventional debt providers is to secure their loans through covenants. In general, breach of a debt covenant usually allows creditors to demand immediate repayment.

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?

Whether or not companies have to publish an annual financial statement depends on their legal form. Annual financial statements have to be published by all corporations, e.g. GmbH (sec. 325 HGB), GmbH & Co. KG (ss. 264a, 325 HGB) and all larger companies pursuant to sec. 1 Public Disclosure Act (*Publizitätsgesetz*). The financial statements are published at the Federal Gazette (*Bundesanzeiger*). In Germany, there is not a specific debt enforcement register. Tax returns do not have to be published.
This being the situation, professional investors typically request that the company provides detailed information about its financial situation (rather than doing a research with the public registers).

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?

In Germany, it is increasingly common that privately-held companies issue notes, e.g. bonds (*Anleihen*), debentures (*Schuldverschreibungen*) or mortgage bonds (*Pfandbriefe*). Many companies fund themselves by notes, e.g. Air Berlin or Karlsberg.
In short, the issuance of notes requires the following, in chronological order:

a. company's choice and decision for a special type of note;
b. collection of all important documents for the procedure, e.g. annual reports, balance sheets;
c. due diligence (economic situation, rating, etc.);
d. definition of the note-conditions (term, securities, profit, etc.);
e. documentation of the conditions;
f. preparation of a prospectus about the company and the notes;
g. prospectus approval through the Federal Agency for Financial Market Supervision (*Bundesanstalt für Finanzdienstleistungsaufsicht - BAFin*) and if applied for, stock exchange trading;
h. denomination of a bank as a paying agent;
i. promotion and sale.

In general, noteholders have the same focus as other debt holders, but they receive higher profits due to a higher risk. Noteholders receive fewer securities. The decisive factors for an investment are a company's solvency and rating.

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?

- It cannot be said that companies have to pay lower interest rates due to their listing. If debt holders envisage more detailed information they request this during the pre-marketing of the debt and if the company is willing to follow this request, it is included in the conditions of the debt. Low interest rates depend more on how familiar debtors are with the respective issuer Issuer whose shares are not listed but for years achieve on debt capital markets may nevertheless get low interest rates.

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?

- It is possible to list notes. They can be listed in the quotation board (standard unregulated market), in qualified unregulated markets like Entry Standard and Primärmarkt and in the regulated market.
- For any kind of listings the notes need to be entered into the clearing system first by issuing a global certificate which is booked into the clearing accounts.
- The listing in the quotation board requires an application by a bank admitted for such applications, it is very quick and cheap. This way is chosen if the bond is placed in a private placement and thereafter listed.
- For listing in a qualified unregulated market a prospectus is required, further, certain preconditions are to be met like having an experienced coach admitted at the respective trading segment and there are certain being public requirements like ad-hoc disclosures. This way is chosen for the so-called “Mittelstandsbonds”, bonds of KMU, which as a market established since 2010.
- Further, listing of a bond in the regulated market is possible. This requires an admission prospectus under the EU Prospectus regime countersigned by bank.

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?

There are no mandatory provisions dealing with this. Whether note holders have a right to terminate their notes on an individual basis depends on whether there is a change of control provision in the terms and conditions. This is often the case, in particular, for smaller issuers but there are a lot of different provisions dealing with this. Interference with the public tender offer by other means is not common.

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

For most issuers there is a change of control termination right in credit facilities.

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?

It most cases, special incentive programmes for the management are set up. This concept is also called "stock for services", "equity compensation" or "sweat equity".
Such programmes usually contain specific regulations in order to ensure that a manager/key employee will not leave the company (ratchet, look-up periods, vesting etc.).

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?

Normally the incentive program includes the issuance of "virtual shares" or "phantom stocks". This means that the managers or employees do not actually participate in equity, but will participate (on a contractual basis) in a sales profit at a later stage in case the company is sold. This is particularly relevant for managers which are not a founding member and are not willing (or do not have sufficient funds) to obtain an equity participation during further capital rounds.

2. Growth phase

The management plays a crucial part in order that a company achieves going from a startup 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?

Whether or not a manager would lose any rights under an incentive plan depends on the individual case (and the terms and conditions agreed in the individual case). In most cases, however, a manager would usually not lose any rights under an incentive plan. In general, German law provides for a strict regime with regard to forfeiture of shareholder rights. In addition, whether or not "leaver"-clauses are legal binding is still controversial in German courts.[20] As a result, "bad leaver" provisions are typically only addressing serious issues (e.g. fraud and wilful misconduct).

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)?

Vesting periods are commonly stipulated for terms between 24 and 48 months. If a manager or employee leaves the company before the expiry of such period, very often they do not lose all shares or options they held since the most contracts include graded vesting regulations. Consequently, the amount of shares or options a manager or employee is allowed to keep depends on the period he has worked for the company.

2.3 In certain jurisdictions the management may fall out of labour 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 labour relationship or corporate relationship). Is this the case in your jurisdiction? If so, is the loss of labour rights compensated by special laws or by contractual means?

Under German law, managing directors (*Geschäftsführer*) are generally not considered as

[20] OLG Frankfurt am Main, decision of 23 June 2004 - 13 U 89/03; OLG Düsseldorf, decision of 16 January 2004 I - 17 U 50/03.

employees and, consequently, employment law (including statutory protection as to unfair dismissal) does not apply.

In contrast, an executive employee (not a managing director) remains an employee even if he/she carries out executive duties for the company.[21] However, under specific circumstances, his/her protection against dismissals can be curtailed. These requirements have to be checked in the individual case. E.g. in the unlikely case that a key employee would obtain an equity holding of more than 50 %, he/she would lose his/her employee status.

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?**

Under German law, corporate bodies are obliged to act in the best interest of the company.

A definition of “interest of the company” is not codified. However it is broadly accepted, that “interest of the company” means that the corporate body has to act aimed at a long term increase in earnings and competitiveness of the company,

[21] BAG, decision of 26 May 1999 - 5 AZR 664/98.

including subsidiaries and the group as a whole. This so called duty of care is owed to the company itself and not to individual stakeholders.

Long term interests have to be taken into account.

Corporate bodies also fall under the scope of fiduciary duties. Under fudiciary duties each member of the management board is obliged to consider the companies interest first. Members of the management board are not allowed to use companies' resources for private aims. One element of fiduciary duties is the non-compete obligation.

All shareholders have to be treated equally.

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?

Management and supervisory board members have to observe a duty of care towards the company. This applies regardless of listing or non-listing. The general duty of care applies that conflicts of interest are to be avoided and that in case of a conflict of interest the respective board member has to value the interest of the company over all other interests. There are few regulations for specific situation like entering into a service agreement (for instance as a lawyer) between a supervisory board member and the company (which requires a consent of the supervisory board).

The German Corporate Governance Codex recommended these members of the management board shell disclose conflicts of Interest to the supervisory board without delay.

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?

For venture financed companies it is quite common to establish incentive plans of key management and employees. The same is the case for private equity owned companies. For other non-listed companies it is not common; for listed companies this depends on the situation and economic area of the company - in high growth business this is more common.

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.)?

- The most significant change is the need to communicate who is the capital market, stick to transparency rules and being in the focus of the public discussions.

- Going Public often leads to other type of shares / warrant based compensation parts being introduced. For instance before an IPO stock options are in most cases not exercisable before an exit, as the shares can in effect not be sold, while after an IPO a liquid market for sale of shares exists.

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?

In Germany the variable part of the salaries for managing board directors needs to include also long term incentives. At least three years is regarded long term.

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.

- There is no mandatory lock-up period for the management and/or employees.
- In almost all cases there is a contractual lock-up for the management of 12 to 24 months after an IPO. Regarding employees it depends on the case but investors like to see the same lock-up period for employees as for the management.

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?

The board needs to be neutral and may only take defense measures which are in the interest of the listed company.

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

There are no standard measures. Any actions will much depend on the individual situation.

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)?

It is not common to change any provisions of agreements with management / key employees upon an acquisition. It is not common to regulate a non-solicitation by the Seller because in most cases selling shareholders only owe a portion of the company.

D) Interest of advisors / lawyers

1. Start-up phase

During the start-up 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)?

Entrepreneurs need predictable costs. So the fees are generally below the standard rates and the fees are limited by caps. Differences in the levels of fees are normally not compensated in later 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 start-up methodology it is advisable to diminish uncertainty for the project by means of developing an MVP to validate the project)?

Sometimes clients suggest paying by shares and warrants, but the majority of German lawyers generally do not accept shares or warrants in place of fees since a lawyer wants to safeguard his independence (and for tax reasons).

2. Growth phase

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)?

Our legal services are usually charged on hourly rates. However, in some cases we are offering fixed fees for particular steps of a project, e.g. each financing round. In later phases, hourly fees are usually agreed.

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?

In our experience, it is unusual that advisors or lawyers take a board position.

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?

Equity has to be negotiated on a case-by-case basis. Generally speaking, the amount of equity a founder should receive is dependent on when, how much and how long he has been contributing to the company. Equal partners may put a company out of business if they cannot agree and do not find a way to settle fundamental disagreements. In particular, a fifty-fifty division could lead to a stalemate. In case that the equity structure becomes more complex, it might be wise to bundle certain shareholders by way of a pooling 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?

Generally speaking, a distinction must be made between the articles of association and shareholder agreements. The articles of association are (in certain cases) also enforceable against third parties, whereas shareholder agreements are only binding between the parties. In principle, German law offers extensive flexibility and it is, for instance, possible to include preference rights in the articles of association.

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)?

Once maturity is reached fee levels can be moderately increased and there are less caps and flat 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)?

- German lawyers are able to become members of the board of directors but have to take in consideration that this might cause difficulties in case they are advising the company on an ongoing bases. This is due to the requirement that service agreements with supervisory board members need to be approved by the supervisory board and must clearly not include any service which the board member in its board position is obliged render. Therefore, agreements which are very unspecific, stating legal advice if provided may be invalid.

- More mature companies with a high level of requirements for legal advice and at a certain stage to engage a corporate counsel which provides ongoing advice in the daily business. Particular financing advice is in almost any case rendered by outside concept

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)?

See C.3.

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

The anti-money laundering provision have not change the form of advice.

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?

In most cases fees are structured with hourly rates and a cap or at least an estimate which is not to be exceeded significantly.

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)?

Beside the obligation to publish a prospectus there are no regulatory aspects before offering equity to the public. Therefore, the drawing up of the prospectus is the main regulatory aspect from a lawyers' perspective. Lately, implementation of the Alternative Investment Fund Directive in Germany became affected to be considered in the equity offering of issuers from the financial sector.

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)?

There is the Entry Standard, a qualified segment of the unregulated market, which is less strict in its requirements than the EU regulated market.

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

No.

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)?

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 difference is that there is a free float and therefore entering into share purchase agreement with all shareholders is not possible. In the regulated market a public tender offer needs to be published which is a whole different process from a standard M&A transaction. Further, insider and ad-hoc regulations as well as the prohibition of market manipulation are to be observed and disclosure requirements of shareholdings have to be observed is to be looked into. A particular challenging point is often to provisions of acting in concert.

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?

As described above a delisting is now rather easy in Germany. However, the main objective of the purchaser in most cases is to get rid of minority shareholders. Therefore, purchasers are looking either for a structure to achieve the threshold of 90% which is required for a squeeze-out or at least to enter into a domination and profit transfer agreement which is possible with a 75% majority in the shareholders’ meeting. Squeeze Out is a transfer of the shares of the minority shareholders by operation of law against a cash compensation at fair value.

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)?

In those stages caps and flat fees are not so common as it is difficult to estimate the fees. Often the issuer advised has a long relationship with us and we are simply invoicing our hourly fees at the rate agreed on before.

BIBLIOGRAPHY

- Eisermann, Sven *Die GmbH als attraktive Rechtsform in Europa: Die Reform des GmbH-Rechts durch das MoMiG*, disserta Verlag, 2014.
- Kästle, Florian/Heuterkes, Katja *Leaver-Klauseln in Verträgen über Management-Beteiligungen im Lichte der neuesten OLG-Rechtsprechung*, NZG 2005, 289-294.
- Michalski, Lutz *Kommentar zum Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbH-Gesetz), Vol. 1*, 2d ed. Reading C.H. Beck, 2010.

TABLE OF CASES

- Court of Justice of the European Union, decision of 9 March 1999 - Rs. C-212–97.
- Court of Justice of the European Union, decision of 5 November 2002 - Rs. C-208/00.
- Court of Justice of the European Union, decision of 30 September 2003 - Rs. C-167/01.
- Court of Justice of the European Union, decision of 28 June 2012 - Rs. C-19/2011.
- Federal Court of Justice (*Bundesgerichtshof - BGH*), decision of 8 October 2013- II ZB 26/12.
- Federal Court of Justice (*Bundesgerichtshof - BGH*), decision of 5 December 1983 - II ZR 242/82.
- Federal Court of Justice (*Bundesgerichtshof - BGH*), decision of 3 May 1988 - KZR 17/87.
- Federal Court of Justice (*Bundesgerichtshof - BGH*), decision of 27 January 2010 - 5 stR 224/09.
- Federal Labour Court (*Bundesarbeitsgericht - BAG*), decision of 26 May 1999 - 5 AZR 664/98.
- Higher Regional Court (*Oberlandesgericht - OLG*) Frankfurt am Main, decision of 23 June 2004 - 13 U 89/03.
- Higher Regional Court (*Oberlandesgericht - OLG*) Düsseldorf, decision of 16 January 2004 I - 17 U 50/03.