

# 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

## 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 buyins (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 has decreased dramatically in 2008 after a number of public bids in previous years. A relative new 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 each 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 dif-

ferent 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, 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, also referred to as the Code Tabaksblat). 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. The renewed Code enters into effect as of the financial year starting on or after 1 January 2009 and replaces the original version effective since 2004; 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 applies. 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 NVP (Nederlandse Vereniging van Participatiemaatschappijen), 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 management members of the board are participating 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 (an example until recently was the one-tier board of Fortis), in general Dutch companies listed in the Netherlands have a two-tier board structure, including 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.

**Management board**

The management board will normally be leading in a going-private transaction. Only in the case of MBOs this may be different, 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 in general 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 in consideration the interests of the shareholders but also the interest of other stakeholders (such as for example 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 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 an 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.

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 which 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 which 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 ten weeks. This period may be extended once by a minimum of two weeks and a maximum of ten weeks. In the event of a competing bid, the period may, however, be extended again 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 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, 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 issues 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 transaction 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? 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 25.5 per cent. However, capital gains and dividends derived from qualifying participations are exempt from CIT under the participation exemption regime. The participation exemption applies to share interests of at least 5 per cent that do not qualify as a 'low taxed portfolio participation'. A participation qualifies as a low taxed portfolio participation if more than 50 per cent of its direct and indirect assets consist of 'free passive portfolio assets', and it is not subject to a profits tax at a rate of at least 10 per cent calculated according to Dutch CIT rules. 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 anti-base erosion rules should not apply in case 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 (ie, 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, as per 1 January 2009 a new tax regime has entered into force with respect to 'lucrative interests'. Based on the new 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 a 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 are these issues 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 19).

**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?

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 the investors may need to be structured through a loan instead of equity. These investor loans will normally be subordinate to all other debt.

**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.

**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.

**12 Fraudulent conveyance issues**

Do private equity transactions involving leverage raise 'fraudulent conveyance' 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 case 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 will include typically 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 a 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.

### 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 IFRS has or has 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?

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.

### 18 Industry-specific regulatory schemes

Do industry-specific regulatory schemes limit the potential targets of private equity firms?

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.

### 19 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 the acquisition by third parties of the target its shares is allowed only if and insofar 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.

A bill has been submitted to parliament that is intended 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 upon 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.

**Update and trends**

In the area of taxation the introduction of taxation of so-called Lucrative Interests as outlined under question 8 above, is a recent development of which any investment manager who is resident of the Netherlands should be aware.

Moreover, due to the economic downturn the structuring of transactions tends to be more prudent to protect investors' interests. Minimising risk seems to be even more critical for transactions to be completed successfully.

Subsequent to the debt push-down 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 push-down structure. Secondly, it should be determined whether the target derives benefit from contemplated transac-

tion. Thirdly, it should be determined whether or not the existence of the target is actually jeopardised by the contemplated transaction.

**20 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?

Like 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, eg, 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.

**21 Recent credit market disruptions**

How have disruptions in the credit markets affected dealmaking?  
What specific changes to transaction terms have you seen and do you expect in the future?

The LBO market has slowed down significantly in 2008. The volume of large transactions, including public to private transactions, has decreased substantially. There are in particular two categories

## Kennedy Van der Laan

**Louis Bouchez**  
**Fenna Van Dijk**

**[louis.bouchez@kvdl.nl](mailto:louis.bouchez@kvdl.nl)**  
**[fenna.van.dijk@kvdl.nl](mailto:fenna.van.dijk@kvdl.nl)**

Haarlemmerweg 333  
1051 LH Amsterdam  
The Netherlands

Tel: +31 20 550 6666  
Fax: +31 20 550 6777  
[www.kennedyvanderlaan.com](http://www.kennedyvanderlaan.com)

## Hamelink & Van den Tooren NV

**Jan van den Tooren**  
**Reinier Noort**

**[jan@hamelinktooren.com](mailto:jan@hamelinktooren.com)**  
**[reinier@hamelinktooren.com](mailto:reinier@hamelinktooren.com)**

Parkstraat 20  
2514 JK The Hague  
The Netherlands

Tel: +31 70 310 5070  
Fax: +31 70 310 5077  
[www.hamelinktooren.com](http://www.hamelinktooren.com)

of transactions whereby private equity firms will continue to play a role in the Netherlands, namely transactions whereby family-owned companies are faced with succession issues, and transactions whereby due to the economic downturn listed companies are forced to spin off activities that, strategically or geographically, no longer belong to the core business.

Regarding the transaction terms there is a renewed heightened interest in those terms that are to protect the investors investment such as representations and warranties and indemnities as well as liquidation preference issues. Each of these trends can be explained by the less favourable economic situation whereby the threat of bankruptcy or suspension of payments for target companies has become more realistic again. Also, exit options are considered more carefully considering the decreased liquidity of the Netherlands capital markets leading to a less favourable IPO climate. In relation thereto IPOs on more liquid stock exchanges outside the Netherlands have become more realistic.