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 Poland

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Introduction

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

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

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

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

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

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

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A. Interest of equity holders

1. Start-up phase

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

From my point of view, the decision of a typical entrepreneur regarding the establishment of a specific business association depends on several factors, including:

- the extent of the planned business activity (local, national, international);
- the scope (object) of the planned business activity (as some activities require the entity in the legal form imposed by law), the risk connected therewith and – consequently – the need to limit such risk (in particular, as regards the personal liability of the entrepreneur – as the equity holder – for the obligations of the business association);
- the amount of the potential co-equity holders, if any (as solely the capital companies may be established as the sole shareholder entity);
- the importance of the stability of the structure of shareholders/partners for the business association;
- the availability of financial resources that may be invested in the business association (some types of associations require the share capital in the amount specified in the Commercial Company Code);
- the arrangements with other entrepreneurs regarding the management of the association on a daily basis;
- the prospected need and availability of the external and internal sources of financing of the association;
- the optimization of the tax issues.

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

The Polish Commercial Company Code (hereinafter referred to as: "CCC") distinguishes between partnerships and capital companies. There are four types of partnerships and two types of capital companies specified in the CCC.

Partnerships include:

1. registered partnership,
2. professional partnership,
3. limited partnership, and
4. limited joint-stock partnership.

Capital companies include:

1. limited liability company, and
2. joint-stock company.

There are a lot of differences between the aforementioned business associations. From an equity holder's perspective, the most crucial differences relate to: the scope of personal liability and tax obligations.

The differences concerning the scope of liability of equity holders in different types of commercial companies

The equity holders of partnerships are – as a rule – personally liable for the obligations of the partnership. The abovementioned personal liability of the equity holder is subsidiary. It means that a creditor of the partnership may conduct execution from the personal assets of the equity holder, provided that the execution from the assents of the partnership proves ineffective.

Notwithstanding the foregoing, it has to be noted that the rule regarding the personal liability of the equity holder of partnerships described above is directly applied solely to the partners of the **registered partnerships**. In other types of partnerships there are some modifications as regards the rules and the scope of personal liability of the equity holders – in comparison to the general rule in question.

In **professional partnerships** partners are liable in accordance with the general rule described above, provided however that the partner shall not be liable for the obligations of the professional partnership which arise in connection with the pursuit by the remaining partners of the profession in the partnership, or for the obligations of the partnership which arise as a result of acts or omissions of persons employed by the partnership under an employment contract or otherwise who have been guided by another partner in the provision of services connected with the objects of the partnership.

In **limited partnerships** there are two categories of equity holders: the general partner and the limited partner. The general partner is liable to the creditors of the limited partnership for the obligations of the partnership without limitation. In other words, the general rule of personal liability presented above shall be applied to the general partner. At the same time, the personal liability of the limited partner is limited to the sum agreed in the articles of association of the limited partnership (commendam sum).

In **limited joint-stock partnership** there are two categories of equity holders as well. The categories include: the general partner and the shareholder. The scope of personal liability of the general partner is identical to the liability of the general partner of a limited partnership. The shareholder is – as a rule – not personally liable for the obligations of the limited joint-stock partnership.

The personal liability of the equity holders of **capital companies** for the obligations of the company is – in general - excluded.

The tax obligations

The differences between partnerships and capital companies as regards the tax obligations - from an equity holder's perspective – concern mainly income taxes.

The income of the capital companies and the limited joint-stock partnerships is subject to the corporate income tax (CIT) in the rate of 19%. Besides, upon the division and the distribution of the profits of the capital company among its shareholders (and the profits of the limited joint-stock partnership to the extent to which the profits are distributed to shareholders of the partnership), the shareholders in question are subject to the personal income tax in the rate of 19%. Consequently, the income of the aforementioned types of business entities is **double taxed**.

Registered partnerships, professional partnerships and limited partnerships are not subject to the corporate income tax. The partners thereof are subject to personal income tax – upon the division and distribution of the profits of the aforementioned partnerships among the partners.

The sole shareholder

Without prejudice to the foregoing, as long as the equity holder's aim is to be the sole shareholder of the business association, his/her choice as regards the type of the business association is limited to the capital companies, since the partnerships shall – pursuant to the CCC – have at least two partners. In other words, it is not permitted to establish a sole partner partnership.

The most commonly used business association structures for start-ups

In accordance with the information from the Central Statistical Office of Poland (as of 31st December 2014), the most commonly used business association structure is a limited liability company. At the end of the year 2014, there were 345.135 of the limited liability companies established in Poland. The second most commonly used business association structure is a registered partnership. There were 34.841 of the registered partnerships registered in Poland as of 31st December 2014.

From my point of view, the dominance of the limited liability company results from its suitability for wide range of activities. In contradiction to partnerships, the limited liability company may be incorporated for any purpose allowed by law

(the partnerships solely to operate a business under its own business name). Moreover, as indicated above, this type of a business structure excludes the personal liability of the shareholders for the obligations of the company and limits the personal liability of the members of the management board of the company. At the same time, the minimal share capital of such company shall amount merely PLN 5000 (approximately EUR 1200), whereas the minimal share capital of a joint-stock company amounts PLN 100000 (approximately EUR 22500) and the minimal share capital of the limited joint-stock partnership amounts PLN 50000 (approximately EUR 11250).

The equity instruments in a limited liability company and the anonymity therein

The only one way of the participation in the limited liability company is the possession of the shares thereof. There are not any specific equity instruments in CCC, other than common shares. Moreover, for shares may not be issued bearer documents, registered documents or documents to an order.

Without prejudice to the foregoing, it has to be noted that the CCC permits the preference shares, i.e. the shares with special rights attached to them. Such rights shall be specified in the articles of associations of the limited liability company. The privileges may concern in particular:

- the right to vote, provided however that the privilege may not grant to the entitled party more than three votes per one share;
- the right to dividends, provided however that the privilege may give entitlement to dividends not larger than 150% of the dividend payable on non-preference shares;
- the way of the participation in the division of assets in the event of liquidation of the limited liability company;
- priority in subscribing for new shares;
- priority in case of the redemption of shares and the receipt of the remuneration due to a shareholder for a redeemed shares;
- the right to the appointment of the members of the company bodies;
- the right to summon the general meeting of shareholders.

It is – as a rule – not possible to remain anonymous for a shareholder of a limited liability company towards the company and other shareholders, as the management board of the limited liability company is obliged to keep a share register where the details regarding the each shareholder (i.e. first name, surname or business name, seat, address, the number and the nominal value of the shares) are entered. Each shareholder has the right to inspect the share register.

Regardless of the foregoing, the transfer of the share to another party shall be notified to the limited liability company by the parties involved. Such transfer shall be effective with respect to the company as of the moment when company receives a notification of the same, together with a proof of the transaction.

As far as the anonymity of the shareholders towards the public is concerned, it should be indicated that there is in Poland the National Court Register, where – i.a. -the shareholders possessing at least 10% of the shares in the share capital of the limited liability company have to be listed. The Register in question is open to the public and is available per Internet.

Even the shareholders possessing less than 10% of the shares in the share capital of the limited liability company may be easily disclosed by the public. Although they are not listed in the Register, still there is a possibility for everyone interested to analyze the registry files of the limited liability company, including the list of all shareholders (which includes the first name and the surname or the business name of the shareholder and the number and the nominal value of the shares of each shareholder) . Such files are filed in the registry court competent for the registered seat of the company and are open to the public as well. As a consequence, the shareholders cannot remain anonymous towards the public.

The aforementioned remarks do not exclude however the possibility of the fiduciary transfer of shares – without the notification to the company thereof. In such case, the transfer of the shares is effective solely *inter partes*.

The equity instruments in a joint-stock company and the anonymity therein

The only one way of the participation – as a shareholder - in the joint-stock company is the possession of the shares thereof. There may be registered shares and the bearer shares of the joint-stock company.

Registered shares may be changed to bearer shares or the opposite change may be made – at the request of the shareholder, unless the law or statutes provide otherwise.

It is not possible – for the holder of the **registered shares** in the joint-stock company – to remain anonymous towards the company and other shareholders. His/her details (i.e. first name, surname or business name, the seat and the address) are disclosed in the register of the registered shares which shall be kept by the management board of the joint-stock company. Each shareholder may inspect the share register and request excerpts therefrom. Moreover, in relations with the company, only a person who is registered in the share register – as the holder of the registered shares – shall be deemed the shareholder.

It is however possible – for the holder of the registered shares in the joint-stock company – to remain anonymous towards the public. Unlike in the limited liability company, in the joint-stock company there are not disclosed any details

concerning the shareholder of the joint-stock company in the National Court Register, except to the extent that the shareholder is the sole shareholder of the company.

As far as the **bearer shares** are concerned, the holders thereof may remain anonymous for other shareholders and for the public. They cannot however be anonymous for the company, as in relations with the company, only a person who has possession of a bearer share shall be deemed a shareholder.

It is allowed under the CCC to issue the non-voting shares in the joint-stock company. These are the shares privileged as regards the dividends with the limited voting right. The right to dividends resulting from the non-voting share is not restricted – unlike the shares privileged in respect of dividends other than non-voting shares - to the 150% of the dividend payable on non-preference shares.

It has to be mentioned that the non-voting shares are perceived in the Polish legal doctrine as the way of obtaining the additional internal financing by the joint-stock company without the risk of any attempt of any hostile takeover of the company (as the holders of the non-voting shares have limited voting rights). In other words, such shares are perceived as valuable rather from the perspective of the joint-stock company, and not from the perspective of the equity investor.

Regardless of the foregoing, the CCC permits the issuance by the joint-stock company of the preference shares. Preference shares, with the exception of non-voting shares, shall be registered shares. The privileges of the preference shares may relate to:

- the right to vote, provided however that the privilege may not grant to the entitled party more than two votes per one share;
- the right to dividends, provided however that the privilege may give entitlement to dividends not larger than 150% of the dividend payable on non-preference shares (and subject to non-voting shares as described above);
- the way of the participation in the division of assets in the event of liquidation of the limited liability company;
- priority in subscribing for new shares;
- priority in case of the redemption of shares and the receipt of the remuneration due to a shareholder for a redeemed shares;
- the right to summon the general meeting of shareholders.

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?

It can be distinguished between the non-professionals equity investors (friends, family and private investors [fools]) and the professional ones. From my point of view, the reasons for which each of the aforementioned group focuses on the investment in the company in the start-up phase are based on different premises.

As regards the **family members**, they know the founder of the company for most of his/her life and have a personal relationship to him/her. Consequently, their decision whether or not to financially support the newly-established company is not based (merely or at all) on financial interest in the company. They rather would like to help the entrepreneur to get his/her business going – in accordance with the principle of the support within the family. At the same time, the family members will not likely be analyzing the chances of commercial success of the company.

As far as **friends** are concerned, their decision whether or not to invest in the company is not based solely on emotional arguments and personal commitments. Although the personal commitments and the interdependence within the social network is of importance, the friends would like also to assess the odds of the commercial success of the company. Unless however they have specific knowledge regarding the business activity of the company, their assessment is based rather on the personal features of the founder of the company. If he/she is perceived as an intelligent, trustworthy and reliable person who is passionate about his/her idea and implements the idea step-by-step, they likely invest their money in the company.

Concerning the motivation of the **private investors** (fools) as regards the investment in the company, they have neither personal relationship with the founder of the company, nor – as a rule - the specific knowledge regarding the business activity of the company and the tools to assess it. Consequently, they make the decision whether or not to invest in the company through the analysis of the behavior of the founder (whether or not he is passionate) and his/her likeability. Moreover, they ask about the past of the company (in order to find out whether or not the company has made any progress from the date of its establishment or the first activity of the company is to find the investor). Besides, they analyze the business plan of the founder – to verify whether the he/she is merely a dreamer or has a realistic plan.

The focus of the **professional investor** differs from the abovementioned focus of the family, friends and fools. The professionals focus on:

1. the state of progress of the project – whether it is solely the PowerPoint slideshow and a business plan or a fully established company – as the transaction regarding the start-up is born with risk, any work performed by the founder (the verification of the market, identification of the competitors, maybe the first contracts signed and first customers) limits such risk and – consequently – make the investment more attractive for the professional investor;

2. the scope of the business of the company – whether company offers a unique solutions to the actual need of the potential customers and whether such company does not compete with the other companies in which the investor has invested;
3. the potential market and the competitors – the investor assess the capacity of the potential market in which the company would like to perform its activity and the knowledge about the market of the founder of the company;
4. the stuff of the company and their experience – whether or not the stuff consists of passionate, innovative, experienced and motivated people;
5. the income of the company (if any);
6. the business model of the company, including – in particular – the sources of financing it;
7. the risk analysis (due diligence) – the identification of any fundamental risks, including the risk resulting from the concluded commercial contracts, employment contracts, etc.

The main differences as regards the legal relationship between the company and the investor – between family, friends and fools and the professional investors – are: the due diligence performed by the professional investor before the entrance into the agreement and the wide range of requests regarding the representations and warranties of the company (the founder).

2. Growth phase

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

In the growth phase the **investors** who have invested their money in the company at the start-up stage are able to initially practically verify whether or not the company has the chances to achieve success in the market.

If the chances are considerable, **the professional investors and the part of private investors** focus on the maintenance of their position in the shareholders structure of the company. Under the CCC, the rule is that the existing shareholders of the limited liability company and the joint-stock company (closed subscription) shall have the priority in subscribing for the new shares in the increased share capital in the company – in proportion to their existing shares. It means that – if the existing shareholder does not exercise his/her right to subscribe for the new shares, his/her participation in the company may be diluted – to the benefit of the other shareholders (either

existing or new). In order to avoid the aforementioned risk, the existing shareholders actively participate in the increase of the share capital of the company.

Notwithstanding the foregoing, in the phase in question, the aforementioned investors are aware that the companies in this phase have a strong growth potential, but at the same time they operate on a higher level of business risk – in comparison to the mature companies. They are not willing to divide the profits of the company (if any). They think long-term and rather would like to keep the profits in the company and assign them for the further development and further investments of the company.

The family, friends and the part of the private investors – do not – as a rule want to bear the expenses in order to protect their position in the company. The friends and the private investors would like to cash out. They are afraid they cannot afford the further development of the company and the constant need of the company to be invested.

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?

As indicated above, the rule in the CCC is that the existing shareholders of the capital companies shall have the priority in subscribing for new shares in the increased share capital – in proportion to their existing shares. It means that as long as the existing shareholders participate in the increase of the share capital of the company, they cannot be diluted. If, however, the existing shareholders do not take part in the increase of the share capital, they are not protected – by the CCC - against the dilution of their position in the company.

Please note that the articles of association or the resolution on the increase of the share capital may provide otherwise, in particular the priority right may be excluded. Such exclusion however – if made in the resolution of shareholders – requires the consent of all shareholders.

Regardless of the foregoing, the CCC stipulates a possibility that the transfer of the share shall be subject to the consent of the company or otherwise restricted. If the transfer is subject to the consent of the company, the consent shall be given by the management board of the company. The other

restrictions - introduced contractually to the articles of association – include i.a.:

- the priority right of the acquisition of the shares by the existing shareholders in proportion to their existing shares;
- the pre-emption right;
- the consent of the general meeting of shareholders or any other third party.

It has to be underlined that the restriction regarding the transfer of the share applies to the shares in the limited liability company and the registered shares in the joint-stock company. As a consequence, the restriction in question does not apply to the bearer shares in the joint-stock company.

2.3 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 holder's wish to keep such information confidential? Do existing equity holders have legal means to prevent management from disclosing such information?

In the CCC the rule is that the management board of the capital companies is entitled to represent the company in all court proceedings and out of court dealings. Such right to the representation of the company may not be restricted with a legal effect towards third parties.

Nevertheless, the members of the management board of the limited liability company and the joint-stock company shall be – in relation to the company – subject to the limitations stipulated in resolutions of the shareholders (and the supervisory board – as regards the joint-stock company). Consequently, the shareholders may adopt a resolution forbidding the management board the disclosure of the confidential information of the company to the third parties.

Regardless of the foregoing, the management board shall manage the affairs of the company and represent the company with the due diligence. The due diligence shall cover i.a. the conclusion of the non-disclosure agreements with the third parties to whom the confidential information is disclosed.

The failure of the management board to comply with the aforementioned resolution or the failure to act with the due diligence may result in the liability of the members of the management board to the company for the damage caused. Notwithstanding the foregoing, at any time the members of the management board of the limited liability company may be dismissed by the resolution of the shareholders (or the supervisory board) – also as an organizational sanction.

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 my opinion, the equity holder base change in the course of the life of the company. Due to the several financing rounds, the shares of the friends, family, private investors and the founder are diluted. As a consequence, the equity investors acquire the dominant position in the company. In this aspect, it has to be taken into account that – in the ordinary course of business – the decrease of the percentage share of the founder in the share capital of the company shall be compensated by the increase of the value of the shares held.

In this phase, the professional investors start thinking about the resale of their shares in the company. In this context, they consider: another (larger) investors, the listing of the company, management buy-out etc.

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?

There are not – as a rule - any differences between the corporate governance rules of the large companies as compared to small companies. Solely, as regards the limited liability company, the CCC provides for that the supervisory board (or the audit committee) shall be created in companies whose share capital exceeds PLN 500000 and where there are more than twenty-five shareholders.

In the opinion of the legislator, in the larger limited liability companies the individual right of the shareholder to control the company shall not be sufficient, as it is – as a rule – inexpert. Consequently, the duty of the supervisory board is to exercise the permanent supervision over all areas of the activities of the limited liability company. At the same time, if the supervisory board (or the audit committee) is created, the articles of association may exclude or limit the right of the shareholders to exercise the individual control over the company.

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.

The fundamental obligation of the shareholders of the capital companies towards the company is to make a contribution (either cash or in-kind) to company.

The shareholders of the limited liability company have only a few other obligations **towards the company**. The obligations include:

- the duty to provide recurrent non-pecuniary performances, if stipulated in the articles of association;
- the duty to make additional contributions to the company – in proportion to the share, if stipulated in the articles of association;
- the return of the payment received by the shareholder in breach of the law or the articles of association of the company;
- the **duty of the loyalty** towards the company – the obligation in question is based on the provision of the CCC pursuant to which: for significant reasons concerning a given shareholder, the court may rule on his/her expulsion from the company. As indicated in the Polish legal doctrine one of the abovementioned significant reasons can be the abuse of the rights of the shareholder by the expulsed shareholder.

The only other obligation (besides the making of the contribution) of **the shareholders of the joint-stock company towards the company** is the duty to provide recurrent non-pecuniary performances, if stipulated in the articles of association.

It has to be noted that the shareholders of the joint-stock company do not have any organizational obligations towards the company. In particular, **there is no duty of the loyalty of the shareholders** towards the company. Although some representatives (minority) of the legal doctrine claim that the duty in question results directly from *animus societatis*, the majority of the representatives claim that:

- in the CCC the duty of loyalty towards company is expressly stated as regards the members of the management board and the members of the supervisory board and not the shareholders;
- the duty of the loyalty of the shareholders shall be against the nature of the fully-capital nature of the joint-stock company.

Regardless of the foregoing, the majority shareholders of the joint-stock company have the obligations towards the minority shareholders regarding the forced purchase of the shares of the minority shareholders:

- upon the adoption of the resolution of the shareholders of the joint-stock company on a major change of the objects of the company (a majority of two thirds of the votes is required); the effectiveness of the resolution depends on the buyout of the shares of the shareholders who do not agree to the change by the remaining shareholders;
- reverse squeeze out - a shareholder or shareholders representing not more than 5% of the share capital may request that the agenda of the next general meeting of shareholders includes the matter of adoption of a resolution on a forced purchase of their shares by no more than five shareholders who jointly represents not less than 95% of the share capital, each of whom holds not less than 5% of the share capital.

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)?

There are two ways of obtaining the status of the shareholder in the capital companies:

1. the (original) acquisition of the share – while increasing the share capital of the company, and
2. the purchase of the share from the other shareholder of the company.

As indicated in section 2.2 above – as a rule – the capital company is entitled to prevent the third parties (including the competitors) from holding the shares in the company in each of these two ways.

As far as the original acquisition of the share is concerned, unless the articles of association of the company or the resolution on the increase of the share capital provide otherwise, the existing shareholders shall have priority in subscribing for the new shares in the increased share capital in proportion to their existing shares. As a result, if all of the existing shareholders exercise their rights of priority in subscribing for the new shares, the third parties will not be able to acquire the shares and – thus – to obtain the status of the shareholder of the company. If, however, any of the shareholder fails to exercise his/her right, the management board is entitled to offer the new shares to any other entity.

As regards the purchase of the share from another shareholder of the company, the articles of association may stipulate that the transfer of the share shall be subject to the consent of the company or otherwise restricted. If the transfer

is subject to the consent of the company, the consent shall be given by the management board of the company. Again – if the company does not want the particular entity to become a shareholder thereof, the management board shall not grant the consent on the transfer of the share.

It has to be underlined that the restriction regarding the transfer of the share applies to the shares in the limited liability company and the registered shares in the joint-stock company. As a consequence, the restriction in question does not apply to the bearer shares in the joint-stock company.

Without prejudice to the foregoing, the arrangements regarding the restrictions of the transfer of the shares by the existing shareholders to the third parties are – as a market standard – stipulated in the shareholders' agreements. The breach of the provisions of the shareholders' agreement regarding the prohibition of the transfer of the share to the third party results – in general – in the compensation liability of the shareholder whose shares were transferred (or – if stipulated – results in the obligation to pay liquidated damages). Nonetheless, the legal action of the transfer of the shares remains effective.

4. IPO/Listed phase

4.1 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 publicly available records on the identity of shareholders achieving or exceeding – in the listed company the threshold of: 5%, 10%, 15%, 20%, 25%, 33%, $33^1/_3$%, 50%, 75% or 90% of the total votes at the general meeting of shareholders.

Regardless of the foregoing, a the identity of the shareholder whose stake has exceeded:

- 10% of the total votes at the general meeting of shareholders is required to notify any change of the stake by at least 2% of the total vote at the general meeting of shareholders.
- 33% of the total votes at the general meeting of shareholders is required to notify any change of the stake by at least 1% of the total vote at the general meeting of shareholders

- is also publicly available.

4.2 Are companies that are listed in your jurisdiction under an obligation to publish price-relevant information? If so, lease provide a short overview of the respective rules including the exemptions from such obligation.

Under the Polish law the listed company is obliged to disclose any and all inside information regarding – either directly or indirectly – an issuer and/or a financial instrument which has not been yet publicly disclosed and such disclosure may have significant impact on the price of the financial instruments in question.
Besides, the listed company is obliged to publish:

- Current reports – report on events concerning the issuer or the issuer's subsidiary, as well as other significant information (e.g. acquisition and the sale of the material block of shares, transactions of the persons performing specific functions in the company);
- Quarterly reports for Q1, Q3 and Q4, containing unaudited abridged quarterly financial statements;
- Semi-annual reports for H1 of the financial year, containing audited abridged semi-annual financial statements;
- Annual reports containing audited annual financial statements prepared in accordance with the accounting principles binding on the issuer.

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.)?

Under the Polish law, the board of the directors of the listed target company is obliged to present its opinion regarding the offer to the public opinion (including the shareholders of the company) and to the Banking Supervisory Commission.

From my point of view, the opinion in question shall be based on the information presented by the bidder in the public notification of the subscription for the sale of the shares (for details please see under 5.2 below).

The board of the directors is obliged to evaluate the influence of the notification on the interests of the company. The opinion shall reference to:

- the strategic plans of the bidder towards the company which are disclosed in the notification and

- the influence of the plans on the employment rate in the company and the planned place of the business activity of the company after the takeover.

In general, the members of the board of directors of the company are obliged to take care of the interests of the company and act with the due diligence. The same standards of behavior shall apply as regards the opinion concerning the takeover of the company.

Without prejudice to the foregoing, the opinion shall take into account the interests of the employees of the issuer and the affiliates of the issuer. It has – however - to be point out that the balance between the interests of the aforementioned entities is not always possible, as the interests of the company, its affiliates, shareholders, members of the board of directors, employees, etc. may be divergent.

Notwithstanding the foregoing, in practice, the boards of directors while making the decisions concerning the support of the offer take into the consideration the following dimensions:

- the prospective position of the members of the board of the directors after the transaction – in order to support the offer, the members of the board of directors have to negotiate the wide scope of freedom and autonomy, as well as maintain their privileges and control;
- the analysis of the situation of the company – whether or not the offer is the best option available for the target company;
- the evaluation of the reasons of the takeover attempt – whether the bidder would like to takeover the company in order to get rid of the market competitor (which will ultimately result in the liquidation of the target company), or rather create the competing enterprise – with the use of the synergy effect;
- the assessment of the probability that the shareholders of the target company will be willing the sell their shares (in case of the hostile takeover attempt) – if the target company develops well and fulfills the interests of its shareholders, the latter will not be willing to get rid of the shares;
- the available defense measures of the target company – both legal and non-legal.

5.2 In your jurisdiction, how does the law protect shareholders of the target in case of public tender offers.

In accordance with the Polish law the takeover of the listed company is conducted by way of the public notification (by the bidder) of the subscription for the sale of the shares of the company in question.

The necessity of the public notifications is aimed at:

- the protection of the investors – by enabling them the sale of their shares in the company;
- the equal treatment of each investors in case of the acquisition of the considerable package of the shares by any of the investors;
- the prevention from the takeovers of the issuer without having first taking into account the interests of the minority shareholders.

As a rule, the bidder is bound by the conditions described in the notification. It means that the bidder cannot purchase the shares on a conditions different than indicated in the notification.

The notification in question has to include the minimum information that is required by law and covers i.a. **the price offered** for the shares. In this context, it is worth noticing that the price cannot be freely determined.
There are some rules regarding the determination of the price of the shares. To simplify: the law stipulates that the offered price cannot be lower than the average market price of the shares – within 6 months preceding the announcement of the notification. Should it be impossible to establish the price as described above, still the price cannot be lower than the fair price.

5.3 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?

As a public company shall be deemed the company in which at least one share exists in the dematerialized form. Consequently, the delisting of the company requires the restoration of the certified form of the shares (i.e. rematerialisation of the shares).

The aforementioned restoration of the certified form of the shares – for its effectiveness – requires the consent of the Banking Supervisory Commission. Such consent is granted on a motion of the issuer (whose shares shall be rematerialized).

The motion regarding the restoration of the certified form of the shares may be filed solely upon the fulfillment of the following conditions (which aim is to protect the minority shareholders of the issuer):

- a call for the subscription for the sale of the shares by the shareholders who do not want the issuer to be delisted (in other words: do not want the shares to be rematerialized) – in order to enable the shareholders in question the exit from the company and – consequently – the sale of their shares for **the fair price**;
- the adoption of a resolution by the general meeting of shareholders of the issuer concerning the restoration of the certified form of the shares - with a **majority of four fifth of the votes of the shareholders representing at least a half of the share capital**.

The Banking Supervisory Commission is entitled to refuse the consent on regarding the restoration of the certified form of the shares solely if the abovementioned conditions are not fulfilled.

There is no obligation of an off-exchange trading for the delisted company.

B. Interest of debt holders

1. Start-up phase

In a startup phase, if an entrepreneur asks FFF to invest in a business idea as a debt holder, the debt holder will usually refrain from asking for security in order not to hinder the development of a startup. An exception could be asking for "soft" security instruments, e.g. issuing a bill of exchange and/or providing a submission to enforcement. Such instruments do not give any specific rights in particular assets/property, but facilitate potential enforcement process. In case of financing provided by related entities/persons, one should remember that the transaction should be on market terms, as otherwise there could be a risk of challenging it by appropriate tax authorities.

The behavior of a company acting as a debt holder depends mostly on its risk appetite. Companies which are willing to accept higher risk in terms of their investment (and simultaneously which are expecting higher return for their investment) might also refrain from requesting personal security for the financing which has been provided (or might accept only the "soft" security instruments referred to above.

There are various forms of protecting the interests of such investors such as:

a. option to choose the preferred form of the exit from the company (IPO vs. private sale), the retention of the right to decide which advisors should be appointed to manage the exit process, in particular investment banks, corporate finance advisors, lawyers, accountants, etc.);

b. preference shares, lock-up obligations on the side of the majority shareholder, share transfers subject to the consent of the majority shareholder etc.;

c. drag-along rights vis-à-vis the minority shareholder, which allow the majority shareholder to force the minority shareholders to co-sell their shareholding together with the majority shareholder.

2. Growth phase

In the growth phase, the focus of debt holders is different than in the startup phase. The entities who were present in the start–up phase may be still interested in investing in the business also in its growth phase. Additionally, other entities may want to support the business due to good financial condition and prospects of the company. In the growth phase, the debt holders normally concentrate on smooth repayment of the debt. Therefore, the relevant financing documentation will likely provide stricter levels of financial covenants applying to the company.

The security which is chosen depends on the underlying assets and the availability of such assets for the purposes of creating security. The most common kind of security requested by debt holders are pledges over the assets and/or bank accounts of the company and/or over its enterprise, pledges over company's shares, mortgages over its real property, and possibly security assignment agreements with regard to receivables (rights) under material contracts entered into by the company and/or under insurance policies. In typical project finance transactions (whereby the risk generated in connection with the activity of the financed company is separated from the activity of the sponsors of the project) the lenders might also request personal security such as guarantee or surety extended by a parent (directly or indirect) of a company.

The security is chosen based on its availability to smooth (and preferably out-of-court) enforcement and the treatment thereof in the bankruptcy scenario of the provider of the security interest.

Registered pledges seem to be the most typical and popular security interest nowadays. The reasons to that are twofold: (i) first of all, the registered pledges are publicly visible, as they are being disclosed in a publicly accessible register, and (ii) secondly, registered pledges allow for prompt and out-of-court methods of enforcement, such as forfeiture of the ownership title to the pledged right or asset, and/or the ability to have the pledged right or thing sold within a public auction.

Subordination within the transaction usually appears where at least two tiers of financing are provided, i.e. where the financing is provided by the bank (and such financing is usually senior towards the other forms thereof), as well as the other forms of junior types of financing are additionally provided by a mezzanine lender, and/or (more frequently) the sponsors or the shareholders of the financed entity. In such structures the credit documentation governing the bank's financing usually provides that putting the appropriate subordination in place is a condition precedent for making available the bank's financing to the a company.

Keeping the possibility to participate in the potential valuation upside may be accommodated in Poland through the use of various instruments such as preferred stock, option to redeem the shares held in the company or holding the hybrid instruments such as convertible or preferred bonds and/or convertible warrants. Usually, such instruments are offered to the private equity/venture capital investors and not to banks (as the banks basically make their earnings on the fees and interest on the financing provided to the financed entity and are not willing to take on the role of equity holder). It is, on the other hand, quite common for mezzanine lenders to also request a so called "equity kicker" i.e. an option (subject to meeting certain performance thresholds, etc.), to acquire additional shares providing for additional bonus to the mezz. lender rewarding such lender for its willingness to take on risk level which is closer to an equity holder rather than financing provider.

3. Maturity phase

In the maturity phase, the focus of a debt holder is typically different from the one in the start-up and/or growth phase. This is usually reflected in the credit documentation, especially in terms of providing more strict levels of financial covenants.

The potential debt holder requesting information about the company's financial status may review the audited financial statements of a given entity which should be publically available in the registration (corporate) court files. Nevertheless, and despite a clear legal

obligation to that effect, many companies fail to submit their financial statements to the court files at all, or, more often, they make such filings with significant delay.

In the Polish jurisdiction it is common for privately-held companies to issue notes. Usually, the financing documentation provides for less excessive covenants than the ones included in a documentation prepared for financing banks. The company may perform a private issuance of bonds or a public offering thereof.

The procedure of private issuance of bonds is as follows:

1. The choice of an advisor (including an arranger and a book runner), although this step is optional.
2. The preparation of the relevant issuance documentation (offer to purchase the notes, offering (information) memorandum, corporate resolutions authorizing the issuance, etc.).
3. The marketing of the issue (subscription of the issue, collecting the payments from the investors and the settlement of the issue).
4. The registration of the bonds in Central Securities Repository of Poland (for listed bonds).
5. Admission to trading and the first trading (for listed bonds only).

4. IPO/Listed

Once a company is listed, the investors usually perceives it as a more reputable company thus listed companies typically have to pay lower interest rates.

Listing of the notes is possible in Polish jurisdiction. For example, the procedure of listing on Warsaw Stock Exchange (WSE) Catalyst market is as follows:

1. The decision of an issuer to issue notes.

2. The choice of a brokerage house and advisors.
3. The preparation of a relevant legal and financial documentation in connection with the issue.
4. The approval of the information document by Polish Financial Supervision Authority (KNF).
5. The registration of the bonds in Central Securities Repository of Poland.
6. The offering of the bonds and the allotment of the bonds by the WSE.
7. The application for admission to trading of the notes on the regulated market.
8. The first listing on the WSE.

5. Acquisition

In Polish jurisdiction, there are no forms of a public tender offers on a listed notes. Such tender offers apply only to shares in public companies and only upon the breaching of certain thresholds provided under the Polish Act on public offering.

C. Interest of management / employees

1. Introduction

Both the management and the employees play extremely important role during the entire company's life cycle and are key factor determining the success or failure of the company.

This part of the report aims at highlighting our experiences on how the position and interest of the company's management and employees changes over time within the Company's growth.

2. Start – up phase

The most common way of keeping the management and key employees with the company is the salary increase and/or implementation of a system of remuneration set in reference to the employee's performance / sale results. The companies also often provide so-called "soft incentives" i.e. incentives of a non – monetary nature, that will create a strong bond of cooperation between the company and its managers and/or key employees. It is not a common practice on the Polish market to implement any participation incentive plans at that early stage of business operations.

At a very early stage, many businesses on the Polish market are operated by sole entrepreneurs or as partnerships, where there is no separate structure for the purposes of conducting the business established nor, in most cases, limitation on liability of the entrepreneurs conducting such activity. Although in most cases, as soon as the business achieves certain size, the owners decide to create a separate legal entity for the purposes of conducting their business to secure their private assets and limit their exposure to business risk, it is not uncommon to see medium enterprises with approx. 20-50 employees operating in a form of sole entrepreneurship. Such structures do not allow for any participation incentive programs to be implemented.

The only type of partnership, which might potentially offer a possibility of introducing the employees' / management participation schemes is a limited joint-stock partnership ("spółka komandytowo-akcyjna"). However, this legal structure does not allow for exclusion of liability of a general partner and is a rather sophisticated structure, which is not commonly used in practice.

The provisions of Polish law allow for creation of two types of companies, being separate legal entities and offering exclusion of liability to the shareholders: (i) a limited liability companies ("spółka z ograniczoną odpowiedzialnością"); and (ii) a joint-stock company ("spółka akcyjna").

Most start-up undertakings are formed as a limited liability companies which, with relatively low minimal share capital i.e. PLN 5,000 and lower costs of operations, is within the economic reach of most start – ups. The legal framework of Polish limited liability company does not offer much in terms of structuring of interest-based incentive plans, mainly because a limited liability company may not issue warrants, its shares have to be fully paid when issued and a statutory minimal nominal value of one share (PLN 50) does not allow for dividing a share capital into many shares if it is set at minimal statutory threshold. Furthermore, in a limited liability company it is not possible to conditionally increase the share capital and each share capital increase requires involvement of the shareholders.

A structure of a joint-stock company, provides for more flexibility in terms of implementation of share incentive plans due to a possibility to issue warrants, possibility to acquire shares without full payment of a share contribution as well as low minimal nominal value of one share (1 grosz = PLN 0,01). Moreover, it is possible to increase the share capital of a joint-stock company conditionally for the purposes of implementing the long-term share acquisition schemes. However, a statutory minimal share capital of a joint – stock company (PLN 100,000.00) is often beyond the economic reach of shareholders in the early stages of operations.

The stability of employment and monthly remuneration, remains the most important factor for the employees and key management in the Polish market. In order to provide the employees with more benefits and minimize the financial burden for the business of the costs of employment, many companies engage their staff based on civil law agreements instead of employment contracts, as the cost of such engagement may be up to 40% lower for the employer and allows to offer higher gross salary to the employee.

3. Growth phase

During its growth phase, a company begins to attract more and more capital i.e. investors. While essential to the company's existence and future conduct, the arrival of new investors may often create changes in the company such as replacement of the management board. This may prompt a question, whether the new management will lose the rights granted under an incentive plan. There is no common pattern as far as the issue of retaining or losing the management's rights granted under an incentive plan is concerned and it vary on the case by case basis. The retaining or losing such rights depends on the type of business and the relevant contractual arrangements between the company and management.

By way of a side note, on the Polish market it is rather standard for the management to stay with the business for at least some time after entry of new investors, especially in a case of highly specialized and innovative or family businesses. Such managers, sometimes being founders of the business, will be often offered additional incentives so that they assure smooth transition into the new corporate structure. In principle, you would more often see

management buy-out transactions than management buy-ins.

The management incentive plans often provide for quite extensive catalogue of bad leaver events, which usually include such a standard circumstances as: (i) breach of non-competition undertaking; (ii) breach of the articles of association and/or other corporate rules of the company; (iii) conviction; and (iv) material breach of other duties, but also termination of employment and/or engagement by the manager before expiry of a given term (irrespective of the reason for such termination).

Generally, most of the incentive programs introduced in the domestic companies, are short-term programs implemented for the period of one to three years, occasionally for a longer period of time. The usual vesting period is set for 1 to 3 years, as this is the most common duration of term of office of the management. Longer vesting periods, often linked to the exit events, are implemented in portfolio companies of private equity funds.

Neither performing executive duties, nor the fact of holding shares in the company prevents the management to be engaged under employment contracts. It is not uncommon for the management to be engaged based on contracts falling outside the scope of labor law, which do not provide for that vast protection to the personnel (limitations on termination of employment, working time, limitations on liability, holiday leave etc.) and more cost-effective for the company.

Due to the progressive personal income tax scale (18% and 32%) which the employee's remuneration is subject to under Polish law, sometimes the members of the management are engaged under the two fold schemes, i.e. they are both employees of the company and in addition to that they provide services to the same company and/or other group company as sole entrepreneurs, which could, under certain circumstances, allow to apply preferential tax rate (19%) irrespective of the total income.

Lastly, the members of the corporate bodies of the company may also be engaged based on the mere appointment, in which case their remuneration is set under appropriate corporate resolutions.

If the managers are not engaged under employment law contracts, the parties are free to negotiate terms of employment more freely, but the lack of employment law protection is often compensated under relevant contracts. In particular, the managers would be in most cases entitled to similar holiday or sick leave as if they were employees and would negotiate certain limitations on their liability in their respective contracts.

4. Maturity phase

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, with the initial

issues and problems such as lack of investors and capital, being replaced by issues of a much more complex nature, especially with regard to the relation between the company and its managers, shareholders, employees, creditors and the control over the company itself.

With the arrival of new investors and the diversification of the company's ownership structure the issue of different interests of the company often becomes more visible. This gives rise to a question, regarding the interests which the management of the company should serve i.e. the company's, shareholder or stakeholder interests, and the definition of the interest of the company.

Although the provisions of Polish law do not provide for an explicit obligation for members of the corporate bodies, to act in the best interest of the company, they do however create an obligation to refrain from participating in situations/disputes which arise due to a conflict of interests, between e.g. a management board member and the interests of the company. Provisions of the Polish Commercial Companies Code (the "**CCC**") impose certain fiduciary duties on the members of the management board such as: refraining from participation in a conflict situation with the company or refraining from conducting competitive businesses without the company's consent and provide for civil liability for damages caused to the company by acts or omissions of the members of the management board. The specific provisions of the CCC considered collectively impose a general duty of loyalty and care towards the company.

The obligation to act in the company's interest may raise many questions and doubts due to the fact that the concept of the "interest of the company" was not defined in any act of Polish law. Therefore the concepts of "the interest of the company" are of a judicial and doctrinal nature.

The most popular theory, is the one developed under the jurisprudence of the Polish Supreme Court (which was also widely acclaimed in the legal doctrine), which treats the interest of the company as *"resultant of the interests of shareholders"*. The Supreme Court stated that the interest of the company cannot be reviewed separately from the interest of its shareholders (shareholder), who by incorporating the company, create a common goal that they want to pursue.

No provision of law creates an obligation for the company's officers to take into account interests other than those of the shareholders and the interests of other stakeholders may be taken into account, only as long as they do not contradict the interest of the company's shareholders.

Neither provisions of law nor legal doctrine nor the jurisprudence clearly states which interests of the company should be taken into account by the company's management: the short term or the long term interests.

Consequently, the sole interest the management board members should protect is the interest of the company, defined as resultant of the interests of shareholders who shall be treated equally (even if a given manager is an appointee of only one shareholder, he or she should act in the best interest of all the shareholders).

The management board, being independent within the scope of corporate governance rules implemented in the company's documents, should also treat all the shareholders of the company equally. Article 20 of the CCC provides that: *The shareholders of a company shall be treated equally in the same circumstances.* Also the Act on Public Offering, the Conditions Governing the Introduction of Financial Instruments to Organised Trading, and on Public Companies, governing the rules of trading in shares of listed companies, in its Art. 20 states that: *Issuers of securities admitted to trading on a regulated market shall ensure equal treatment of the holders of securities of the same type in the same circumstances (…).*

The equal treatment rule, however, is subject to some restrictions and limitations of both general and specific nature, which obviously allow for differentiation of the powers of the shareholders depending on their respective shareholding in the company and/or based on other specific elements (e.g. the specific naure and/or importance of their contribution and/or continued support to the company).

After acknowledging that the company itself is a combination of many different interests, one must also acknowledge the possibility and the existence conflicts of interests on many levels of the company's activity.

This matter is subject to regulation of corporate law, although there is no single, comprehensive set of rules in Polish law, which addresses this issue. The rules that already exist may be divided into two groups: those that may prevent a conflict of interest and those that apply after the conflict has arisen.

The rules that may prevent the conflict of interest include e.g.:

d. a prohibition to take competitive actions by the members of the management board without company's consent (for a joint stock company please see Article 380 of the CCC; for a limited liability company please see Article 211 of the CCC); or

e. a lack of authorization of the members of the management board to represent the company with respect to actions carried out with other member of the board or in a dispute with such other member (for a joint stock company please see Article 379 of the CCC; for a limited liability company please see Article 210 of the CCC).

The most important rule applicable after the conflict has arisen is that in the event of a conflict of interests between the company and a member of the management board, his spouse, relatives by blood and second degree affinity and persons with whom the member of the management board has a personal relationship, the member of the management

board shall refrain from participating in the settlement of such disputes and may request that such fact be recorded in the minutes of the management board meeting (for a joint stock company please see Article 377 of the CCC; for a limited liability company please see Article 209 of the CCC).

It is also important to point out, that even though the CCC does not create such restriction for the supervisory board, most of the legal doctrine in Poland accepts, that the obligation should also apply to the supervisory board. The abovementioned provision has also been introduced in the Code of Best Practice for the Warsaw Stock Exchange Listed Companies with regard to publicly listed companies.

Within the maturity phase of Polish companies, it is a common practice to implement various bonus schemes for members of key management and employees. Such schemes would usually provide for cash bonuses based on individual performance and in case of the top management, such schemes may depend on both the overall performance of the company and the individual performance of a given member of the management and their team.

Although the share bonus schemes might in certain circumstances be more beneficial to the management and/or key personnel, they are not very popular on the Polish market and are implemented mainly in international corporations within international schemes, as they often seem more complicated and less certain than ordinary cash bonuses.

Moreover, entrepreneurs themselves are often discouraged from implementing such plans as their preparation and execution might be costly (mainly due to a lack of duly established market standard patterns that might be easily followed and necessity to engage external advisors with that respect and/or apply for tax rulings in case of more sophisticated plans) as well as by the lack of any tax benefits from their implementation.

5. IPO phase

Once a private company goes public, its day-to-day operations may change considerably, mainly due to a necessity of implementation of more strict internal rules and regulations aiming at controlling the information flow to the market as well as adjusting to new environment created by various reporting obligations and lack of immediate contact with a shareholder.

However, as far as the management and employees are concerned, the mere fact of admission to public trading does not trigger any drastic changes to the terms of their remuneration or terms of the remuneration, although within initial public offering certain entities implement schemes for the top management with certain lock-up periods to encourage potential investors to make their investment in the company's shares.

The terms of remuneration of the members of the management board are rarely linked to the shares price and even if such interconnection exists, it would usually only influence the

amount of bonuses earned by the management and not their base remuneration. However, if the operations of a company require long-term investment, which in a short term may decrease the share price, the management would usually negotiate such terms of bonus system that would take into consideration the company's operations in a longer term.

It is not uncommon on the Polish market to implement certain retention programs for the management and/or key employees when the company goes public. Such schemes are intended to assure the potential investors that the company will operate without interruption within the first stage of its operations on the public market. If such persons already hold or will acquire shares within the public offering, sometimes a lock-up period would be established, in average for 12 months.

6. Acquisition

The management of the company may also play an important role at the divestment stage.

Very often, a bid for the company's shares, while beneficial to the company and in line with its interest, creates the risk of introducing changes or even replacing the current management board. This may induce the target company's management board to try and obstruct the offer (which may be objectively beneficial to the company and/or the shareholders) or to mislead the target company's shareholders, by providing them with false information regarding the offer.

The scope of measures available to the management in the light of purported take-over will depend on the rules of corporate governance established in a given company and on whether the company is listed or not. In particular it shall be noted that under provisions of Polish law, the statute may impose limitations on transferability of shares in the limited liability companies as well as registered shares of a joint-stock company, e.g. may provide that a sale of such shares shall require company's consent granted by the management board, which in theory could give the management certain influence on the transaction. Such limitations, however, will rarely have any practical importance in case of companies owned by a sole shareholder or where one shareholder holds such majority of votes that can easily change the composition of the management board. The case may be different in case of companies with many shareholders whose cooperation is required to effectuate any such changes. In such situation, the management may play important role in the acquisition process.

The situation is different in case of public companies, where the management board does not hold any formal entitlement to block the acquisition, although may apply other measures to jeopardize a take-over and/or make the company a less attractive target thereof, e.g. by way of:

a. making efforts to find an alternative investor (*white knight defence*) who, nevertheless, would have to offer a better price for the shares, which although possible may be very difficult in practice;

b. disposal of key assets of the company in order to decrease the value of the company (*crown jewel defence*), which bears a risk of personal liability of the members of the management board in case the company suffers damages as a result of such actions;

c. acquisition of interest in an entity being a direct competitor of the potential acquireer (*anti-trust defence*)

Under provisions of Polish Act on Trading in Securities (apart from other regulations relating to acquisition of significant stake in a public company):

a. the threshold of 33% of the voting rights in a public company may be exceeded only as a result of a takeover bid for the sale or exchange of that company's shares in a number that allows the shareholder to reach 66% of the voting rights (unless the 33% threshold is a exceeded as a result of a tender offer referred to in letter b) below); and

b. the threshold of 66% of the voting rights in a public company may be exceeded only by way of an announcement of a takeover bid for the sale or exchange of all the remaining shares of that company.

If such takeover bid is announced, the management board is obliged to prepare an opinion on the potential consequences of the takeover. The opinion of the management board of the company, based on the information provided in the takeover bid by the potential acquirer of shares, shall include, in particular, the board's views on the effects of the takeover bid on the company's interests, and specifically on its employees, potential acquirer’s strategic plans for the company and their likely repercussions on the employment and the locations of the company's places of business, as well as the opinion as to whether the price proposed in the takeover bid corresponds to the company's fair value, subject to the provision that the fair value cannot be measured only on the basis of the stock exchange prices.

Apart from the above, the statute of the company may provide that during a takeover bid for the sale or exchange of all the remaining shares of that company, the company's management board and supervisory board shall obtain prior authorisation of the general meeting of shareholders for taking any measures to frustrate the bid. Lack of such provisions does not, however, allow the management a freedom with respect to defensive measures, as the management has to bear in mind potential liability for damages caused to the company. If, on the other hand, such provision is included in the statute, the

management shall not be entitled to take any defensive measures unless it obtains the shareholders' meeting consent thereto.

It seems that the most effective way to align the interest of shareholders and the management within the divestment phase, is an implementation of a bonus scheme or offering the management high severance payments in case of their dismissal before expiry of their term of office. Moreover, the management of a private company would be less prone to jeopardize the sale, if it holds interest in the company and/or when the management is entitled to accede to the transaction with the selling shareholder (e.g. in case of management buy-ins). Clearly, the management of a public company would not be willing to take actions decreasing the price of the shares if holding or entitled to acquire shares thereof.

Within the private M&A transactions, it is a market standard to include non-competition undertakings (including non-solicitation) of the seller in the share transfer agreements and sometimes the buyers also try to extend such undertaking to include the key employees and/or management if they leave the company on completion of the transaction and remain with the seller thereafter. Such undertakings would usually be concluded for a period of 2-3 years after completion of the transaction.

As for the obligations of the managers and/or the key employees of the target, it is a common practice for the companies to conclude non-compete agreements with the members of the management or a key management which shall prohibit such persons from conducting competitive activity after termination of their engagement in the company. It shall be noted that in case of managers engaged under the employment contracts the contract must provide for a compensation for the entire time of duration of the non-compete undertaking after termination of employment in the amount not lower than 25 % of the remuneration received prior to the termination. Although, it is not required by the mandatory provisions of Polish law, similar rules would be applied in the contracts with managers engaged under other contracts.

If such agreements are already in place, it is not a common practice to seek reinforcement of the obligations of the employees and/or the management under their existing contracts or by way of concluding additional non-compete agreements. If, however, there are no non-compete undertakings of the manager, conclusion of such contract will often be considered within the transaction, in particular in case of businesses which rely on the know-how and experience of the managers and may be easily replicated.

D. Interest of advisors / lawyers

1. Startup

As already mentioned above, within the start-up phase most of the businesses struggle due to the insufficient funding and/or at least periodic shortages of cash. At the same time, the structuring of the business with the view of minimizing the risks connected with the launch, compliance with regulatory requirements set for certain types of business, acquiring financing and/or preparation of effective corporate governance rules requires advice from advisors including lawyers.

Unfortunately, many businesses do not use professional advice at the early stage of their operations or at a very least chose their advisors only based on price of their services not their experience in a given field which may often create risks in their future operations. In many cases, the entrepreneurs do not event make enquiries to find out what would be the price for services fitting their needs. In practice, medium-size or large law firms will, therefore, rarely encounter start-up businesses as their clients.

Moreover, the rules of remuneration provided in the relevant provisions of the codes of conduct of lawyers admitted to the bar in Poland limit the flexibility of the law firms (also being subject to such restrictions) in terms of different methods of structuring their fees.

Firstly, it shall be pointed out that neither the advocates nor legal counsels (being the two types of legal professions entitling to provide legal advice to the clients in Poland) are allowed to accept remuneration based only on the success fee (although partial success fee is permissible).

Moreover, due to the rules of professional conduct and in order to avoid conflict of interest, the barred lawyers are reluctant from engaging in certain types of activity and/or acquiring stakes in the businesses they provide legal advice to. Accepting such interest might prevent the law firms from providing advice to other entities conducting business in the same or similar field.

In the light of the abovementioned restrictions, the law firms usually tend to decrease their rates and, e.g. in case of legal assistance provided to start –ups, agree for discounts if the project fails or for partial success fees if the project is successful.

2. Growth

With regard to structuring of our fees in the growth phase the standard practice is used (caps for legal fees and discounts granted to the clients are commonly used). There is no much difference in the fees structuring in comparison to a start-up phase, except that in the

start-up phase you are more likely to offer some sort of entry-discounts and/or agree to a deferral of (part of) your remuneration until a point in time when the company in question starts earning profits.

As to whether lawyers accept board positions, it is sometimes the case with respect to seats on the Supervisory Board, never on the Management Board. Such duties (holding a post on the Supervisory Board) can be performed with no remuneration at all, or merely with reimbursement of costs. Underlying companies would normally not grant full exclusivity for rendering legal services, but certainly the likelihood of being offered an assignment from such a company increases significantly.

Sometimes, we are asked to provide the advice on the division of equity (in particular to FFF). We believe, however, that rendering such advice is rather the matter of business advice than the legal one, unless the issue comes down to interpretation of a shareholders agreement and its relevant provisions on the terms of distribution of profits to the shareholders.

In general terms, Polish law allows for all rights of the shareholders to be regulated in the articles of association (the by-laws) of the company, which includes such rights as preferential preemptive rights, drag along or tag along rights. In principle, under Polish law all rights of the shareholders should be regulated in the articles of association (by-laws) of the company (as otherwise they may not be fully enforceable towards third parties as the shareholders' agreement is only binding upon the parties thereto). On the other hand, there are certain standard instruments usually applied in shareholders agreements, such as drag or tag-along rights and/or call/put options) which although are allowed under Polish law, are not strictly regulated and can be difficult to be implemented into articles of association (by-laws) of a company. Therefore, these rights are often structured under shareholders agreement, rather than under the by-laws, and the shareholders accept the limited enforceability of such arrangements.

3. Maturity

The standard practice in terms of fees structuring used in previous stages is also used during this stage and there is no difference in the fees structure as compared to the growth phase.

In general terms there are no legal obstacles preventing the lawyers from becoming the directors of the companies except for Polish advocates who may not perform certain corporate functions in certain entities due to the rules of professional conduct applicable to their profession. Holding a post in a supervisory board, rather than on the management board, is not uncommon.

With regard to the provision of legal advice to corporate entities, normally we tend to provide it to the companies within the scope which falls outside the typical ongoing corporate advice which is provided by in-house lawyers of the given company.

In a case of a conflict of interest of the management, the art. 210 § 1 of the Commercial Companies Code applies, according to which: *in contracts between the company and a member of the management board and in disputes with him, the company shall be represented by the supervisory board or an attorney in fact, appointed under a resolution of the general meeting.*

The anti-money laundering provisions did not change the form we render advice but they require us to take certain customer due diligence measures while giving advice in order to prevent money laundering and terrorist financing.

4. IPO/ Listed phase

A decision to offer the shares of a company to the public may be either: (i) a method to acquire additional funds for further development; or (ii) a method of divestment by the current shareholders (especially, in case of private equity investors, or founders of sizeable businesses who wish to exit (at least partially)).

The formalized process of initial public offering usually requires professional advice of experts from different fields of expertise, including lawyers, auditors, tax and financial advisors. The companies also often engage public relations agencies to manage a public perception of listing the shares.

The most demanding and time consuming part of an IPO is a preparatory phase which may often involve certain restructuring and due diligence of the company for the purposes of preparation of the prospectus and other related documentation. It shall be noted that only shares in a joint stock company may be subject to admission to a regulated market in Poland. Thus, sometimes the preparatory phase may involve transformation of a given entity into a joint-stock company.

If the offer to acquire shares in a joint-stock company is directed at an unspecified addressee or to at least 150 persons, it is subject to the rules set out in the provisions of Polish Act on Public Offering, which implements into the Polish legal system the uniform rules on trading in securities set out in the EU Prospectus Directives.

There are two markets on which the shares of the companies may be listed in Poland:

a. the primary market – Warsaw Stock Exchange (WSE); and

b. the alternative market – NewConnect, primary designed for listing of innovative small and medium companies, however, with time it became a platform of trading in securities of companies operating in different sectors and of different sizes, but usually bearing more risk than the securities traded on the WSE.

In general terms, public offering or the admission of securities to trading on a Warsaw Stock Exchange requires drawing up a prospectus, its approval by the Polish Financial Supervision Commission, and making it available to the public. Only then, the subscription for the shares may be carried out and the company's shares may be admitted to trading at the organized market. Drawing up a prospectus and getting it approved by the Polish Financial Supervision Commission is a long-lasting process. The above is especially true, in case of entities conducting highly specialized businesses as in such case the process often involves answering detailed questions, addressing concerns of the Commission as well as adjustments to the prospectus.

Admission to trading on the NewConnect is less rigid. In particular in case of smaller offers, it does not require drawing up a prospectus, but only a simplified information document and supporting documentation. The process is less formalized which allows for faster admission to trading (in certain circumstances the shares may be admitted to trading within 10 days as of the date of submission of the relevant documentation with the manager of the stock exchange). The costs of admission to trading at the NewConnect are also much lower than the costs of admission to the WSE.

The legal fees connected with the public offering process are often based on hourly rates capped at certain thresholds for certain phases of the process (in most cases the hourly rates for pre-divestment structuring, due diligence and preparation of prospectus will be lower than the rates applied for regulatory advise at further stages of the process). It is also common to agree on partial success fees and/or discounts in case the process is not successful.

5. Acquisition

Being the most formalized and costly divestment method, the IPO is not frequently applied by the shareholders willing to sell their business. Two main types of M&A transactions carried out on the Polish market are (i) most commonly – a transfer of shares; or (ii) less frequently - a transfer of assets (ongoing enterprise) of the target company.

The asset deals are applied mostly in case of acquisition only of a certain part of a business of a target company and much less frequently in case of acquisition of the entire enterprise, as such structure usually requires that the agreements entered into by the Target are transferred individually to the acquirer, which may be extremely problematic in practice. Moreover, in case the asset deal involves a transfer of an ongoing business, the buyer is

jointly and severally liable with the seller for the seller's liabilities arose in connection with conducting the business prior to the transaction (the same rule applies to an organized part of an enterprise). Lastly, certain permits, concessions and/or administrative decisions would not transfer within the asset deal. Therefore, the asset deals are done less often, and usually in cases where there are specific reasons why a share deal is not feasible (usually tax driven or due to legal or other risks making a share deal not a preferred option).

There are also significant differences in terms of acquisition of public and private companies. Trading in shares of a listed company will involve various information obligations on both parties and the company itself in case the acquirer breaches certain thresholds of shareholding and may also require announcement of public tender offers in case of acquisition of larger stakes, although the agreements for sale of shares would be usually less complex than in the private deals, in overall the public processes are more complex.

Another additional step connected with acquisition of shares of a public company may be its delisting. Obviously not all acquisitions on the public market will encompass delisting, but taking into account the reporting rules applicable to public companies most buyers who as a result of acquisition hold more than 80-85% of shares consider going private with their investment. The main steps of delisting of the company include:

a. announcement of the public tender offer for purchase of minority shares of the company;

b. convening and holding the shareholders' meeting with a view to adopt a resolution on delisting (delisting of a public company requires 4/5 of votes at the shareholders' meeting of the company)

c. submission of a motion to the Polish Financial Supervision Commission for delisting;

d. decision on delisting.

The above process is sometimes preceded with a squeeze out procedure.

From the point of view of fee structuring with respect to the M&A transactions, the remuneration structure would be most commonly based on hourly rates and capped at certain thresholds for certain phases of the process.

In most cases the hourly rates for a due diligence phase will be lower than the rates applied for preparation of transaction documentation, their negotiations and/or regulatory advise at further stages of the process (including advice with respect to the anti-trust clearance). It is also common to agree on partial success fees and/or discounts in case the process is not successful.