Netherlands

Louis Bouchez, Floor Veltman and Maurits Bos

Kennedy Van der Laan NV

Jan van den Tooren and Reinier Noort

Hamelink & Van den Tooren NV

Formation and terms operation

1 Forms of vehicle

What legal form of vehicle is typically used for private equity funds formed in your jurisdiction? Does such a vehicle have a separate legal personality or existence under the law of your jurisdiction? In either case, what are the legal consequences for investors and the manager?

The following legal structures are commonly used for LBO funds in the Netherlands:

- private company with limited liability (BV);
- public company (NV);
- limited partnership (CV);
- cooperative society; and
- fund for joint accounts.

Currently only the BV, the NV and the cooperative society have corporate personality. However, pursuant to the proposed – and recently accepted – Partnership Act, which is expected to come into effect during the course of 2011, a CV as well as, under certain circumstances, a fund for joint accounts, can opt for corporate personality.

Since the legal structures are often set up to minimise the tax burden on distributions to the investors, Dutch holding companies are frequently used. More specifically, holding companies in the form of Dutch cooperative societies are used to provide for a distribution of dividends to LBO funds free of Dutch dividend tax.

Investors in BVs and NVs are only liable for the sum of their contribution. The same applies for investors in a CV. These investors however need to make sure that they are not involved with the management of the CV, nor that their names are reflected in the name of the CV, since they will then face the risk of being considered a general partner and will thus be personally liable for the CV's liabilities. Investors in a fund for joint accounts will generally also only be liable for the amount of their contribution. There may be issues with respect to how the fund for joint accounts is to be qualified because of the contractual basis thereof. A court could rule that such fund is in fact a CV, a general partnership or partnership, resulting in the form of liability that is applicable to the respective partnership. Finally, the members of a cooperative society will in principle each be liable for an equal share of a deficit. The liability can be limited further in the articles of association.

It is important to note that the main activities of a CV at the time of formation should be located in the Netherlands in order to avoid possible discussions as to the question of which laws govern the CV. Moreover, all of the partners need to share in the profits. General partners are therefore often offered a 0.01 per cent profit share in addition to their management fee.

2 Forming a private equity fund vehicle

What is the process for forming a private equity fund vehicle in your jurisdiction?

Setting up a BV or NV will require a statement of no objection from the Dutch Ministry of Justice and registration with the Trade Register of the Chamber of Commerce and a notarial deed of incorporation. The current minimum capital requirements for BVs and NVs are €18,000 and €45,000 respectively (a bill is in the making to abolish said capital requirement for BVs).

A cooperative society, a CV and a fund for joint accounts do not have minimum capital requirements. The CV and the fund are formed by a contractual arrangement entered into by the relevant parties. Notary involvement is therefore not required. A cooperative society does require a notarial deed.

The entire incorporation process for all these structures will generally take no more than a few weeks.

Pursuant to the Dutch Act on Financial Supervision (AFS), effective as of 1 January 2007, it is prohibited to offer a right to participate in an LBO fund in the Netherlands, unless the management company of the LBO fund or, if the LBO fund does not have a separate management company, the LBO fund itself, has been granted a licence by the Authority for the Financial Markets (AFM). In general, the application process takes approximately three months. Exemptions to the licence obligation may apply (see question 11).

3 Requirements

Is a private equity fund vehicle formed in your jurisdiction required to maintain locally a custodian or administrator, a registered office, books and records or a corporate secretary, and how is that requirement typically satisfied?

Yes; LBO funds incorporated under the laws of the Netherlands are required to maintain books and records and should have a registered address in the Netherlands. Trust offices often provide these registered office services. Registration with the Trade Register needs to take place for every LBO fund that qualifies as an undertaking as further specified in question 4.

4 Access to information

What access to information about a private equity fund formed in your jurisdiction is the public granted by law? How is it accessed? If applicable, what are the consequences of failing to make such information available?

All BVs and NVs have to be registered with the Dutch Trade Register. The information that needs to be made publicly available consists of, among other things, the amount of the issued share capital, the annual accounts of the company, the articles of association and the managing and supervisory directors of the company. CVs and cooperative societies will also have to be registered with the Trade Register and publish their annual accounts. A CV will furthermore have to

list the personal details of all general partners as well as the number of limited partners. No obligation to register with the Trade Register exists for funds for joint accounts. Annual fees are payable to the Trade Register.

Failing to comply with the above-mentioned obligations constitutes an economic offence under the Economic Offences Act. This is not commonly enforced. For the (supervisory) directors of a BV, NV and a cooperative society, an additional risk is that, in the event of bankruptcy, not having (timely) filed the annual accounts constitutes an incontestable presumption of improper administration, which can result in each director being held jointly and severally liable for any shortfall in payments due to creditors of the company.

In addition to the aforementioned, as per 1 January 2009, an amendment to the AFS, implementing the EU Transparency Directive (2004/109/EC) (the EUTD) came into effect, which is applicable to issuers of units as defined in the AFS trading on a regulated market for which the home member state is the Netherlands. Pursuant to the EUTD, an issuer's annual financial report must be published ultimately within four months of the end of each financial year. Unlike under existing Dutch law, this term cannot be extended.

The EUTD further introduces the requirement for issuers to publish half-yearly financial reports along with interim management statements. Although these are new requirements under Dutch law, the publishing of half-yearly financial reports was already a listing requirement of Euronext Amsterdam. These half-yearly reports do not require an auditor's statement, but mention will have to be made whether an auditor has reviewed the report, and information on important transactions must be disclosed.

The interim statements must contain an overview of important transactions or other material event as well. Companies that already publish quarterly statements are exempted from this obligation.

In addition to the current obligation of the directors and supervisory directors of a Dutch company, the aforementioned annual and half-yearly reports will require a 'responsibility statement' from the persons responsible at the issuer. This obligation is not intended to bring any changes in the applicable rules on liability for the annual accounts currently in effect pursuant to the Dutch Civil Code (DCC).

Issuers of units with a nominal value per unit of at least €50,000 are exempt from the disclosure requirements set out above as stated in the EUTD. On 31 December 2010 the directive amending the Prospectus Directive came into effect, which must be implemented in the Netherlands before 1 July 2012 pursuant whereto, among others, this threshold will be increased from €50,000 to €100,000 (Amendment Prospective Directive). Pursuant to the Amendment Prospective Directive disclosure requirements will also apply, albeit less extensive, in relation to, for example, the offer of shares to existing shareholders. The requirement to publish an annual financial report will be deleted upon implementation of the Amendment Prospective Directive.

5 Limited liability for third-party investors

In what circumstances would the limited liability of third-party investors in a private equity fund formed in your jurisdiction not be respected as a matter of local law?

In principle, the shareholders of a BV or NV will only be liable up to the amount of their contribution to the share capital of the company. Under very exceptional circumstances, however, a shareholder can be held liable in the event that it becomes apparent that the shareholder is considered a de facto director.

With respect to a CV, limited partners can be held liable in the event that they are considered to be involved with the management of the partnership. Under the new Partnership Act, this involvement can also be assumed in the event that a limited partner is able to exert decisive influence on the management by the general partners. Dutch law currently prescribes that the limited partner can then subsequently be held liable for all existing and future liabilities of the partnership, whereas under the upcoming Partnership Act, this liability will be limited to those liabilities that have originated in, and following from, the period in which the limited partner was considered to be involved with the management of the partnership.

6 Fund manager's fiduciary duties

What are the fiduciary duties owed to a private equity fund formed in your jurisdiction and its third-party investors by that fund's manager (or other similar control party or fiduciary) under the laws of your jurisdiction, and to what extent can those fiduciary duties be modified by agreement of the parties?

Under Dutch law, fund managers will have to act in good faith and observe the principle of reasonableness and fairness. Derogation of the aforementioned by contract is not possible.

7 Gross negligence

Does your jurisdiction recognise a 'gross negligence' (as opposed to 'ordinary negligence') standard of liability applicable to the management of a private equity fund?

Dutch law recognises various degrees of negligence, including 'gross negligence'. Dutch corporate law already protects the management of BVs, NVs and cooperative societies in the sense that they can only be personally held accountable in the event that a serious blame can be attributed to them. This implies that ordinary negligence will in principle not lead to liability.

For the other legal structures, liability can be limited to gross negligence in the management contract.

Limiting the liability of managers in the event of gross negligence or, for the BV and NV, in the event serious blame can be attributed to the manager, is considered to be impossible. Under Dutch law it is possible for an LBO fund to indemnify the management. There is, however, discussion as to the extent of such an indemnification. An indemnification for gross negligence is argued to be unacceptable.

8 Other special issues or requirements

Are there any other special issues or requirements particular to private equity fund vehicles formed in your jurisdiction? Is conversion or redomiciling to vehicles in your jurisdiction permitted? If so, in converting or redomiciling limited partnerships formed in other jurisdictions into limited partnerships in your jurisdiction, what are the most material terms that typically must be modified?

The investors will typically receive preferred shares. The scope and extent of the rights attached to the preferred shares differ from transaction to transaction. Typically, however, the rights attached to the preferred shares include veto rights with respect to amendment of the articles of association, issuance of shares and exclusion of pre-emptive rights.

Under the corporate law for BVs, the articles of association should contain a restriction on the transfer of shares under which shares can only be transferred once the provisions of the articles of association have been met. This share transfer restriction should take the form of either of the following obligations:

- the shareholder must obtain the approval of a body of the portfolio company (eg, the general meeting) for the intended transfer of the shares; or
- the shareholder must first offer the shares to the co-shareholders on the same terms and conditions.

For NVs different variations of these elements may be agreed on in, for example, the shareholders' agreement.

As a result of the proposed changes to the laws governing Dutch BVs, the mandatory restriction on transfer of shares will become more flexible. The BV and its shareholders shall be able to draw up

an alternative arrangement, at their discretion, which will set aside the statutory provisions unless the transfer of shares shall become impossible or extremely difficult.

In order for a partnership to qualify as a Dutch partnership, the partnership should have had significant activities in the Netherlands at the time of formation. Redomiciling may therefore not be possible without the formation of a new CV.

Redomiciling a foreign company to the Netherlands will never result in the creation of a Dutch legal entity. Under Dutch law the foreign company will still be considered as a foreign entity active in the Netherlands. This could lead to conflict situations when the actual country of formation or incorporation considers the foreign entity to be a Dutch entity following the redomiciling. In that situation, the entity cannot be registered with the Dutch Trade Register.

For fiscal transparency, see question 17.

9 Fund sponsor bankruptcy or change of control

With respect to institutional sponsors of private equity funds organised in your jurisdiction, what are some of the primary legal and regulatory consequences and other key issues for the private equity fund and its general partner and investment adviser arising out of a bankruptcy, insolvency, change of control, restructuring or similar transaction of the private equity fund's sponsor?

There are no such regulatory or legal consequences other than that a bankruptcy, change of control or restructuring may result in a situation whereby the criteria for an exemption are no longer being met and as a result a licence would be required. This is commonly agreed upon in the fund documentation between parties.

Regulation, licensing and registration

10 Principal regulatory bodies

What are the principal regulatory bodies that would have authority over a private equity fund and its manager in your jurisdiction, and what are the audit and inspection rights available to those regulators?

The AFM and the Dutch Central Bank (De Nederlandsche Bank, DNB) are charged with the supervision of the requirements under the AFS and have broad inspection and enforcement authorities with respect to the LBO funds that have to obtain a licence. The AFM is charged with the supervision of conduct that, inter alia, will be comprised of ensuring that the rules for informing consumers (transparency) and the duty of care is met, whereas the DNB is charged with exercising prudential supervision that is focused on the solidity of financial undertakings and contributing to the stability of the financial sector. Should an LBO fund refuse to cooperate or refuse to provide the requested information, cooperation can be enforced by having an order for incremental penalty payments imposed, instigating a criminal investigation or having an administrative fine imposed upon the fund.

11 Governmental requirements

What are the governmental approval, licensing or registration requirements applicable to a private equity fund in your jurisdiction? Does it make a difference whether there are significant investment activities in your jurisdiction?

The AFS makes a distinction between two forms of investment institutions, namely an investment fund and an investment company. An investment company is a legal entity (NV, BV or cooperative society) and is governed by the rules in the DCC containing provisions regarding control, distributions and capital. An investment fund does not qualify as a legal entity and therefore the aforementioned provisions of the DCC do not apply. The AFS does require an investment fund to have a separate management company and a custodian. Once the proposed Partnership Act comes into effect, and a CV can thus opt for corporate personality, the CV will most probably still qualify as an investment fund and will thus need to comply with the aforementioned AFS requirements instead of those in the DCC.

Whether or not the management company of the LBO fund requires a licence therefore depends on the legal structure of the LBO fund.

It should be noted that promoting the right to participate in an LBO fund can, under certain circumstances, already be considered as offering a right of participation under the AFS, therewith requiring a licence from the AFM.

No licence is required in the event one (or more) of the following exemptions, as listed in the AFS, apply:

- the right to participate is offered solely to qualified investors;
- the offer is extended to fewer than 100 persons (not being qualified investors);
- the offered unit has an individual denomination of at least €50,000 (or its foreign equivalent) (a bill has been submitted pursuant whereto, in anticipation of the implementation of the Amendment Prospective Directive, this threshold will be increased to €100,000. This bill is expected to come into force ultimately on 1 January 2012); or
- a participant can only acquire the offered unit for a total consideration of at least €50,000 (or its foreign equivalent) (pursuant to the aforementioned bill, this threshold will be increased to €100,000).

If one of more of the above-mentioned exemptions is applicable, the LBO fund is obliged to inform the public when offering the right to participate, as well as in marketing and advertising statements, that it does not hold a licence and does not fall under the supervision of the AFM. The content of the statement is determined by whether the LBO fund is open-end or closed-end and by the party offering the units.

Under the directives applicable to Undertakings for Collective Investment in Transferable Securities (UCITS), a licence is not required in the event of offering UCITS established in a state designated by the Dutch minister of finance in which the supervision on collective investment schemes provides sufficient safeguards with regard to the interests that the AFS seeks to protect.

Pursuant to the legislative bill 'Amendment Act for the Financial Markets 2010' – which will most likely come into effect ultimately on 1 January 2012 – a voluntary supervisory regime for investment institutions is introduced. In some cases, foreign institutional investors are only allowed to invest in investment institutions under supervision. The new regime makes it possible that investment institutions come under supervision voluntarily. As a result, they will also be available to the aforementioned foreign institutional investors.

In addition to the obligation to obtain a licence when marketing an LBO fund, a prospectus approved by the AFM may need to be made available. This obligation does not apply to open-end funds, or closed-end funds without transferable participation rights. In addition, certain exceptions to the obligation to prepare a prospectus may apply, which are similar to those applicable to the need to obtain a licence. Pursuant to the Amendment Prospective Directive, the criteria that determine whether you need to prepare a prospectus will be amended in order to reduce the administrative burden for issuers of units. The changes are similar to the changes with respect to the need to obtain a licence. In addition, the threshold for the exception for offers of units that are extended to fewer than 100 persons will be increased to 150 persons.

If an LBO fund is incorporated under the laws of a member state of the European Union and offers units in the Netherlands, there is no need to prepare a prospectus if this fund has already met the relevant prospectus obligation in its country of incorporation.

Regardless of whether there are significant investment activities in the Netherlands, the following requirements, among others, apply

to an LBO fund in the event that a licence is required, as explained in question 2:

- if the LBO fund is structured as an investment company, the management company is obliged to be the statutory director of the fund;
- the management company has to consist of at least two natural persons, who will have to fulfil certain requirements with respect to expertise in managing a financial enterprise and integrity;
- if the LBO fund is structured as an investment fund, a separate and independent custodian is required who holds legal title to the fund's assets. The custodian will have to enter into an agreement of management and custody with the fund's management company;
- preparation of a prospectus might also be required for the fund and the management company;
- any advertisement of the fund will need to meet certain requirements assuring that they are not misleading; and
- the registration obligations as discussed in question 4 need to be fulfilled such as publishing annual and semi-annual accounts.

12 Registration of investment adviser

Is a private equity fund's manager, or any of its officers, directors or control persons, required to register as an investment adviser in your jurisdiction?

In principle, an investment adviser would require a licence for the provision of its services. However, in the event that the provided advice is given with respect to units issued by the LBO fund of which the adviser is the management company, an exemption applies and no additional licence as an investment adviser is required.

13 Fund manager requirements

Are there any specific qualifications or other requirements imposed on a private equity fund's manager, or any of its officers, directors or control persons, in your jurisdiction?

The management company of an LBO fund will need to comply with a minimum capital requirement of €225,000. Furthermore, the custodian (in the event the LBO fund is structured as an investment fund) of the fund will need to comply with a minimum capital requirement of €112,500.

14 Political contributions

Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure of, political contributions by a private equity fund's manager or investment adviser or their employees.

There are no specific rules in the Netherlands designed to prevent a private equity fund's manager from making political contributions to public pension plans or other governmental entities, as seen in the United States.

In light of growing investments by institutional parties such as pension funds in alternative asset categories such as private equity, the Dutch pension supervisory authority (the DNB) has provided a set of key principles for assessing the risk management for alternative investments of pension funds. Good practice suggests that pension funds should fully consider the specific risk-and-return characteristics of these alternative investments and should be sufficiently transparent in their communication with stakeholders regarding their alternative investment policy. This could imply that there is an obligation on the side of the pension fund manager (and therefore not the private equity fund manager in which the relevant pension fund invests) to disclose information with respect to transactions where there may be a conflict of interest or other hidden agenda.

15 Use of intermediaries

Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure by a private equity fund's manager or investment adviser of, the engagement of placement agents, lobbyists or other intermediaries in the marketing of the fund to public pension plans and other governmental entities.

No such specific rules exist in the Netherlands. As set out under question 14, pension funds must make sure that they manage their investments in private equity funds adequately and should therefore make sure that they receive sufficient information on the investments from reliable sources and not be prejudiced by alternative incentives.

16 Bank participation

Describe any legal or regulatory developments emerging from the 2008 financial crisis that specifically affect banks with respect to investing in or sponsoring private equity funds.

No legislation is in the making such that – as in the US – will ban banks from sponsoring or investing in private equity and hedge funds.

Taxation

17 Tax obligations

Would a private equity fund vehicle formed in your jurisdiction be subject to taxation there with respect to its income or gains? Would the fund be required to withhold taxes with respect to distributions to investors? Please describe what conditions, if any, apply to a private equity fund to qualify for applicable tax exemptions.

As described in question 1, frequently used vehicles in the Netherlands for LBO funds are among others NVs, BVs, limited partnerships CVs and cooperatives.

Dutch NVs, BVs and cooperatives are always non-transparent for Dutch tax purposes and in general subject to Dutch corporate income tax (CIT). Dutch limited partnerships can be set up either as non-transparent or transparent for Dutch tax purposes. A non-transparent limited partnership is subject to CIT, whereas a transparent limited partnership is not subject to Dutch CIT.

Dutch resident companies are subject to CIT on their worldwide profits at a rate up to 25 per cent. However, capital gains and dividends derived from qualifying participations are exempt under the participation exemption. The rules of the participation exemption have been amended as of 1 January 2010, thereby broadening the scope of the participation exemption. The participation exemption applies to share interests of at least 5 per cent (participations) that are not held as a portfolio investment. Participations that are held as a portfolio investment can nevertheless qualify for the participation exemption if the participation is considered a 'qualifying portfolio investment participation'. A qualifying portfolio investment participation is a participation of which the direct or indirect assets do not consist of more than 50 per cent of 'low taxed free portfolio assets', or is subject to a 'reasonable' profits tax at a rate according to Dutch CIT rules. In general terms, if a participation is subject to a profits tax against a regular statutory rate of at least 10 per cent, the participation is considered to be subject to a reasonable profits tax, provided that the local tax base does not significantly deviate from the Dutch tax base.

NVs and BVs may apply for the special CIT regime for fiscal investment institutions (FBIs). FBIs are subject to zero per cent CIT but are under the obligation to distribute their current income (excluding capital gains) annually. NVs may also apply for the special CIT regime for exempt investment institutions (VBIs). A VBI is exempt from CIT. The VBI regime is only available for certain specified investments (at least including all listed securities). A company that opts for VBI status is not considered a tax resident of the

Netherlands for tax treaty purposes and therefore cannot benefit from these tax treaties.

A limited partnership is considered to be transparent for Dutch tax purposes if the admission, substitution or any other transfer of a limited partner's interest can only take place with the prior approval of all partners. If no prior approval is required for the admission, substitution or any other transfer of a limited partner's interest, the limited partnership is considered to be non-transparent for Dutch tax purposes.

Dividend distributions by Dutch NVs, BVs and non-transparent limited partnerships are subject to a 15 per cent Dutch dividend withholding tax. This is similar for an NV or BV that applies for the FBI regime. This rate may be reduced if the corporate shareholder is a tax resident in the Netherlands or in the EU or under the application of tax treaties. Furthermore, as of 1 January 2010, shareholders in Iceland and Norway are treated similarly to EU shareholders for dividend tax purposes.

Distributions by an NV that applies the VBI regime by a transparent limited partnership or by a cooperative are not subject to Dutch dividend withholding tax.

18 Local taxation of non-resident investors

Would non-resident investors in a private equity fund be subject to taxation or return-filing requirements in your jurisdiction?

If the LBO fund is transparent for Dutch tax purposes, an investor should in general not be subject to Dutch tax solely by virtue of his or her investment in the fund. However, this may be different if the investor has a permanent establishment in the Netherlands to which the investment in the fund can be allocated.

If the LBO fund is non-transparent for Dutch tax purposes, a non-Dutch resident investor should not be subject to Dutch tax provided that such investor does not perform any Dutch activities or have any taxable presence in the Netherlands to which the investment in the LBO fund can be allocated. Any Dutch taxing rights may be limited if the investor is a tax resident of a country with which the Netherlands has concluded a tax treaty. In addition, a corporate non-Dutch resident investor, owning an interest of 5 per cent or more in a non-transparent LBO fund, may become subject to Dutch tax if the investor is a tax resident of a country with which the Netherlands has not concluded a tax treaty. However, this should not apply if the interest in the LBO fund can be allocated to a business enterprise of the investor.

19 Local tax authority ruling

Is it necessary or desirable to obtain a ruling from local tax authorities with respect to the tax treatment of a private equity fund vehicle formed in your jurisdiction? Are there any special tax rules relating to investors that are residents of your jurisdiction?

Depending on the facts and circumstances, tax rulings are available in the Netherlands for most situations. Rulings can, for instance, be obtained with regard to the application of the participation exemption to investments, transparency for Dutch CIT purposes of a limited partnership or the application of the FBI or VBI regime. Obtaining a tax ruling in connection with the tax position of the fund is not necessary but may be desired.

20 Organisational taxes

Must any significant organisational taxes be paid with respect to private equity funds organised in your jurisdiction?

There is no such taxation in the Netherlands.

21 Special tax considerations

Please describe briefly what special tax considerations, if any, apply with respect to a private equity fund's sponsor.

Management fees received by Dutch tax resident investment managers are subject to Dutch taxation.

Carried interest received by Dutch resident entities is in general subject to Dutch taxation. However, it can also be exempt (if structured properly) under the application of the participation exemption.

A special tax regime is applicable to 'lucrative interests'. A lucrative interest is present if, in broad terms, an employee or manager of a fund has acquired shares, receivables or rights with similar economic characteristics that are granted with the intention to form remuneration for services rendered by the employee or manager. This taxation specifically aims at taxing the carried interest of fund managers.

Shares should in general only constitute a lucrative interest if either there are different classes of shares, the class of shares held by the employee or manager ranks junior to the other classes and the class of shares held by the employee or manager is less than 10 per cent of the total share capital; or the employee or manager owns preference shares with a preferred dividend of at least 15 per cent per year.

Benefits from a lucrative interest will be taxed against the progressive personal income tax rates up to 52 per cent or as income of a 'substantial interest' (ie, an interest of 5 per cent or more) against a flat rate of 25 per cent if the lucrative interest is held through an entity in which the employee or manager holds a substantial interest.

The regime on lucrative interests also applies to foreign employees or managers if the lucrative interest intends to form remuneration for services rendered in the Netherlands, although it should be reviewed on a case-by-case basis whether the Netherlands can levy tax from foreign employees or managers under the application of double tax treaties.

Companies that have granted lucrative interests will not be entitled to deduct payments on these lucrative interests for Dutch corporate income tax purposes.

22 Tax treaties

Please list any relevant tax treaties to which your jurisdiction is a party and how such treaties apply to the fund vehicle.

The Netherlands has concluded tax treaties with more than 75 countries. If the fund vehicle is subject to CIT in the Netherlands (ie, it is non-transparent), it should be entitled to tax treaty benefits. An NV that has applied for the VBI regime is not entitled to claim the benefits of the Dutch tax treaties.

23 Other significant tax issues

Are there any other significant tax issues relating to private equity funds organised in your jurisdiction?

In certain situations, LBO funds may not be entitled to a full reclaim of their input VAT.

Selling restrictions and investors generally

24 Legal and regulatory restrictions

Describe the principal legal and regulatory restrictions on offers and sales of interests in private equity funds formed in your jurisdiction, including the type of investors to whom such funds (or private equity funds formed in other jurisdictions) may be offered without registration under applicable securities laws in your jurisdiction.

To offer rights to participate in an LBO fund in the Netherlands, the management company of the LBO fund, or, in some cases the LBO fund itself, must be granted a licence by the AFS unless an exemption applies (see question 11).

If an exemption applies, a selling restriction will be agreed upon in transaction documentation to ensure that the LBO fund will continue to benefit from the exemption for the duration of the fund.

25 Types of investor

Describe any restrictions on the types of investors that may participate in private equity funds formed in your jurisdiction (other than those imposed by applicable securities laws described above).

In response to more and more calls for adequate control on foreign LBO funds offering units in the Netherlands using a European passport and thereby not falling under the direct supervision of the AFM, it has been suggested to further monitor the major Dutch investors (such as pension funds and other institutional investors) in these foreign LBO funds by, for example, imposing limits on the use of leverage.

It is uncertain at this stage whether such restrictions will actually be imposed on the institutional investors and pension funds in the future.

Furthermore, UCITS are only able to invest in a limited number of asset classes as defined in the UCITS directives. However, the directives do leave room for UCITS to invest up to a maximum of 10 per cent of their assets in other asset classes that are not allowed by the UCITS directives. Whether an LBO fund qualifies as a permissible asset class or not depends on, among other things, the nature of the fund (closed or open ended) and the transferability of the units offered.

26 Identity of investors

Does your jurisdiction require any ongoing filings with, or notifications to, regulators regarding the identity of investors in private equity funds (including by virtue of transfers of fund interests) or regarding the change in the composition of ownership, management or control of the fund or the manager?

According to the AFS, direct or indirect holders of voting rights or share interests in the issued capital of a Dutch NV or a legal entity incorporated under the laws of a non-EU member state (including managing directors and supervisory directors and the manager of an LBO fund) are subject to a notification duty if the percentage held in the issued capital or the voting rights exceeds or subsides below certain bandwidths (in principle ranging from 5 per cent to 95 per cent). A bill has been submitted that contains amendments based on recommendations made to the legislator in the report of the Corporate Governance Code Monitoring Committee (Frijns Commission) of 30 May 2007. This bill contains the following proposals, but has not yet been adopted:

- the first notification threshold shall be lowered from 5 per cent to 3 per cent;
- an obligation shall be introduced for shareholders with a substantial interest (3 per cent or more) to state their views on the strategy of the company;
- a scheme for the identification of shareholders will be introduced; and
- the threshold for the right to put items on the agenda shall be raised from 1 per cent to 3 per cent.

There is also a duty to disclose ownership of shares with special controlling rights. An LBO fund in the form of a Dutch NV or a legal entity incorporated under the laws of a non-EU member state also need to disclose the outstanding share capital and voting rights. Several exemptions from the notification duty may apply. As a result of the Transparency Act (as discussed in question 4) the notification requirements now also apply to holders of rights to acquire (depository receipts for) shares. The term within which notification to the AFM has to take place has been set at two days after the closing day of the relevant transaction.

Update and trends

Discussions with respect to increased supervision continue to be hot topics. The alternative investment funds directive (AIFM Directive), which was adopted on 11 November 2010 and which needs to be implemented in the Netherlands ultimately at the beginning of January 2013, will greatly impact the Dutch regulatory system with respect to alternative investment funds (ranging from hedge funds and private equity funds to funds of funds and real estate funds) and its managers in relation to, among others, licence requirements and marketing rules.

27 Licences and registrations

Does your jurisdiction require that the person offering interests in a private equity fund have any licences or registrations?

See question 2.

28 Money laundering

Describe any money laundering rules or other regulations applicable in your jurisdiction requiring due diligence, record keeping or disclosure of the identities of (or other related information about) the investors in a private equity fund or the individual members of the sponsor.

LBO funds are always under the obligation to identify the investors in the fund. Moreover, LBO funds under the supervision of AFS should also determine whether the investor poses an increased or unacceptable risk and create a risk profile for the investors.

Exchange listing

29 Listing

Are private equity funds able to list on a securities exchange in your jurisdiction and, if so, is this customary? What are the principal initial and ongoing requirements for listing? What are the advantages and disadvantages of a listing?

It is possible for LBO funds to list on Euronext Amsterdam and this has occurred in the past. An IPO has the financial advantage that required capital can be raised. Disadvantages of an IPO include undesirable changes to the governance structure of the LBO fund and the requirement to reveal information that may also be of interest to competitors.

The admission criteria for shares are laid down in the Euronext Rule Book, and can be summarised as follows:

- a free float of at least 25 per cent or 5 per cent if the 5 per cent represents €5 million calculated based on the offering price. Any percentage lower than this must be approved by Euronext;
- audited financial statements (IFRS) must be available for the last three financial years. Dispensation may be granted by Euronext provided the issuer has supplied the information needed to form a sound opinion about the company, its financial position and its business operations; and
- if the financial year closed more than nine months before the date of admission to listing, the company must contact Euronext about its half-yearly accounts.

There are certain ongoing information disclosure obligations to which listed companies are subject, such as:

- publication of price-sensitive information;
- shareholding and voting rights disclosures (see question 26);
- publication of annual reports, half-year reports and interim management statements (see question 4); and
- amendments to the articles of association need to be discussed with Euronext prior to the general meeting of shareholders.

30 Restriction on transfers of interests

To what extent can a listed fund restrict transfers of its interests?

The only ways in which the transfer of interests can be limited are:

- imposing a maximum shareholdings interest per shareholder;
- imposing selling restrictions in the transaction documentation (see question 24); and
- limiting the group of possible shareholders to natural persons or companies without corporate personality.

Participation in private equity transactions

31 Legal and regulatory restrictions

Are funds formed in your jurisdiction subject to any legal or regulatory restrictions that affect their participation in private equity transactions or otherwise affect the structuring of private equity transactions completed inside or outside your jurisdiction?

There are no such legal or regulatory restrictions other than that European and Dutch rules on merger control for concentrations may apply.

32 Compensation and profit-sharing

Describe any legal or regulatory issues that would affect the structuring of the sponsor's compensation and profit-sharing arrangements with respect to the fund and, specifically, anything that could affect the sponsor's ability to take management fees, transaction fees and a carried interest (or other form of profit share) from the fund.

In relation to this question in particular, the tax structuring of the fund is to be considered by the relevant parties (on a case-by-case basis).

Kennedy Van der Laan

Floor Veltman **floor.veltman@kvdl.nl**
Louis Bouchez **louis.bouchez@kvdl.nl**

Postbus 58188
1040 HD Amsterdam
Netherlands

Tel: +31 20 550 6692
Fax: +31 20 550 6792
www.kvdl.nl

Hamelink & Van den Tooren
TAX LAWYERS

Jan van den Tooren **jan@hamelinktooren.com**
Reinier Noort **reinier@hamelinktooren.com**

Parkstraat 20
2514 JK The Hague
Netherlands

Tel: +31 70 310 5070
Fax: +31 70 310 5077
www.hamelinktooren.com