



# ICLG

The International Comparative Legal Guide to:

## Private Equity 2015

**1st Edition**

A practical cross-border insight into private equity

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## EDITORIAL

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Welcome to the first edition of *The International Comparative Legal Guide to: Private Equity*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of private equity.

It is divided into two main sections:

Four general chapters. These are designed to provide readers with a comprehensive overview of key private equity issues, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in private equity laws and regulations in 22 jurisdictions.

All chapters are written by leading private equity lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor, Shaun Lascelles of Skadden, Arps, Slate, Meagher & Flom (UK) LLP, for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at [www.iclg.co.uk](http://www.iclg.co.uk).

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# Netherlands

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## 1 Overview

### 1.1 What are the most common types of private equity transactions in the Netherlands and what is the current state of the market for these transactions?

The Dutch private equity market is covered by local Dutch private equity players as well as London-based and other international houses. According to information collected by the Dutch private equity association NVP last year, approximately 70 private equity players were active in the Dutch market, holding participations in 1,400 companies that collectively represent about 10 to 15 per cent of the Dutch economy.

The Netherlands has proven to be an attractive market for the acquisition of privately held businesses, including innovative (tech and life science) businesses and family-owned businesses. However, as a result of the now long established nature of private equity investing in the Netherlands, secondary buyouts are also a frequent occurrence. Following the 2008/2009 financial crisis, deal making in the Dutch market slowed down considerably, which continued for quite some time as a mismatch persisted for a while between potential sellers' pricing expectations and prospective buyers' valuations. This has, in the meantime, changed dramatically and 2014 was a stellar deal year in what has – again – become largely a sellers' market. Almost all disinvestments of participations were concluded with private parties, with both strategic buyers and other investors. The auction process is quite common in private deals in the Netherlands. Although the public market is currently on the rise, IPO exits by private equity firms are still relatively uncommon in the Netherlands. However, having said that, dual-track processes have been initiated more frequently recently. Such dual-track processes have been mostly used to apply pressure on potential interested private buyers during the transaction process, and often led to private deals in the end. On the other hand, several good PE-led IPOs were done recently (and Euronext Amsterdam has also been a good source for PE targets).

Most investments in the Dutch private equity market have taken place in SMEs. There were only a few larger deals in the past years, which have been mainly driven by non-Dutch private equity funds. According to NVP, an above average amount of transactions were aborted prematurely in recent years. There is a small trend in growth in financing start-ups through equity deals. Separately, some focused PE houses, consistently and successfully, focus on distressed and turnaround plays. Although club deals do happen in the market, they do not appear to become the rule.

### 1.2 What are the most significant factors or developments encouraging or inhibiting private equity transactions in the Netherlands?

A couple of (high profile) private equity investments in (in particular, print) media businesses, where in the public perception PE was seen as stripping the business, have shown that careful PR management in publicity-sensitive businesses may be of major relevance. Also, following the financial crisis, tax legislation (see below) has been adopted that is designed to deal (through taxation) with “excessive remuneration”. The pros and cons to the economy and society as a result of private equity investment continue to be the subject of public/political debate from time to time (interest in the subject appears to come and go). However, as a general matter, the Dutch economy is open, and Dutch business and public opinion is open-minded towards (both Netherlands-based and international) private equity investors. The PE-relevant regulatory environment in the Netherlands is influenced by EU-wide regulatory initiatives, and implementation thereof in the Netherlands tends to be no more onerous than in other EU jurisdictions. Also, the Dutch State has shown itself to be a willing prospective seller to private equity investors. Separately, continuing uncertainty surrounding the euro and the Eurozone economy may create uncertainty around companies with substantial Europe-based businesses (even though recent indicators look more promising), but may also present an opportunity for US and other non-Eurozone based buyers in light of the softened euro exchange rate.

## 2 Structuring Matters

### 2.1 What are the most common acquisition structures adopted for private equity transactions in the Netherlands?

Typically, a Dutch bid vehicle (which may or may not be held by a non-Dutch fund structure) will purchase a Dutch target entity. Frequently, management will participate, through its own vehicle, at the bid vehicle – or higher – level. The bid vehicle will ordinarily acquire 100 per cent of the capital of the target entity. Although asset deals are, of course, possible, they are less customary.

### 2.2 What are the main drivers for these acquisition structures?

Typical drivers in the selection of the transaction structure are tax considerations, business continuity and protection of assets (i.e.,

assessment to be made based on due diligence on matters such as contractual change of control issues, transferability of licences, IP protection and ability to effect debt pushdown).

### 2.3 How is the equity commonly structured in private equity transactions in the Netherlands (including institutional, management and carried interests)?

Dutch private equity funds (as well as non-Dutch funds marketed in the Netherlands) typically are – broadly – in line with UK practice, including investor liability that is limited to its investment, an approx. 8 per cent hurdle rate, a carried interest allocation of 20 per cent, and a management fee on the commitment between one and two per cent, with a step-down following the investment period. Transaction fees will typically be offset, in whole or in part, against the management fee. A typical investment period may be three to five years, with an overall term of eight to 12 years during which redemptions are not permissible. There will typically be at least a one per cent co-investment by the manager. Application of IFRS and EVCA valuation principles is customary.

A Dutch fund is typically structured as a Dutch limited partnership (*commanditaire vennootschap*, or “CV”), a Dutch private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*, or “BV”), a Dutch public limited liability company (*naamloze vennootschap*, or “NV”), a Dutch cooperative (*coöperatief*), a Dutch fund for mutual account (*fonds voor gemene rekening*), or a combination thereof.

At the portfolio level, institutional investors will typically invest through the fund. The fund and carried interests will typically invest indirectly and the structure may, in addition to (ordinary) shares, typically include (PIK) notes and other debt. Frequently, company management will participate in its portfolio company, through its own vehicle, at the bid vehicle – or higher – level.

Typically, a Dutch bid vehicle (which may or may not be held by a non-Dutch fund structure) will purchase a Dutch target entity. Although alternatives might be selected in particular cases, the bid vehicle typically will be a BV. A BV has full independent corporate personality while allowing great flexibility in terms of governance and equity structuring (more so than, for instance, in an NV). The bid vehicle can borrow part of the acquisition financing, which can lead to interest deductibility when such BV becomes part of the target group’s fiscal unity. However, particularly in international structures, frequently a Dutch cooperative is interposed, which offers similar governance and equity structuring flexibility, but, among other things, is generally not subject to a 15% dividend withholding tax.

### 2.4 What are the main drivers for these equity structures?

Typical drivers in the selection of the equity structure will be facilitation of effective management, alignment of interests with those of the fund investors (both at the fund management and portfolio company key employee level), and return on capital and exit in an efficient manner from a governance, management tools and tax point of view.

### 2.5 In relation to management equity, what are the typical vesting and compulsory acquisition provisions?

Frequently, company management will participate in its portfolio company, through management’s own vehicle, at the bid vehicle –

or higher – level. The equity held by management will typically constitute (a direct or indirect interest in) part of the portfolio company’s ordinary stock, ensuring an appropriate mix of risk and reward. The provision of a loan to management (which may be provided on a non-recourse basis) to finance the acquisition of such equity stake is not uncommon.

In an effort to ensure that the private equity investor(s) do not need to deal with a broad group of co-shareholders, company management’s investment is typically channelled through a single vehicle (which could be managed by nominees of the PE house(s), but is typically managed by the portfolio company’s senior management itself).

Such vehicle can be a Dutch (orphan) foundation (*stichting*), which would hold and vote the equity stake on behalf of company management, against issuance of depositary receipts (which embody all of the economic entitlements to the equity stake) to participating management and other key employees. The foundation board would typically be entitled to vote and dispose the shares held by the foundation, but be required to directly pass on any and all economic benefits on the equity (including any dividends, other distributions and – prospective – sale proceeds). The foundation structure will typically be transparent from a tax point of view.

Alternatively, company management participants may hold their (collective) stake through stock ownership in a senior management-controlled BV or other corporate that would hold such stake.

We note that, sometimes, management participants may also directly hold non-voting shares in the (bid co or) portfolio BV. However, as non-voting shares, under Dutch law, still (mandatorily) carry the right to be called for and attend shareholder meetings, the presence of non-voting stock may complicate shareholder decision-making (i.e., block shareholder action by written consent in the absence of cooperation by the holders of non-voting stock in each specific instance). As a result, depositary receipt structures (as described above) tend to be preferred over non-voting stock structures.

Apart from outright (senior) management equity participation on an unrestricted basis from day one, key employees/management may be granted (either) restricted stock, subject to a call option that – for instance – expires in tranches of 20 per cent each over a five-year period, or stock options subject to a similar vesting period. Stock options and restricted stock grant agreements will typically contain (internationally customary) good leaver/bad leaver provisions.

Also, the management participation vehicle or direct participants, as the case may be, will typically be party to a shareholders’ agreement entered into with the private equity firm(s), providing – among other things – for customary drag and tag along provisions, as well as non-encumbrance commitments, aimed at ensuring a smooth PE-led exit process.

## 3 Governance Matters

### 3.1 What are the typical governance arrangements for private equity portfolio companies?

Dutch law allows for the creation of either a single-tiered board governance structure, or a two-tiered board structure. In the case of a single-tiered board structure, the board could consist of either solely executive directors, or both executive and non-executive directors. In the case of a two-tiered board system, the company’s articles of association will provide for the creation of both a management board (solely comprised of executive directors) and a supervisory board (solely comprised of non-executive directors).



Apart from supervising the business through the exercise of shareholder rights, private equity firms typically seek non-executive board 'representation'. Historically, this was frequently done through the appointment of one or more trusted individuals on the supervisory board, in a two-tiered structure. Such two-tiered structure was particularly popular (and, in fact, in the past mandatory for certain larger companies) as the explicit possibility to appoint non-executives in a single-tiered board structure was only reflected in the Dutch civil code relatively recently.

Prospective director liability exposure is (still) typically perceived as more limited for a supervisory director in a two-tiered board structure in comparison to a non-executive director in a single-tiered board structure (as a supervisory board member would – as opposed to a non-executive in a single-tier board structure – not form part of the company's sole 'managing' board). However, we believe that the single-tiered board structure is becoming more popular in PE transactions, because (i) it allows the PE house's 'representatives' direct access to all management/board information and a more direct handle on day-to-day business developments, and (ii) the structure tends to be more familiar to US, UK and other international investors.

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**3.2 Do private equity investors and/or their director nominees typically enjoy significant veto rights over major corporate actions (such as acquisitions and disposals, litigation, indebtedness, changing the nature of the business, business plans and strategy, etc.)?**

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Incorporation of a list of reserved matters in the shareholders' agreement, the articles of association of the portfolio company and/or the portfolio company board rules is customary. As a general matter, such rules do not directly affect the rights of third parties. Accordingly, if one or more executive board member(s) would exceed their (internal) authority by binding the company to a commitment without first obtaining the required internal approval (be it at the non-executive or at the shareholder level), the company will generally be bound. However, if an executive would have done so in breach of the company's articles of association, it may be relatively easy to establish director liability *vis-à-vis* the company in relation thereto. Accordingly, reserved matters lists tend to be effective tools.

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**3.3 Are there any limitations on the effectiveness of veto arrangements: (i) at the shareholder level; and (ii) at the director nominee level? If so, how are these typically addressed?**

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At the shareholder level, as long as shareholders do not infringe basic standards of reasonableness and fairness that should be observed *vis-à-vis* other stakeholders in the company, private equity investors are free to vote in their own particular (shareholder) interests. When voting at the board level, a nominee director – like any other director – must, in the fulfilment of his or her duty, act in the interest of the company and its business as a whole (as opposed to the interest of a particular shareholder). The corporate interests that the director must seek to safeguard consist of the interests of all stakeholders in the company (including all shareholders, but also employees, creditors, etc.). In practice, board members may seek legal guidance in particular sensitive situations, but mostly this tends not to be a real issue in typical portfolio company situations.

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**3.4 Are there any duties owed by a private equity investor to minority shareholders such as management shareholders (or vice versa)? If so, how are these typically addressed?**

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Under Dutch law, a majority shareholder (such as a PE house in a portfolio company) should observe basic standards of reasonableness and fairness towards other shareholders and their *bona fide* interests. This, essentially, means that the majority shareholder should not exercise its rights in an abusive manner. Having said that, the overriding rule is that a shareholder is free to act in its own interests and it does not owe any fiduciary or similar duty to any other shareholder.

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**3.5 Are there any limitations or restrictions on the contents or enforceability of shareholder agreements (including governing law and jurisdiction)?**

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Dutch company shareholders' agreements are relatively flexible in terms of content. In order to make certain commitments fully/directly enforceable (as opposed to potentially creating 'just a breach of contract'), it may be preferable to lay down certain commitments in the portfolio company's articles of association as well. Dutch company articles of association are more restrictive, though, both in form and in substance. In addition, the full content of Dutch companies' articles of association are publicly on file with the trade register, while shareholders' agreements can be kept fully confidential. A shareholders' agreement with respect to a Dutch portfolio company may be governed by a law other than Dutch law and jurisdiction in the Netherlands is not required. We note that the articles of association of a Dutch company (which will in any case also contain a substantial number of the company's governance provisions) will mandatorily be governed by Dutch law, and disputes involving corporate duties under the law or the articles can be brought in the Dutch courts, irrespective of the governing law and jurisdiction provided for in the shareholders' agreement. In connection therewith, and recognising the record of the Dutch courts, many Dutch as well as non-Dutch private equity investors have been happy to provide for Dutch law and jurisdiction in their shareholders' agreements. However, we frequently see alternative arrangements as well.

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**3.6 Are there any legal restrictions or other requirements that a private equity investor should be aware of in appointing its nominees to boards of portfolio companies? What are the key potential risks and liabilities for (i) directors nominated by private equity investors to portfolio company boards, and (ii) private equity investors that nominate directors to boards of portfolio companies?**

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Non-executive directors (whether in a two-tiered structure or in a single-tier structure) are barred from taking executive action and supervisory board members cannot sit on the company's management board. When a supervisory board member takes any executive action, he or she exposes him or herself to increased levels of potential liability, as if such person is a management board member.

At the level of each board, the duties of the board members are collective in nature, which means that if the board consists of more than one member, the members of the board should exercise their

decision-making powers collectively. As a general rule, collective responsibility of the board may result in joint and several liability. A board member may avoid liability by proving that he or she was not culpable for the shortcoming(s) of the board and that he or she was not negligent in taking action to avert the negative consequences of the shortcoming(s).

Directors may be held personally liable – by the company, but not by its shareholders on behalf of the company (i.e., no US-style derivative suits) – for serious violations of their specific statutory duties and general good faith obligations (as developed in case law). The standard to which directors are held is that of a reasonably acting “business person”.

When director duties are fulfilled with reasonable diligence, and appropriate D&O coverage has been taken out, we believe it is fair to say that the potential risks and liabilities for a director nominated by private equity investors to the board of a Dutch portfolio company should be deemed reasonable and manageable by international standards.

For a brief description of certain (limited but) potential risks and liabilities for private equity investors that have nominated directors to boards of Dutch portfolio companies, please refer to our answer to question 10.4 below.

### 3.7 How do directors nominated by private equity investors deal with actual and potential conflicts of interest arising from (i) their relationship with the party nominating them, and (ii) positions as directors of other portfolio companies?

The Dutch director conflicts of interest rules are relatively restrictive. In principle, a conflict of interests only arises if a director has a personal financial interest in the matter concerned. Accordingly, a conflict of interests is not necessarily deemed to arise if a director does not have a personal (and substantial) financial stake in the outcome of the matter. In case of a conflict of interests, the relevant board member cannot take part in the board decision-making process on the matter concerned.

It follows from the above that under Dutch law, a director is not necessarily disqualified from the board decision-making process in case of a (potential) conflict with either the party that nominated the director or another portfolio company where the director serves on the board as well.

Apart from the above-described formal compliance with the Dutch conflict of interests rules, each director should continuously ensure that he or she acts independently and in the interest of the relevant portfolio company and all of its stakeholders. Private equity firms may want to ensure that they do not nominate individuals for board positions with respect to whom conflicts of interest are overly likely to arise. Moreover, parties should ensure that any particular directors’ board positions at other (portfolio) companies do not give rise to confidentiality or competition concerns. In addition, private equity firms are well advised to monitor that they either have sufficient and appropriate nominees on the board to ensure that they continue to feel comfortable with decision-making when one or more of their nominees abstain from a decision-making process as a result of a conflict of interests, or ensure that the matter concerned will be raised to the shareholder level. It is not atypical to require that any particular resolution will in any case require the affirmative vote of a PE firm-nominee, in the absence of which it must be raised to the shareholder level.

## 4 Transaction Terms: General

### 4.1 What are the major issues impacting the timetable for transactions in the Netherlands, including competition and other regulatory approval requirements, disclosure obligations and financing issues?

The major issues impacting the timetable for private transactions in the Netherlands mainly relate to the involvement of the works council in the transaction and competition clearance. Formally, the works council of a company should be provided with the opportunity to form an opinion on the envisaged transaction at a stage in the transaction process at which the opinion could potentially have an impact on the outcome of the transaction. For IPOs to be listed on a regulated market, an additional issue impacting the timetable consists of prospectus preparation and dealings with the regulator, whose approval of the prospectus typically dictates the entire timetable. Fortunately, The Netherlands Authority for the Financial Markets (AFM) has proven to be willing to be quite cooperative and takes a constructive approach, making it relatively easy for parties to set a clear and manageable timetable. For public-to-private transactions, the public bid rules, together with the competition process, will typically dictate the timetable.

### 4.2 Have there been any discernible trends in transaction terms over recent years?

Following the financial crisis, the market turned from a sellers’ market into a buyers’ market, and has now largely turned into a sellers’ market again. Accordingly, deals tend to get done in shorter time frames again and, sometimes, with ‘lighter’ documentation.

## 5 Transaction Terms: Public Acquisitions

### 5.1 What particular features and/or challenges apply to private equity investors involved in public-to-private transactions (and their financing) and how are these commonly dealt with?

PE firms tend to face no greater challenges in public bid situations than strategic bidders. In fact, although typically the entire portfolio needs to be considered for antitrust review purposes, issues in this respect tend to be more serious (potentially leading to an extended bid period) for strategic buyers. In the case of a cash bid (of course, likely in the case of a public-to-private deal) the bidder must confirm ‘certain funds’ when it files its bid document with the AFM for approval. This is not necessarily more onerous to a PE house than to a strategic bidder offering cash.

We refer to Houthoff Buruma’s contribution in Global Legal Group’s *The International Comparative Legal Guide to: Mergers and Acquisitions 2015* for more extensive detail on the Dutch public bid rules and timetable.

### 5.2 Are break-up fees available in the Netherlands in relation to public acquisitions? If not, what other arrangements are available, e.g. to cover aborted deal costs?

Break fees are allowed (including reverse break fees, although less typical). There are no specific rules in place, nor is there definitive case law on the matter. However, it is generally believed that

excessive break fees may conflict with the target board's fiduciary duties, and could qualify as a disproportional anti-takeover defence, if they would frustrate potential competing bids.

There is extensive case law in the Netherlands on the subject of aborted deal negotiations. In general, the Dutch Supreme Court has held that a party has contractual freedom, and, as such, is free to abort negotiations at any point during the process, unless aborting negotiations is unacceptable given the legitimate expectations of the counter party that a deal would be signed, which makes the aborting party liable for damages of the other party.

## 6 Transaction Terms: Private Acquisitions

### 6.1 What consideration structures are typically preferred by private equity investors in the Netherlands?

The predominant structure for private equity transactions in the Netherlands is similar to the structure prevalent in other jurisdictions such as the UK and the U.S. The transactions (typically straight buyouts) are commonly funded partially by one or more banks and partially by private equity funds together with the management of the target company. The leverage ratio is dependent on the current market conditions and the projected cash flows of the target company. Due to the market conditions in the past eight years, a clear trend of lower leverage ratios in private equity transactions has clearly been visible, but recently the tide appears to have turned.

In terms of consideration, cash deals tend to be preferred. Reinvestment by management and certain other sellers (including, for instance, influential local investors) may be (strongly) encouraged (or demanded). With regard to determining the purchase price, private equity funds in the Netherlands traditionally prefer *locked box* mechanisms (focused on working capital) over *closing accounts*, although the latter has become more popular in recent years, due to the current economic climate and the resulting increase in risk aversion of market participants (whereby, also in this respect, the tide appears to be turning again now).

### 6.2 What is the typical package of warranties/indemnities offered by a private equity seller and its management team to a buyer?

In line with the prevalent practice in other jurisdictions, private equity sellers in the Netherlands tend to insist on offering very limited warranties and indemnities, and frequently limiting exposure to any business warranties to an amount equal to an escrowed amount. However, in recent years, from time to time private equity sellers have offered warranties and indemnities beyond the standard authority and title warranties, etc., in an effort to get a deal done. In that event, we have seen that – although the warranty and indemnity insurance market is arguably still somewhat underdeveloped in the Netherlands – warranty and indemnity insurance (with a preference for buyers' insurance, whereby the premium is sometimes deducted from the purchase price) can fill the gap between the comfort sought by the buyer and the exposure the private equity seller is willing to accept.

### 6.3 What is the typical scope of other covenants, undertakings and indemnities provided by a private equity seller and its management team to a buyer?

They are in line with UK practice.

### 6.4 Is warranty and indemnity insurance used to “bridge the gap” where only limited warranties are given by the private equity seller and is it common for this to be offered by private equity sellers as part of the sales process?

As mentioned above, the warranty and indemnity insurance market is still underdeveloped in the Netherlands and, as such, warranty and indemnity insurances are not commonplace in the Netherlands. However, given the fact that the number of warranty and indemnity insurance policies concluded on a yearly basis worldwide have increased in recent year as a result of more sophisticated and tailor-made insurance products and lower insurance premiums, insurance brokers expect that such insurances will also become more attractive to the Dutch M&A market. As a matter of fact, insurance brokers have recently started to actively approach deal-makers in the Netherlands. It is expected that, in the future, more clients will make use of warranty and indemnity insurance products, especially during controlled auctions, in which case the insurance might be seen as covering certain risks and could – as a result – potentially have a positive impact on valuation, giving a bidder a competitive edge.

### 6.5 What limitations will typically apply to the liability of a private equity seller and management team under warranties, covenants, indemnities and undertakings?

See question 6.2.

### 6.6 How do private equity buyers typically provide comfort as to the availability of equity finance and what rights of enforcement do sellers typically obtain if commitments are provided by SPVs?

This is in line with UK practice.

### 6.7 Are reverse break fees prevalent in private equity transactions to limit private equity buyers' exposure? If so, what terms are typical?

As mentioned above, reverse break fees are less typical in the Dutch private equity market, both in public and private transactions.

## 7 Transaction Terms: IPOs

### 7.1 What particular features and/or challenges should a private equity seller be aware of in considering an IPO exit?

Although interest in IPO exits has clearly increased recently, they are still relatively rare in the Dutch private equity market. Also, recently we have noted a marked uptick in dual track deals. An obvious major drawback of the IPO exit is the fact that the customary lock-up arrangements, prevalent in any IPO, as well as market dynamics, deprive the private equity firm of the opportunity to sell its stake in its entirety on the date of listing. Apart from market and disclosure risks, from a legal perspective, the main challenge remains preparing the target company to become a public company. In deals where a PE house may not have sole control, we have seen that it may be key to ensure – in the early stages of the PE investment, far before an IPO transaction should actually be implemented – that



the shareholders' agreement (and other contractual framework) truly allows the PE house to get done what needs to get done to complete the public offering and listing.

## 7.2 What customary lock-ups would be imposed on private equity sellers on an IPO exit?

This is in line with UK practice.

## 7.3 To what extent can rights in pre-existing shareholders' agreements survive post-IPO?

Rights laid down in pre-existing shareholders' agreements may survive post-IPO. Of course, in particular where the company is party to the agreement, miscellaneous items may need to be disclosed in the IPO prospectus. In addition, any remaining commitments will obviously need to be suitable for a publicly traded company, and the underwriters may not be comfortable with some particular items. In practice, we typically see that pre-existing shareholders' agreements will, upon consummation of an IPO, be terminated, either by their own terms or by mutual agreement at the time of the IPO. The presence (or not) of a post-IPO relationship agreement (and, if there is to be one, its content) is a typical negotiation item.

## 8 Financing

### 8.1 Please outline the most common sources of debt finance used to fund private equity transactions in the Netherlands and provide an overview of the current state of the finance market in the Netherlands for such debt.

Debt finance for Dutch private equity deals is largely made available in the form of senior debt and to a lesser extent mezzanine finance, with funding/valuation gaps commonly being filled with vendor loans and/or earn-out arrangements.

The senior debt is largely sourced from Dutch banks and (to a lesser extent) from US/UK banks or German banks. Mezzanine finance is to a large extent sourced from specialised mezzanine-debt funds and to a lesser extent by Dutch or US/UK banks. Stapled financing (i.e. where the seller pre-arranges an acquisition loan for benefit of the buyer) may also occur depending on the transaction, but seems to be less common.

### 8.2 Are there any relevant legal requirements or restrictions impacting the nature or structure of the debt financing (or any particular type of debt financing) of private equity transactions?

With respect to private companies with limited liability (*besloten vennootschappen met beperkte aansprakelijkheid*), the financial assistance restrictions have been abolished as of 1 October 2012. This means that there is no longer any specific legal provision that renders void financial assistance transactions by a Dutch private company with limited liability for acquisition loans, and no specific deal structuring is necessary in this regard. The financial assistance rules with respect to public companies (*naamloze vennootschappen*) remain in force. Succinctly put, the consequence of these rules is that a public company or its subsidiaries (i) is not allowed to provide security or guarantees for financing that is used to acquire the shares in such public company, and (ii) is restricted in providing loans to third parties to acquire shares in such public company. Common

ways of addressing the financial assistance rules include ensuring that the acquisition financing: (i) is provided to the target public company which can, along with its subsidiaries, provide security for such loan after which the proceeds of the loan are upstreamed by the public company to the buyer, which then purchases the shares in the public company; or (ii) is provided to the buyer and the buyer enters into a statutory merger (*juridische fusie*) with the target public company after the shares thereof have been acquired, following which the merged entity can provide security for the loan. Please note, however, that the number of private companies with limited liability existing in the Netherlands far exceeds the number of public companies. The practical consequence for private equity transactions of the continued existence of financial assistance rules with respect to public companies is therefore not great. Although the importance of financial assistance rules under Dutch law is therefore limited, it should be noted that general principles of Dutch law such as corporate benefit, fraudulent conveyance and board duties towards the company and its stakeholders remain important to consider when resolving on whether or not to enter into financial assistance transactions.

## 9 Tax Matters

### 9.1 What are the key tax considerations for private equity investors and transactions in the Netherlands?

As noted above, generally, Coop/BV structures are used for transactions where private equity firms invest in and outside the Netherlands. This enables private equity investors to invest in a tax efficient manner if the structure suits the main business purpose of the private equity investors.

The key features of such a structure is that the Coop/BV can benefit from the participation exemption. The Dutch participation exemption provides for a full exemption of corporate income tax in relation to income (dividend and capital gains) derived from (Dutch and non-Dutch) qualifying subsidiaries.

In the Netherlands, dividend payments are subject to 15 per cent dividend withholding tax. However, in many cases the dividend withholding tax rate is reduced due to the applicability of tax-treaties. Distributions of profits by a Coop are generally not subject to withholding tax if certain requirements are met. Capital gains realised on the sale of an interest in a Coop/BV are generally not subject to corporate income tax unless certain anti-abuse provisions are met.

Although Dutch law does not have thin cap rules, limitations on interest deductions may apply on leveraged acquisitions.

Managers of Dutch-resident private equity investors may be subject to the so-called "lucrative interest" rules, which aim at taxing income from shares at progressive income tax rates (box 1 taxation) rather than the rates ordinarily applying to income from shares (box 2 and box 3 taxation). The rules, however, allow that the income is taxed under the income from shares rules (box 2). Non-Dutch resident managers are generally not subject to these rules due to the application of tax treaties.

### 9.2 Have there been any significant changes in tax legislation or the practices of tax authorities (including in relation to tax rulings or clearances) impacting private equity investors or transactions and are any anticipated?

In January 2015, the European Council adopted a new binding general anti-abuse provision to be included in the EU Parent-

Subsidiary Directive. The new anti-abuse rule requires states within the European Union to refrain from granting withholding exemptions if (one of) the main purpose(s) of an arrangement is to obtain a tax advantage. Also, in July 2014, the European Council adopted another anti-abuse provision regarding hybrid loans. This provision prevents double non-taxation in hybrid loan arrangements. Neither anti-abuse provision has yet been implemented in Dutch statutory law. The Dutch Government will have until 31 December 2015 to implement these anti-abuse provisions. The Netherlands still grants advance pricing agreements and advance tax rulings.

## 10 Legal and Regulatory Matters

### 10.1 What are the key laws and regulations affecting private equity investors and transactions in the Netherlands, including those that impact private equity transactions differently to other types of transaction?

The key legal regime that normally applies to private equity is the Dutch regime implementing the Alternative Investment Fund Managers Directive (2011/61/EU), or AIFMD. Pursuant to this regime, management companies of private equity funds are normally subject to regulation. Private equity investors themselves are not directly impacted by this regime, as the regime only regulates management companies (so-called alternative investment fund managers or AIFMs) and funds (or alternative investment funds or AIFs). Certain exemptions apply, the most important exemption being true family offices and sheer corporate holding structures.

Pursuant to the AIFMD, management companies are subject to registration or licensing depending on the size of all funds managed. If this is less than EUR 500 million on an aggregate basis, and assuming that the funds are closed-end for at least five years and no leverage at fund level applies, a Dutch management company is subject to registration with the AFM only. When registered, certain reporting requirements need to be met. A large part of the Dutch private equity fund management companies is subject to this registration. If the aforementioned threshold is exceeded, however, a management company is subject to licensing and compliance with certain ongoing requirements. Among such ongoing requirements is the requirement to publish a prospectus, meeting the requirements set by the AIFMD (and, in case of retail marketing, the Dutch regime on retail marketing) and rules relating to holdings and control of non-listed companies. These rules include a duty to disclose acquisitions of interest to the AFM when surpassing certain thresholds, and a prohibition on asset stripping during the first 24 months following acquisition of control (>50% of the votes) of targets of a particular size by means of dividend payments, capital reduction, repayment on shares and repurchase of shares. As a result, PE transactions may be impacted if this licensing regime applies.

### 10.2 Have there been any significant legal and/or regulatory developments over recent years impacting private equity investors or transactions and are any anticipated?

No, the AIFMD regime entered into force on 22 July 2013. Small amendments have been made since and further updates are expected, as the regime did not yet enter into force completely. However, the general requirements for private equity firms active in the Netherlands have remained the same since. We do note that certain exemptions are still available to non-EU management companies and non-EU funds.

### 10.3 Has anti-bribery or anti-corruption legislation impacted private equity investment and/or investors' approach to private equity transactions (e.g. diligence, contractual protection, etc.)?

Apart from Dutch law compliance checks, when investing in the Netherlands, private equity houses tend to be very much aware of the US and UK anti-bribery and anti-corruption rules, and sensitivity to potential issues in this respect tends to form an integral part of the diligence process. Contractual comfort sought in this respect tends to be in line with international practice.

### 10.4 Are there any circumstances in which: (i) a private equity investor may be held liable for the liabilities of the underlying portfolio companies; and (ii) one portfolio company may be held liable for the liabilities of another portfolio company?

If there is intense involvement by the private equity house (for instance, through a combination of information and consent rights laid down in the governance documentation, and *de facto* intense involvement in the company's management, strategy and controls) causing the PE house to exercise decisive influence over the strategy and/or operations of a portfolio company, such involvement may lead to a duty of care *vis-à-vis* the company's creditors if the PE house knew or should have known that – without its appropriate action – the portfolio company would end up in insolvency. Accordingly, it may be helpful to aim for an appropriate balance between active involvement and reliance on senior management.

Apart from the above, we refer to the *EC power cable cartel* case (EC, IP/14/358, 2 April 2014) in which a large investment bank was held jointly and severally liable by the European Commission in relation to that investment bank's former ownership of a power cable manufacturer, which, obviously, may have ramifications for PE houses active in the Netherlands as well.

Assuming no other ties (except for the fact that they are ultimately held by the same PE fund), and, accordingly, assuming among others that no contractual comfort is provided for each other's debt or the like, there is no particular basis under Dutch law that would make a portfolio company liable for the liabilities of another portfolio company.

## 11 Other Useful Facts

### 11.1 What other factors commonly give rise to concerns for private equity investors in the Netherlands or should such investors otherwise be aware of in considering an investment in the Netherlands?

In a controversial 2010 ruling, the enterprise chamber at the Amsterdam court of appeals held that a private equity firm, when entering the capital of a target company, should consider the corporate interests of the target prior to becoming a shareholder (i.e., should consider what level of leverage might adversely affect the target's corporate interest and therefore be non-acceptable, etc.). The Supreme Court has not confirmed this view (in the absence of appeal); there was ultimately no specific PE party liability, and this view remains controversial. Less controversial was the court's finding that the target board should duly consider the company's corporate interest prior to approving a PE deal. Not doing so might constitute mismanagement.

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