Netherlands

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1 Types of private equity transactions

What different types of private equity transactions occur in your jurisdiction?

The term private equity is used to describe leveraged investments in more mature companies; transactions include both private-to-private and public-to-private deals. In a leveraged transaction the purchase price to be paid by the private equity fund in exchange for the shares is paid mostly with borrowed money. The finance documentation is structured in such a way that the borrowed money ultimately becomes a debt of the portfolio company itself (ie, debt push-down). Examples frequently seen in the Netherlands include institutional buyouts (IBOs, whereby the management team of the target is asked by a private equity firm to join in) and management buyouts (MBOs, whereby the management of the target initiates the buyout itself); more rare transactions are going-private transactions and management buy-ins (MBIs, whereby a management team from outside the target initiates the transaction or is asked by a private equity firm to join in). The interest of private equity houses in going-private transactions decreased dramatically again in 2009 after a number of public bids in previous years. Another trend concerns secondary buyouts (SBOs), whereby a private equity firm sells its interests in a portfolio company to another private equity firm rather than exiting through a trade sale or IPO. Characteristic of IBOs, MBOs, MBIs and SBOs is that they are structured as leveraged buyouts (LBOs), whereby a substantial part of the acquisition price is financed through debt that is intended to generate a high internal rate of return (IRR) on invested equity.

A category that is similar but still distinct from private equity is venture capital. Venture capital is typically used to describe the provision of capital (often equity rather than debt) to relatively immature private companies that have a high growth potential but are too small to be financed with bank loans since there are hardly any security rights that the banks can receive in return.

2 Corporate governance rules

What are the implications of corporate governance rules for private equity transactions? Are there any advantages to going private in leveraged buyout or similar transactions? What are the effects of corporate governance rules on companies that, following a private equity transaction, remain or become public companies?

In general, the corporate governance regime applicable to companies listed on a stock exchange in the Netherlands is more stringent than for privately held companies. The corporate governance legislative and regulatory framework applicable to publicly listed companies includes the following:
- book 2 of the Dutch Civil Code (DCC) – this entails the general set of Dutch corporate law, including mandatory legislation;
- the Financial Supervision Act (the FSA), which regulates the different players operating in the financial markets as well as the regulated financial market itself;
- the Euronext Rule Book, book I (the Rule Book): harmonised market rules, effective from 3 March 2008 and amended on 1 July 2009, which applies to listed companies;
- the Works' Council Act, applicable to companies with a works' council (which is mandatory for companies with more than 50 employees);
- the SER Merger Code dealing with the position of employees of the target that are member of trade unions;
- the corporate governance code (the Code). The Code applies to all listed companies with their statutory seat in the Netherlands. Although not mandatory pursuant to the Code, all listed companies are under an obligation to report on their compliance with the Code on the base of the 'comply-or-explain' principle; such report is part of the management's notes to the annual accounts and is to be presented to the annual shareholders' meetings; and
- the Public Bids Decree (the Decree), effective from 28 October 2007, implementing the European Directive on takeover bids and imposing to notify the relevant authorities in relation to public bids.

A potential advantage of a going-private transaction is that some of the aforementioned legislation and regulation no longer apply. In particular the Rule Book, the Code and the Decree will no longer apply.

When a publicly listed company is delisted by a private equity company, such private equity company may need to apply the code of conduct adopted by the Nederlandse Vereniging van Participatiemaatschappijen (NVP), the Dutch industry association of private equity firms, on 20 May 2008. The NVP has initiated this code of conduct and membership code to provide more insight into the operating methods of its members. The basic premise of both the NVP code of conduct as well as the membership code is that NVP members adhere to the applicable laws and directives. In addition, the NVP recommends that its members follow the European Venture Capital Association's guidelines on corporate governance, valuation and reporting. The code of conduct is based on five general principles supported by all members. The principles have been further specified into best practices.

3 Issues facing public company boards

What are the issues facing boards of directors of public companies considering entering into a going-private or private equity transaction? What is the role of a special committee in such a transaction where members of the board are participating or have an interest in the transaction?

Two-tier board structure

Although a one-tier board, with executive and non-executive directors sitting in one board, is allowed in the Netherlands, in general Dutch companies listed in the Netherlands have a two-tier board structure. In December 2009, a bill was submitted to parliament introducing statutory provisions on the one-tier board (the Board Bill; it is expected that the Bill will be adopted during the course of 2011). If the Bill is adopted in its current form, non-executive directors in particular will need to ensure that the tasks within the one-tier board are allocated precisely in view of potential liability.

Two-tier boards in the Netherlands typically include both a management board that, in short, is responsible for day-to-day management of the company while acting in the best interests of the company and its business, and a supervisory board whose main duties include the supervision of management board policy and the company's general strategy and state of affairs.

It should be noted that, unlike in the US and the UK, the Netherlands does not have a formal concept of a 'special committee' that will consider the terms and conditions of the contemplated transaction protocol. Depending on the structure of the transaction, either the management board or the supervisory board will be leading in assessing the proposed transaction. Having said that, in the Netherlands supervisory boards of listed companies do have special committees such as an accounting committee and a remuneration committee.

The aforementioned Board Bill also proposes to adopt more stringent rules on how boards will have to deal with conflicts of interest of members of the management board – this proposal is in line with the regime already included in the Code.

Management board

The management board will normally be leading in a going-private transaction. This may be different only in the case of MBOs due to the inherent conflicts of interests threat; in these cases the supervisory board will be leading. One of the key concerns for the management board to properly deal with is to prevent conflicts of interests or the threat thereof. Adequate and timely disclosure of information to all relevant parties therefore is of the essence. The Decree and the FSA contain detailed regulation to that effect.

Considering the impact of a going-private transaction for the target, the management board from the very beginning will need to involve the supervisory board. The management board will not only need to inform the supervisory board but will also need to obtain its consent to enter into talks with the private equity firm considering the bid.

Supervisory board

The supervisory board will need to assess the fairness of the share price offered by the bidder (ie, whether the valuation of the target has been undertaken on an arm's-length basis) and the further conditions of the public bid as well as any alternative scenarios. In undertaking such assessment, the supervisory board will need to take into consideration the interests of the shareholders and the interests of other stakeholders (eg, the company's creditors and employees). The above-mentioned issue of preventing any conflicts of interests also applies to the supervisory board and its individual members.

As pointed out above, in MBOs the supervisory board will have a leading role. Their independent assessment of the merits of the contemplated MBO for both the company and its stakeholders in such cases is of the essence.

4 Disclosure issues

Are there heightened disclosure issues in connection with going-private transactions or other private equity transactions?

There is no specific heightened disclosure regime applicable to going-private transactions or private equity transactions. However, in the case of a going-private transaction there are general disclosure requirements to be complied with by the relevant parties. The regime applicable to going-private transactions is enacted in the FSA and the Decree (in which the European Directive on takeover bids has been implemented).

General considerations

In relation to the disclosure requirements, it should be noted that the statutory basis of the Netherlands public offer rules is incorporated as a prohibition: a public offer for securities admitted to an official listing on a securities exchange is prohibited. The prohibition is not applicable if an offer document has been made available and if a reference to the offer document is made in every announcement relating to the public offer. The fact that the main rule regarding public offers has been drafted as a prohibition underlines the relevance of the disclosure requirements. The disclosure regime is supervised by the Authority for the Financial Markets (AFM).

Insider trading

In principle, all investors should have access to the same information at the same time. Pursuant to Netherlands law (implementing the Market Abuse Directive 2003/6/EC in 2005), a company listed on Euronext Amsterdam should always make immediately public any price-sensitive information in order to prevent rumours or incorrect information that might interfere with the exchange rate or encourage insider trading. As a general rule, Netherlands law provides that if a public offer is in preparation or disclosed then, as soon as the bidder and the target reach conditional or unconditional agreement, the bidder and the target shall make such an announcement. The bidder is free to acquire shares of the target after the initial public announcement, provided the bidder does not hold any price-sensitive information.

The bidder and the target are allowed to approach shareholders and discuss a contemplated public bid prior to the first public announcement regarding such a bid. Contact with shareholders is permitted provided the consultation is limited to the extent reasonably necessary to determine whether the offer will be successful and appropriate measures are taken to ensure confidentiality and compliance with the rules prohibiting the use of price-sensitive information. It is common to acquire irrevocable undertakings ('irrevocables') from shareholders to tender their shares under a public offer prior to the first public announcement. Irrevocables are not considered a violation of the prohibition to use price-sensitive information, provided the irrevocables state exactly how many shares the shareholder agrees to tender.

If shareholders are approached to tender their shares regarding an envisaged public offer, these shareholders become insiders and are no longer allowed to trade their shares or inform anyone about the envisaged public offer. The irrevocables and the information provided to such shareholders should be made public at the time the public offer is issued.

Disclosure of major holdings

Disclosure obligations may occur for a bidder if a certain percentage of control in a target is acquired or sold. These disclosure requirements apply to holdings of shares and voting rights in an 'issuing institution'. Issuing institutions are Netherlands' public limited companies whose shares or depositary receipts are admitted to trading on a regulated market in a European Economic Area (EEA) member state; and non-EEA companies whose shares or depositary receipts are admitted to trading on a regulated market in the Netherlands. Shareholders of listed companies are obliged to disclose their shareholdings when certain thresholds are met. These thresholds are 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 30 per cent, 40 per cent, 50 per cent, 60 per cent, 75 per cent and 95 per cent. The thresholds also apply to non-EEA companies whose shares or depositary receipts are admitted to trading on a regulated market in the Netherlands and of which the Netherlands is the host member state within the meaning of the Transparency Directive.

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, which supervises the Code. 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.

Shareholders who have voting agreements must register as a group if, together, they exceed the thresholds. The situations in which a person is deemed to hold voting rights include: that are held by a third party with whom it has entered into a contract that provides for a temporary and paid transfer of voting rights; or that it could exercise as proxy holder at its own discretion.

Ongoing disclosure obligations

As from the first public announcement, the bidder and the target have an ongoing obligation to provide the AFM with a statement of the transactions in the securities to which the envisaged public offer relates, unless the AFM has granted exemption to this rule.

5 Timing considerations

What are the timing considerations for a going-private or other private equity transaction?

A going-private transaction is subject to the FSA and the Decree if the AFM is the competent supervising authority. This is the case if the target is a Dutch company whose shares are listed on a regulated market in the Netherlands. If the target is not a Dutch company but its shares are listed on a regulated market in the Netherlands, the FSA and the Decree may still apply (this needs to be assessed on a case-by-case basis). If the AFM is not the competent regulator the EU passport regulation may apply pursuant to which a public offer document approved by the competent regulator in another EU jurisdiction.

On a separate note regarding timing, parties should consider any legal or regulatory restrictions due to EU or Dutch rules on merger control for concentrations that may have a significant impact on the timing of a contemplated transaction.

Timing issues relating to a public offer

A going-private transaction in the Netherlands is subject to the rules enacted in the FSA and the Decree. The Decree prescribes strict time limits to ensure a clear and transparent offering procedure. An initial public announcement is mandatory when agreement on the offer is reached, whether it is conditional or not.

Works' council advice as well as trade union consultation should be obtained and at such moment in time that the views of the works' council and the trade unions may have a meaningful effect on the terms and conditions of the contemplated transaction. In practice, the formal request for the works' council's advice is submitted to the works' council just after the initial public announcement, and for this reason the initial announcement normally will not contain any information regarding the consequences for the personnel of the target. Such consultations should not take more than four weeks.

The procedure laid down in the Decree states that no later than four weeks after the offer is announced, the bidder must make public whether it will issue an offer document. If the bidder intends to pursue the offer it must, no later than 12 weeks after the offer is announced, submit the offer document to the AFM for its approval. In principle, the AFM will decide within 10 working days whether or not to grant its approval. The bidder then has six working days in which to actually make the offer by publishing the offer document.

The initial acceptance period for shareholders may not be shorter than four weeks or longer than 10 weeks. This period may be extended once by a minimum of two weeks and a maximum of 10 weeks. In the event of a competing bid, the period may be extended until the end of the acceptance period for the other offer. After the offer has been declared unconditional, the post-acceptance period may be set at a maximum of two weeks.

At least six working days before the end of the acceptance period, the target must hold a general meeting of shareholders to discuss the offer. No later than four days before that meeting, the target must provide a reasoned opinion in relation to the offer. If a competing offer is issued, the target must make known its reasoned opinion in relation to that offer, but is not required to arrange another shareholders' meeting.

Squeeze-out and sell-out regarding minority shareholders

For listed public companies in the case of a public bid, the implementation of the 13th EC Directive (2004/25/EC) has resulted in the possibility for the squeeze-out of minority shareholders. If after a public offer the bidder has acquired shares representing at least 95 per cent of the target's issued share capital and at least 95 per cent of the voting rights, the bidder may demand from the minority shareholders the remaining shares within three months after the bid has been finalised and under the condition of approval by the Enterprise Chamber of the Amsterdam Court of Appeal. If, after having made a bid and acquired shares representing at least 95 per cent of the target's issued share capital and at least 95 per cent of the voting rights, the bidder does not buyout a remaining shareholder, then the latter may initiate sell-out proceedings in respect of its shares against the bidder.

Finally, actual delisting of the target from Euronext Amsterdam will normally take no more than two weeks.

6 Purchase agreements

What purchase agreement provisions are specific to private equity transactions?

In general, purchase agreements in private equity transactions in the Netherlands will include at least the following clauses, which may be considered typical for private equity transactions: a 'subject to financing' clause, which is crucial for the private equity investor because its obligation to acquire is conditional upon the lending banks having formally confirmed that the necessary funds will be available; a material adverse change clause; and a clause that the target's works' council (if there is one) must advise on the security to be granted by the target for the financing of the transaction. In addition, conditions prescribing management commitment to cooperate and invest are common as well as clauses prescribing the conclusion of transaction documents acceptable to the investors. The scope of representations and warranties as well as indemnities is likely to be mitigated in purchase agreements relating to SBOs.

7 Participation of target company's management

How can management of the target company participate in a going-private transaction? What are the principal executive compensation issues?

In both going-private transactions and private equity transactions, getting a long-term commitment from the management of the target is often a prerequisite for the investors. This may be arranged for by a combination of an employment contract, including both fixed and variable components (such as bonuses that depend on agreed specified milestones), as well as an offer to directly participate in the target. The latter is arranged for by the possibility for management to acquire a stake in the target through the purchase of ordinary or sometimes preferred shares, or through an employee stock option plan (ESOP). The ESOP may be arranged for through a special trust office (*administratiekantoor*). The employment contract (or service contract with management's newly incorporated personal management companies) may contain good-leaver and bad-leaver arrangements. Obviously the beneficial tax and social security treatment of the management remuneration package will need to be considered thoroughly.

8 Tax issues

What are the basic tax issues involved in private equity transactions? Give details regarding the tax status of a target, deductibility of interest based on the form of financing and tax issues related to executive compensation. Can share acquisitions be classified as asset acquisitions for tax purposes?

For Dutch corporate income tax (CIT) purposes Dutch resident companies are subject to CIT on their worldwide income at a rate up to 25 per cent. However, capital gains and dividends derived from qualifying participations are exempt from CIT 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 for 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. Because share transactions can take place without Dutch CIT under the participation exemption, private equity transactions typically are structured as share deals rather than asset deals.

An often-used leveraged acquisition structure in the Netherlands consists of the acquisition of a Dutch target by a Dutch leveraged holding company followed by the formation of a fiscal unity (ie, tax consolidation) between the target and the holding company. As a result of the fiscal unity, the holding company and the target are treated as one taxpayer, as a result of which the interest expenses on the acquisition loan at the level of the holding company is effectively offset against the operating income of the target.

In general, for Dutch CIT purposes interest expenses are tax-deductible. However, interest deduction on related-party loans may be limited under the thin capitalisation rules or under specific anti-base erosion rules. Under the thin capitalisation rules in principle a debt-to-equity ratio of 3:1 should be maintained. The specific anti-base erosion rules may not apply if the interest income is effectively subject to tax in the hands of the lender at a rate of at least 10 per cent.

Furthermore, interest expenses on certain profit participating loans (ie, hybrid debt instruments) are not deductible for Dutch tax purposes. Whereas the interest expenses on profit participating loans are not deductible, the interest income on such loans is exempt from Dutch CIT under the participation exemption regime. As a result, if the acquisition of a foreign participation is made by a foreign acquisition company that is financed with a profit participating loan by its Dutch parent company, a tax benefit (interest deduction but no pick-up) may be obtained (however, in certain countries the interest expenses on profit participating loans are not deductible, as in the Netherlands).

In general, remunerations provided to management, such as golden parachutes, stock option plans and deferred compensation plans are subject to Dutch personal income tax. In addition, a special tax regime applies to 'lucrative interests'. Based on this legislation, a lucrative interest is present if 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.

9 Existing indebtedness

What issues are raised by existing indebtedness at a potential target of a private equity transaction? How can these issues be resolved?

Often a private equity transaction will involve an entire refinancing of the target's debt due to the wish of investors to acquire a cash and debt-free target. Issues relating to pre-existing debt to be dealt with may include change of control clauses (which may lead to accelerated repayment obligations), negative pledges and other financial covenants and potential break-up fees. The refinancing will bring along the need to replace the existing collateral package by new security. If the new security includes mortgages and pledges in the Netherlands, these need to be granted by way of notarial deeds. In relation to this issue parties should thoroughly consider potential financial assistance issues (see question 18).

10 Debt financing structures

What types of debt are used to finance going-private or private equity transactions? Do margin loan restrictions affect the debt financing structure of these transactions? Are there any other restrictions in your jurisdiction on the use of debt financing for private equity transactions?

Typically, an LBO transaction will include secured senior debt and secured mezzanine debt. In larger transactions the mutual relations among the different debt instruments and debt providers may be taken care of in an 'inter creditor agreement' specifying the ranks of the different security involved as well as the subordination details. For tax reasons, part of the investment by investors may need to be structured through a loan instead of equity. These investor loans will normally be subordinate to all other debt.

When structuring the debt financing, parties involved should consider the still-applicable restrictions on financial assistance that can be mitigated by using a 'debt push-down' structure (see also question 18).

Senior debt

The senior debt mostly consists of several tranches, usually with a term between seven and nine years. The senior loan will normally also include a working capital facility. The working capital facility may be granted in different forms such as a letter of credit, a bank guarantee or current account facility. This working capital facility is often granted in addition to the normal ancillary working capital facility; the latter is mostly documented in separate documentation to ensure that it is a stand-alone facility with other terms and conditions than those applicable to the senior debt.

Mezzanine debt

The mezzanine debt is a subordinate loan with a term that lasts usually one year longer than the senior debt. The interest margin of the mezzanine loan is higher than the margin of the senior debt due to the fact that it is subordinate, that it has a lower rank in the security package and that the term is longer. Warrants may be offered to the banks in order to make it more attractive to participate in the mezzanine facility. These warrants give the right to acquire shares and thus will have a potential upside in case the investment by the investors becomes successful. It is also possible to grant the mezzanine providers the right to convert the loan into shares of the target.

Update and trends

Lately it seems that strategic buyers have an advantage in attracting acquisition financing compared to private equity buyers. The latter are confronted with still-hesitant banks. Moreover, there seems to be a trend for the legislator as well as courts in the Netherlands to restrict or even ban elements that are typical for private equity transactions. This can be derived from, for example, (draft) bills and politicians trying to address public opinion, which seems to have a negative connotation about the private equity industry. The key topic in this context is remuneration of individuals involved, which is perceived as too high (also in the case of other stakeholders involved). In relation to the latter, reference is made to a high-profile case involving publishing company PCM and private equity investor Apax in which the Enterprise Chamber in Amsterdam ruled that for a private equity investor considering investing in a Dutch company by making use of typical private equity transaction structures, it should not only take into account its own interests but also further interests relating to the target company.

11 Debt and equity financing provisions

What provisions relating to debt and equity financing are typically found in a going-private transaction? What other documents set out the expected financing?

There are no specific financing considerations for going-private transactions. Pursuant to a bill submitted to parliament in December 2009 (the Flexibilisation Bill), the current minimum equity capital requirements for private and public limited liability companies (which are €18,000 and €45,000 respectively) will be abolished; consequently no minimum equity capital requirement for limited liability companies will apply. Moreover, the Flexibilisation Bill proposes to entirely abolish the prohibition on financial assistance (see question 18).

12 Fraudulent conveyance and other bankruptcy issues

Do private equity transactions involving leverage raise ‘fraudulent conveyance’ or other bankruptcy issues? How are these issues typically handled in a going-private transaction?

In general, there are no specific fraudulent conveyance issues in relation to private equity or going-private transactions, other than those applicable to normal mergers and acquisitions. In practice, this means that any prejudiced creditor, or the receiver of the target in the event of bankruptcy of the target, may nullify any security granted by the target (or any of its group companies) if the granting of security was prejudicial to existing or future creditors of the target, and at the time of conclusion of the transaction the parties involved knew or should have known that creditors would be prejudiced. Such knowledge is presumed if it was indeed likely that such prejudice would occur. Therefore, parties should ensure that the transaction is entered into on an arm’s-length and reasonable basis.

13 Shareholders’ agreements

What are the key provisions in shareholders’ agreements covering minority investments or investments made by two or more private equity firms?

It should be noted that in the Netherlands, shareholders’ agreements typically include clauses that parties do not wish to be included in the articles of association. This is because the articles of association are public and binding on all shareholders and the company, while shareholders’ agreements may include confidential information and may only be binding for those shareholders that are party to the agreement. The contents of the shareholders’ agreement do not have to be consistent with the articles of association. In the Netherlands, private limited liability companies are obliged to have a share transfer restriction clause in the articles. In relation thereto, it is common practice to include a provision stating that in the event of conflict between the articles and the shareholders’ agreement, the terms of the shareholders’ agreement will prevail.

The shareholders’ agreement will contain provisions protecting the investors’ interests. Other clauses deal with board representation (including special majority requirements and veto rights), deadlock, dividend distribution, share transfer restrictions (pre-emptive rights, tag and drag-along), call and put options, good and bad-leaver clauses relating to management shareholders, ratchets, IRR provisions, exit scenarios, non-compete clauses and confidentiality.

As a result of the Flexibilisation Bill the mandatory restriction on transfer of shares in limited liability companies will become more flexible. A limited liability company and its shareholders shall be able to draw up an alternative arrangement within, for example, a shareholders’ agreement, at their discretion, which will set aside the statutory provisions unless the transfer of shares becomes impossible or extremely difficult.

14 Limitations on transaction size

Do private equity firms have limitations on the size of transactions they may engage in?

Under Netherlands, law no limitations on the size of transactions have been imposed.

15 Exit strategies and investment horizons

How do the exit strategies and investment horizons of private equity firms affect the structuring and negotiation of leveraged buyout transactions?

Obviously, the particular exit strategy and investment horizon depends on the outcome of negotiations in any specific transaction. Shareholders’ agreements may include provisions explicitly dealing with timing and form of an exit, namely through an IPO, SBO or trade sale, or with the sale of specific tranches. There may be specific clauses included in the transaction documents dealing with the interests of particular investors, for example, for participating management (leaver clauses, ESOP) or strategic minority investors.

16 Principal accounting considerations

What are some of the principal accounting considerations for private equity transactions?

It should be noted that although accounting considerations are beyond the scope of this report, in general, differences in applied accounting standards between the target and the investors are to be considered. Also, the different ways the International Financial Reporting Standards have or have not yet been implemented at the respective levels of the target, the acquisition vehicle and the investors should be examined.

With reference to the general statements above, as a more specific issue it should be considered that a Dutch legal entity may be required to prepare audited financial statements if two out of the following three circumstance are present in two consecutive years:

- the value of the assets exceeds €4.4 million;
- the net revenue exceeds €8.8 million; or
- the average number of employees amounts to 50 or more.

17 Target companies and industries

What types of companies or industries have typically been the targets of going-private transactions? Has there been any change in focus in recent years? Do industry-specific regulatory schemes limit the potential targets of private equity firms?

In the Netherlands, the range of targets of going-private transactions has been very broad over recent years, from very large to relatively small caps.

Although basically any industry is available for private equity investments, regulatory considerations may play an important role. In the Netherlands, regulated sectors include network-based sectors such as energy and telecoms; other traditionally regulated sectors are the banking, insurance and pension funds sectors. In addition, the health care, food, weapons and aircraft industries may be subject to regulatory oversight.

18 Cross-border transactions

What are the issues unique to structuring and financing a cross-border going-private or private equity transaction?

Financial assistance

The DCC contains a provision prohibiting financial assistance, both for domestic and cross-border transactions. Targets of a going-private or private equity transaction are prohibited from granting security rights, guaranteeing payment of the acquisition price or otherwise guaranteeing, or binding itself with or for third parties for the purpose of the acquisition by third parties of its shares. Transactions that violate the financial assistance prohibition may be void.

Providing a loan for the purpose of acquisition by third parties of the target is allowed only if and insofar as the articles of association of a private limited liability company allow the company to do this, and only up to the amount of the freely distributable reserves of the company.

The Flexibilisation Bill proposes to abolish the current regulation governing the provision by a private limited liability company of financial assistance to third parties for the purchase of shares in the company's own capital.

Debt push-down structure

Unlike in the UK, there is no 'whitewash procedure' available under Dutch law. A technique used to mitigate the financial assistance prohibitions is the 'debt push-down' structure. Under a debt push-down structure, a target's operational debt is upstreamed to the acquisition vehicle to pay off acquisition debt. The upstreaming is carried out by using an intercompany loan. Pursuant to case law, a private limited liability company is allowed to obtain a secured loan and use the proceeds to distribute a dividend or lend funds upstream to help finance an acquisition, provided that certain restrictions (which need to be elaborated on a case-by-case basis) are taken into account. Upstream lending is only permitted up to the amount of a private limited liability company's freely distributable reserves and provided that such loans are permitted in its articles of association.

Subsequent to the debt pushdown, parties may wish to cancel the intercompany loan. This is often arranged for through a merger of the target into the acquisition vehicle. It should be noted that such merger may take some time to complete. There must be a one-month waiting period taken into account after publication of the intention to merge, during which creditors may file any objections to the merger with the court.

Ultra vires

The validity of a legal act may be affected by the ultra vires provisions included in the DCC. These provisions give legal entities the right to nullify a transaction if such transaction as entered into by such entity cannot serve to realise the objects of such entity and the other parties to such transaction knew, or should have been aware, that such objects and purposes have been or would be exceeded. Therefore, it should be verified whether the articles of association of the target allow for the debt-pushdown structure. Secondly, it should be determined whether the target derives benefit from the contemplated transaction. Thirdly, it should be determined whether or not the existence of the target is actually jeopardised by the contemplated transaction.

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19 Club and group deals

What are the special considerations when more than one private equity firm (or one or more private equity firms and a strategic partner) is participating in a club or group deal?

As in other jurisdictions, in the Netherlands it is necessary that investors participating in a group should agree on clear and detailed commitments. In particular, in larger transactions in recent years group deals have shown to be an effective way of cost and risk mitigation for the group members. Issues to be dealt with typically include bidding strategy (including timing), communication with relevant regulators, possible break-up scenarios, alignment of interests of different group members, board representation (including procedural aspects, for example, quorum requirements for voting procedures), deadlocks, decisions for which supermajority votes are required, veto rights, minority right protection, IRR objectives, share transfer restrictions (tag and drag-along rights), post-deal integration, confidentiality issues, exit scenarios, cost and benefit-sharing arrangements and other practical matters such as service level agreements among the consortium members.

20 Issues related to certainty of closing

What are the key issues that arise between a seller and a private equity buyer related to certainty of closing? How are these issues typically resolved?

As pointed out above, a typical closing condition in private equity transactions is the condition precedent for the buyer to attract financing of the deal. Other conditions are further described in question 6. In the Netherlands, special consideration should be given to the role of the works' council, if any, and their advisory role, both on the transaction as a whole as well as regarding any security to be granted.