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 the Netherlands

Marnix van den Bergh
Höcker advocaten
Van Eeghenstraat 98
1071 GL Amsterdam, the Netherlands
+31 20 5 77 77 54
vandenbergh@hocker.nl

Tyshanti de Jonge
Loyens & Loeff N.V.
Blaak 31
3011 GA Rotterdam, the Netherlands
+31 10 224 6351
tyshanti.de.jonge@loyensloeff.com

General Reporters:

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

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

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

All of the above mentioned factors are relevant in making a decision about what business association structure/legal form an entrepreneur will use for its business. However, avoidance of personal liability is in general the most important reason, followed by tax reasons.

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

The jurisdiction of the Netherlands provides the following business association structures:

a. General partnership / partnership under common firm (*vennootschap onder firma*).

b. Limited partnership (*commanditaire vennootschap*).

c. Private limited company (*besloten vennootschap "BV"*).

d. Public limited company (*naamloze vennootschap "NV"*).

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

The most crucial difference between the general partnership versus the other legal forms is that the partners of the general partnership are liable jointly and severally for the obligations of the partnership. A limited partnership has two types of partners: silent partners and general partners. Those general partners are also jointly and severally liable for the obligations of the limited partnership, while the silent partner is not.

The most crucial differences between the NV and the BV are that an NV can issue both bearer and registered shares, is subject to capital protection rules (such as the requirement of minimum capital and formalities on the payment of shares, share buybacks, financial assistance and the distribution of dividends and reserves) and is subject to European harmonization rules on public companies with a wider range of shareholders and therefore less flexible with regard to the possibility of tailoring its corporate structure and articles of association / by-laws (*statuten*) (the "Articles") to its shareholders' needs than the BV, while a BV can only issue registered shares and is designed to be a more flexible instrument with very limited rules on capital preservation, and the possibility to reflect shareholders' arrangements in the Articles.

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

By far the most commonly used business association structures (for start-ups) are the NV and the BV. An NV is more commonly used for a company that will be listed on a stock exchange and is mandatory businesses with banking or insurance activities. A BV is mainly privately owned and is frequently used for smaller businesses or for group holdings or finance purposes. The reason for this dominance is the limited personal liability, tax benefits (for foreign shareholders) and the fact this those structures are most well-known abroad.

- ***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?***

Other typically used equity instruments are priority shares, (cumulative) preference shares and non-voting shares.

- ***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)?***

There is no legal obligation to disclose ownership stakes in unlisted NVs and BVs (except in the case of single-owner companies, where the identity of the owner must be recorded in the publicly accessible in the Dutch trade register of the chamber of commerce (the "Trade Register")). If the company has issued registered shares, as is the case for all BVs and many NVs, its management (obviously) keeps a register of shareholdings, which must include the names and addresses of all the shareholders. However, there is no legal obligation to make this information accessible to the general public.

Further, the silent partner in the limited partnership (CV) will remain anonymous as well, while the general partner a limited partnership cannot remain anonymous and is disclosed in the Trade Register.

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

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

The focus of FFF could typically be helping the entrepreneur setting up his business and helping to keep his business going for the first period.

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

The focus of professional investors could typically be trying to make a profit within a period of 3-5 years.

- ***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)?***

There is in general a difference in focus among the various equity investors. This is commonly reflected in the set-up of the agreement with the entrepreneur. The FFF tend to invest on the basis of an oral agreement or a simplified contract, because they trust the entrepreneur and are merely focused on helping the entrepreneur and in the end getting their investment back. The professional investor will in general choose to protect its investment in both the Articles and a shareholders' agreement. The legal instruments a professional investor will use for that purpose are mostly included in the shareholders' agreement and the Articles and regard inter alia an exit preference, pre-emption rights, (full ratchet/weighted average) anti-dilution protection, qualified majority vote decisions in the general meeting of shareholders (the "General Meeting") and approval of management board decisions.

2. Growth phase

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

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

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

  Protection from dilution is an important focus of a professional investor. Further, if the business is going well the FFF might realize they can actually make a profit and their attitude might change from helping the entrepreneur to safeguarding their position and realizing a profit on their investment (including protection from dilution).

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

  The FFF in general do not participate in further capital rounds. As a result, they generally accept a dilution or cash out at this point. The professional investor will in general not accept a dilution if the new investor gets a better price for the shares. In most cases the professional investor has safeguarded his rights in this respect in a shareholders' agreement. The foregoing also depends on the new investor and the type of business the company is in.

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?

Under Dutch law the issuance of shares is a shareholders decision (with a simple majority vote) that can be delegated to another corporate body. Each shareholder has a pre-emptive right on the issuance of shares pro rata to his stake. However, this right can be limited or set aside by a shareholders' resolution, to the extent the Articles do not stipulate otherwise.

With respect to the FFF it is common to include a "pay or dilute" provision in the shareholders' agreement. The professional investor could ask for a qualified majority vote with respect to the issuance of new shares in the Articles when he is a minority shareholder (and include full ratchet anti-dilution protection in the Articles /shareholders' agreement).

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?

The first source of protection is an non-disclosure or confidentiality agreement. Further, the information could be provided in tranches with the most sensitive information to be provided in the last phase of the negotiations or even after the purchase or investment agreement is signed (with a right of termination for the new investor if e.g. the information provided results in a lower valuation of the business). To make sure the management board does not provide this information to the new investor in spite of the wishes of the shareholders, an non-disclosure provision is generally included in the employment contract or management contract of each management board member.

3. Maturity

During the various capital rounds in the growth phase, the circle of equity investors in a company typically becomes larger and the atmosphere may become less familiar. Also, in the maturity phase the management of the company may become more professional in the sense that there is a management in place which is not, or not significantly, invested in the company (i.e., intensification of the principal-agent-conflict). As a consequence, legal concepts that govern the relationship between equity holders (such as fiduciary duties of majority equity holders) as well as legal concepts that govern the relationship between management and equity holders (such as fiduciary duties of the board members / management, duty of loyalty, principle of equal treatment) may become more important. In other words, corporate governance may become more important. Against this background:

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

The equity holder base will change between the start-up phase to the maturity phase from the founder as majority shareholder, and the FFF and (not always) an investor as minority shareholders to the founder as a minority shareholder with one or more investors as majority shareholder.

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?

Large Company Regime

Under Dutch law stricter corporate governance rules apply to NVs and BVs that are considered large companies. An NV or BV is qualified as a large company if:

a. according to the balance sheet with explanatory notes the sum of the issued capital of the company and reserves amounts to at least € 16 million;

b. the company or one or more subsidiaries has, pursuant to a statutory obligation, established a works council; and

c. the company and its dependent companies together normally employ at least one hundred employees in the Netherlands.

In short, if a company has met the criteria under a through c for three consecutive years it must apply the large company regime (*structuurregime*) (the "Large Company Regime") as described in book 2 of the Dutch Civil Code ("DCC").

If the Large Company Regime is applied a company must establish a supervisory board, whereby a profile regarding the size and composition of the supervisory board is required. As a general rule, under the Large Company Regime the supervisory board directors are appointed by the General Meeting on the basis of a binding nomination drawn up by the supervisory board. The General Meeting and the works council have the right to recommend persons to the supervisory board, whereby the recommendation of the works council must be followed. The supervisory board has the powers to appoint the management board and certain important management board resolutions are subject to the mandatory prior approval of the supervisory board.

Dutch Corporate Governance Code

Companies that are listed on a stock exchange (or more specifically, who trade on a regulated market or a comparable system) and companies with a registered office in the Netherlands with a balance sheet value of more than EUR 500 million and whose shares (or depositary receipts for shares) have been admitted to trading on multilateral trading facility or a comparable system, are subject to the Dutch Corporate Governance Code (the "Code").

The Code contains principles and best practice provisions that regulate relations between the management board, the supervisory board and the General Meeting. Compliance with the Code is in accordance with the 'apply or explain' principle (i.e. the principles and best practice provisions of the Code are either applied with unconditionally or an explanation must be given in the annual accounts for any deviation).

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.

Dutch law does not contain an explicit duty of loyalty between shareholders. No obligation other than to pay up the nominal amount of a share may be imposed upon a shareholder of an NV against its will (even by an amendment of the Articles. For a BV, the Articles may, with respect to all shares or shares of a particular class or type, impose obligations of a contractual nature towards the shareholders. Please note that an existing shareholder of a BV cannot be bound to such obligations without its consent.

3.4 Does the company have any means to control the circle of its equity holders (i.e., can the articles of incorporation prevent competitors from holding

shares in the company?) or have such restrictions to be agreed among the other equity holders (e.g., shareholders' agreement)?

The circle of equity holders can be controlled by including pre-emptive rights in the Articles, as a result of which (i) the other shareholders have to approve the sale and transfer of shares or (ii) the other shareholders have the right to purchase the shares before they are sold to a third party. Further, the Articles may also provide for so-called 'qualitative requirements' to be met by the shareholders (e.g. being a party to the shareholders' agreement or not-being a competitor of the company).

4. IPO / Listed phase[1]

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?

In general the focus of the shareholders shifts in the going public phase to short term and the focus on distribution of earnings may soften.

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?

Anyone whose interest in the share capital or voting rights of a listed company exceeds or falls below one of the thresholds set forth in Article 5:38 of the Dutch Financial Supervision Act ("FSA") (the first threshold is 3%) should notify the Netherlands Authority for the Financial Markets ("AFM") thereof. The AFM enters the information in a public register. Management and supervisory board directors must also inform the AFM of their interest in the listed company. The fact that the register is publicly available might be a reason for shareholders not to (actively) exceed the first threshold of 3%.

[1] With special thanks to Mila Plasman (attorney at law at Loyens & Loeff N.V. in Amsterdam, the Netherlands) for her input and suggestions with respect to the IPO sections of this National Report.

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

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

  On the basis of Article 5:25i FSA, listed companies are obliged to make price-sensitive information generally available without delay by means of, among other things, a press release. 'Price-sensitive information' is defined as (Article 5:53(1) FSA):

  > "*awareness of specific information that relates directly or indirectly to an issuer as referred to in Subsection (4)(a) to which the financial instruments pertain, or to the trade in those financial instruments, which information has not been publicly disclosed and whose disclosure might have a significant influence on the price of the financial instruments or on the price of derivative financial instruments.*"

  A listed company may suspend the obligation to immediately publish price sensitive information (Article 5:25i sub 3 FSA) in case (i) there is a legitimate interest, (ii) there is no risk of misleading the public, and (iii) the confidentiality can be safeguarded.

- ***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?***

  In short, the FSA and the Dutch Market Abuse Decree state that anyone is prohibited from making use of inside information (inside information has the meaning of 'price-sensitive information' as set forth in Article 5:53 (1) FSA and stated above) by undertaking or executing a transaction in or from the Netherlands in financial instruments of a listed company (Article 5:56 FSA). In addition, Article 5:58 FSA sets forth certain prohibitions in the context of market manipulation, e.g. the prohibition to undertake a transaction in financial instruments which makes or might make an inaccurate or misleading impression with regard to the offering of, the demand for or the price of said financial instruments and the prohibition to undertake a transaction in financial instruments using deception or misrepresentation. Insider trading and marketing manipulation qualify as a felony and an economic crime under

Dutch law. There are certain transactions that are exempted from the prohibition of making use of inside information and market manipulation, such as allocation of financial instruments in the context of an employee benefit scheme and buy-back of financial instruments.

Additionally, a listed company is required to adopt and implement an internal code, which regulates the possession of, and transactions in, financial instruments related to it, by its employees and the persons determining the day-to-day policy of the company, and those charged with their supervision.

5. Acquisition

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

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

For its decision on the bid the management board of the target company is required to take into account all the company's interests on a long term basis and the bidder's strategic plans for the company and their repercussions on employment and the locations of the company's places of business as set out in the offer document.

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?)

After the initial announcement of the intended takeover bid, the shareholders of the target company are protected by the 'best price rule'. Pursuant to the best price rule, the bidder is obliged to pay the highest price that it has paid in any transaction (for a security in the target company) for every security that has been tendered under the offer. However, prior to the initial public announcement of the intended takeover bid, the bidder is free to purchase securities of the target company for a higher price than the subsequent fixed offer price, notwithstanding the obligation of the bidder to include an explanation of the price difference in the offer document.

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?

Most listed companies have anti-takeover schemes in place to prevent a takeover (and consequently a possible delisting), for example a 'continuity foundation' (*stichting continuïteit*) to which a call option is granted which option might be exercised by the foundation in case of an imminent takeover. A delisting does not require a qualified majority consent of the shareholders by law. However, such can be included in the Articles. The deadlines for delisting are subject to the rules of the specific stock market. NYSE Euronext Amsterdam decides on a delisting at the request of the shareholder or issuers. After the consent of NYSE Euronext Amsterdam's approval, delisting will take place in principle 20 trading days after publication of the decision (or at any later date as specified in an exit arrangement).

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?*

Friends, family and fools will be primarily interested in supporting the entrepreneur to get the business going, especially in the absence of traditional financiers such as banks. Depending on their relationship with the entrepreneur, FFF will usually be prepared to take a gamble in order to kickstart the entrepreneur‘s business and will not require a personal security from the entrepreneur. Angel investors may also be found and can be useful to the company not only for their investment but also for their skill and advice.

Interest rate, while it may be above market rates for established companies, will not usually be as high as the actual risk would warrant. In summary, loans from FFF are not granted on purely commercial terms. Note that Dutch law prohibits soliciting loans from the general public other than from professional investors, so FFF must truly be an intimate group.

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?*

Due to the major risks involved, professional investors are usually reluctant to lend to startups. As opposed to the FFF previously mentioned, professional investors are likely to require either a solid security, an interest rate reflecting actual risk and\or conditional access to equity (e.g. pursuant to conversion). Banks, if interested at all, will often require a (partial) personal security from the borrower.

The legal framework offers a lot of flexibility with respect to the structuring of the loan, so no specific preferred instruments can be listed. Some examples are the safeguarding of loans with pledges on receivables, assets, etc.

2. Growth phase

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

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

At this stage, FFF may no longer be able to provide the amounts that a growing company will continue to require and as a result professional investors will become more prominent. They will also regard the growing company as a somewhat safer partners than at its startup phase and normal interest rates may now start to apply.

2.2 ***What kind of security is commonly requested 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?***

Presuming that the entrepreneur is even able to provide further personal guarantees in addition to what he had previously provided, collateral securities will now be more important since they will in this phase provide more value to the debt holders. Debt holders may require that mortgages are provided on the company's real estate and that pledges are granted on the company's other assets.

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

Professional investors will not usually be willing to subordinate debt and especially not without renegotiating the other terms of the loans. The entrepreneur and FFF are more likely to be willing to do so depending on the circumstances.

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?

The appropriate instrument under Dutch law would be the convertible loan, which can be converted into equity if specific performance milestones are achieved.

3. Maturity

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

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

- **_Are the debt holders and their focus in the maturity phase typically different from the ones in the start-up or growth phase?_**
- **_If there is a difference, how may this be reflected in the contractual relationship?_**

Once again, as risks decrease, regular banks may start to become more interested in engaging in a finance. FFF may become less involved at this stage.

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

The Netherlands has a very decent trade register system in which company information is listed. The information therein is generally up to date and correct, and may be relied on as a matter of good faith.

Larger companies (measured by employees and turnover) are required to file their annual accounts with the Chamber of Commerce. Such accounts are public information and may be accessed by any interested party for a nominal fee. Generally, such information is somewhat out of date, since an ultimate filing date of 13 months after the end of the fiscal year applies. Some companies file their information more quickly and this is thus one way of influencing the available information. Theoretically a company could also attempt to stay below 'large company status' to reduce its filing obligations.

No public debt enforcement register is available, although a public insolvency register is in place. Many commercial parties do advise on creditworthiness of companies.

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?

Privately held companies may issue notes (*obligaties*). This does not happen often, but neither is it unheard of. Such issuance requires the approval of the shareholders and the management board, as well as the advice of the company's works council (if there is one). Case law provides that the legal position of a note holder is no different than that of another debts provider, so there is no legal reason why the note holders' focus should be different.

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?*

Listed companies often pay lower interest rates, but the main reason is that such companies are often very large and as such enjoy huge credit facilities which allows them to benefit from a lower interest rate. So this is more due to their size rather than the very fact that they are listed companies (which may in fact have a detrimental effect on 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?

Notes may be listed. Certain requirements set out by Euronext Amsterdam apply, which concern the preparation of such documents as a prospectus, technical term sheet, application form, et cetera.

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?

Both notes‘ and other debt instruments‘ conditions may include change of control clauses and a ‘make whole‘-clause which allows the borrower to pay off remaining debt early in such events, as compensation for the note holder‘s missed future payments.

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

See above.

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?

Employees may be granted stock options to ensure that they will stay with the company for a certain duration. Especially in the event that share value is low initially, granting options may be a convincing way to retain the employees, in the expectation that they will be rewarded in due time. A more traditional way of binding employees to the company is by offering them a bonus when certain milestones are reached. Because of the limited funding of a company in the start-up phase, such arrangements regularly include the condition that the company must be sufficiently profitable (measured by a fixed amount).

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?

Yes, please see the answer to question C.1.1..

2. Growth phase

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

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

Management incentives will have been granted by way of an agreement. Such agreement cannot usually be cancelled unless previously agreed therein. This is not a common occurrence.

Bad leaver provisions will usually regard situations in which the leaver acts in bad faith and are not usually used to cater for situations as described in this question. If it does apply in case of new investors, the leaving manager under circumstances has the possibility to request for severance in court proceedings.

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)?

No specific vesting period applies.

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

Executives of a company be appointed by the General Meeting as 'Managing Director' (s*tatutair directeur*) in which case executives can be dismissed by a resolution of the General Meeting. The employment or management agreement of an executive often includes a 'parachute' entitling the executive to severance in case of a non-culpable dismissal.

Furthermore, Managing Directors of listed companies by law should be contracted on the basis of a management agreement (in the form of an assignment agreement), not on the basis of an employment agreement.

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?***

The managing board is composed of individual management directors. Article 2:9 DCC provides that each managing director has an obligation towards the company to properly perform the duties assigned to him. The law provides that managing directors must act in accordance with the company's *corporate interest and that of the enterprise connected with it* at all times.

In a private limited company this is perceived as the interests of all stakeholders, including shareholders, employees and creditors, converging into the long term continuity of the company and the enterprise connected with it. If the entity is part of a group of companies, the interests of such group of companies may also be taken into account. In general the board of directors should be allowed a certain degree of discretion.

This degree of discretion, and the corresponding limited review by the court, is generally restricted to the substance of the board's business judgments. In this respect, the traditional Dutch position is that the court should review the board's conduct relating to the business judgment only for reasonableness, a test which is still quite vague. Under this test, the court must limit its substantive review to some extent, but is nevertheless allowed to take into account the 'sensibleness'/ 'desirability' of the board's business judgment, in other words its quality of wisdom, while still showing deference.

Under Dutch law, there is a statutory duty (laid down in article 2:92 DCC) to treat holders of shares with equal rights, 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?***

Conflict of interest rules for management provide, in general, that conflicted managers are not entitled to vote on the relevant matter. The matter may also be referred to the supervisory directors if such a board is in place. Alternative arrangements may also be made in the company's Articles.

The rules broadly apply to both listed and non-listed companies.

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

Both cash bonuses and incentive plans are used. This is especially the case for foreign companies operating a Dutch subsidiary, for major Dutch companies and (as mentioned) for start-ups. Mid-market companies usually only offer a 'traditional' employment package consisting of (mainly) salary, holiday allowance, holidays and expense reimbursement.

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 IPO will change the structure of the entity and will require a fair amount of administrative efforts since the listed company falls under additional scrutiny of supervisory bodies. Compensation for increased workload and tasks is likely. However operational employees will not usually be affected.

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?

N.A.

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 statutory lockup period, but such periods may be agreed upon (e.g. in underwriting agreements). Furthermore, issuing companies are required by law to draft by-laws with respect to the holdings of its own shares by 'insiders', e.g. employees, in which they may provide for such lockup periods.

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?***

Of course this depends on whether the directors themselves are also shareholders. If they are there may not be any conflict.

As a matter of principle under Dutch law, directors are expected to take the interest of the company as a whole into account in their acting as directors. If directors prove to act mainly in their self-interest, they may ultimately be held liable.

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

Earnout agreements are often put in place in order to retain management and key employees. Such arrangement will often be linked to the company's performance and will grant management and key employees a substantial fee if the company continues to show excellent results. This should simultaneously allow the acquiring party sufficient time to make arrangements for the eventual replacement of the management and the key employees.

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)?

In general, Dutch law is very protective towards employees and it will be difficult, if not impossible, to force unwanted changes upon them. Non solicitation clauses may be regulated and are enforceable. Key employees and management are generally involved in the process of acquisition and are generally offered a new employment agreement by the buyer – even though in a lot of cases the transfer would fall under the transfer of undertaking and protection of employees rights directives. As such, employment would by law continue under the same terms after the acquisition.

D. Interest of advisors / lawyers

1. Startup

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

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

If we see a future for the company we would consider going below our standard rates and agree to have the difference compensated at a later stage (i) if and when the company has become more successful or (ii) agree with the client to become a long term client if the company becomes more successful.

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

We do not accept warrants/rights to shares as compensation for professional services rendered. The Dutch professional rules of conduct for lawyers prohibit any payment for services other than by bank transfer or (in special circumstances and up to a limit) in cash.

2. Growth

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

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

In this phase we usually start working with our standard (hourly) rates. There are various fee structures that could be considered: discounted hourly rate, volume hourly rate, blended hourly rate, straight fixed fee, fee cap, phase-based fee, bonus/malus, success fee/loss discount, broken deal discount, etc.

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?

No, it is not common for lawyers to take board positions in companies that are clients in general. The Dutch professional rules of conduct for lawyers require that a lawyer remains independent from their client.

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

The Dutch professional rules of conduct for lawyers require that we take the interest of our client as our primary concern. Since we are engaged by the entrepreneur and not by the company, the basis for our advice will be the interest of our client (the founder). Nevertheless, if it proves important to the founder that the FFF are not being squeezed, because they are after all family and friends who are helping him out, we will provide the founder with multiple options taking into account his interest and the FFF's.

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?

Preferential preemptive rights and tag along rights are generally accepted in the Articles of a BV. There are ongoing discussions about drag along rights. For NV's it is not allowed to included such rights in the Articles. Therefore, for NV's such rights are only included in the shareholders' agreement.

Further, to be very succinctly, in general a shareholders' agreement is not enforceable against third parties, but an exception can be made in exceptional circumstances if a specific third party is aware of the contents of the shareholders' agreement.

3. Maturity

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

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

The fee structure in the maturity phase is similar to the growth phase (see D.2.1).

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)?

In general it is not common for lawyers to take board positions in companies that are clients.

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)?

Depending on whether lawyers are engaged by the company itself or by individual board members, we may or may not be able to advise on conflicts of interest. If we act for the company we cannot take the interests of individual management board members into account and should act in the best interest of the company as a whole.

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

Anti-money laundering provisions mainly regard the identification of the client, its ultimate beneficiary owners and the objective of the contemplated transactions. These matters are usually dealt with at the start of the lawyers' engagement and do not affect the way in which advice is rendered. If the client's intent is manifestly fraudulent, the lawyer has an obligation to make a report to the national Financial Intelligence Unit (FIU) and is not allowed to report this to the client ('tipping-off ban').

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?

It is common to work with a capped fee for all in scope IPO work such as prospectus, governance, legal opinions etcetera. Obviously, the amount of the cap depends on market practice and in this regard the fact that IPO's are often cross-border (e.g. the listing of a Dutch NV on the London stock exchange) plays a role, since the market prices in the applicable country need to be taken into account as well. Certain subjects such as finance and employment matters are usually considered and agreed on as out of scope.

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)?

Pursuant to Article 5:2 FSA, when offering securities to the public in the Netherlands or having securities admitted to trading on a regulated market situated or operating in the Netherlands it is obliged to make a prospectus generally available in respect of the offer or admission which prospectus has been approved by the AFM or by a supervisory authority of another Member State of the EEA. Once listed, a company is supervised by the AFM and is *inter alia* bound to certain notification obligations (such as a notification with the AFM of changes in its issued share capital). Next to that, management and supervisory board members and shareholders of the listed company may be obliged to notify the AFM in certain events as well (e.g. the notification obligation set forth under question 4.3 of part A of this report).

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)?

Such a specific market is 'Alternext Amsterdam', a multilateral trading facility organized in Amsterdam. Alternext Amsterdam offered small- and midsized companies easier access to capital markets with fewer obligations and a lighter regulatory regime compared to the regulated market Euronext Amsterdam. However, in April 2014 it was announced that Alternext Amsterdam will be wind down and the license granted to Euronext Amsterdam N.V. for operating Alternext Amsterdam has been withdrawn (on the request of Euronext Amsterdam N.V.). In order to procure an orderly completion of the Alternext Amsterdam activities, Euronext Amsterdam N.V. will close Alternext Amsterdam on 30 April 2016 at the latest, and if possible earlier.

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)?***

A rough estimate is 85% share purchase deal and 15% asset 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 more rules and regulations are involved when acquiring a large stake in a listed company. As a result of that, the process of acquiring a large stake in a listed company generally is longer.

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?

A company can remain a public entity (an NV) after an acquisition.

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

The fee structure in the acquisition phase is similar to the growth and maturity phase (see D.2.1).

30 / 30