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

Commission(s) in charge of the Session/Workshop: Corporate Acquisition and Joint Ventures Commission

London, 2015

Christian Leuenberger
Pestalozzi Attorneys at Law Ltd
Löwenstrasse 1, CH-8001
Zürich, Switzerland
christian.leuenberger@pestalozzilaw.com

Pablo Vinageras
J&A Garrigues, S.L.P
Avda. Diagonal, 654 D 1
08034 Barcelona, Spain
pablo.vinageras.cobielles@garrigues.com

June 2015

1. 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.

Copyright Information

General Reporters, National Reporters and Speakers contributing to the AIJA Annual Congress 2015 accept the terms here below in relation to the copyright on the material they will kindly produce and present. If you do not accept these terms, please let us know:

- General Reporters, National Reporters and Speakers grant to the Association Internationale des Jeunes Avocats, registered in Belgium (hereinafter: "AIJA") without any financial remuneration license to the copyright in his/her contribution for AIJA Annual Congress 2015.

- AIJA shall have non-exclusive right to print, produce, publish, make available online and distribute the contribution and/or a translation thereof throughout the world during the full term of copyright, including renewals and/or extension, and AIJA shall have the right to interfere with the content of the contribution prior to exercising the granted rights.

- The General Reporter, National Reporter and Speaker shall retain the right to republish his/her contribution. The General Reporter, National Reporter and Speaker guarantees that (i) he/she is the is the sole, owner of the copyrights to his/her contribution and that (ii) his/her contribution does not infringe any rights of any third party and (iii) AIJA by exercising rights granted herein will not infringe any rights of any third party and that (iv) his/her contribution has not been previously published elsewhere, or that if it has been published in whole or in part, any permission necessary to publish it has been obtained and provided to AIJA.

1. Start-up phase

A. Interest of equity holders[1]

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

There are many reasons why an entrepreneur may choose to set up a specific business association, such as: (i) align interests and rights; (ii) legal personality of the business association; (iii) formalities and administrative costs; (iv) structure strength; (v) control issues; and (vi) business governance.

Nevertheless, it appears that, based on the national reports submitted (the "National Reports"), the main reasons for incorporating a business association are: (i) avoiding or reducing the personal liability of the founders; and (ii) attractiveness or benefits for investment. The latter is especially important as it is difficult to obtain funds during the start-up phase; also, it is important for tax optimization purposes as some kinds of business associations offer considerably lower tax rates than others.

The foregoing generally applies to each of the countries from which National Reports were submitted (regardless of whether they have a civil or common law system). This also applies to such countries as Brazil, India and Japan.

---

1 The information contained herein is supplemented by the relevant charts which have been prepared in order to provide a better overview of the items covered by each of the National Reports.

Moreover, it is also worth pointing out that in Japan the selection of the type of entity is also important with regard to obtaining certain licenses and approvals from the local authorities.

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

In general, all the jurisdictions distinguish two principal groups into which the business associations can be divided: the corporations and the partnerships. These two groups can be subdivided into further kinds of business associations. The use of corporations is more frequent than the use of partnerships based on the information contained in the National Reports.

Corporations can generally be divided into (Public or Private) Limited Liability Companies and Joint-Stock Companies (or Companies limited by shares), while the partnerships can be divided into General and Limited Partnerships.

Other kinds of business associations (less commonly used) can be found within the civil law countries such as the European company, the cooperatives, the interest grouping, the temporary commercial company, the civil law association or the entrepreneurial company.

A new Italian business structure called the "Innovative Start Up" is especially notable. The incorporation of this type of entity provides several incentives and tends to have a structure which facilitates attracting investments more easily than other business associations. However, some requirements have to be met and certain limitations respected. For example, companies under this form of business association may not have existed for more than 48 months (six years are allowed only if the Innovative Start Up was incorporated before the enactment of the current regulation dating from 2012) and, more importantly, the Innovative Start Up has to be linked to innovation and technology items.

It is also remarkable that Brazil still does not provide for the concept of a sole shareholder. Hence, it remains necessary to have a minimum of two founders to set up a business association.

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

  The most crucial differences between the business association structures mentioned above (with no distinction between the legal systems) are the following:

  - *Liability*: Some companies allow for the avoidance of personal liability, which is important from the perspective of the entrepreneur and the equity investors;

  - *Governance*: The main difference is that the governance of a partnership is entrusted to the partners while it is common that the governance of the corporations is executed by different types of management bodies; and

  - *Legal personality*: The legal personality of an entity is an important factor which may grant more flexibility, allow for broader growth possibilities and attract additional investment opportunities.

  Moreover, the tax treatment of the different types of business structures is also important in some countries.

  Furthermore, it is worth mentioning that there are certain remarkable differences within the civil law countries. For instance, the minimum initial capital required differs significantly between the different types of businesses as does the manner in which the quotas and/or shares are transferred.

- **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?**

In the civil law system, the LLC structure is the most commonly used as it offers limited personal liability, a flexible legal framework, and also requires only low initial capital. All these characteristics are really important to the entrepreneurs as they have, in general, only limited funds to create the business association and they prefer a flexible legal framework which allows for a wide range of activities.

In contrast, in the common law system, the most frequently used business associations are the corporations (Canada) and the companies limited by shares (United Kingdom). The stated reasons for such preference include avoidance of personal liability as well as the attractiveness for investments.

Finally, the LLC (or private limited company) is clearly the preferred choice in Brazil and India, because its offers flexibility, limits personal liability, and entails fewer costs.

The exception to the foregoing is Japan where the sole proprietorship and the corporation are the most frequently used business associations to set up a new business association.

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

In the civil law system it is common that the companies issue different sorts of equity instruments. The different equity instruments that were identified in the National Reports included profit shares, non-voting shares, shares with qualified voting rights, preference shares, obligations, convertible obligations, loans, and convertible loans.

In the common law system it is common to issue preferred/preference shares.

In India and Japan it is also common to use convertible preference shares and preferred shares, while in Brazil, it is usual to issue participation certificates, subscription warrants, and/or debentures.

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

In the civil and the common law systems (in almost all the countries in these groups), a registration or ledger of shareholders exists in the companies; in general, they are accessible to the company and to the other shareholders. However, it is worth mentioning that this scheme is implemented with more strength in the civil law system than in the common law system.

In the common law system the registration books are available to the company and the shareholders, while in the civil law system there are some countries that let the wider public consult them (Finland, Republic of Cyprus) and others that do not (the Netherlands or Denmark, for instance). In Canada (starting in July 2016) and in the UK, the company has to file an annual return which states the registered owners of the company's share capital and beneficiaries of more than 25% of the shares (directly or indirectly).

The concept of shareholders registration is also known to emerging countries (such as Brazil) and to Japan (however, in this case it is not open to the public).

It is possible for equity investors to remain anonymous by means of holding bearer shares (very frequent in the civil law jurisdictions). This alternative allows for the equity investors to remain anonymous not only with regard to the public but also to the other shareholders. The bearer shares are used in different ways by different countries. However, in Finland and Estonia this equity instrument is not allowed.

Furthermore, throughout the National Reports other alternatives to remaining anonymous have been identified, such as the concept of a nominee, trustee, fiduciary, or even a SPV. These constructs allow the shareholders or members to participate indirectly in the relevant entity.

Finally, it is notable that in India there is no possibility of an anonymous regime.

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 during this phase?

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

In the civil law system many of the FFF investors are focused on helping the entrepreneur to develop or grow the business. Nonetheless, there are certain civil law countries in which the FFF investors' focus differs. For instance, in Estonia the FFF's focus is on the development and validation of the product and in Germany FFF usually contribute know-how.

We have identified that the focus of the FFF in the common law system tends to be on obtaining a financial return and profits, which seem reasonable based on the amount of assumed risk.

- **What could typically be the professional investors' focus?**

  In the civil law system, generally, the professional investors' focus is to limit risk and maximize potential profits. The professional investors may choose to base their investment decisions on the Return on Investment rate (RoI), the Internal Rate of Return (IRR), or any other study about the start-up and its potential profits.

  The professional investors' focus is also on retaining certain rights so as to allow them to have an important control in the company (through its relevant management and decision bodies) with the aim of achieving the business goals and diminishing risks.

  In the common law system the professional investors also look for a financial return.

  The same professional investors' focus can be identified in Brazil, India and Japan.

- **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)?**

  In general, the main difference in the civil law system between the FFF investors and the professional ones is that the first group prefers simpler and lower-cost documentation as they focus more on receiving their investments back at a later stage, and do not care as much as the professional investors about obtaining profits. In contrast, the second group (the professional investors) prefers detailed contracts, which may include putting in place a due diligence, shareholders agreements, articles of associations and/or management agreements. It is noteworthy that in Denmark, Latvia, and Japan there are no major differences.

Particularly, in common law countries (i.e. Canada), professional investors are interested in the company's management. We have identified that professional investors use shareholders' agreements or shares with multiple voting rights to achieve such approach. Likewise, in the United Kingdom, professional investors, whom are concerned with the company's management, tend to ensure their rights by means of the company's articles of association and/or in the corresponding shareholders' agreements.

It could be said that the trend is to regulate the legal relationship by means of the company's articles of association and relevant shareholders' agreement.

Finally, it is important to mention that in India the FFF investors usually invest in equity and the professional investors tend to invest in convertible instruments.

B. Interest of debt holders

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?

It is uncommon in all the countries that the FFF act as debt holders in this phase (with the exception of Latvia). If they do, however, the main reasons are the same as if they were investing as equity holders: helping the entrepreneur and making sure the business gets going. This notwithstanding, there are some exceptions in Germany, Japan and India where the decision is more focused on the company's growth and expected returns.

In general, the FFF debt holders do not ask for securities and the interest rate does not reflect the risk implied with these investments. However, in Germany it is very frequent to ask for securities, and in Switzerland the FFF will ask or not depending on the amount invested. In India the FFF will ask for securities except in cases of a familiar relationship. Moreover, in Spain, Cyprus, and the United Kingdom it is very frequent to use a participative loan agreement. In Spain it is common to use a profit sharing agreement with a variable rate based on profits.

It is notable to mention that in Japan the Japan Finance Corporation provides an equity-nature loan, with long terms ranging from 7 to 15 years. It does not imply immediate instalment payment since it will be reimbursed at the end of the maturity, while it can be deemed as equity for financial institution inspection purposes.

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

It is uncommon (both in the civil law and common law systems) that professional investors act as debt holders due to the fact that they tend to focus more on obtaining equity (which will allow them to gain more control over the company). In Finland and Poland, however, professional investors can be debt holders depending on a case by case basis and, particularly, if they expect a very high return.

However, if professional investors actually do act as debt holders, they will ask for significant securities, in most cases in form of personal guarantees and also in the form of share pledge agreements. Additionally, the interest rates will reflect the high risk.

C. Interest of management / employees

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?

The most commonly used means to ensure that the management / key employees remain in the company until the company reaches the growth or maturity phase are stock plans (in various forms such as call options, sweat equity, etc.). Alternatively, other means used are non-compete agreements (with an adequate compensation), a system of earn-out or incentive bonuses as well as cash considerations.

The exception would be Denmark where it is uncommon to provide incentives schemes during the start-up phase.

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?

While stock incentive schemes are common in all the countries, warrants are not (neither in the civil law system nor in the common law system). The exception would be Japan where it is common to grant warrants.

Notwithstanding the foregoing, in certain countries (Denmark and Portugal) granting warrants is becoming a trend.

It is worth mentioning that (i) in Germany it is common to grant virtual shares or phantom stocks, which do not consist of a direct participation in equity, but rather of a participation in the sales profits at a later stage; and (ii) in Poland the companies tend to engage with management/key employees through civil law agreements instead of employment agreements with the aim of lowering costs and establishing higher remuneration.

D. Interest of advisors / lawyers

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)?

The common difficulty for lawyers or advisors during the start-up phase, throughout all the groups of companies, is the lack of funds of the start-ups. The start-ups have limited resources and think in a short-term basis, so they prefer to focus on the business (investing in developing the product, investigating or other things) rather than in a really complete legal advice but in a more affordable legal advice.

In order to make it easier/more attractive to access good quality legal advice, the different law firms or individual lawyers use different fee structures depending on the kind of work, for example:

- Fixed fees or flat-fees;
- Hourly fees with lower rates/discounted rates/limited by caps;
- Delay the due date of payments; and/or
- Progressive incremental prices, with lower rates at first and higher ones in the future.

Some countries, such as Austria, the Republic of Cyprus, Portugal, Spain or the United Kingdom restructure their fee schemes because they take into account the potential of the start-up and the future business relationship with the client. Other countries, such as Germany, Canada or Japan, are reluctant to grant discounts based on these grounds as they are conscious that the client can end the relationship in the future, and such a decision, sometimes, may not be in the hands of the current decision makers if, for example, new investors take control of the company.

Although there are no important differences between the groups of companies, it is interesting to point out one speciality in Austria. The Austrian Chamber of Commerce provides certain free services (legal issues, social security, trade law matters, and other important subjects) to start-up companies with the purpose of advising them for free in this economically complicated stage.

A further example is the United Kingdom, where some of the firms offer general advice using the knowhow acquired and by means of providing standard templates to start-ups during the growth phase in order to obtain bigger transactions in the future and establish a preferential commercial relationship with these.

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 valuation of the company? If so, whose valuation? Is it common for an advisor in this situation to request that the company previously has successfully completed a minimum viable product ("MVP") stage which reduces the risk of failure (i.e., as part of lean start-up methodology it is advisable to diminish uncertainty for the project by means of developing an MVP to validate the project)?

Generally, it is uncommon for lawyers / advisors to accept warrants / rights to shares, because it is not accepted, as in Netherlands, or because it involves some issues which will likely trigger a conflict of interest.

However, in Turkey this compensation mechanism is accepted and the law firms / lawyers use their own assessments and evaluations, taking into account the business model, market share or profitability of the start-up.

In Italy, although it is an uncommon practice, this sort of compensation has been established as a possibility for Innovative Start Ups and the Innovative PMI (*"piccole e medie imprese"*).

2. Growth

A. Equity holders

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)?

In all the legal systems analyzed no noteworthy shifts in the focus could be made out as compared to what has been pointed out in the start-up phase.

Please note that the focus of equity holders during the company's growth phase is concentrated on maintaining the company's steady evolution by means of attracting more investment, preserving the business control as well as protecting themselves from third party interests in the company that could provoke a share capital dilution.

Notwithstanding the foregoing, in some countries such as Denmark or the United Kingdom, absolutely no changes in the focus were registered at all.

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

The different legal systems analyzed do not offer strict protection against the dilution of the equity holders' interest in the company. They do, however, protect equity holders through two different techniques:

a. share capital reinforced majorities required to approve the issuance of new shares; and/or

b. preemptive rights that grant equity holders the opportunity to acquire new shares before third party investors are allowed to (always in proportion with the equity holders' existing percentage of share capital in the company).

Please note that occasional exceptions to these rights may apply if there are imperative financial reasons or based on a shareholders' resolution if this option is included in the company's by-laws.

In addition to what has been pointed out, other protective measures could be contractually adopted (issuance of anti-dilution warrants, veto rights or more qualified majorities, call options and contractual securities). In Belgium, for instance, business angels and venture capitalists usually only hold a small percentage of the company's equity and, consequently, they usually negotiate contractual protections in advance. Thus, shareholders' agreements contain many of these anti-dilution provisions.

Japan is the only jurisdiction that foresees the need to include protective measures against dilution in the articles of association and professional investors need to seek anti-dilution through other contractual remedies.

Finally, it can be said that the current equity holders of a company usually participate actively in further financing rounds, mainly in order to avoid share dilution by investment made by new shareholders. The situation is different for FFFs as they usually do not have enough capital to make further investments and they would usually rather accept a dilution or cash-out in order to profit if the company is then valued higher. In contrast, professional investors would rather choose to participate in further financing rounds.

In Brazil and Japan, founders and/or other equity holders are more interested in increasing the investment through debt. In such cases, dilution does not happen and they can focus on seeking more sophisticated investors.

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?

Different legal means are used to prevent management from disclosing confidential corporate information. The most commonly used is the non-disclosure agreement (usually referred to as "**NDA**") that is frequently executed with new potential investors before starting with the due diligence or when other confidential information has to be disclosed.

The management is usually bound by non-disclosure obligations which are typically included in the employment/management agreements. Furthermore, the management has some implicit loyalty and confidential obligations/duties based on their position which include liability in case such obligations/duties are broken.

B. Debt Holders

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

In this phase, no considerable differences are seen throughout the different jurisdictions.

It is business practice that several different types of private lenders provide debt in this phase: banks, mezzanine financiers, business angels and venture capitalists, among others. In contrast, in Denmark debt holders are unusual.

As a general rule the companies/industries who lend money will be focused on a high return on investment.

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?

Throughout the different jurisdictions, it is business practice to use collateral securities (mortgages, pledge of shares, equipment or other assets). Additionally, as the company starts growing and acquiring more assets, such assets can be used to secure future loans/debt.

The case is somewhat different in such countries as the Republic of Cyprus, Estonia or Italy which tend to use personal guarantees instead of collateral securities.

Largely, the preference amongst the different types of securities depends on the accessibility and efficiency of the security in case of its execution.

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

In civil law systems, the FFF investors are more willing to subordinate their debt than the professional investors. However, sometimes professional investors also accept subordinating their debt if, in return, they can renegotiate the terms of their debt. Frequently, the subordination is under bank loans which in many cases are the more senior debt.

In Italy, in particular, any loan granted by the shareholders of a *S.r.l.* is subordinate to any other loan granted by third parties. This practice, however, is unclear when the company is a *S.p.A.* In contrast, in common law jurisdictions investors are more reluctant to subordinate their debt. In Canada, for instance, they only subordinate their loans if the business is viewed as likely to succeed.

Finally, in the other jurisdictions, such as Brazil or India, professional investors usually do not subordinate their debt. In Japan it is possible to subordinate debt but simple schemes are enforced.

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 most frequently used mechanisms to participate in the potential upside valuations are the convertible loans and the profit-participating loans. The holders of convertible loans are offered the opportunity to convert their loans into equity and acquire certain rights in the company.

C. Management / Employees

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

In civil law systems, although it depends on a case by case analysis, it is common that managers lose their rights under an incentive plan if their management agreement is also terminated. Contrariwise, in Germany a loss of rights in such a situation is not usual.

Additionally, when the terminating party is considered a "good leaver", such a member of the management should be able to preserve his/her rights. This is the case in Austria and Belgium where it must be taken into account whether or not the terminating party is considered a "good leaver" or a "bad leaver", the former profiting from better exit conditions than the latter.

Finally, as the criteria to establish the meaning of a "bad leaver" is very broad, such criteria are often included in shareholders' agreements or in other contractual covenants.

2.2 Upon implementation of an incentive plan, the rights related to the shares that 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)?

Please note that it is difficult to identify uniform criteria among all analyzed jurisdictions. While in some countries there is no vesting period (Austria, the Netherlands, Portugal, Turkey or Brazil), in others the vesting period ranges, for example, from 1 to 3 years (Estonia, the Republic of Cyprus, or Poland), 2 to 5 years (Switzerland) or other periods (in the United Kingdom, for instance, where shares are divided into tranches and vested over a number of years, subject to performance criteria), or the vesting period is continuous (as in Denmark).

It is also typical in some countries that the vesting period is linked to a liquidation event (common in Finland and Canada).

2.3 In certain jurisdictions the management may not fall within the scope of a labor relationship since it is performing executive duties for the company and/or may hold certain stock of the company (it might be subject to 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?

First of all, a distinction must be made between a labor relationship and a corporate/management relationship. While the former is governed by the rights provided in the respective labor law, the latter relationship is only protected by special contractual mechanisms included in the corresponding agreement.

Generally, among all the analyzed jurisdictions the management relationship with the company is not considered a labor relationship (exceptions being Denmark and Austria where the management relationship is considered a labor relationship with some exemptions stipulated in the labor legislation).

However, certain jurisdictions have established that one relationship does not necessarily exclude the other. Thus, a manager can also be considered an employee and, in this case, the labor law rights will protect the manager/employee to the extent of labor duties concerned. In the United Kingdom it is required that if one person holds both positions (manager/director and employee), two separate documents are necessary one covering each relationship.

In conclusion, management relationships are more beneficial for the employer, as they make it easier to dismiss the manager without justifying reasons being necessary. To the extent that labor rights do not apply to these kinds of relationships, other contractual clauses are sometimes foreseen in the management agreements, often differing depending on the level of compensation.

D. Interest advisors / lawyers

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 civil law jurisdictions and such jurisdictions as Brazil or India, there are a vast variety of methods to structure the legal fees. For instance, there may be tailored fee arrangements, hourly fee structures, discounted fees, service packages, fixed fees and also retainers or combinations of retainers for specified services, among others. Notwithstanding the foregoing, the fees in this phase are closer to the standard rates that individual lawyers/law firms usually apply.

In contrast, in common law systems law firms, while structuring their fees, are more focused on the current circumstances of each client (company) and on their expectations of a future relationship with the client.

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

It is uncommon for advisors to take board positions during this phase, with the exception of Denmark and Finland where such board members may be compensated.

Nevertheless, in some cases advisors hold positions in the "Supervisory Board" or as a "secretary no member" (as in Spain) or as a non-executive member (this is the case in Portugal). Such positions may be compensated by means of providing legal services (in the case of Spain), by means of cash (in the case of the Republic of Cyprus), or may not be remunerated at all (Belgium). In many jurisdictions, it is prohibited to participate in future litigation regarding such matters which happened inside the company in which the respective advisor holds a position.

In the common law systems, and especially in the United Kingdom, there is a business practice for lawyers to act as directors in the companies' board of directors. This, however, is becoming more and more uncommon as it is perceived that the total independence from the company is necessary in order to advise it correctly. In any event, any position held in these jurisdictions will not be remunerated.

2.3 As a lawyer you may be asked by an 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?

There is no uniform answer to this question. Furthermore, specific answers are hard to come by as most of the countries questioned pointed out that the answer would depend on the specific case.

However, some of the countries have stated that the main focus could be on maintaining the entrepreneur's control in the company, the expected lifetime and further investment requirements. Such a focus would always keep the interests of the entrepreneur as client in mind. Moreover, if the entrepreneur is worried about the FFF equity holders, several options would likely be given to her/him for the purpose of finding the best one in the specific situation.

It is worth mentioning that in the common law system this question/advice is considered a commercial decision and, as such, generally not part of the lawyers' function.

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

Broadly, it can be said that among all analyzed jurisdictions the by-laws may cover certain rights relating to the shareholders as long as they do not contradict the mandatory corporate/commercial law duly in force. For instance, it is crucial that shareholders' rights can be regulated in the articles of association, as generally the articles of association are also binding towards third parties (with the exception of Latvia, where the articles of association will only bind third parties if they were aware of the content of the articles of association. The same is true in the Netherlands but with respect to the shareholders' agreements instead of the articles of association.), while the shareholders' agreements only bind the parties thereto.

The exception to the abovementioned is Brazil, where certain rights may not be regulated by the articles of association. The shareholders' agreements, however, will be enforceable against third parties also once such agreements are annotated in the relevant corporate books and in the shares' certificates.

3. Maturity

A. Equity Holders

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? Is the focus on fair distributions of earnings?

Equity holders may vary during the lifetime of a company from non-professional (i.e. FFF) to professional investors (i.e. private equity investors). As a common factor, investors will always want to obtain a high return on their investment as well as dividends for the duration of their investment.

In addition to the abovementioned, many investors throughout the different jurisdictions begin to shift their focus towards preparing the sale of their shares/quotas through private methods or through an IPO (an IPO being the main focus of investors in Japan for example).

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?

Based on the answers of the questioned jurisdictions, we generally did not identify major differences between small and large companies. However, please note that many jurisdictions differentiated between listed and unlisted companies for obvious reasons.

Civil law jurisdictions (e.g., Belgium, Finland, or the Netherlands) impose an obligation on listed companies to follow a specific corporate governance code (the "**Code**"). Please note that the Code may also be binding for certain privately held companies (e.g. in Belgium).

Furthermore, several of the analysed jurisdictions establish certain thresholds (generally relating to profits, to economic size, or to number of employees) that may trigger stricter corporate governance rules, such as the appointment of a mandatory supervisory board.

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.

Generally, civil law jurisdictions do not impose specific obligations on equity holders or on the company. However, it is common business practice among the analysed jurisdictions that shareholders enter into a shareholders' agreement in order to set out certain rights and obligations among them (e.g., non-disclosure obligations, non-competition obligations, or pre-emption rights).

Notwithstanding the abovementioned, in Estonia equity holders shall act among each other in accordance with the principle of good faith. This is also the case in Denmark where there is a duty of loyalty towards the other shareholders. In Spain or Belgium the concept of "abuse of rights" was introduced into law. This concept (also called "alternative remedy" in the Republic of Cyprus) can be relied upon in courts by equity minority holders in cases in which the majority holder(s) act(s) oppressive towards them.

In common law jurisdictions obligations among equity holders generally also do not exist, although certain protective measures are in place for the benefit of minority holders. For instance, in Canada and United Kingdom courts have ruled that majority shareholders have equitable duties towards the minorities. Brazil's legal system requires that all equity holders act in good faith with respect to the company's interest.

Finally, please note that, in certain scenarios, Japan's legal system empowers any of the company's shareholders to challenge the decisions adopted at the shareholders' meeting if the challenged resolution is contrary to the interests of such shareholder.

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 do such restrictions have to be agreed upon among the equity holders (e.g., shareholders' agreement)?

Throughout all the jurisdictions analysed, several manners in which the transfer of a company's shares can be controlled could be identified. In addition to certain restrictions that may be incorporated in the articles of association, a shareholders' agreement could prevent the unrestricted transfer of the company's shares.

Particularly in civil law jurisdictions, the right of first refusal as well as drag-along and/or tag-along rights are quite frequently included in shareholders' agreements.

In common law jurisdictions, certain restrictions (e.g., the right of first refusal, tag-along and drag-along rights, and/or pre-emption rights) can be imposed by means of adapting a corresponding shareholders' agreement.

In addition to the foregoing, in Brazil public non-listed companies can impose restrictions regarding whether or not investors are allowed access to equity.

B. Interest of debt holders

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

During the maturity phase, debt holders are mainly financial institutions (i.e. banks or other financial entities). However, private equity funds, such as pension funds and/or mezzanine investors, are also common debt holders.

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

  The focus of debt holders in the maturity phase lies on interest rates and guarantees. Debt holders primarily look for low risk investments and/or covenants for securing their loans. This is, for instance, the case in the United Kingdom where investors have a strong aversion towards investment risks.

  In Switzerland, FFF remain debt holders because it makes it easier for the company to attract professional investors.

  Finally, in Brazil the focus shifts in search of future profitability of the companies, while in India debt holders' emphasis is on the company's current performance, the credit history, and the repayment capacity of the company.

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

  In civil law jurisdictions it is common to reflect such changes in focus of the debt holders by amending the contractual relationships with regard to the loan terms (e.g., lower interest rates and additional collateral). In other circumstances, the contractual relationships will rather be changed with regard to the applicable timeframes.

  Please note, however, that each jurisdiction has its own particularities. For instance, Turkey allows for the incorporation of certain restrictions to future financing rounds into the articles of association.

  The situation is different in common law jurisdictions, such as Canada, where contractual relationships often include negative covenants restricting certain activities that the company may undertake.

Finally, please bear in mind that in Brazil it is common to grant convertible loans or to issue convertible debentures, while in India debt agreements are generally regulated in favour of the debt-holders, who seek to introduce stringent contractual terms to safeguard their debt investment.

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?

As per our analysis, civil law jurisdictions usually publish statutory accounts and audit reports, among other financial statements, which are publicly available in the corresponding commercial registers (Switzerland being the exception). In Switzerland, if debt holders want to access financial information of a Swiss privately held company, they can only obtain such information by means of a due diligence of the company. In connection with this question, please find below certain particular scenarios:

- In Austria, the information available differs depending on the size and type of the company. Thus, the bigger the company (in terms of revenue), the more financial information is publicly available. It is also possible to check the creditworthiness of a potential borrower with a credit check institution.

- In the Republic of Cyprus, a debt enforcement register does not exist. Information, however, can be obtained from credit bureaus.

- In Hungary it is possible to check tax information, the land registry, as well as the central credit information system which provides information on whether the company has been complying with its obligations concerning the bank loans.

- In Latvia the list of tax debtors is made publicly available by the tax authority.

The situation is similar in common law jurisdictions where financial information may not be publicly accessible. As a consequence, it is advisable to verify for each jurisdiction which information is available and to identify the relevant particularities.

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?

The issuance of notes is unusual in civil law jurisdictions, especially for privately-held companies (with the exception of Poland where it is generally a common practice). However, it is common in Belgium and Denmark, where public limited liability companies issue notes.

In Italy small and medium size companies can issue a sort of notes called *cambiale finanziaria* which only professional investors may subscribe to.

In common law jurisdictions it is possible to issue notes, although in the United Kingdom is infrequent. Besides, private companies are forbidden from offering debt securities to the public.

The requirements and the procedures relating to the issuance of notes are not uniform throughout the countries. In some cases the procedure is regulated by the national law (at least some aspects) and in other cases the procedure has to be set out in the corresponding articles of association.

Please be aware that the focus of note-holders and debt holders is not so different. For instance, in Belgium the focus of convertible loan holders is to align their interests with the shareholders' interests. In Estonia, the note-holders are frequently focused on the company's (or on the personal) securities package, but if the notes are non-secured, the focus is on the economic situation of the company. In Spain the note-holders are focused on getting a high interest rate and a safe return of the invested capital.

C. Interest of management / employees

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?

Civil law jurisdictions generally have such an obligation to "act in the best interest of the company" in place, although it may not necessarily be incorporated in the national legislation. In some cases, the courts are in charge of establishing how to interpret the "interest of the company" and they take different approaches in doing so.

Generally speaking, the interest of the company can be seen as the interest of the stakeholders. For instance, in Hungary, in the event of an insolvency situation managers of the company should give priority to the interests of the company's creditors. In contrast, the interest of the company includes the interest of all the stakeholders (including shareholders, employees, and creditors), in the Netherlands, in Portugal, or in India and Japan for example.

In common law jurisdictions, the fiduciary duties obligate the directors to act in the best interest of the companies.

3.2 How are "fiduciary duties" or a duty to treat equity holders equally defined?

Although "fiduciary duties" originally were only used in common law jurisdictions, nowadays no substantial differences can be made out among the different jurisdictions.

The fiduciary duties are in the best interest of the company and, accordingly, all equity holders must be treated equally. Some countries have established that this principle also means that in unequal situations the equity holders have to be considered unequally. In certain jurisdictions fiduciary duties are not regulated by law but result from the relevant case law.

To sum up, fiduciary duties are: to act bona fide in the interest of the company (as we mentioned before, sometimes the interest of the company includes the interests of the shareholders and sometimes not), duty of care, duty of loyalty, non-compete obligations, avoidance of conflict of interest situations and acting in good faith.

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

The conflicts of interest between the executives/management of the company and the company usually arise in principal-agent situations. This may be the case, for instance, when the executive/manager takes advantage of the company's information or obtains a benefit from the company by making certain decisions that will exclusively be profitable to himself/herself and will not be in the company's interest. A conflict of interest may also arise between shareholders and the company.

Even though there is no uniform way to treat these problems, some common practices can be observed throughout all the analysed jurisdictions. For instance, it is common practice for the members of the management to be required to inform other members of the management (or the supervisory board and/or the auditor of the company) of a conflict of interest before the decision is made in the matter, while themselves not participating in the decision-making. Moreover, it is common practice among all jurisdictions to apply restrictions in cases in which contracts between the managers (or their relatives) and the companies are entered into.

The rules resolving or preventing conflicts of interests are, in general, applicable to listed and non-listed companies (with the exception of Italy). However, they are usually more rigid for listed than for non-listed companies. For instance, in some jurisdictions these rules may be applicable to both types of companies (listed and non-listed), however may only be mandatory for listed companies and only voluntarily for non-listed companies (e.g., Republic of Cyprus and Brazil).

3.4 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 advantages for the company?

It is quite common in all the studied countries to set up incentive plans for key managers and/or employees. This is not the case, however, for listed companies in Germany or Italy. Cash bonuses are still common, as are insurance/pension plans and warrant programs or other beneficial packages.

Incentive plans generally do not provide widespread tax advantages and some incentive plans do not offer any tax advantages at all. For example, in the Republic of Cyprus, in Hungary, in Switzerland, in the United Kingdom and in Italy (unless the company is an Innovative Start Up or Innovative PMI), as well as in Brazil and India no tax advantages are provided to incentive plans.

Specifically, in Japan it is possible to consider the granting of stock option incentives as costs for the company in order to profit from tax advantages.

D. Interest of advisors / lawyers

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)?

In the maturity phase, there are not many differences in the structure of fees as compared to the growth phase. The most used fees in the civil law jurisdictions are fees on a time spent basis. However, these kinds of fees are expensive for companies in earlier phases (e.g., start-up phase). Retainers are also common in some countries such as Latvia, Portugal, or Spain. Fixed fees for specific projects are sometimes applied, as for example in the Republic of Cyprus.

3.2 Are you able to become a 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)?

Although it is possible to become a member of the board of directors of the companies, it is infrequent among civil law jurisdiction companies and also in the United Kingdom, Brazil, and India. Generally, the aim of not becoming a member of the board of directors is to protect the attorney's independence when providing legal advice to such companies, as otherwise a conflict of interest may arise.

However, it is common that lawyers become members of non-executive supervisory boards (Estonia, Hungary, Poland, or Spain) in order to continue rendering legal advice to the company. In Japan, however, a corporate counsel generally cannot at the same time be a director of the company.

The legal advice provided to companies will generally depend on a case by case basis. Nevertheless, in many civil law jurisdictions it will become more specialized, more limited to specific problems, and less wide-ranging. Companies tend to have their own counsels who deal with the daily legal issues.

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)?

There are no mandatory rules among the jurisdictions analysed other than a code of business conduct.

For instance, in Austria and in the Netherlands lawyers not representing the managing director, but the company, must act in the best interest of the company and advise the managing director to appoint his own lawyer in case a conflict of interest arises.

Moreover, lawyers should advise the company in a manner in which such conflicts with their managers can be avoided in advance (e.g., Republic of Cyprus).

Finally, in India it is considered good practice to report any conflict of interest to a specific team of employees (created *ad-hoc*) in order to analyse the impact of such conflict of interests and propose certain solutions.

3.4 Do the anti-money laundering provisions in your jurisdiction change the form of your rendered advice?

The anti-money laundering provisions generally do not change the form of the rendered advice, neither in civil nor in common law jurisdictions. This is also true for the other analysed countries. However, the client generally must always be identified before the lawyer starts to render advice.

Sometimes, the anti-money laundering rules and confidentiality rules must be coordinated. In Switzerland, for instance, the lawyer is not subject to the anti-money laundering act when he/she represents a client within the traditional activities of the legal profession. The lawyer, however, is obligated to report any suspicions that assets may have originated form criminal activities.

Finally, the great exception to the abovementioned client identification rule is India, where no special diligence has to be performed.

4. IPO / Listed phase

A. Equity Holders

4.1 How does the focus of the shareholders change by the going public of the company 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 the civil law countries, the shareholder's concern often lies with the liquidity of the company's shares (understood as the ability to leave the company and to obtain an objective value for the shares they own). Consequently, the more liquid the company’s shares are, the more the focus on the distribution of benefits becomes weaker. In some countries such as Denmark, however, only small investors focus on the liquidity of the shares. In contrast, larger investors generally prefer to hold long-term investments and, consequently, their focus on the distribution of earnings remains important.

In Belgium, the long-term focus of the investors generally remains, while in other countries, such as Estonia and Germany, a distinction can be made between institutional investors (long-term focus) and speculative investors’ (short-term focus). The situation is the same in common law countries where the focus of the investor will depend on the type of industry and/or the type of investor.

In Brazil the shareholders’ focus is generally on the economic and financial growth of the company.

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

Commonly, the identities of the shareholders of a listed company are not publicly accessible. However, most analysed countries have in common that once certain thresholds are met or surpassed the identities of such shareholders have to be reported to the competent authority. This is the case in all analysed countries but Spain where such information is only accessible to the company and to other shareholders. Please note that in Finland the identity of non-Finnish investors can remain anonymous by means of appointing a nominee.

In some countries the accessibility to this sort of information is deemed to have an influence on the shareholders' focus (e.g., Republic of Cyprus, Turkey, and Brazil).

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.**

  In all analysed countries there is an obligation to disclose insider information relating to the company (especially such information that has an effect on the price of shares of the company).

  However, please bear in mind that in many of the analysed countries the company can choose when to disclose the information in order to: (i) protect the legitimate interests of the company; and/or (ii) not leave the investors unprotected; and/or (iii) safeguard confidentiality; and/or (iv) notify or get the authorization of the competent institution.

- **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 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?**

  Insider trading and market manipulation are reprehensible acts that are regulated by laws in all analysed countries. These acts can be punished by administrative/civil sanctions and can be criminally prosecuted with punishments ranging from monetary fines to imprisonment. In Japan, for instance, the punishment is imprisonment for up to 10 years.

  Although such acts are regulated in all analysed countries, it is also important to take note of the Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse).

  The European Union Member States have incorporated into their local legal systems the rules regarding market abuse set out in the *Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)* (the "**Directive**"). The Directive's aim is to protect the correct functioning of the European Union's financial markets.

  The Directive sets out certain prohibitions regarding the disclosure of information such as: (i) disclosing privileged information to any other person outside the scope of the exercise of their employment; (ii) recommending any other person to acquire or dispose of financial instruments to which that information relates; and (iii) engaging in market manipulation.

B. Interest of debt holders

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?

Many surveyed civil law countries (e.g., Denmark, Estonia, Latvia, Poland, Portugal, and Spain) have pointed out that the more accessible such information is, the lower the interest rates tend to be. Due to the more accessible financial information, the company's risk behaviour can be observed more easily.

However, other analysed countries stated that the terms and conditions of the loans do not depend on whether the company is listed or not.

Listed companies do not necessarily profit from lower interest rates, although the information disclosing obligations that they have can make it easier to obtain better loan terms (this tends to be the case in Turkey, India, and Japan for example).

In many other cases, non-listed companies also have to provide financial information, and the terms of the loans depend more on the size of the company (e.g., the Netherlands) and/or other factors such the entity's credit rating, the financial stability, as well as the riskiness and the cash flow of the company (e.g., Belgium, Finland, Canada, and United Kingdom).

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?

In all analysed countries it is possible to list notes and, in some cases, the procedure is the same or similar to the one for listing equity. In other countries, the procedure includes additional requirements as for instance that the total amount listed must be more than € 200,000.00 (e.g., Latvia and Portugal).

Some countries establish different kinds of procedures depending on whether the notes will be listed in a regulated market or in an unregulated market.

Although listed companies in Brazil try to obtain better interest rates, the negotiating power regarding the terms of the loans lay with the debt holders.

Finally, the focus of debt holders and equity holders is similar. Some particularities throughout the analysed jurisdictions, however, do apply to note holders: holders of listed notes are usually more prudent (Belgium), they are able to sell their notes (Republic of Cyprus), they have extended rights regarding the company (possibility to access relevant information, e.g. Latvia), they can trade their notes (Spain), they focus more on the increase of profitability in the short term (Turkey) and on receiving interest payments (Canada), and, finally, the holders of listed notes will not try to hold the bonds during the redemption period (the United Kingdom).

C. Interest of management / employees

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.)?

Throughout the analysed countries, we can point out that private companies that go public have to comply with many additional requirements as well as the change of the corporate structure.

The management has to disclose more information relating to the company (sometimes even regarding their own remuneration) as the company is generally required to fulfil a higher level of transparency.

In many countries, the total amount of compensation does not necessarily increase (as pointed out by Latvia, Brazil, and Japan). However, the trend is that such compensation is increased and that the structure of compensation changes (in Poland and in Denmark, however, the structure of the compensation does not change substantially). In general, stock options are the most usual instrument to increase the remuneration.

In Hungary, for instance, the corporate governance laws/principles provide that the management's remuneration must be set in accordance with the level of responsibility held by the management, the goals that they reach, and the company's economic and financial situation. A further approach is to establish a level of remuneration by taking into account the market standards, as it is usual in the United Kingdom.

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 the 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 remuneration paid in mid- to long-term options?

In several of the analysed countries certain measures are taken by the companies in order to avoid such conflicts, namely by incorporating long term incentive plans in the management's remuneration for example. However, such long term incentive plans, usually, are quite complex.

Measures to avoid such conflicts also include the distribution of stock options to the management while restricting the transfer of such shares through lock-up periods or other provisions, as well as often including vesting periods.

The mentioned measures (and other measures) are usually included in the agreements with management or in employment agreements. Nevertheless, in many countries (e.g., Denmark, Spain, and Turkey) the applicable code of good governance will also stipulate some of the mentioned measures and/or provide other provisions regulating the behaviour of the management as well as the management's potential liability in case of violation of the provisions set out therein.

4.3 Are the management and/or the employees bound by a mandatory lock-up period due to the IPO? In the event that the lock-up period is not mandatory, please explain the common standards in your jurisdiction with regard to implementing a lock-up period.

In civil law countries, in general, it is not mandatory to implement lock-up periods (except in Denmark and Portugal). It is possible, however, to agree to such lock-up periods in the agreements with management, in the underwriting agreement, and/or in the prospectus of the IPO. The duration of such lock-up periods can be quite different from country to country. For instance, in Finland the lock-up period usually applies for 90 to 180 days and in Italy for 18 months to 5 years.

In common law countries, management holding securities are typically bound by lock-up periods. In Canada, the escrow period is about 18 months, while in the United Kingdom the lock-up period is 1 year with the possibility of extending such a period contractually.
Finally, in Latvia, the manager/employee leaving the company has to return the shares to the company or must transfer them to the new manager/employee in exchange for a fair price.

D. Interest of advisors / lawyers

4.1 How do you structure your fees for an IPO?

There are many heterogeneous fee structures within the studied countries. There are some practices, however, which are commonly used, such as: amount billed in accordance with standard rates; flat-fees (generally used when the time to be spent can approximately be predicted); and success/discount fees, which are more frequent in the common law countries (common in Italy as well) and are dependent on the success of the transaction.

Notwithstanding the abovementioned, in Portugal, for instance, lawyers/advisors set their fees depending on: (i) the size of the IPO and the responsibility in connection with such a task; (ii) the list of documentation that has to be produced in connection with the IPO; and (iii) the success of the transaction.

4.2 From a lawyer's 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)?

In order for a company to become a listed company, many requirements and obligations have to be fulfilled. For instance, the most relevant and common aspect to be considered, from a lawyers' perspective, is the drafting of a prospectus which has to be prepared for an IPO. Such a prospectus must often be drafted after a respective due diligence and must then be presented to the relevant authorities.

Companies in civil law countries and in Japan do not usually reach the IPO stage. In contrast, in some countries such as Finland or Italy a tendency of more and more companies reaching this stage can be observed.

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

In all analysed countries, except for Denmark and Japan, some kind of secondary market exists which focuses on start-up companies, or small to mid-sized companies, that are still growing and that cannot reach the minimum requirements in order to be listed in the principle/primary stock markets. In the secondary markets, the regulations are more flexible. Such secondary markets are, however, also considered more risky.

In connection with this question, three relevant developments should be pointed out:

a. Netherlands: The secondary market ("Alternext Amsterdam") will be closed by the "Euronext" on 30 April 2016 at the latest.

b. Turkey: A secondary market exists which has recently been inaugurated as a new market under the control of BIST. The new market is characterized as a private market where start-up companies can raise capital without going public.

c. Brazil: Legal measures have been taken in order to incentivize IPOs (in September 2014, the Brazilian Securities and Exchanges Commission issued a new normative instruction).

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

In civil law countries, but also in the common law countries and in Brazil, law firms generally do not adjust their rates based on the fact that their clients have become listed companies, at least not automatically. However, in the Republic of Cyprus, Finland, Hungary, Poland, Portugal, Spain, and in Switzerland it is common that lawyers will adjust their fees according to the complexity and the volume of work. This is also true in India and in Japan.

5. Acquisition

A. Equity Holders

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? Do only shareholders' interests (e.g., offer price) have to be considered? Do the interests of other stakeholders (employees, community, etc.) have to be considered?

All analysed countries share the idea that the board of directors must act in the best interest of the company. The best interest of the company will generally not only include the shareholders' interest, but also the employees' relationship with the company, the relationship of the company with its suppliers and customers, and the community and environment (e.g., in the United Kingdom). It is important to point out, however, that the shareholders and employees' interests are generally the most important aspect to take into account.

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 (regarding the rejection of a low offer for example). 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? Is there a specific process for public takeover offers, for example, which provides protection? Does the bidder need to treat target shareholders equally? Are there, for example, minimum price rules and/or best price rules?

The equal treatment principle is present in almost all analysed legal systems.

In all civil law countries (except in Italy) there are specific price rules that aim to protect all shareholders in case of takeover bids.

In general, please take note of the following exemplary price rules:

- the highest price paid throughout a specific period of time (usually 6 or 12 months) prior to the takeover offer must be offered to all shareholders; and/or

- the average market price of the shares throughout a specific period of time (usually 6 or 12 months) prior to the takeover offer must be offered to all shareholders; and/or

- the share price calculated by an independent auditor must be offered to all shareholders (although less common than the two previous methods).

Several analysed countries apply different methods for calculating the price of the shares. These applicable methods tend to be a bit more extensive in Austria, Canada, and Japan with the goal of providing appropriate information about the shares and the bid. In Cyprus, the price rules include the publishing of an irrevocable letter of intent.

5.3 As mentioned above, a listing (ideally) provides liquidity to 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) consent of the shareholders? What are the deadlines for the delisting? Do issuers need to provide for an off-exchange trading for a certain period following the delisting?

In generally all analysed countries the delisting is regulated in order to protect investors from the consequences of such a delisting.

Please bear in mind that some countries require a shareholders resolution in order to delist a company (e.g., Austria and Latvia), while in other countries this requirement does not exist (e.g., Belgium, Italy, and Japan). Usually, the delisting will not require a specific majority vote. Such a reinforced majority may, however, be required by the articles of association (e.g., Netherlands and Spain).

In other countries such specific majorities may be required by law (e.g., 75% of shareholders' votes are needed in the United Kingdom and India). Finally, the consent of a specific regulatory authority is required in Austria, Italy, and Poland.

The criteria and the different deadlines vary among the analysed countries. For instance, in some countries there are no specific deadlines (e.g., Belgium) while in other countries the deadlines are set by the rules of the relevant stock market (e.g., the Netherlands).

Off-exchange trading for a certain period following the delisting is not mandatorily required, although it is quite common in the United Kingdom for example.

B. Interest of debt holders

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?

Certain mandatory rules are common among all analysed countries (with the exception of Japan, where generally the *Tender Offer Bid* rule ("**TOB**")[2] must be followed) which do not allow the holders of listed notes to have them redeemed. However, it is common that the terms governing the loans will contain clauses that allow the holders of listed notes to request the repayment of the listed notes. The most used clauses are change of control clauses, although other clauses with similar consequences are used to, as for instance, the "make-whole"–clauses (in The Netherlands) or the "event of default"–clauses (in Switzerland).

Furthermore, holders of listed notes are not able to interfere in the process of a public tender offer beyond the influence that may be granted by the above mentioned clauses. However, a few of the analysed countries remarked that the bidder may have an implicit obligation of equal treatment with regard to the holders of listed notes (e.g., Belgium and Spain, in the case of convertible notes, and also the United Kingdom), giving them *a pro rata* price value per share.

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

The typical effect of a public tender offer on existing credit facilities is that the change of control clauses usually contained in the credit agreements may be triggered (e.g., Estonia, Finland, Germany, Turkey, Switzerland, Canada, and United Kingdom). Further effects can be identified among the different analysed countries, such as shareholders securing existing company liabilities with their own assets (e.g.,

---

[2] *The first step of a squeeze-out consists of a tender offer regarding the shares of a company.*

Latvia). In certain cases, the interest rates may be increased and more collateral might be requested (Portugal).

C. Interest of management / employees

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 defence measures that the board of directors of the target may take?

In many countries (not Portugal however) the applicable regulation aims at dealing with such conflicts. The board of directors generally have a responsibility to act in the best interest of the company and it is typical that they would have to draw up certain corporate documents (each jurisdiction has specific ones) containing objective opinions in such a constellation. However, frequently such documents alone are not binding with regard to the company as it is usually the shareholders who decide on an offer.

Regulations of the analysed countries may limit the defensive measures (e.g., in Switzerland and in Canada) or may generally forbid them (e.g., Italy).

The directors in India who hold shares must abstain from participating in any deliberations that affect their own interests.

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

The common methods to retain management / key employees (except in Germany and Italy where there are no standard methods) include letting them participate in financial incentive plans, and increasing their remuneration (for example with warrants and stock programs or maybe with earn-out agreements). In Spain, for instance, the salary could be increased up to a certain level in order to retain key people; such a salary increase, in case of non-executive directors, may not jeopardize their independence.

Based on the analysis of the different reports submitted we can conclude that different methods may be implemented depending on the country in which the company is located.

5.3 Is it common to enforce non-competition and confidentiality undertakings of the management / key employees upon acquisition? Is it common to set out non-solicitation obligations to be observed by the Seller and are such obligations enforceable (for which period)?

In civil law countries there are different practices. Some countries do not allow the enforcement of such undertakings unless they were implemented in the initial employment agreements.

Please bear in mind that in Italy non-competition and confidentiality undertakings are only mandatory during the employment relationship. In contrast, in Netherlands it is common that the former management/employees have to comply with such undertakings.

In Poland it is mandatory that such obligations be compensated (at least 25% of the remuneration received before the termination of the employment relationship). Non-competition and/or confidentiality undertakings are subject to certain limitations in some of the analysed countries (e.g., in Turkey the duration of such clauses cannot exceed two years and the non-compete undertakings have to be restricted to a specific area and line of work).

Common law countries usually enforce such undertakings. In the United Kingdom restrictive covenants are limited to a maximum period of 12 months with regard to employees and 3 years if such limitations are imposed on the seller.

In Japan it is uncommon to apply such clauses as far as the TOB rule is followed.

Finally, in all analysed countries it is common to sign non-solicitation agreements when acquisitions take place.

D. Interest of advisors / lawyers

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

In most countries the share purchase deal is more frequent. However, in some countries there is no dominant tendency and the type of purchase deal will rather depend on the potential tax consequences and possible liabilities of the target (e.g., Republic of Cyprus and Brazil) or on the intentions of the buyer (e.g., Hungary and India).

It is also worth pointing out that the share purchase deal is generally considered as a less complex transaction than the asset deal.

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

It has been noted by all countries that the process of acquiring a stake in listed companies requires complying with a larger number of requirements and fulfilling certain regulatory formalities. In contrast, the parameters of an acquisition of a stake in private companies are largely up to the negotiations between the relevant parties.

Moreover, although due diligence analyses are conducted for private and public companies, sometimes the access to information may be more limited in the case of private companies (Denmark).

5.3 From a lawyer's perspective, which are the main steps in your jurisdiction in order for a public entity to become a private entity as a consequence of an acquisition?

Generally, it is difficult to make out a common process for the delisting of public companies throughout the analysed countries.

In this kind of a transaction it is common that interaction between shareholders, the board of directors, and the corresponding security market authority of the analysed countries play an important role. At least one of these actors will normally have the power to decide about the delisting.

The process usually requires a takeover offer. Then, if the bidder acquires a high enough percentage (typically 90% or 95%), the squeeze out bid will take place.

Based on the information contained in the national reports submitted, delisting a company may also entail the preparation of a number of important documents and a complete restructuring of the company with the corresponding amendments to the articles of association once the delisting has been implemented.

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

In many of the analysed countries no differences regarding the structure of fees exist as compared to the fee structures in other phases (e.g., Estonia, Netherlands, Italy, or the United Kingdom). In contrast, in some countries it is usual to change the fee structure to premium pricing or contingent/percentage fees (e.g., Republic of Cyprus).

Notwithstanding the foregoing, please bear in mind that each analysed country has its own particularities.