ICLG

The International Comparative Legal Guide to:

Private Equity 2017

3rd Edition

A practical cross-border insight into private equity

Published by Global Legal Group, with contributions from:

Aabø-Evensen & Co
Advokatfirman Törngren Magnell
Ali Budiardjo, Nugroho, Reksodiputro
Allen & Gledhill LLP
Angola Capital Partners
Ashurst Hong Kong
Atanaskovic Hartnell
Bär & Karrer Ltd.
Borenius Attorneys Ltd
British Private Equity & Venture Capital Association
Cox Hallett Wilkinson Limited
Dentons
Fried, Frank, Harris, Shriver & Jacobson LLP
GTs Advocates LLP
Houthoff Buruma
Lloreda Camacho & Co.
Matheson
McMillan LLP
Memminger LLP
Morais Leitão, Galvão Teles, Soares da Silva & Associados
Pinheiro Neto Advogados
Samvād: Partners
Schindler Attorneys
Schulte Roth & Zabel LLP
Skadden, Arps, Slate, Meagher & Flom LLP
Tomashevskaya & Partners
Triay & Triay
Udo Udoma & Belo-Osagie
VdA Vieira de Almeida
Webber Wentzel
Zhong Lun Law Firm

BVCA British Private Equity & Venture Capital Association

glg global legal group

glg
global legal group

Contributing Editors
Lorenzo Corte & Lutz Zimmer, Skadden, Arps, Slate, Meagher & Flom LLP

Sales Director
Florjan Osmani

Account Director
Oliver Smith

Sales Support Manager
Paul Mochalski

Sub Editor
Oliver Chang

Senior Editors
Suzie Levy, Rachel Williams

Chief Operating Officer
Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
May 2017

ISBN 978-1-911367-54-3
ISSN 2058-1823

Strategic Partners

ECLA — European Company Lawyers Association

FSC — MIX Paper from responsible sources FSC® C011748

General Chapters:

1	**What's in Store for PE in 2017, Trends and Practices** – Sandro de Bernardini & Stephen Sims, Skadden, Arps, Slate, Meagher & Flom LLP	1
2	**Private Equity Transactions in the UK: the Essential Differences from the U.S. Market** – Nicholas Plant, Dentons	3
3	**Reallocating Risk: An Introduction to Warranty and Indemnity Insurance in UK Private Equity Transactions** – Dan Oates & Hannah Luqmani, Fried, Frank, Harris, Shriver & Jacobson LLP	6
4	**International Standard Setting Bodies and the Global Regulatory Agenda** – Michael Johnson, British Private Equity & Venture Capital Association (BVCA)	12

Country Question and Answer Chapters:

5	**Angola**	VdA Vieira de Almeida and Angola Capital Partners: Hugo Moredo Santos & Rui Madeira	18
6	**Australia**	Atanaskovic Hartnell: Lawson Jepps & Jon Skene	25
7	**Austria**	Schindler Attorneys: Florian Philipp Cvak & Clemens Philipp Schindler	34
8	**Bermuda**	Cox Hallett Wilkinson Limited: Natalie Neto	43
9	**Brazil**	Pinheiro Neto Advogados: Eduardo H. Paoliello Jr.	49
10	**Canada**	McMillan LLP: Michael P. Whitcombe & Brett Stewart	56
11	**China**	Zhong Lun Law Firm: Lefan Gong & David Xu (Xu Shiduo)	63
12	**Colombia**	Lloreda Camacho & Co.: Santiago Gutiérrez & Juan Sebastián Peredo	72
13	**Finland**	Borenius Attorneys Ltd: Johannes Piha & Johan Roman	79
14	**Germany**	Memminger LLP: Peter Memminger & Tobias Reiser	86
15	**Gibraltar**	Triay & Triay: F. Javier Triay & Jay Gomez	93
16	**Hong Kong**	Ashurst Hong Kong: Joshua Cole	100
17	**India**	Samvād: Partners: Vineetha M.G. & Ashwini Vittalachar	105
18	**Indonesia**	Ali Budiardjo, Nugroho, Reksodiputro: Freddy Karyadi & Anastasia Irawati	115
19	**Ireland**	Matheson: Éanna Mellett & Aidan Fahy	122
20	**Mongolia**	GTs Advocates LLP: Zoljargal Dashnyam & Enkhsaruul Jargalsaikhan	130
21	**Netherlands**	Houthoff Buruma: Alexander J. Kaarls & Vivian A. L. van de Haterd	138
22	**Nigeria**	Udo Udoma & Belo-Osagie: Folake Elias-Adebowale & Christine Sijuwade	147
23	**Norway**	Aabø-Evensen & Co: Ole Kristian Aabø-Evensen & Harald Blaauw	154
24	**Portugal**	Morais Leitão, Galvão Teles, Soares da Silva & Associados: Ricardo Andrade Amaro & Pedro Capitão Barbosa	174
25	**Russia**	Tomashevskaya & Partners: Zhanna Tomashevskaya & Roman Nikolaev	181
26	**Singapore**	Allen & Gledhill LLP: Christian Chin & Lee Kee Yeng	191
27	**South Africa**	Webber Wentzel: Nicole Paige & Andrew Westwood	198
28	**Sweden**	Advokatfirman Törngren Magnell: Anett Lilliehöök & Sten Hedbäck	207
29	**Switzerland**	Bär & Karrer Ltd.: Dr. Christoph Neeracher & Dr. Luca Jagmetti	215
30	**United Kingdom**	Skadden, Arps, Slate, Meagher & Flom LLP: Lorenzo Corte & Sandro de Bernardini	223
31	**USA**	Schulte Roth & Zabel LLP: Peter Jonathan Halasz & Richard A. Presutti	232

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Netherlands

Alexander J. Kaarls

Houthoff Buruma

Vivian A. L. van de Haterd

1 Overview

1.1 What are the most common types of private equity transactions in your jurisdiction? What is the current state of the market for these transactions? Have you seen any changes in the types of private equity transactions being implemented in the last two to three years?

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, 146 Dutch companies received buyout (73 companies) or growth capital (73 companies) for a combined total of over EUR 3.1 billion over the year 2015. EUR 2.6 billion was invested to facilitate buyouts and EUR 482 million was invested as growth capital. Non-Dutch private equity houses were responsible for 30 primarily larger buyouts, for a combined total of EUR 1.05 billion. In 2015, private equity firms held 1,400 Dutch portfolio companies, employing 380,000 people in the Netherlands.

Also, in 2015, EUR 163 million was received by 202 Dutch start-ups through venture capital investments. This is a decrease in comparison to preceding years, in which the average investment per year was EUR 190 million. The reason for this decrease can be found in the increase in non-Dutch investments by Dutch venture capitalists. Dutch venture capital firms raised EUR 260 million in new funds in 2015. Other than an outlier in 2014, this is a significant increase compared to previous years.

NVP also published a preliminary report on private equity and venture capital activity in the Netherlands for the first half of 2016. This report shows a strong fundraising climate: three life sciences venture capital funds raised a total of EUR 261 million (against merely EUR 111 million in 2015). The overall fundraising for private equity strategies (growth, buyout, generalist) amounted to EUR 1.1 billion raised by seven funds, against EUR 1.4 billion that was raised in the first half of 2015. However, growth funds reported good fundraising of EUR 403 million in the first half of 2016, compared to EUR 207 million raised in the whole year of 2015.

54 Dutch companies received a total of EUR 66 million in investments from domestic or non-Dutch venture capital firms in the first half year of 2016, while an aggregate EUR 750 million was invested in 36 buyouts in the first half of 2016, which was below the trends recorded in recent periods. The second half of 2016 looked strong though (after market participants appeared to put aside Brexit concerns and largely ignored the US elections).

Finally, as a general matter, there appears to be an upward trend in venture capital investments in start-ups. Separately, non-Dutch investors are increasingly active in the Dutch private equity market, which has been growing spectacularly over the years 2012–2015, while at the same time, Dutch funds are found investing abroad more frequently.

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

While potential acquisitions of Dutch publicly traded companies by non-domestic buyers have recently been met, in the Netherlands, by higher levels of public scepticism than used to be the case in earlier years, it appears that private equity buyers and private equity deals now in fact face less public scrutiny; PE deal-making has gained a (desirable) level of respect in the public eye. In the meantime, PE firms have, successfully, been on the forefront when it comes to developing and utilising newer deal techniques, including, for instance, the use of dual-track exit processes.

2 Structuring Matters

2.1 What are the most common acquisition structures adopted for private equity transactions in your jurisdiction? Have new structures increasingly developed (e.g. minority investments)?

Typically, a Dutch bid vehicle (which may or may not be held by a non-Dutch fund structure) will purchase a Dutch target entity. Generally, management will, through its own vehicle, participate 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. Although there can be the obvious potential drawbacks to minority investments, we have seen PE investors be willing to take a proactive and creative approach in a competitive market in recent years, including the structuring of minority investment deals that include targeted protections and upside sharing mechanisms.

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 the protection of assets. Such assessment is usually made based on the results of the due diligence investigation, such as contractual change of control issues, transferability of licences, IP protection and ability to effect debt pushdowns.

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

Dutch private equity funds (as well as non-Dutch funds marketed in the Netherlands) typically behave – broadly – in line with UK practice. This means that in the Netherlands, investor liability is limited to its investment, an approximate eight per cent hurdle rate applies, a carried interest allocation of 20 per cent applies, and that a management fee on the commitment between one and two per cent is common, 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 the 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 preferable 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 per cent dividend withholding tax.

2.4 What are the main drivers for these equity structures?

Typical drivers in the selection of the equity structure are 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 a vehicle can be a Dutch (orphan) foundation (*stichting*), which would hold and vote the entire equity stake on behalf of company management, against the issuance by the foundation to individual participating company managers and key employees of depositary receipts (which depositary receipts embody all of the economic entitlements to the underlying shares). The foundation board would typically be entitled to vote and dispose of the shares held by the foundation, but would be required to directly pass on to the holders of depositary receipts 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 and other key employees 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 (bidco or) portfolio (BV) company itself. 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 the 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.

2.6 If a private equity investor is taking a minority position, are there different structuring considerations?

Customary minority protection will typically be negotiated, including proportionate board representation and veto rights in respect of selected, material corporate actions.

3 Governance Matters

3.1 What are the typical governance arrangements for private equity portfolio companies? Are such arrangements required to be made publicly available in your jurisdiction?

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 was 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 gaining in popularity 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.

The general governance arrangements are typically laid down in the articles of association. There is a statutory obligation to file the articles of association with the trade register of the Dutch chamber of commerce and as a result the general governance arrangements laid down in the articles of association are publicly available. There is no statutory requirement to file any – more detailed – governance arrangements laid down in, for example, board rules or shareholders agreements.

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.)? If a private equity investor takes a minority position, what veto rights would they typically enjoy?

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. In cases of minority investments, customary minority protection will typically be negotiated, including proportionate board representation and veto rights in respect of selected, material corporate actions.

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?

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 particularly sensitive situations, but mostly this tends not to be a real issue in typical portfolio company situations.

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?

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.

3.5 Are there any limitations or restrictions on the contents or enforceability of shareholder agreements (including (i) governing law and jurisdiction, and (ii) non-compete and non-solicit provisions)?

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.

One of the more restrictive covenants in the shareholders' agreement is the non-compete. The restrictions are driven by EU rules and regulations and are mainly related to the duration of the non-compete after the termination of the shareholders' agreement and the geographical and product scope of the non-compete.

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 under corporate law and also more generally under other applicable laws (see section 10 below)?

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 U.S. 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 10.5 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 cases where there is 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 your jurisdiction, 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 2017* for more extensive detail on the Dutch public bid rules and timetable.

5.2 Are break-up fees available in your jurisdiction in relation to public acquisitions? If not, what other arrangements are available, e.g. to cover aborted deal costs? If so, are such arrangements frequently agreed and what is the general range of such break-up fees?

Break fees are allowed and are frequently agreed (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 (i) there should be some relationship between size of the break fee and deal costs, and (ii) 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. A break fee of one to two per cent would not be atypical.

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 (i) on the sell-side, and (ii) on the buy-side, in your jurisdiction?

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 following the financial crisis, a clear trend of lower leverage ratios in private equity transactions has clearly been visible, but in more recent years 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 became more popular during the downturn due to the resulting increase in risk aversion of market participants (whereby, also in this respect, the tide appears to be turning again).

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 warranty and indemnity insurance (with a preference for buyers' insurance, whereby the premium is sometimes deducted from the purchase price) is increasingly becoming popular and 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? If so, what are the typical (i) excesses / policy limits, and (ii) carve-outs / exclusions from such warranty and indemnity insurance policies?

The warranty and indemnity insurance market is increasing in size and importance in the Netherlands and, as such, warranty and indemnity insurances are not necessarily (yet) 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 (now also covering, for instance, tax matters) and lower insurance premiums, insurance brokers expect that such insurances will also continue to become more attractive to the Dutch M&A market. Insurance brokers are actively approaching deal-makers in the Netherlands, and we notice increased acceptance of the tool in the Dutch market. We expect that, in the future, more and more buyers will make use of warranty and indemnity insurance products, especially in controlled auction situations, 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 Do (i) private equity sellers provide security (e.g. escrow accounts) for any warranties / liabilities, and (ii) private equity buyers insist on any security for warranties / liabilities (including any obtained from the management team)?

Although private equity sellers tend to push back on providing security for any warranties/liabilities, (limited) escrow arrangements are agreed from time to time. When buying, private equity houses tend to take a willing look at warranty and indemnity insurance as a partial alternative to seller provided security. Comfort/security from the management team is frequently not seen as desirable ('you don't want to sue your new partners'), and in fact comfort can be sought from sellers that they won't seek recourse from continuing management team members. Still, in case of a strategic seller, depending on the sale dynamic and competitiveness of the sale process, it is not entirely uncommon for a private equity buyer to seek a more extensive set of warranties and corresponding security for those warranties.

6.7 How do private equity buyers typically provide comfort as to the availability of (i) debt finance, and (ii) equity finance? What rights of enforcement do sellers typically obtain if commitments to, or obtained by, an SPV are not complied with (e.g. equity underwrite of debt funding, right to specific performance of obligations under an equity commitment letter, damages, etc.)?

Private equity buyers typically provide comfort by means of an (internationally) customary comfort letter.

6.8 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?

IPO exits are still relatively rare in the Dutch private equity market (albeit, markedly more popular in recent years as a result of the IPO window being open for an extended period of time and a well-performing Euronext Amsterdam). Also, recently we have noted a marked uptick in dual-track exit process 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 Do private equity sellers generally pursue a dual-track exit process? If so, (i) how late in the process are private equity sellers continuing to run the dual-track, and (ii) were more dual-track deals ultimately realised through a sale or IPO?

In 2016, the majority of the IPO's in the Netherlands were preceded by a dual-track process. We expect that this exit strategy will continue to be popular in the years to come. In some cases, the dual-track exit processes were prepared in great detail, and were run pretty much until the end. In other cases, we have seen the IPO as leading option while the seller remained willing to sell privately. Although the processes went either way in recent years, ultimately, most of the dual-track exit processes are concluded with a sale rather than through an IPO.

8 Financing

8.1 Please outline the most common sources of debt finance used to fund private equity transactions in your jurisdiction and provide an overview of the current state of the finance market in your jurisdiction for such debt (particularly the market for high yield bonds).

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 the 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 your jurisdiction? Are off-shore structures common?

As noted above, generally Dutch Coop/BV or CV 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.

One of the key features of a Dutch structure is that it can benefit from the participation exemption. This 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 or cancelled due to applicable tax treaty rates. In addition, if structured properly and certain requirements are met, distributions of profits by a Coop are generally not subject to withholding tax.

Capital gains realised on the sale of an interest in a Coop/BV by either a Dutch or foreign entity are generally not subject to corporate income tax unless certain anti-abuse provisions are triggered (see under question 9.4).

Although Dutch law does not have thin cap rules, specific limitations on interest deductions may apply on leveraged acquisitions, for example in respect of an inclusion of a debt funded Dutch BidCo in a fiscal unity with an underlying Dutch target entity.

9.2 What are the key tax considerations for management teams that are selling and/or rolling-over part of their investment into a new acquisition structure?

Managers who obtain a qualifying carried interest in the acquisition structure in relation to their Netherlands-based work activities will fall within the scope of the so-called "lucrative interest" rules for Dutch income tax purposes. Income and capital gains derived from a lucrative interest are taxed at progressive rates up to 52 per cent, unless such a lucrative interest is held indirectly through an intermediate holding vehicle and some other conditions are met (see under question 9.3).

The lucrative interest rules apply if (i) a taxpayer owns an equity instrument, (ii) such equity instrument is held with the purpose to be remuneration for the activities performed, while (iii) the equity instrument requires no (or only a limited) capital investment that due to gearing may result in a potential return that is disproportionate to the capital invested.

Equity instruments generally speaking qualify as a lucrative interest if:

(i) the equity instrument is a class of shares that is subordinated to other classes of shares and the paid-in capital of the subordinated class is less than 10 per cent of the total paid-in capital of the company concerned; and

(ii) the equity instrument consist of preference shares bearing an annual yield of at least 15 per cent.

Loan receivables bearing a yield that is dependent on, for example, the profits or turnover of the business or other managerial or financial targets can also qualify as an equity instrument qualifying as a lucrative interest.

9.3 What are the key tax-efficient arrangements that are typically considered by management teams in private equity portfolio companies (such as growth shares, deferred / vesting arrangements, "entrepreneurs' relief" or "employee shareholder status" in the UK)?

A manager who has a certain carried interest in the acquisition structure qualifying as a lucrative interest as mentioned in question 9.2. above, may structure its interest through an intermediate entity in such manner that its capital gains and income qualify for specific taxation in Box 2 (at a flat rate of 25 per cent). Such treatment will be available if the following conditions are met:

(i) the lucrative interest is held indirectly through a (Dutch or non-Dutch) holding company in which the taxpayer holds a substantial interest (i.e. an interest of at least five per cent of a certain class of shares); and

(ii) at least 95 per cent of the annual lucrative interest income (i.e. dividends and capital gains) derived by the (Dutch or non-Dutch) holding company is distributed to the taxpayer within the calendar year of realisation (the "distribution requirement"), unless this is not possible due to legal restrictions. In that event, distribution has to take place immediately upon the moment that the restrictions no longer apply.

For foreign managers, it is important to observe the applicability of a double tax treaty which may prevent or limit the Netherlands from levying Dutch tax on a carried interest.

9.4 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, management teams or private equity transactions and are any anticipated?

As part of the implementation of a European Directive, the Dutch tax rules in relation to taxation of non-Dutch resident entities were amended slightly as of 1 January 2016. Taking into account this latest change, non-Dutch resident entities are generally only subject to corporate income tax on income and capital gains realised in respect of shareholding in a Dutch BV or membership interest in a Coop if:

- such shareholding or interest is attributable to an enterprise or permanent representative of the shareholder in the Netherlands and the Dutch participation exemption does not apply to such shareholding or interest; or
- a shareholder holds a substantial interest in the Dutch entity (generally a direct or indirect five per cent shareholding or interest), such substantial interest is held with the main purpose or one of the main purposes to avoid Dutch income tax or dividend withholding tax of another person, and such substantial interest is the result of a (series of) artificial arrangement(s) that (are) not genuine (e.g. not based on sound business principles).

10 Legal and Regulatory Matters

10.1 What are the key laws and regulations affecting private equity investors and transactions in your jurisdiction, 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 per cent 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 How detailed is the legal due diligence (including compliance) conducted by private equity investors prior to any acquisitions (e.g. typical timeframes, materiality, scope etc.)? Do private equity investors engage outside counsel / professionals to conduct all legal / compliance due diligence or is any conducted in-house?

Depending on the complexity of the business or the importance of a certain legal field to the business (e.g. environmental, intellectual property, securities/regulatory), levels of legal due diligence vary. Compliance has become an increasing focus over recent years. The legal due diligence process is commonly conducted by outside counsel. In controlled auctions, it is not uncommon that an extensive legal vendor due diligence report is prepared, on which reliance can be given (in addition to the bidder/buyer's own – confirmatory – due diligence). Many private equity buyers prefer a focused, high level legal due diligence exercise resulting in issues-based reporting. Legal due diligence efforts are typically undertaken within weeks, whereby – when needed – substantial efforts can be undertaken and finished in short timeframes, whether in an effort to contain costs (e.g. in competitive auction processes), to allow for pre-emptive bidding or to allow for bidding in emergency processes (e.g., insolvent seller).

10.4 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 U.S. 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.

10.5 Are there any circumstances in which: (i) a private equity investor may be held liable for the liabilities of the underlying portfolio companies (including due to breach of applicable laws by the 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 your jurisdiction or should such investors otherwise be aware of in considering an investment in your jurisdiction?

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.

Acknowledgment

The authors are grateful to their colleagues Jean Paul Dresen (tax), Jan-Paul van der Hoek and Michiel Pannekoek (PE transactions), Oscar van Angeren (fund formation), Jeroen Vossenberg (debt finance) and Bastiaan Siemers (regulatory) for their valuable input.

Alexander J. Kaarls

Houthoff Buruma
Gustav Mahlerplein 50
1082 MA Amsterdam
Netherlands

Tel: +31 20 605 6110
Email: a.kaarls@houthoff.com
URL: www.houthoff.com

Alexander Kaarls focuses on (cross-border) private & public M&A and capital markets transactions. He also regularly advises on joint venture, securities laws compliance and governance matters. Before joining Houthoff, Alexander practised law with Skadden, Arps, Slate, Meagher & Flom LLP from 1994 until 2004. He is recognised as a leading M&A practitioner in The Netherlands by *The Legal 500*, *Chambers Global*, *Chambers Europe*, *Who's Who Legal – Mergers and Acquisitions*, and *IFLR1000*. Alexander studied at Leiden University (School of Law) and Sciences Po (Paris). Alexander is a member of the Bars in Amsterdam and California.

Vivian A. L. van de Haterd

Houthoff Buruma
Gustav Mahlerplein 50
1082 MA Amsterdam
Netherlands

Tel: +31 20 605 6580
Email: v.van.de.haterd@houthoff.com
URL: www.houthoff.com

Vivian van de Haterd specialises in (cross-border) private M&A transactions. She mainly represents private equity firms. Vivian graduated from the Faculty of Law of the University of Amsterdam in 2015. Vivian joined Houthoff Buruma in 2015 and was admitted to the Bar in the Netherlands in that same year.

HOUTHOFF BURUMA

Houthoff Buruma is a leading Netherlands-based law firm with over 290 lawyers worldwide. Focusing on complex transactions and dispute resolution matters, the firm typically advises domestic and international corporations, private equity houses, financial institutions and governments on a broad variety of matters, including those that may have a key strategic impact on or present the most significant challenges to the organisation.

In addition to its offices in Amsterdam and Rotterdam, Houthoff Buruma has offices in London, Brussels and New York. On cross-border matters, the firm frequently works jointly with leading New York and London based-firms, as well as major firms in other global economic centres. Houthoff Buruma is the exclusive member for the Netherlands of Lex Mundi.

Houthoff Buruma is continuously listed as a top tier firm by international client guides, including *Chambers*, *IFLR1000* and *The Legal 500*. In the current edition of *Chambers Europe* (2017), 36 of our 49 partners are recommended, covering 14 practice areas. The firm is consistently listed as a top firm in the Netherlands in terms of M&A deal flow, and is recognised for its strong private equity practice.

Other titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com