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High growth companies and how to fund them – a real driver of economic growth?

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GENERAL REPORT

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The M&A Commission's working session in Prague is entitled "*High growth companies and how to fund them – a real driver of economic growth?*" In the working session we plan to address funding alternatives for high growth companies (i.e. companies with significant annual growth over time); opportunities and challenges that both entrepreneurs and investors may encounter in your jurisdiction. The working session will also look at corporate governance issues in connection with investments in high growth companies.

This General Report mainly concentrates on these two topics in relation to high growth companies, but also covers commercial and regulatory opportunities and constraints.

All the best and looking forward to be seeing you in Prague!

Kadri & Jesper

1. CORPORATE FINANCE – FUNDING ALTERNATIVES

1.1 Which financial instruments are typically used when investing in high growth companies; ordinary shares, preference shares, convertibles, warrants, stock options, debt instruments such as bonds, hybrid instruments such as participating debentures etc.?

A majority of the national reports suggest that pure equity based instruments, such as ordinary shares and preference shares are used to a high degree when investing in high growth companies. Debt instruments such as bonds are common, but perhaps not as prevalent as equity based instruments. Many national reports suggest that convertibles and other hybrid instruments that allow debt to be transformed into equity are in common use.

In Belgium, growth financing is provided by a wide range of investors, ranging from banks to private equity funds, specialized mezzanine funds, CVs, and, business angels, using an even wider range of instruments. As elsewhere, bank lending has become harder to get, compared to the period before the crisis of 2008. Ordinary shares, preference shares, convertibles, warrants, stock options, debt instruments and hybrid instruments are all used.

In Brazil, the most common instruments are equity based, often in the form of preference shares. Debt instruments, often with a possibility of converting the debt, are used as a subsidiary form of investment in high-risk projects.

In Canada, the instruments most commonly used are: common shares, preferred shares, debentures, convertible debt, flow-through shares, equity lines of credit, limited partnership units, including flow-through limited partnership units.

In Denmark, the most common instrument is the preference share, or variations thereof. If the investment is made by venture capital funds the ordinary share is the typical instrument.

In England and Wales, the most common instruments are ordinary shares, convertible loan notes and preference shares. Hybrid instruments are used although the use is generally limited to larger investments.

In Estonia, the most common instrument is an ordinary share, convertible loans are used as well. Employee stock options are rather widespread.

In Finland, equity based instruments, or hybrid instruments, are the most common, either as different classes of shares or as convertible loans. To complement the typical equity based instruments ordinary debt instruments and mezzanine financing such as subordinated loans are used. Stock options are used, although mainly as a mean to incentivise employees and management.

In France, instruments used when investing in high growth companies include ordinary shares, preference shares, convertible bonds, bonds, bonds with warrants attached and stock options.

In Germany, equity based instruments are most common and most important. Debt financing is usually not an alternative, although mezzanine financing, especially in the form of subordinate loans with an equity kicker, is increasingly common. Hybrid instruments such as convertible loans and silent participations are increasingly common.

In India, ordinary shares are the most commonly used instrument, although convertible loans with contractually derived voting rights is used as an alternative.

In Ireland, ordinary shares and/or preference shares or loan notes, or a combination of the two are the typical means of investing in high growth companies.

In Luxembourg, equity, debt or hybrid instruments such as convertible preferred equity certificates (CPECs) or preferred equity certificates (PECs) are most commonly used. Tracking instruments are also used, linking a category of instruments to the performance of a specific asset. Simple bonds, convertible bonds, warrants and employee share plans are used but are not as common.

In the Netherlands, no typical instrument can be said to be in use. A variety of instruments such as ordinary shares, shares without voting rights, shareholder' loans, convertible loans, bank loans and various debt instruments are all used.

In Peru, ordinary shares and bonds are the typical financial instruments used when investing in high growth companies. There is little experience with preference shares, convertible bonds, warrants and hybrid instruments, while the using of stock options is limited because of labour regulations.

In Poland, the most commonly used instruments when investing in high growth companies are securities such as shares, subscription rights, pre-emptive rights, bonds or short-term corporate debt securities.

In Spain, the common instrument when investing in high growth companies are shares, warrants, loans, often in combination with the acquisition of shares, and stock options. Silent partnerships and temporary joint ventures are other arrangements used when investing in high growth companies.

In Sweden, ordinary shares are most common for seed- and angel financing, while preference shares are more common for professional investors and in later stage financing. Convertibles are typically used for bridge financing.

In Switzerland, ordinary shares and convertibles are the most common instruments in the seed financing phase. Ordinary and/or preference shares are used in early stage investment. In later stage investments preference shares is clearly the most important instrument.

In Turkey, the most commonly used instruments are ordinary shares and preference shares. Debt instruments are sometimes used, as well as convertibles or stock options.

In Uruguay, the typical instrument for investing in high growth companies are equity based instruments, typically ordinary and preference shares. Debt instruments are used, but not to the extent of equity based instrument. The use of convertible debt, warrants, stock options or hybrid instruments is not common in Uruguay.

1.2 Please elaborate on the pros and cons of the instruments used (ref. 1.1 above)

(Describe 2-3 most widely used instruments more in-depth (any combinations as well, if applicable). Also other features, i.e. typically electronically registered instruments or not? etc.) In every jurisdiction, shares, either ordinary or preference, are important instruments used in financing high growth companies. The advantages and disadvantages of using shares as a financing tool are generally quite similar across jurisdictions. The advantages of using equity based instruments such as shares to investor are that the shares confer a right to take part in the result of the company, as well as a right to insight and control (which conversely is a drawback from the point of view of the entrepreneur). Equity based instruments are often rather cheap source of funding in the short term, especially considering that dividends only have to be paid if there are sufficient funds available. The disadvantage with share transactions is a higher risk involved to the investor, a disadvantage that is compounded by the difficulty in many cases to assess the future profitability of a company that is still in early stages of start-up. Transactions with equity instruments often require a more extensive process in comparison with debt instruments. Both in terms of time and cost of documentation, administrative procedures, and due diligence, but also in terms of the time and cost associated with negotiating an investment agreement. Oftentimes the investors value the company much lower than the founder/original owners. Another drawback of using shares is the requirement that companies to disclose the larger shareholders, as is the case in e.g. Denmark. The Danish national reporter remarks that the issue may be mitigated by the acquisition of preference shares instead.

Preference shares allow the entrepreneur to adapt the equity that is transferred to the investor to the specific need of the individual company. Possible variations might differ from different jurisdictions and might include limitations on the right to control the company, including shares without voting rights, e.g. Spain and Canada, shares with limited voting rights, or even shares with more voting rights, e.g. Germany, as well as differentiated rights to dividends in comparison to ordinary shareholders. Compared to debt instruments, funding through preference shares can be used in several jurisdictions to give the impression that the company is less leveraged, compared to if the funding is acquired through the incurrence of debts. Preference shares might carry with them a privileged position compared to ordinary shares in the case the company dissolves; such is the case in e.g. Canada.

Equity instruments in general give the holder of the instruments greater incentive to work for the growth of the company as an equity holder will be an owner rather than a creditor. The upside of holding a shareholder is in theory unlimited, while a creditor's return on his investment is usually fixed by the terms of the loan agreement.

Debt based instruments are often easier and cheaper to arrange (in terms of documentation and negotiations), allow for greater flexibility in the terms of the repayment of the loan and allow the investor to minimize the risk and the entrepreneur to retain control of the company. However, as, among others, the German reporter points out, pure debt financing are not always a possibility for high growth companies due to their lack of collateral in a start-up phase. A major advantage of debt instruments is that interest payments are paid before taxes and from the interest is payable out of cash flow, not distributable profits. This is an advantage especially if the company is incorporated in a jurisdiction with strict capital maintenance rules, such as Germany (in the case of a stock corporation) or Ireland. As interest rates paid by the company often are tax deductible, debt instruments are could be considered to be a cheaper way to obtain financing. The commercial utility of debt based instruments as a mean of investment could be limited by national requirements of compliance with external commercial borrowings regulations prevailing in e.g. India.

A subset of debt instruments with some of characteristics of equity instrument, such as a more distinct share in the risk and reward of the company, known as mezzanine financing, is reported as growing in importance, in particular in the reports from Belgium, Germany and Finland. Mezzanine loans are often subordinated to ordinary loans and are thus a greater risk to the investor. As a result the investor will typically be rewarded with a higher interest rate. The remuneration of the investor may, as the German report suggests, be structured as a profit participation scheme that gives the investor both a fixed interest rate as well as a floating interest rate, determined by the success of the Company. In England and Wales, mezzanine financing is reported to be a complement to rather than a replacement of more traditional debt instruments, typically used to allow already successful companies to receive an influx of capital without giving up equity.

Another category of instruments that allows for combinations of the pros and cons of debt based instruments as well as and equity based instruments is hybrid instruments. The most common hybrid instruments in use are convertible loans. Since the holder has the right to convert the loans to shares the holder could potentially get to partake in the company's profit should there be any, however convertibles is a limited risk to investors compared to equity since it typically allows for a fixed rate of interest returned upon the investment should the investor choose not to convert the debt. As the conversion of the debt into equity is almost always at the option of the lender, convertibles are often considered to be a form of equity by the issuing company. Upon the exercise of the conversion option the holder dilutes the stock of the company. Among others, Belgium, Estonia, France, Germany, India, Ireland and Switzerland report the use of convertibles as a financing instrument used by high growth companies.

In India, convertibles are often coupled with contractually derived voting rights for the holder, giving the holder some say in the internal affairs of the issuer.

In Luxembourg, CPEC/PECs, are instruments that are considered debt for the issuing company but equity for the subscriber, and, in the case of CPECs they are convertible to shares. Holders of CPECs/PECs are subordinated to all other creditors. They do not, however, entail any voting rights, not even in those matters a bond holder would normally be provided with decision making powers by Luxembourg law.

Stock options are put forth as an alternative in Spain, Finland, Estonia and France, although mainly as a mean of incentivizing personnel rather than as a mean of attracting external funding.

Other instruments of note include stock, warrants, shares with warrants attached, certificates of participation in a financial trust, debentures and silent participation.

1.3 Are there any regulatory constraints to the instruments used (ref. 1.1 above)?

In the EU member states, including Belgium, Denmark, England and Wales, Estonia, Finland, France, Germany, Ireland, Luxembourg, the Netherlands, Poland, Spain and Sweden, the EU Prospectus Directive restricts the offering of securities to the public. When financing high growth companies, the shares and other securities are thus usually offered only to a limited number of professional investors, known as qualified investors, such as venture capital funds and business angels. The offering of securities to the general public would be subject to the requirements of preparing a prospectus, the cost of which would often be too high for the purposes of gathering financing for a high growth company. Consequently, the offerings are subject to the requirement of publishing a prospectus, unless an exemption set out in the Prospectus Directive applies to the offering. However, even in cases when there is no duty to publish a prospectus, sufficient information must always be provided on factors that may have a material effect the value of the investment. As the costs relating to preparing a prospectus are substantial, this would come mainly into question only at a later stage usually in connection with an IPO. Similar rules on the duty to provide a prospectus when offering securities to the public, unless there is an exemption, are applicable in many Canadian jurisdictions.

Reporters of several jurisdictions, among them Brazil, Denmark, Spain, Switzerland, Sweden and Turkey, reports that there are no constraints with regards to the instruments themselves.

In Belgium, there is a whole range of legal rules relating to these instruments. For instance, a recent law on financing of SMEs provides additional obligations for certain professional lenders when they provide debt financing to SMEs. Additionally, the general rules of lender's liability, general corporate laws, corporate limitations on issuance of (preference) shares without voting rights, etc. must always be taken into account.

In Brazil, there are no constraints on the instruments themselves, but there are certain legal issues that must be observed, such as, without limitation, the registrations of foreign investments and foreign loans transactions with the Brazilian Central Bank system; the limitations of applicability of interest rates in Brazil, restrictions imposed by Brazilian Law for foreign investment in certain sectors, and thin capitalization rules. Additionally, there are rules requiring the registration of foreign investors and cross-border loan transactions, as well as rules requiring investors to have an attorney-in-fact in Brazil.

In Canada, in addition to the prospectus rules mentioned above, the purchases or sales of securities allowing their holders to exercise control over larger issuers (i.e., common shares or any shares that carry the right to change the management of an issuer) may be subject to review under Canadian foreign investment laws if the transaction is made to a non-Canadian buyer

In Denmark, many instruments used in investment in high growth companies are governed by the Danish Company Act and the Danish Securities Trading Act. As such, no constraints are imposed on the instruments.

In France, the main regulatory constraints to the instruments used are thresholds on the percentage of capital that may be controlled by the issuer of stock-options or free shares as well as requirements that the beneficiaries must be employees or directors of the issuing company, and requirements on the tax status, time after incorporation, owner composition and listing status of the issuer, and status as employee or director of the beneficiary when it comes to warrants for subscription to business creator shares.

In Germany, there are certain legal constraints on the different types of financial instruments. These limitations depend on the individual circumstances, in particular the legal form of the target entity and the investing entity, the overall financial situation of the participating entities and the number and type of shareholders of the target entity.

Limited Liability Company (*GmbH*) are subject to capital maintenance rules. According to these rules, a company may not repay its registered share capital to its shareholders. Any allocation to the shareholders that would cause the equity to fall short of the registered share capital or that is made when the equity is already below the registered share capital is prohibited. This restriction does not only apply to a straightforward payment of cash to a shareholder but also other transactions that have the same effect.

Moreover, if any financial instruments are deemed to be shareholder loans, they will be treated as equity capital. Claims for repayment would therefore have the lowest rank possible in the event of an insolvency of the company.

The capital maintenance rules for stock corporations (*AG*) are even stricter and prohibits contributions being repaid to shareholders. Interest may neither be promised nor paid to shareholders. Prior to the dissolution of the company, only the balance sheet profit may be distributed among the shareholders.

In India, the Reserve Bank of India has recently clarified that investment in instruments with exit options are permitted subject to certain conditions such as lock-in requirement of one year and valuation requirements. The Reserve Bank of India has also specified that investors exiting by exercise of such exit options cannot exit at a pre-determined/ assured price and a valuation as per the methods prescribed will be required to be undertaken at the time of exit. This is of a major concern to private equity investors as now investment agreements cannot specify an assured/ guaranteed rate of return. Another regulatory constraint faced by investors in India is the valuation requirements required to be complied with. As per the foreign exchange regulations of India, at the time of making an investment, the price of the shares subscribed to or acquired (other than under through the charter documents of the company) is required to be equal to or higher than the price of shares calculated as per the discounted cash flow method. Further, at the time of exiting the investment (other than exit by way of put options), the price of shares is required to be lower than the price of shares calculated as per the discounted cash flow method.

In Ireland, there are capital maintenance rules, requiring a private limited company to maintain its share capital and prohibiting a number of actions to reduce a company's share capital. This will be particularly relevant when a company proposes to redeem shares held by a shareholder; purchase its own shares; carry out a reduction of share capital; or make a distribution/pay a dividend to its shareholders. Other regulatory constraints may apply depending on the investee company's industry.

In Luxembourg, particular attention must be paid to the issuance of instruments to the public and the listing of shares. In particular, debt instruments cannot be issued to the public.

In the Netherlands, the Dutch Act on Financial Supervision it is not permitted for persons or legal entities, not being a licensed bank, in the pursuit of a business outside a restricted circle (i.e. from the public), to invite, acquire or have the disposal of repayable funds (e.g. loans) from parties other than professional market parties. This prohibition however does not apply to, amongst others, those inviting repayable funds by providing transferrable securities in accordance with the Dutch prospectus rules (see above) and in case the funds that are attracted from one party amount at least to EUR 100,000 (nominal value).

In Peru, the public issuance of shares and bonds shall be made subject to the regulations and surveillance of the Superintendency of Securities Markets, a governmental agency which is in charge of the supervision and regulation of the Peruvian securities market. In the public tender offer a prospectus shall also be filed with Superintendency of Securities Markets. In the case of companies with shares listed in a stock exchange, the purchaser of said shares would be subject to the takeovers regulations if the purchase implies the direct or indirect transfer of ownership of voting stock that represent a percentage equal to or higher than 25% of the capital stock.

In Poland, an offer addressed to at least 150 people or unaddressed recipient can be made only on a regulated market or in the alternative trading system and only if financial instruments like securities are admitted to trading on a regulated market or in the alternative trading system.

In Spain, as a general principle, there are no constraints to the instruments used. There are however certain requirements for acquiring control of companies on the stock market.

In Uruguay, the current legislation in Uruguay relating to the rights and limitations that can be granted to preference shares is quite restrictive as Law 16,060 (hereinafter the “Corporations Act”) enumerates them exhaustively. It is thus not possible to grant any right or limitation to preferred shares that differs from the Corporations Act. This limits the utility of preference shares sharply. Traditionally shareholders agreements have been used to mitigate the effect of the restrictions imposed by the Corporations Act.

With regards to negotiable debt securities issued by corporations, the issuance of negotiable debt securities must be provided in the bylaws of the company or must be resolved at the extraordinary meeting by shareholders representing the majority of paid-in capital.

In case of public offerings of equity or debt, the issuers and the security have to be registered and the requirements for registration are burdensome, onerous and time-consuming. This creates an obstacle for certain companies to resort to public offerings as a financing alternative.

1.4 Is crowdfunding a funding alternative in your jurisdiction? How wide is the practice? If at all, please describe pros and cons.

In Belgium, crowdfunding is not widely used, although it is attracting some attention as a marketing and financing tool, primarily by very small enterprises. Cons of crowdfunding include negative reactions from subsequent investors if debt has been provided, as well as restrictive and cumbersome regulations such as the prospectus law and the bank law.

In Brazil, crowdfunding is an alternative but is not yet adequately regulated. Crowdfunding might be included in an exemption from the general duty to register the distribution of shares with the Brazilian Securities Exchange Commission, but as the legal status of crowdfunding remains uncertain it is not in general use by start-up companies.

In Canada, securities regulators in Ontario are considering reforms that potentially could provide for equity crowdfunding in Ontario. Currently investment through crowdfunding is limited through restrictions that prescribe investment opportunities to be offered to “accredited investors” only.

In Denmark, legislation on companies’ and securities’ trading places imposes strict requirements, i.a. on the share capital of equity crowdfunding platforms, and the current legislation’s ambiguity on the subject of crowdfunding makes it very difficult to establish a crowdfunding platform. It is likely that crowdfunding will be increasingly important in Denmark, but most likely such a development requires the crowdfunding model to be adapted to Danish circumstances.

In England and Wales, crowdfunding is one alternative to provide either debt or equity finance to a small, but growing number of businesses. It is starting to gain ground in the UK with many start-ups and small firms using crowdfunding as a realistic alternative to bank lending and VC funding. There are concerns related to the fact that the regulation is still a grey area. Crowdfunding platforms are rarely FCA regulated, resulting in a larger risk for the investors in the case the investment is a scam or if the provider of services is closed down. The risk for investors investing through crowdfunding is often high. Time will tell if crowdfunding is to become a serious alternative to a bank loan in particular.

In Estonia, crowdfunding is quickly gaining momentum, moving from local non-business projects (hooandja.ee) to platforms that are targeting companies who would like to obtain financing for business ventures (Investly).

In Finland, crowdfunding has been used as a financing method and a number of crowdfunding platforms have emerged in Finland during the recent years and include both equity and non-equity crowdfunding. The legal framework of crowdfunding is fairly established in Finland. Non-equity crowdfunding generally requires a permit, or an element of consideration. As regards equity based crowdfunding, this needs to comply with the SMA as is the case with any other offering of securities to the public as set out above.

In France, crowdfunding is gaining popularity as well as active support of the French government. The banking and financial regulations are still an obstacle to the expansion of crowdfunding in France, although reforms addressing some of the issues are underway. Advantages of crowdfunding in France are the small effort required by the entrepreneur in the fund raising process, as well as the fact that almost anyone with a little capital to spare may participate.

In Germany, crowdfunding can be an alternative to secure financing of a start-up company, most commonly for innovative but small projects. Equity-based crowdinvesting might be more useful as a financing tool.

In India, crowdfunding is at a nascent stage although online crowdfunding platforms have been launched recently. However, very few initiatives of crowdfunding have been noted in mainstream entrepreneurship as financing through conventional loans is considered easier and more efficient. The securities market regulator is proposing regulations that are better suited to crowdfunding, resulting in greater clarity and better directions for investment through crowdfunding.

In Ireland, crowdfunding is a funding alternative, although the development of the crowdfunding market is still at an early stage. The benefit of crowdfunding is that it gives small start-ups access to cash which they may not otherwise have access. From the perspective of the entrepreneur, they will have limited risk while companies themselves can avoid having to obtain high interest loans at early stages of their development. One downside of crowdfunding is that the amount of cash available can be limited. There is currently no legislation or regulations in Ireland dealing with crowdfunding but operators of crowdfunding platforms need to be careful that any such offerings do not fall within regulated services such as “investment services” (within the definition of the Markets in Financial Instruments Directive 2004/39/EC) or “banking business” (under the Central Bank Act 1971).

In Luxembourg, crowdfunding is still in its infancy, with the first platforms expected to be launched in 2014. As of yet, there is no specific regulatory framework tailored to crowdfunding.

In the Netherlands, crowdfunding can be a good alternative for investing and raising money, in particular in cases where traditional finance parties, are not willing to provide for funding. Several crowdfunding platforms were launched in the Netherlands over the past few years. The Dutch crowdfunding market is growing at an impressive pace; it is however still relatively small compared to the crowdfunding market in other countries, especially the US. Crowdfunding in the Netherlands will trigger various legal requirements and challenges that need to be dealt with (e.g. regulatory, privacy, civil law and tax law). The various legal aspects adhering to crowdfunding can lead to (substantial) costs for the parties involved. These costs may form a barrier for new parties intending to enter into the Dutch crowdfunding market.

In Peru, crowdfunding is not a funding alternative.

In Poland, crowdfunding is still a novelty. Currently, there are eight crowdfunding portals[1] active in Poland. Nevertheless, crowdfunding is perceived as an interesting promotion tool for new projects rather than an effective financing method for entrepreneurs[2]. There also is a legal uncertainty, since no regulation on crowdfunding exists.

In order to use crowdfunding in a way that amounts to a public fundraising in Poland, formal requirements, such as a permit to organize such public fundraising, have to be met, essentially requiring a special purpose entity to be set up with the purpose of serving certain public interests. Equity based crowdfunding may qualify as activities involving investing funds. Such activity is reserved exclusively for investment funds and requires a permit of the Financial Supervisory Authority.

In Spain, crowdfunding has emerged as an alternative source of funding in recent years, as a consequence of lack of financing from the traditional financing sector. Despite the significant growth of crowdfunding in Spain, there is no specific legislation on this system. There is a clear need to regulate this type of investment. As a consequence of this lack of regulation, there are certain risks that associated with crowdfunding, including risk of default of the platform, risk of default of the receiving party, risk related to the lack of experience in the investors as well as the lack of the protection offered by a professional investment, as well as the risk of fraud.

In Sweden, crowdfunding is a funding alternative. The interest for crowdfunding has increased in recent years and equity based crowdfunding has recently emerged as an alternative. Advantages of crowdfunding include the possibility of turning to the public if funding through conventional investors fails, and the possibility to use crowdfunding to market the product/company/service to potential customers. Disadvantages includes the lack of means to conduct proper due diligence, to evaluate, or even to negotiate the price of the shares, of the investors.

In Switzerland, crowdfunding has gained some momentum recently in Switzerland. There have been a growing number of platforms most of which are purely “reward-based”. Platforms which issue stock or debt to the crowd are not yet visible in the market. It should generally be noted that the crowdfunding market in Switzerland is overall considered rather small thus making business cases for crowdfunding platforms less viable.

In Turkey, crowdfunding is not currently a funding alternative.

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[1] Data published by Crowdfunding.pl Sp. z o. o. on http://crowdfunding.pl/crowdfunding-w-polsce/#.UsakLVMmAyp

[2] Marta Czekaj, *„Crowdfunding – zrzuć się na biznes”* in TREND Miesięcznik o Sztuce Inwestowania, April 12, 2013, http://www.gazetatrend.pl/artykuly/502-crowdfunding-zrzuc-sie-na-biznes#_ftn1

In Uruguay, crowdfunding is theoretically a funding alternative; however, it is not used in practice. Crowdfunding would be considered a public offering in Uruguay and as such the issuer and the securities would have to be registered with the Security Markets Registry of the Superintendency of Financial Services of the Uruguayan Central Bank. Given that the requirements for registration of the issuer and securities are burdensome, onerous and time-consuming, crowdfunding is not used in practice.

2. INVESTORS VIEWPOINT – OPPORTUNITIES AND CONSTRAINTS, LEGAL AND COMMERCIAL

2.1 Who are typical investors into a high growth company in your jurisdiction? Sources of funding (i.e. founders-family-friends, angel investments, venture capital investments, private equity)

In Belgium, venture capital funds have invested in 2013 almost EUR 77 million in Belgian high growth companies. It should be noted that traditionally, as a result of Belgium's open economy, international private equity houses have been active on the Belgian market. There is also an ongoing trend whereby wealthy individuals and/or wealthy families set up new investments funds or family offices. The traditional players on the venture capital market are also seeing more and more competition from university incubators and funds as well as business angels (although their investments are smaller).

In Brazil, the typical investors in high growth companies are angel investors, seed capital, venture capital (including all types of specialized venture capital funds) and private equity funds.

In Canada, typical investors in high-growth companies include: founders, friends and family, angel investors, venture capital funds, private equity funds (including private equity search funds) and pension funds (typically venture capital and private equity divisions of large public sector pension funds).

In Denmark, the most common and typical investors into high growth companies are angel- and venture capital investors. In addition, these types of investors often group together and for private equity funds.

In Estonia, mostly venture capitalists provide funding to high growth companies, lately business angels or groups of business angels.

In England and Wales, private equity rarely invests at the early stage so the typical investors into high growth companies in the UK are founders-family-friends, angel investments, venture capital investments plus investors using crowdfunding. Venture capital funds source equity from a wide range of investors, both public and private. Private investors can include: high net-worth individuals, family offices, pension and insurance funds, funds of funds, sovereign wealth funds, or corporate investors.

Public investors can include: local and central government pension schemes, charities (these are becoming increasingly important sources of funds, particularly for venture capital funds that have a wider social purpose), or a range of quasi-governmental institutions and public sector-backed venture capital investors, including regional venture capital funds and enterprise capital funds.

In Finland, the financing sources of start-ups and growth companies often consist of a mix of private and public funding. The typical private investors include the founders of the company as well as their family and friends, banks, business angels (especially in the seed and early growth phases) as well as domestic and international venture capital funds. The public funding includes various state grants and loans.

Investors in the growth phase of the company are normally venture capital funds and through the public innovation system, the main public sources of finance being normally the Finnish funding agency for innovation ("Tekes") and Finnvera, a specialised financing company owned by the State of Finland. In addition, banks have traditionally provided a substantial amount of financing into companies. Furthermore, in the growth phase the company receives also revenue from sales to finance its operations.

In France, the kind of investors involved in high growth companies depends on the characteristics of the company itself. Entrepreneurs often start their ventures with "informal" financing, i.e. their own funds or those of friends and family. Depending on the size and scope of the venture, entrepreneurs may need other external sources of seed capital such as angel investment or venture capital.

In Germany, the main players investing in high growth companies are business angel investors, venture capital companies and, to a smaller extent, private equity firms.

In India, investments by strategic investors, private equity funds, and venture capital investors are the most common investors in high growth companies. Family and friends of the founders also provide initial capital for the company.

In Ireland, the types of investors in a high growth company will typically depend on the stage that the company is at in its life cycle. At earlier stages of development, investment will typically be confined to founders-family-friends. External investors at early stages are mainly business angels who often take a more active role in the company. Venture capital funds typically enter at start-up stage and follow on into expansion and development stages investing in larger amounts. There are a number of development capital funds that have recently been established in Ireland for the purpose of investing development and growth capital in established, mid-sized and profitable company to support and accelerate growth.

In Luxembourg, investments in high growth companies depend on the stage of development of the companies. Business angels have taken an important place in the financing of research, development of concepts and ideas before the start-up phase of development. Usually entrepreneurs do not approach private equity and venture capital investors without a consistent business plan

In the Netherlands, approximately 90% of the Dutch high growth companies use equity of its founders to finance its early stage business. However, often such equity will not be sufficient. Consequently, the company will be required to raise external funds at a certain stage of its development. A 'traditional' bank loan is (still) the most common way of financing high growth companies. In this regard, it should be noted however that, due to the difficult economic environment, banks have become more cautious in providing credit. Apart from attracting bank financing, venture capitalists and angel investors are a good alternative. In addition to such investors, also other (less) typical investors, such as friends and family, make investments into high growth companies. Private equity is not a very common source of funding of Dutch high growth companies.

In Peru, the typical investors are the private pension funds. Employees have the obligation of contributing to pension funds, which may be public or private. Pension funds have to invest these funds and have limits on how much may be invested abroad.

In Poland, the most common source for financing high- growth companies are equities, whereas the role of external capital is still growing. Next to the bank loans, the use of capital market instruments and funds such as private equity or venture capital and financing through business angels and mezzanine are all becoming increasingly common. In general terms there are two types of funds operating in the Polish market: local funds, originating from and/or concentrating their activity in Poland (and/or other CEE countries), and big international funds with Poland being just one of its many markets.

In Spain, family and friends are the most important investors in the seed phase. In the start-up phase business angels and venture capital start to get involved. Venture capital investments and private equity investments are common categories of investors in the growth phase.

In Sweden, it is rather uncommon to see private equity investors invest in high growth companies. Further, there is a lack of early stage professional investors between approximately MSEK 20-50 investments. Up to MSEK 5 would be investments from angel investors, family and friends. Above MSEK 100 you see the larger investors.

In Switzerland, all the commonly known types of investors are active (founders-family-friends, business angels, venture capitalists, private equity investors). However, depending on the development stage of a venture and, based thereon, the financing phase and needs of such venture, the mainly active types of investors may vary considerably.

In Turkey, there are no legal limitations regarding the sources of funding. As a result, investors include founders-family-friends, angel investments, venture capital investments, private equity. Funding via founders-family-friends is the most common source of these investments. Angel investments are regulated in Turkish Law under the Regulation regarding Individual Participation Capital. However, due to attractive tax incentives, investors have begun to prefer this method.

In Uruguay, the typical investors into high growth companies have traditionally been founders, family and friends in the case of local companies and the headquarters in the case of international companies. However, in the last years, there has been an increase of investments of private equity firms. Also, venture capital investors and angel investors have had some presence in private equity transactions, although their participation is less frequent. Almost all private equity investors which have invested in Uruguayan companies in the last years are foreign funds, mostly from the United States, Europe and Latin America.

2.2 Is there a typical size of the investment into a high growth company in your jurisdiction?

In Denmark, Estonia, Germany, Luxembourg, the Netherlands, Peru, Spain, Poland, Turkey and Uruguay there is no typical size reported of an investment into high growth companies.

In Belgium, investments in high growth companies tend to be relatively limited as regards the amounts invested, with deal values not exceeding EUR 20 million.

In Brazil, the typical investors in high growth companies invest between USD25,000.00 and USD250,000.00 in the case of angel investors, between USD250,000.00 and USD1,000,000.00 in the case of “Seed Capital”, between USD5,000,000.00 and USD20,000,000.00 in the case of venture capital (all types of specialized venture capital funds), and even larger amounts in the case of private equity funds.

In Canada, the average venture capital investment in 2012 and 2011 was approximately C$3.7 million. There is an observed trend that venture capital investments are getting increasingly larger.

In Denmark, the two most common investor types to a high growth company tend to be venture capitalists, typically investing in companies with an investment need of not less than DKK 20-25,000,00 or business angels, typically investing in companies with an investment need between DKK 100,000 and 2,500,000 Most investments are less than DKK 1,000,000.

In England and Wales, venture investment can range from tens of thousands of pounds from a business angel in a seed round to tens of millions of pounds from institutional investors in a later round Broadly, early stage/seed investment are common around the £1,000,000 mark and early stage "with revenues" seed investment are likely to be around the £3,000,000 mark. An institutional investment will typically be between GB£500,000 and GB£5,000,000.

In Finland, the investments made by business angels to early stage companies usually vary between tens of thousands euro up to hundreds of thousands, whereas the average investment is normally EUR 30,000–50,000. In the growth phase the investments normally vary between hundreds of thousands euro to a few million euro. The private equity investments often amount to from little less of a million up to a few million euros. A typical investment made by venture capital funds to a growth phase company was between EUR 1–1,500,000.[3] In the later expansion phases the investments may amount from approximately EUR 5,000,000 up to tens of million euro.

In France, angel investors typically invest EUR 25,000-500,000 while venture capital funds typically invest EUR 3,000,000-5,000,000.

In India, there is no specific size of investment in a high growth company. On an average, the investment size is below USD 1,000,000 in high growth companies/ start-ups.

In Ireland, business angels will typically invest EUR 25,000-250,000. Seed capital funds will typically invest amounts up to EUR 500,000 while venture capital funds and development funds will invest EUR 500,000-20,000,000.

In Sweden, seed/angel investments of up to SEK 5,000,000 and VC-investments of approximately SEK 10,000,000-30,000,000 are of typical size. Further, it is common to see several smaller investment rounds, i.e. the start-ups will gradually seek and receive financing and it is more uncommon with the large one-time investments.

In Switzerland, the amounts invested in high growth companies are rather low (compared to international standards). A typical investment lies in the range of a couple of millions of Swiss francs and only rarely exceeds 20,000,000 Swiss francs.

2.3 Describe the process of documenting the investment (Which documents are typical? Which terms need to be included in the articles to be enforceable? etc.)

Although there are national variations in the manner in which an investment is documented there are enough similarities to allow for a meaningful generalisation of the process. Exactly how an investment is documented will of course vary, subject not only to differences between jurisdictions, but also to the specifics of the investment in question. If an investment is made by the purchase of existing

[3] FVCA Yearbook 2008

shares, the formal requirements on the documentation are lower compared to an investment made through subscription to newly issued shares at the occasion of a capital increase. However, most investments by purchase of existing equity will typically include provisions that require amendments of the articles of association of the target company and potentially registration measures as well.

Generally, the documentation required in a traditional share sales process include: a letter of intent (and/or, memorandum of understanding and/or term sheet) outlining the basic terms of the transaction; the share purchase/investment/subscription agreement itself putting forth the terms on which the investor makes its investment, what it gets for its cash and how the investment will be made; a shareholders' agreement protecting the interests of the shareholder-investor, regulating issues such as the ability to appoint representatives to the board of directors and veto powers at the shareholders' meeting; amended articles of association containing the rights attached to the shares that are to be enforceable against third parties, usually tailored to meet the requirements of the investment agreement; and other corporate documents linked to the investment, including management service agreements. The share purchase agreement and the shareholders' agreement are the core documents in any investment, with the articles of association as an important complement, often performing an important function. Generally shareholders' agreements may be kept confidential, but are not binding against third parties, while the articles of association are enforceable against third parties, but are public.

When performing their due diligence investors will usually be required to sign a confidentiality agreement to ensure that all the information disclosed to them during the process will remain confidential.

If the investment is to be made through subscription of newly issued of new shares following an increase in capital, a decision by a shareholders' meeting is generally required to increase the capital. Such a decision would often have to be registered in the share register, or at least passed before a notary public. In some cases, e.g. Denmark, the decision to issue new shares must be recorded in the articles of association of the target company.

In case of investment through the use of debt instruments, a loan agreement is usually sufficient but may of course be complemented by additional documentation.

In Denmark, any decision to raise equity must be made at the general assembly. Subsequently, the board of directors can agree to issue shares in accordance with a donation/investment from a third party. Regardless of the type of investment and size, certain procedures must be followed. For example, the decision to issue shares must be entered into the company's articles of association. The general assembly can mandate a direct investment into the company or mandate the board to accept such investment within boundaries decided at the general assembly. A decision to issue new shares or intension to do so must be recorded and adopted in the articles of association of the target company.

Any such changes to the articles of association must be recorded with the Danish Business Authority (in Danish *Erhvervsstyrelsen*) and are thus on a public record. Since these investments into high growth companies usually are singular and not public, the actual and detailed documentation of the investment will be in the form of a shareholders' and/or investment agreement between the two parties owner/company and investor. Such an agreement is not public and has no formal procedure.

In Estonia, typical documents include a term sheet, an investment/subscription agreement, a shareholders' agreement, and respective corporate documents (decision to increase capital and the right to waive the existing shareholders' pre-emption right to subscribe for shares must be adopted by qualified majority voting of the existing shareholders, and the capital is increased at its registration at the Estonian commercial registry). With a more established company, the parties may enter into a separate non-disclosure agreement for the due diligence period.

In Finland, with investments through equity based financing instruments being the most important form of investment, the most important documents are the shareholders' agreement and the articles of association. In connection with the execution of the shareholder's agreement, the articles of association are often amended to take into account specific requirements of the investors which may include, for instance, the right to represent the company, consent and redemption clauses, as well as creating different classes of shares (corresponding e.g. preference shares and common shares).

In order to be enforceable against third parties, the redemption and consent clauses, liquidation preference, and differences between share classes need to be included in the articles. More detailed provisions on the rights of the shareholders are normally included in the shareholders' agreement. In comparison to the articles of association, the shareholders' agreement can be kept confidential as opposed to the articles of association which is a publicly available document.]

In France, the articles of association ensure enforcement better than a shareholders' agreement, which is why it is generally appropriate to include in the articles of association all provisions regarding share transfer obligations, prior approvals of share transfers or preemption rights. Furthermore, it is generally appropriate to include the various management bodies in the articles of association in order to inform third parties of existing supervisory or executive committees.

In Germany, a comprehensive list of representations and warranties relating to the transaction is generally agreed upon by way of an independent guarantee (*selbstständiges Garantieversprechen*). The structure will largely correspond to the list of representations and warranties in standard share purchase agreements.

In order to ensure that the entrepreneur actually uses the funds provided to increase the going concern value of the company, the agreement may provide for a “milestone financing”. Under this mechanism, the financing capital is not immediately paid in full, but rather gradually in several instalments. Each payment tranche is contingent upon the achievement of certain interim targets (milestones). If the target company is a GmbH, any participation agreement will have to be notarized.

In India, a business/ asset transfer will require a business transfer/ asset transfer agreement to be entered into along with ancillary agreements/ documents such as delivery note, novation agreement with customers, vendors, suppliers, service providers. In case of a share purchase/ acquisition/ subscription, a share purchase/ subscription agreement and a shareholder’s agreement will be entered into. In case of a joint venture, a joint venture agreement setting out the share acquisition mechanism and the rights of the joint venture parties (akin to a shareholder’s agreement) will be executed. Additionally, license agreements may be executed in case the foreign investor is also bringing in technology/ intellectual property to the investee company. As a matter of practice in India, the terms of the shareholder’s agreement, specifically in respect of voting rights, management and board structure and restriction on transfer of shares are incorporated in the charter documents of the investee company to be enforceable against the investee company.

In Ireland, the usual documents (in addition to those mentioned above) that will be entered into/adopted on completion of the agreement will include: disclosure letters, qualifying the warranties contained in the subscription and shareholders’ agreement/investment agreement; loan note instruments, setting out the rights attaching to the loan notes; and put option agreements, requiring the company to purchase shares held by investors on the occurrence of certain events.

In Luxembourg, investors often need time to proceed to the due diligence of the company. In order to reduce competition from other investors during this period, it is common that investors and entrepreneurs enter into exclusivity agreements in order to prohibit the entrepreneurs from entering into parallel negotiations with other potential investors. Such agreements are always limited to a fixed time period.

In the Netherlands, it is noted that it is not always advisable to incorporate too many specific (commercial) arrangements agreed upon in a participation or shareholders' agreement in the articles of association. First of all this is not always permitted by law. Furthermore, the articles of association have to be filed with the trade register of the Dutch Chamber of Commerce and are thus publicly available. Additionally it should be noted that the transfer and issuance of shares of a BV, requires the execution of a notarial deed executed before a Dutch civil law notary.

In Peru, if the investment is made in shares, the acquisition of the shares shall be registered in the company´s share ledger. If the acquisition of shares is done through a capital increase, the approval of a shareholders meeting is required, and the capital increase must be formalized before a notary through a public deed and registered it in a public registry. If the acquisition of shares is done through a purchase agreement, just a private agreement is needed.

In Spain, the most frequent form of investment is to acquire shares in the company or to make contributions to the share capital, the investors are thus becoming shareholders. Consequently, the first document that is usually implemented is a shareholders' agreement. However, a shareholder's agreement will not be binding upon third parties. In order to have effect against third parties, the provisions of the shareholders' agreement must be registered with the appropriate commercial registry. It is therefore advisable for most of those provisions to be reflected in the company's bylaws. Unfortunately, it is likely that some provisions cannot be registered at all, since the Spanish Capital Companies Act is too rigid to allow for certain types of provisions to be registered.

In Sweden, it is not possible to include as many regulations in the articles of association (which are public) as it is in many other European jurisdictions (e.g. Denmark, and England and Wales). Instead, regulations which are typically included in the articles of association in other jurisdiction included in the shareholders' agreement instead.

In Switzerland, share transfer restrictions (in case the company is organized as a stock corporation) can, under Swiss law, only be included into the articles of association to a very limited extent. Therefore, such restrictions are generally agreed on a contractual basis, i.e. in the shareholders' agreement.

In Turkey, an application for registration must be made to the relevant trade registry office after signing the related documents, in order to finalise the process.

2.4 Are there incentive schemes for investing into high growth companies (governmental grants (including co-investment funds, state as a guarantor of loans, etc.)?

In Belgium, the government is quite active when it comes to helping companies access financing or supporting particular investments. Early-stage healthcare investors, for instance, are supported by public investment funds and subsidies. There are also several tax incentives and subsidies for R&D (research and development) activities in Belgium. Between public investment funds and investment firms and other existing governmental initiatives relating to the financial or operational support of start-ups, SME's and larger companies, under the form of subsidies, guarantees, credit, tax incentives, operational assistance, the Belgian government offers plenty of schemes for supporting high growth companies.

In Brazil, there are no specific incentives from the government for investing in high growth companies. The government has, however, developed certain programs created with the purpose to promote and finance innovation and the scientific research in companies, universities and even the government itself. Additionally, the Brazilian Bank of Social and Economic Development may invest in high growth companies through investment funds as well.

In Canada, the federal government and many provincial governments provide tax incentives, partnerships with research universities and mentorship opportunities for investments in start-up and high-growth companies. Regional tax incentives include tax holidays and tax credits for specific industries. Of particular note, is the federal government's Scientific Research and Experimental Development Tax Incentive Program which provides investment tax credits for expenditures such as wages, materials, machinery, equipment and some overheads.

The 2014 Canadian federal government budget contains several investment programs and tax incentives for small to medium size businesses and for businesses in certain high-growth industries.

In Denmark, there are no incentive schemes for investing into high growth companies. However, as an entrepreneur you may apply for funding at the Danish Entrepreneurship Foundation. Denmark recently amended its tax regulations on portfolio shares. In the Danish Capital Gains Tax Act, there is a provision which defines tax-free portfolio shares. The provision includes shares that are not publicly traded and owned by a company that owns less than 10 % of the shares in the portfolio company. It is a condition that the portfolio company is a limited company, or an equivalent foreign company. The tax exemption does not apply to dividends from portfolio companies. Therefore, the current Danish rules for tax on dividends will continue to apply.

In England and Wales, there are a few incentive schemes for investing into high growth companies in the company. These schemes are both tax schemes and governmental grants. The latter include Big Society Capital Limited (BSC). BSC is a UK social investment bank which started in 2011 to help finance project under the UK Government banner of the "Big Society" and launched a GBP£600 million investment fund on 4 April 2012, as well as seed funding programs. The former include tax schemes that offers tax relieves to investors who purchases ordinary shares in small and medium sized trading companies. Additionally, private individuals investing in venture capital trusts receive favorable tax treatment.

In Estonia, there are a number of schemes in Estonia for incentivising investments into high growth companies, e.g the Estonian Development Fund, a public institution whose aim is to contribute to the economic development of Estonia, is investing into innovative companies in Estonia.

In Finland, public financing is primarily available through the public innovation program which is organised under the Ministry Employment and Economy. The public incentive schemes can be divided into two classes consisting of public subsidies, grants and loans and equity investments and loans. The public incentive schemes are mainly administered by Tekes and Finnvera.

Tekes grants funding for research, development and innovation projects that aim to create in the long-term the greatest benefits for the economy and society. Finnvera makes direct investments in early-stage enterprises. Furthermore, Finnvera provides financing for the start, growth and internationalisation through offering loans, domestic guarantees, venture capital investments, export credit guarantees and other services associated with the financing of exports.

In France, there are a variety of financial incentives for business investments. The support from the French authorities, mainly allocated to the company itself and not to the direct investors, comes in various forms, such as limited or interest-free loans, grants for physical investments' projects and R&D, reduced tax estate costs and tax exemptions.

In Germany, the government has adopted several measures to promote the financing of high growth companies. These the most relevant measures are venture capital grant for private investors and ERP-Startfonds, as well as state guarantees, where the relevant state assumes assume guarantees to credit institutions of up to 80% of eligible companies' potential default.

In India, there are no incentive schemes for investing into high growth companies, however, incentive schemes may be available for specific sectors such as export oriented companies or companies engaged in the software industry. Such incentive schemes usually involve tax incentives for eligible companies.

In Ireland, the government provides a range of supports, including: venture capital funds, lending and SME equity funds through the National Pension Reserve Fund, a microenterprise loan fund and the Employment and Investment Incentive Scheme, offering relief by way of a deduction against income tax for "qualifying individuals" for amounts subscribed for "eligible shares" in "qualifying companies."

In Luxembourg, various financial aids are available for investments in high growth companies, such as the co-financing from the National Credit and Investment Corporation, the granting of insurances and guarantees covering certain risks in high growth companies, and a favourable tax regime for investors for investments in small and medium sized enterprises.

In the Netherlands, policy makers have set up several incentive schemes for investors in (high growth) companies. For instance, the government has set up: the SEED capital-scheme, the Dutch Venture Initiative, the Growth Facility Scheme, the SME+ Innovation Fund, the Business loan guarantee scheme, the Qredits Micro finance and the Growth Accelerator.

In Peru, the incentives are applicable to investments in general rather than aimed specifically at high growth companies. The Political Constitution of 1993 establishes that local and foreign investment is subject to the same conditions. In addition, it establishes free private initiative, economic pluralism, free foreign currency disposition, and the right to property, subject to certain limitations.

In Poland, two examples of incentive schemes are the operations of two funds: the National Capital Fund, and the National Credit Guarantee Fund. The National Capital Fund operates as a specialized vehicle that allocates its fund in other capital funds. As a mechanism of co-financing investments it allows twice as large allocation of venture capital, compared to what can be achieved with the involvement of the National Capital Fund as a public investor. An additional advantage is that capital which is obtained by the private investor will have priority in the reimbursement of capital. One of the main tasks of the National Credit Guarantee Fund is to securitize National Economy Bank loans. Guarantees can cover bank loans for the purchase of raw materials for production or investment.

In Spain, innovative companies are supported through i.a. the ENISA programme, a programme offering favorable long term participating loans to entrepreneurs and start-ups. The fixed interest rates are low, with an additional floating interest rate subject to the company's profitability.

In Sweden, ALMI, which is owned by the Swedish state, can offer both loans and investments to match/supplement other investments. Further, Industrifonden is a foundation established by the Swedish state which invests in small and medium sized growth companies. Another example is Fouriertransform which is a state-owned venture capital company tasked with strengthening the Swedish industrial cluster's international competitiveness on a commercial basis. It should also be mentioned that new tax legislation admits special rights to tax deductions for venture capital investments.

In Switzerland, there are no state funded incentive schemes for investing in high growth companies that the national reporter is aware of. However, there are several private initiatives to promote private equity and corporate finance activities in Switzerland and to provide networking platforms to persons and companies interested in investing in such companies.

In Turkey, a new investment incentives system came into effect in 2012, comprising four different schemes which both local and foreign investors have equal access to. These schemes are: General Investment Incentives Scheme; Regional Investment Incentives Scheme, Large-scale Incentive Scheme and Strategic Investment Incentive Scheme. The major investment incentives are exemptions from customs duties and VAT.

In Uruguay, an effective Investment Promotion Regime has been in place since 2007, through which the Executive Branch chooses to promote certain investment projects or sectors. The chosen projects are granted significant tax benefits.

2.5 Any instruments referred to in section 1 preferred from the point of view of an investor? Why? Would the answer differ if the investor is international or domestic?

In Brazil, as mentioned above, investments in high growth companies are usually made through equity transactions.

In Canada, transactions involving foreign investors acquiring control of Canadian businesses may trigger review under federal and provincial statutes. To avoid such review, foreign investors may wish to forego investing in equities that would enable them to have a direct or indirect control of the Canadian business but, instead, to invest in the Canadian business' debt instruments that do not carry any management participation rights.

In Denmark, investments made as a combination of preference shares and a strong shareholders' agreement are clearly preferred by investors. As the requirement for agreeing terms are quite informal most issues can be agreed in the documents freely, thus giving the investor a strong foothold. Most of the traditional and most common instruments are available to international investors without restrictions. As long as investments are not done in person by foreign nationals into Danish real estate no restrictions are made. However, this is hardly the case with high growth companies.

In England and Wales, private investors and business angels will prefer simple equity investments due to the tax breaks they can get for EIS qualifying investments in the UK and other tax breaks which can be lost if loans are included in the mix. the institutional investors and venture capitalist firms will usually prefer loan notes to preference shares for tax purposes and because interest is payable out of cashflow not distributable profits. The tax reliefs referred to above are unlikely to apply to foreign investments by UK ordinarily residents

In Finland, which financing instruments are used depends primarily on the investors and the investor's objective as regards profit and risk of the investment. Due to their uncapped potential for profit, venture capital funds usually prefer shares. Public funds often use also capital loans as a way of making investments as their objectives differ from the private venture capital funds aiming to make a profit. The investments are usually made by subscribing new shares or acquiring shares from the previous owners as well as by granting capital loans (a subordinated loan). In addition, convertible loans and different mezzanine instruments are used by venture capital funds. Finnvera's venture capital investments are either share capital investments or convertible loans. The loans can also be granted as capital loans.

In France, preference shares and convertible bonds are usually the preferred instruments. Preference shares may pay higher dividends than ordinary shares and dividend income provided to investors is treated favorably from a tax perspective relative to other forms of income. Therefore, preferred shares are often able to offer a good after-tax yield. In certain cases, investors prefer convertible bonds since they can exchange them for a specific amount of shares at a later date, subject to a pre-determined formula. Unlike non-convertible bonds, they have the potential to rise in price if the company performs well. As a general principle, financial dealings between France and foreign countries are unrestricted. However, certain foreign investments are subject to regulations.

In Germany, hybrid financing instruments seem to be the most popular investing methods, especially from the investor's point of view. This is due to their balance between equity capital, which is subordinated in the event of insolvency, but effective due to the control over the business, and debt capital, which lacks control over the company, but has a higher rank in an insolvency situation.

In India, equity shares are preferred by most investors, although convertibles where voting rights are conferred contractually is an alternative, whether international or domestic, as they both guarantee voting rights and investment returns.

In Ireland, an advantage of loan notes over preference shares is greater repayment flexibility irrespective of whether the investor is international or domestic. The interest accruing on loan notes can be paid to the Noteholder in circumstances where a fixed dividend on preference shares might not be able to be paid due to a lack of distributable profits. Similarly, a loan note can be repaid where the redemption of preference shares may not be permitted by the Companies Acts. Loan notes may also be preferable to an investor for certainty of repayment amount where it difficult to place a defined valuation on the company at the date of investment. Convertible loan notes offer investors an opportunity to take equity in the company at a later point.

In Luxembourg, investments in high growth companies are usually made by a combination of equity, debt and hybrid instruments. Despite the considerable number of instruments, shares often remain the most preferred instrument for investors allowing them (i) to have rights to attend and vote at shareholders meetings, (ii) to receive information regarding the company's situation and (iii) to participate in the company's profits. Luxembourg does not impose any restrictions on foreign investments and it is worth mentioning that hybrid instruments which combine the elements of debt and equity may be of particular interest for foreign investors

In the Netherlands, there is not one specific instrument an investor prefers. The financial instrument investors prefer when investing in a high growth company, largely depends on the type of investor, the relevant amount to be invested and the type and stage of the target businesses / company's development.

In Peru, the shares in most of the companies are concentrated in few owners. There is not a tradition of diversified shareholders and few companies do tender shares to the public. The issuance of bonds is more common as a way of financing. Thus, investors usually find more opportunities to invest in bonds than in shares. There is no difference between international and domestic investors.

In Poland, domestic investors are still rather uninterested in making investments through financial instruments under the Act on Trading Financial Instruments. According to the international investors, the obstacles for making investments in Poland are uncompetitive labor law, unclear tax rules and barriers applying for investment activities.

In Spain, an investor would normally, simply tend to acquire some shares in the target company and would formalise an investment agreement to regulate the terms and conditions of the acquisition and coexistence of the various shareholders in the share capital of the target company. The same applies in relation to either international or domestic investors. In the case of an investor from outside Spain, the investor and/or the target company, as the case may be, might be required to submit certain declarations.

In Sweden, preferred shares are typically more commonly used by professional investors. Further, the “normal” model for preferred shares is generally tougher in Sweden than in many other European jurisdictions.

In Switzerland, the type of financial instrument preferred for an investment in a high growth company depends to a larger extent on the financing phase of the venture, rather than the investor. Obviously, the degree of complexity increases with the development of the venture. It is noteworthy in that respect that based on the principle of economic freedom, as guaranteed in the Federal Constitution of Switzerland, the Swiss economic and legal framework is very liberal with regard to inbound investments. In particular, there is no general restriction or authorization requirement neither for such transactions nor for inbound or outbound payments.

In Turkey, investors generally favour preference shares, usually supported by liquidation preference rights, anti-dilution provisions, privileges in management and profit distribution. In Turkey, it is not possible to have convertibles in companies which are not subject to the requirements of the Capital Markets Board. It is also not possible to convert a bridge finance granted by the investors to the companies into capital by allocating some portion of such amount as emission premium since the emission premium must be paid in cash. Therefore, different legal mechanisms are created on a case by case basis considering the necessities of the high growth companies.

In Uruguay, the preferred instrument from the point of view of an investor, domestic or international, is equity because the investor can gain at least a certain level of control in the company’s affairs and because the returns of the investment are potentially higher than investing through debt instruments.

3. ENTREPRENEUR’S VIEWPOINT – OPPORTUNITIES AND CONSTRAINTS, LEGAL AND COMMERCIAL

3.1 Which company form is most popular? (Special company forms for high growth companies? Tiers of management typical for a high growth company? Liability point of view?)

In Belgium, two commercial company forms are typically used for high growth companies, *i.e.*, the private limited liability company (“*BVBA/SPRL*”) or the public limited liability company (“*NV/SA”).* Although the statutory minimum capital of the NV (EUR 61,500) is significantly higher than the statutory minimum capital of the BVBA (EUR 18,600), the NV will most often be the preferred company form since its shares can be easily transferred and it allows the issue of specific financial instruments (shares without voting rights, preferred shares, (convertible) bonds, warrants).

The NV is managed by a board of directors which must have at least three members, unless the company has only two shareholders in which case only two directors must be appointed. Directors are appointed for a maximum term of six years but can be re-elected. A director can be dismissed at any time, without cause, by a simple majority vote of the shareholders.

The board may delegate powers to a management committee (*“directiecomité/comité de direction”*), with the exception of (i) general management and strategic decisions, which, by law or by the articles of association, are exclusively reserved to the board, and (ii) the supervision of the management committee. The members of the management committee can be directors or other persons.

In some cases, the BVBA is used as company form. The BVBA is a more ”private” company than a NV and is in many ways similar to the NV. There are, however, some differences, such as a lower statutory minimum capital (EUR 18,600, as stated previously, of which a minimum of EUR 6,200 needs to be fully paid up at incorporation). Also, the transfer of shares is subject to the prior approval of at least 50% of the shareholders, who represent together at least three quarters of the share capital. However, such prior approval is not required is specific cases (among others, transfer to another shareholder, to the spouse of the transferor, to a blood relative, to another person admitted by the articles of association) unless the articles of association provide otherwise. The BVBA can have only one shareholder provided this single shareholder is a natural person.

The BVBA is managed by one or more general managers who, in principle, each have the power to individually represent the company *vis-à-vis* third parties. They can be appointed for an unlimited term. The general manager can also be appointed in the articles of association, in which case he or she will be a so-called statutory general manager. Statutory managers can only be dismissed by the shareholders with a 75% majority vote (and provided three quarters of the share capital is present or represented) unless more strict provisions are provided for in the articles of association.

The grounds for liability of directors of a NV and general managers of a BVBA are almost identical under Belgian law and will, as such, have no impact on the choice between both commercial company forms.

Originally, the NV was mainly seen as a vehicle for medium-sized or large undertakings, whereas the BVBA was intended to be used for small businesses where management and ownership often coincide. To this day, the BVBA is mostly used for smaller (privately-owned) businesses. Large multinational groups tend to incorporate their Belgian subsidiaries under the form of a NV (though some may opt for the BVBA for foreign tax transparency reasons). From a Belgian tax perspective, a NV and a BVBA are subject to the same corporate tax rules.

In Brazil, the most popular form of company (for small and medium sized companies) is the limited partnership (*sociedade limitada*). However, when a company is ready to receive an investment, investors generally require that the company is in the form of a corporation (*sociedade por ações*), which is a more adequate form for companies with multiple shareholders or investors, as it provides and regulates corporate structures of higher complexity and provides for several rights and protections to the company, its management and the shareholders.Both types of companies basically enjoy the same tax treatment, nevertheless the costs implied in the setup of a limited partnership are less significant, and expenses with publications of corporate documents and financial statements may be waived, thus enhancing confidentiality as to corporate affairs. Additionally, limited partnerships are more flexible types of company, since their articles of association can be drafted more freely and in line with the expectations of the partners.

In Canada, company forms are predominantly dictated by tax concerns. For most small to medium size businesses, a corporate entity with a share capital consisting of common shares, preferred shares and/or debt instruments is the most common.

In Denmark, there are two Acts to consider, either the Danish Company Act or, the Danish Act on Certain Commercial Undertakings. Quite many smaller businesses are set up as partnerships or sole proprietorships, but as soon as the company grows larger, the only reasonable thing to do is to convert into a limited company or a private limited company. Since partnerships and the like are not regulated in detail under Danish law, the two forms of limited companies are by far the easiest and safest to invest in and, therefore, also the most popular. Should you wish to establish a private limited company to begin with, you must provide a starting capital of DKK 50,000. A limited company requires DKK 500,000.

In England and Wales, most young trading businesses or high growth enterprises seeking finance will be incorporated as private companies limited by shares. To an extent, a private limited company might make the business more credible to potential customers, partners or investors. The key features of a private company limited by shares includes: the separate legal personality of the company, limitations on the liability of the participators, separation of management from ownership, prohibition on shares being offered to the public, no restrictions on minimum share capital, and requirements on the company to have at least one director. Certain businesses may opt for the form of a Limited Liability Partnership for tax reason.

In Estonia, a private limited liability company is a widespread limited liability business form in Estonia, while the other typical form is the Estonian public limited liability company - Aktsiaselts (AS). A private limited liability company is better suited for smaller businesses or with limited number of shareholders, having smaller share capital requirements (minimum EUR 2,500) and simpler corporate structure, for example formation of a supervisory board (in addition to the executive management in the form of a management board) and election of an auditor is optional. In case of a public limited liability company, the share capital requirement is higher (minimum EUR 25,000) and the corporate structure is more complex- formation of a supervisory board, auditing of the annual accounts and registering the shares at the Estonian Central Register of Securities is compulsory (the latter is not the listing of the company´s shares at the local stock exchange). Typically, a high growth company has a two-tier management system at the first stage, however, it is quite common that an investor would like to set up either a formal supervisory board for monitoring the investment, or a more informal advisory committee.

In Finland, the limited liability company (Fi: *osakeyhtiö*) is clearly the preferred and most popular company form and the standard company form used in Finland. The limited liability company is also the most flexible company form, for instance, as regards various financing structures and the issuance of shares and granting option rights. Furthermore, from the entrepreneur's point of view, the limited liability company provides that the entrepreneur will not, based on the Finnish company law, be personally liable for the obligations of the company.

A company is under the Finnish Company Act required to have a board of directors. In addition, the company may have a managing director, which is quite common although not required under the Finnish Company Act. Often in a high growth company, the main shareholders and the management are at least partly the same persons and are actively involved in the day to day business. Venture capital funds usually provide their own expertise in the assistance of the high growth companies or may utilise their contacts to find key persons with suitable skills for the companies.

In France, the most popular company form is the **simplified joint-stock company (*société par actions simplifiée* – "SAS")**. The SAS owes its popularity to the fact that it is the most flexible type of company. The shareholders of an SAS have a lot of freedom regarding the drafting of the Articles of Association. Shareholders also freely determine the form and the conditions under which collective decisions are taken (unanimity, simple majority and absolute majority). Only few decisions require mandatory unanimity. A president is the only mandatory management body. Other reasons for the popularity of the SAS are: allowing as few as a single shareholder, a minimum share capital of €1, limitation on the personal liability of the shareholders and a corporate tax due by the company itself rather than by the company owner.

In Germany, venture capital investors usually provide equity capital only if the company is a corporation *(Kapitalgesellschaft)* and the liability is thus limited to the assets of the company. As mentioned above, the most popular corporations in Germany are limited liability companies (*GmbH*) and stock corporations (*AG*).

In practice, GmbHs are the most common type of corporation. They come into existence upon registration in the Commercial Register and have a statutory minimum share capital requirement of EUR 25,000. The organisational structure has two levels: the shareholders' meeting and the managing director(s). Since 2008, German legislation also provides for an entrepreneurial corporation subject to special regulations, the *Unternehmergesellschaft*. This is a type of GmbH which requires a minimum share capital of only one Euro.

AGs are the most strictly regulated types of German corporations. The minimum share capital is EUR 50,000. The organisational structure has three levels and shareholders only have limited shareholder rights through the general meeting. The formation of AGs is still relatively rare. Generally, AGs are brought about by changing the form of an existing company to an AG by way of conversion. Due to the possibility of listing on a stock exchange and a relatively uncomplicated change in shareholders, AGs are well suited for raising equity capital.

In India, high growth companies are usually formed as private limited companies or closely held /unlisted public limited companies with a view of listing on the stock exchanges at a later stage. Private companies as compared to public companies have less stringent compliance requirements under Indian laws and hence for a growing company, private company form is a preferred option. Indian laws do not prescribe a mandatory management structure for a private company, other than having a mandatory board of directors. In high growth companies/ start-ups, the founder of the company generally holds the position of the chairman/ managing director, thereby having control of all main matters of the company.

In Ireland, the usual company form for high growth companies is the private company limited by shares. A private company limited by shares must have: at least one shareholder, at least two directors, and certain provisions in its articles of association inter alia restricting the right to transfer the shares in the company and prohibiting offers to the public to subscribe to securities. The liability of each shareholder will be limited to the amount subscribed for the shares held.

Directors are responsible for the day-to-day management of the company and can exercise most company powers (e.g. issue of new shares, borrowing powers, use of company seal, and declaration of dividends) subject to any restrictions set out in the articles of association or a shareholders' agreement/investment agreement. As most matters of importance are delegated to directors, the shareholders typically will not intervene unless their approval is required by the Companies Act for a particular transaction or act. Unlike civil law jurisdictions, Irish law provides for only one board of directors, rather than a two-tier system.

In Luxembourg, the most commonly used forms of vehicles are: private limited liability companies (*sociétés à responsabilité limitée*), public limited liability companies (*sociétés anonymes*), and partnerships limited by shares (*sociétés en commandite par actions*).

Public limited liability companies may be managed by a two tier system consisting of a supervisory board that is elected by the shareholders, which appoints the members of the management board. One tier system public limited liability companies are managed by a board of directors that is appointed by the general meeting of shareholders. The board of directors or the management board are empowered to undertake any action in the name of the company but the day to day management may be delegated to directors, officers, managers or other agents.

By introducing the law of 12 July 2013, Luxembourg has created the special limited partnership (*société en commandite speciale*) which offers a lot of structuring flexibility, as the parties are free to organise their political and economic rights in the partnership agreement.

In the Netherlands, the most commonly used legal entity is the private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid; BV*). The BV is a flexible form of company and is therefore used in the vast majority of all cases, especially after the reform of the rules governing BV's (effective as from 1 October 2012). BV's generally have either one single board of directors or a two-tier board system. As from 1 January 2013, however, the Dutch legislator enacted the monistic system, allowing Dutch companies to install a one-tier board with executive and non-executive directors instead of the traditional two-tier board structure.

The main advantages of a BV are: no minimal capital requirements, no compulsory share transfer restriction clauses, increased possibilities for financing of transactions, possibilities to differentiate in types of shares, and the possibility to adopt resolutions outside the general meeting of shareholders.

Alternatively, one could of course also opt for another Dutch legal entity such as the Dutch cooperative association (*coöperatie*). The cooperative has become an increasingly popular vehicle for structuring fund investments and acting as a group holding company, due to the favorable Dutch tax treatment it receives and its flexibility from a Dutch law perspective. A cooperative is a legal entity with legal personality. A cooperative is different from a limited liability company, instead of shareholders a cooperative has members. The cooperative is an association incorporated by at least two members by way of a notarial deed. The liability of the members of the cooperative can be excluded in the deed of incorporation.

Another legal entity which is used for commercial activities in the Netherlands is the Dutch (public) limited liability company (*naamloze vennootschap; NV*). The NV is similar to the BV in its organization and structure, although less flexible, and identical in its tax treatment. The NV is normally used, amongst others, in case it is envisaged that (a part of) the share capital of the company will be listed

In Peru, the most popular form of company is the *sociedad anonima* (corporation), a limited liability company with its capital represented by shares. The corporation has by-laws and is registered in a public registry. Its highest authority is the shareholders meeting comprised by shareholders. Other authorities are the board of directors and the management, although the corporation may assume the form of closed corporation (*sociedad anonima cerrada*) in which case the board of director is optional. The board of directors shall be comprised of a minimum of three directors. The management is led by a general manager which may be a natural person or a legal entity.

In Poland, a Polish limited liability company (sp. z o.o.) is the most commonly used type of fund vehicle. Among the reasons of its popularity are: the low share capital requirements (minimum of PLN 5,000) , the limitation on liability of the shareholders, and the relatively uncomplicated corporate structure (e.g. no compulsory supervisory board). Even though the shareholders are not directly liable to third parties for the company’s actions and liabilities, they can, to a large extent, influence the company operations. With respect to Polish limited liability company there are practically no financial assistance limitations and they may easily provide upstream security for external transaction financing.[4]

The joint stock company (S.A.) is the only type of Polish company that can be publicly listed. There are higher share capital requirements for joint stock companies than for limited liability companies (minimum of PLN 100,000). At the same time it should be noted that Polish joint stock company offer more diverse ways of financing than limited liability company. In a Polish joint stock company it is possible to increase the share capital in a way which is similar to

[4] WKB Wierciński Kwieciński Baehr Wierciński Andrzej, Jędrzejak Jakub, Frątczak Klaudia, Czekański Łukasz. Private Equity Jurisdictional Comparisions. First Edition 2010.

what is commonly known as authorized capital where the decision to issue shares is vested with the board. It is also possible to increase the company's capital conditionally. Finally, in a Polish joint stock company it is possible to issue bonds and/or warrants that are convertible into shares or which provide for a right of pre-emption with respect to newly-issued shares. On the other hand, a significant limitation of joint stock company are certain financial assistance limitations.[5]

In Spain, the SL and the SA are the most commonly used forms, although there are other corporate forms under Spanish legislation. The liability regime is the main reason for this preference. In the SL and in the SA the liability of their members is limited to their contribution to the company.

A new type of company was recently introduced, the "*Sociedad Limitada de Formación Sucesiva*" ("**SLFS**"). The SLFS is a sub-type of SL that, similarly to the German *Unternehmergesellschaft*, allows a company to be formed without any share capital. However, such a company must allocate 20 percent of the profit obtained in the financial year to a legal reserve, may not distribute dividends until the minimum share capital for an SL is reached (i.e. EUR 3,000), and restricts the remuneration paid out to shareholders and board members to 20 percent of the value of the company's net assets. In the event of liquidation, the shareholders and board members will be jointly and severally liable up to an amount of EUR 3,000.

In Sweden, the limited liability company is by far the most popular company form used in Sweden and it is very rare to use any other form.

In Switzerland, many founders start off with a limited liability company (GmbH/Sàrl) and they sometimes keep this form throughout their seed financings and sometimes even through early stage financing rounds. However, for a number of reasons the stock corporation (AG/SA/Ltd) is more suitable for high-growth companies and in fact, most such companies are structured as a stock corporation. In a stock corporation the management is typically organised by having a board of directors (with the founders and some representatives of the investors which are, however, non-executive) and a separate management board (with the founders and possibly additional key employees).

In Turkey, the main corporate entities involved in private acquisitions are joint stock companies or limited companies. Both company types allow shareholding structures which involve a single shareholder. In terms of liability of shareholders, for both company types, each shareholder's potential liability is limited to an amount equivalent to the capital which they invested (Article 329 of the TCC for joint stock companies and Article 573 of the TCC for limited companies).

In Uruguay, the majority of business entities are organized either as corporations ("*sociedades anónimas*" or "*S.A.'s*") or foreign company branches. However,

[5] WKB Wierciński Kwieciński Baehr Wierciński Andrzej, Jędrzejak Jakub, Frątczak Klaudia, Czekański Łukasz. Private Equity Jurisdictional Comparisions. First Edition 2010.

some companies choose to operate as limited liability companies ("*sociedades de responsabilidad limitada*" or "*S.R.L.'s*") or partnerships limited by shares ("*sociedades en comandita por acciones*" or "*S.C.A.'s*") mainly because of the tax regime in United States under which S.A.'s are mandatorily taxed as corporations while other type of business entities can chose by "*checking the box*" to be taxed as corporations or as pass-through entities.

From a liability point of view, in a S.A. shareholders are, in principle, only liable up to the amount of shares subscribed. In S.R.L.'s members are liable in principle only for the amount of subscribed membership interests. However, some particularities should be considered, which make member's liability in S.R.L.'s more severe that the shareholders in corporations: according to tax regulations, when members of an S.R.L. act as managers they are jointly and severally liable for income tax applicable to the company; and S.R.L.'s members are jointly and severally liable for salaries unpaid by the company plus legally applicable interest. Lastly, in S.C.A's, there are two types of members: active members who are unlimitedly, subsidiary and joint and several liable for all the company´s obligations and limited partners who are only liable to the amount of shares subscribed.

3.2 What sectors are most preferred by high growth companies in your jurisdiction (information and communications technologies, biotech, etc.)?

In Belgium, the preferred sectors by high growth companies are mainly the alternative energy sector and the biomedical sector.

In Brazil, high growth companies are mainly concentrated in the technology sector, therein included social media networks and platforms for rendering of services through tablets and smartphones. Due to the upcoming FIFA World Cup and Olympic Games, the hospitality sector (including hotels and tourism) has also been receiving significant investments.

In Canada, the majority of investments take place in the mid-size market (C$20 – C$200 million). In 2012, Canadian venture capital deal making was concentrated in the information technology sector with steady venture capital activity in life sciences sectors. Until the third quarter of 2013, software and information technology sectors received 45% of all funding with agribusiness, manufacturing and non-technology companies also receiving a notable share of investments.

Oil and gas transactions led all private equity investments in 2013, representing a reported 17% of all deals, and this level of activity is expected to continue in 2014. Perceiving an opportunity to invest at reduced valuations due to lower commodity prices, sponsors have increasingly looked to Canada's oil patch for acquisitions or investments, including related service sectors. In addition, while private equity funds have traditionally avoided mining investments due to high valuations, commodity price risk and volatility in earnings and cash flows, a number of Canadian and international sponsors have become increasingly focused in the sector, including the raising of dedicated funds and new asset allocations in existing funds. Last year mining was the second largest sector for deployment of private equity capital in Canada and interest from sponsors is expected to continue in the year ahead including in distressed mining investments.

In Denmark, the two most popular sectors of high growth companies are trade and transport and business services.

In England and Wales, the current sectors concerned have a novel technology or business model in high technology industries, such as IT and digital business, biotechnology, clean tech and life sciences, renewable energies and business natural resources, are generally considered to have a good potential for exponential growth.

In Estonia, it is probable that IT start-ups may play an increased role in the high-growth enterprises area.

In Finland, the industries which have attracted most investments have been communications, life sciences, and computer & consumer electronics.[6] In addition, cleantech industry can be mentioned as a more specialised industry in which a number of investors are seeing substantial growth potential. Finally, the Finnish mobile gaming industry is worth mentioning, especially after the success of the mobile gaming companies such as Rovio Entertainment with its highly successful Angry Birds franchise.

In France, sectors preferred by high growth companies include: sustainable development and green energies, information and communication technologies, biotech, software, and medical research.

In Germany, high growth companies are mainly found in the telecommunications, media and technology sectors, as well as in the dynamic fields of internet, e-commerce and life sciences. They usually have a strong technology and research orientation with high capital expenditure.

In India, consumer web, e-commerce, healthcare and education are the most preferred sectors by high growth companies.

In Ireland, software, internet, games and media, and life sciences are the most preferred sectors by high growth companies.

In Luxembourg, apart from the traditional financial services sector, high growth companies prefer sectors such as technologies, e-commerce and communications, as well as health tech, clean tech, eco tech and bio tech sectors. Due to its central location in Europe, Luxembourg has also become a key location for logistic services and suppliers to the automotive industry.

[6] FVCA VC/PE Industry in Finland 2011

In the Netherlands, the emergence of successful ICT companies increased in 2012 and 2013. According to the 'FD Gazellen top 100', last year more than one third of the high growth businesses were active in the ICT sector.

In Peru, there are no specific sectors preferred by high growth companies, but in the last years the mining, construction and energy sectors may have received the largest investments.

In Poland, the most preferred fields to invest in are currently: biotechnology, electronics, IT, medicine, environmental protection, and telecommunications. This does not mean, however, that investments are limited only to these sectors.

In Spain, the current trend for new start-ups points to areas involving information technology, communication technology, applications, software, health, biotech and the internet.

In Sweden, the most common high growth sectors are IT and high tech.

In Switzerland, the life sciences (biotech and medtech) sector has traditionally produced a high output of growth companies. Additionally, cleantech has a seen a sharp rise in 2013.

In Turkey, the ICT, automotive, energy, utilities, renewables and industrial production sectors are all of interest for high growth companies.

In Uruguay, the sectors most preferred by high growth companies are agro-industrial, agribusiness, information technology and renewable energies.

3.3 **Are there incentive schemes for entrepreneurs incentivising high growth companies** (e.g accelerators/incubators? Other?)

In Belgium, both the federal government and the Regional governments have developed an extensive set of incentives to create a business-friendly environment. These incentives range from direct aid, such as financial support for specific investments, to tax measures, labour and training incentives, stimulation of research & development and international trade opportunities and are also used to incentivise high growth companies.

A tax incentive introduced at the federal level focuses on intellectual property and came into force in 2008. It is called Patent Income Deduction (“PID”). In order to stimulate the registration of new patents in Belgium, companies are able to deduct from their taxable income 80 % of the income generated by newly registered patents. As a result, the corporate taxation on the income from patents effectively dropped from 34 % to only 6.8 %.

In Brazil, there are several private accelerators and incubators for high growth companies, and they work to provide support aiming the continuing growth of the company and potential investments in the company by angel investors or venture capital funds.

In Canada, both in many provinces and federally, seed funding is available for businesses in the cleantech, information technology, and life sciences and healthcare sectors. Public and private sectors funds have also joined together to provide technology start-up funding and mentorship. Additionally there are various regional incubators in Toronto, Ontario, Waterloo, Ontario, Montreal, Quebec and Vancouver, British Columbia, providing funding of up to C$50,000, advisory services, office space and entrepreneurship mentoring.

In Denmark, there are generally no such incentives. However the governmental venture fund, the Business Development Finance (in Danish *Vækstfonden*) provides under certain limited terms funds (both equity and loans) to growth companies. High growth companies are not normally eligible to receive funding from the fund.

In England and Wales, the two main tax incentive scheme of entrepreneurs are: the entrepreneurs' relief, available to individuals (and in certain cases, trustees) who realise qualifying gains, applying a lower tax rate on capital gains, and the enterprise management incentives (EMI), a tax-favored share options scheme.

In Estonia, there are a number of accelerators in Estonia, both general and specialised (e.g on mobile games etc). Also, there are a few incubators in major cities in Estonia, mostly backed by local municipalities.

In Finland, the Aalto Entrepreneuship Society (Aaltoes), a non-profit organisation founded in 2009 by students of Aalto University in Helsinki as well as its Startup Sauna Seed Accelerator Program and Startup Life Internship Program are worth mentioning as regards start-up incubators in Finland. Aaltoes has gained substantial reputation after its foundation and been often affiliated with the emergence of the Finnish start-up culture during the last few years.

In France, there are more and more incentive schemes for entrepreneurs over the past few years (accelerators, incubators, co-working spaces and startup programs), notably incentivizing high growth companies. There are two kinds of incubators: the non-profit incubators (e.g. related to R&D), and private incubators. The latter generally take a percentage of the capital of the company to realize a capital gain when the company is sold.

A good example of a French incubator is “DojoCrea**”**, which has three buildings totaling over 1,000 m² in Paris, providing *domiciliation* (a legal process for all companies requiring a mailing address in order to incorporate), connections with banks, lawyers, accountants, etc. Many French universities or “*grandes écoles*” have incubators which provide access to the school’s alumni as well. In addition, government-funded incubators like “Paris Incubateurs” and “PRIMA” have buildings all over Paris where startups come together.

In Germany, the number of accelerator programs that have been offered is still low, but on the increase. Business accelerators include Seedcamp, the Telefonica subsidiary Wayra and the German Silicon Valley Accelerator. The latter seeks, with the help of the Federal Ministry of Economics and Technology, to enable young German companies to gain footing in the U.S.

Additionally, there are around 400 incubators in Germany. These institutions support technology-oriented (preferably innovative) start-ups and young companies and are at the same time meant to boost the regional economy. Incubators have proven themselves as an effective economic development instrument in Germany for almost 30 years. The services offered include, among other things, advising on the planning, formation and building up of the start-up, assistance in finding capital, as well as providing low-cost and flexible leased spaces (office, laboratory, and production sites) in attractive locations and infrastructure.

In India, a high growth company may be granted a micro, small or medium enterprise status depending on whether the parameters set out in the relevant legislation are met. If a micro, small or medium enterprises status has been obtained by a company, the company has a statutory right to receiving payments from its debtors within forty-five days of acceptance of the service/ goods from the company. Also, certain banks in India have special credit facilities programmes for micro, small and medium enterprises. However, other than the above, there are no specific laws providing specific incentives to high growth companies presently.

In Ireland, there are currently approximately 27 accelerators/incubators which have been set up with the aim of nurturing and supporting start-ups and early stage companies. Some accelerators offer mentoring, legal and tax advice as well as access to funding sources while others offer micro seed investments for a small equity stake.

In Luxembourg, the law of 5 June 2009 relating to the promotion of research, development and innovation offers financial support to innovative companies, such as aid for research and development projects or programmes, aid for technical feasibility studies, aid for protection of technical and industrial property, aid for young innovative enterprises, innovation advisory services and innovation support services, temporary secondment of highly qualified personnel, process and organisational innovation in services.

Luxembourg innovative enterprises active in technological development also benefit from incubators programs supporting them by providing access to networks of partners, individualised coaching and a work infrastructure and an environment that correspond to their needs. Different incubators offer a support programme for foreign companies that wish to establish themselves in Luxembourg.

In the Netherlands, the number of (start-up) incubators and accelerators has increased dramatically since the start of the financial crisis. The most familiar incubators/accelerators which incentivize entrepreneurs in the Netherlands are

Startupbootcamp Amsterdam, Rockstart Accelerator, Founder Institute, and nReduce.

In Poland, a large group of entities operating within the private equity/venture capital market can be distinguished, where funds invest in an early phase of projects with high potential. One of the most famous is Leviathan fund – Business Angels Seedfund, BAS. Another fund is, IIF S.A, the only one listed in Warsaw Stock Exchange. Worth mentioning is AIP Seed Capital, a seed fund of Academic Incubators of Entrepreneurship. AIP is a very good source of capital for young high-growth companies.

In Spain, there are no incentive schemes for entrepreneurs to support high growth companies. Nevertheless, there are some companies providing accelerator or incubators but there are no incentive schemes for these types of companies.

In Sweden, there is a national network of incubators in all larger cities. Coaching is typically provided but no other incentives.

In Switzerland, there are various incubators targeted at high growth companies, especially in the region of Zurich, Basel and Lausanne. There is currently talk about a possible accelerator being set-up in Zurich but it is unconfirmed. In addition, a large number of competitions incentivise high growth companies as do various coaching programmes. Finally, financing by business angels, universities and technical schools is generally a well-established source of funding, especially in the early stage area. Some banks have also started to grant financings to start-ups.

In Turkey, capital incentives are available in relation to a range of aspects relevant to high growth companies. These are administered and obtained by several organizations, including the Scientific and Technological Research Council of Turkey (TÜBİTAK), the Foundation of Technologic Development in Turkey (TTGV), and the Small and Medium Industry Development Organization (KOSGEB).

In Uruguay, there are several governmental and private accelerators and incubators which incentivize high growth companies, particularly companies founded by entrepreneurs who have innovative ideas.

3.4 Any instruments referred to in section 1 preferred from the point of view of an entrepreneur? Why?

Many reporters suggest that debt instruments generally are preferred from the point of view of the entrepreneur. In contrast to equity instruments, debt allows the founder to retain control of both day-to-day business and long term strategic decision. However, due to the high risk in investing in many high growth companies, financing purely through debt instruments is rarely an alternative. In many cases the entrepreneur has no choice but to consider some sort of transfer of equity, or hybrid instruments potentially allowing such transfers.

There is however exceptions as several reports hold that ordinary shares and similar equity based instruments are preferred. Preference shares in particular allow the founder to retain control over the company, while allowing the investor to participate in the profit.

In Belgium, in the case of a high growth company, the entrepreneur would commonly prefer to keep the control over the management of the company, by maintaining the majority of voting rights in the general meeting of shareholders. Hence, such company would prefer financing of the company through debt, rather than by attracting other investors/shareholders.

In Brazil, there is no specific preference, it basically depends on a case-by-case analysis, whereby the entrepreneur should decide and approve of the investor's valuation of the company before the investment and the consequent dilution of the founder. Depending of the negotiations and other specific circumstances, the founder may otherwise decide to be financed through a debt transaction, as opposed to an equity transaction.

In Canada, the reporter has observed that many entrepreneurs prefer issuing debt and preferred shares over common shares or any other securities with management participation rights. These instruments provide an effective way to raise capital and will not dilute the existing management powers of the equity holders.

In Denmark, fundamental and traditional concerns like retaining control and future profits speak in favour of simple loan capital as compared to actual third party ownership. For the entrepreneur himself the preference is to retain as much share capital as possible.

In England and Wales, ordinary shares are cheap for company to finance in the short term, and the trading company only has to pay out dividends if it has profits available to fund them.

In Finland, the assets of the entrepreneur and any bank loans have no effect on the ownership of the company. Investments in equity based instruments made by business angels and private equity funds places less risk on the entrepreneur but result in a dilution of ownership. However, the entrepreneur may appreciate the know-how and experience and contacts provided by business angels / VC funds. Financing necessary for large scale growth is often only available through large PE / VC funds.

The main benefits of the equity based instruments relate naturally to their unlimited earnings potential. From the entrepreneur's point of view, the equity investments do not need to be paid back by the company during the investor's investment period. Revenue from sales can be used to expand and develop the business. Further, such equity instruments improve the debt / equity ratio of the company.

In France, stock options (even though the tax regime is less interesting than previously) and warrants for subscription to business creator shares are the most interesting, from the point of view of an entrepreneur. The financial advantage lies in the fact that the share price is fixed when the shares are granted (and not at the time of exercise). The more value the company creates between the date the shares are allocated to the manager and the date the shares are sold, the more important is the capital gain. The entrepreneur is thus involved in the increased value of his company.

In Germany, debt capital would be the most favourable form of investment from an entrepreneur's point of view. In this scenario, the entrepreneur remains in control of the company, but still benefits from the financial liberty that the funding provides. The financial reality of high growth companies is, however, dominated by external equity or hybrid financing, while pure debt capital only gains importance toward the end of the growth phase. Equity financing by way of venture capital participation or an angel investment can also represent a sensible and efficient instrument for increasing the equity capital, thereby paving the way for further financing rounds. Ultimately, mezzanine capital is a very suitable financing instrument because it can be adapted to fit any profit-risk situation due to its flexibility in structuring.

In India, investors would prefer investing by way of equity shares as it will grant the investor voting rights in the company as well as guarantee a return on their investment; the same applies to convertibles where voting rights are contractually conferred.

In Ireland, for small family run companies, the entrepreneur may wish to buy the investor out within a certain defined period and on that basis a loan note instrument may be preferable. The entrepreneur will thus retain control of the company and will not have to part with equity.

In Luxembourg, the key element from the entrepreneur's perspective is to maintain control over the company, thus shares with voting rights remain the most preferred instruments. Founders are also incentivised by subscription to convertible bonds and warrants.

In the Netherlands, an entrepreneur would normally prefer, in addition to its own equity stake, bank loans as financial instruments in order to retain maximum control over its company. Entrepreneurs are more reluctant to use business angels or venture capitalists as external investors because a (significant) loss of control over the business is then inevitable. Therefore, the entrepreneur would normally first try to arrange for a bank loan or other debt instruments.

In the experience of the national reporter, most high growth companies opt for a blend of equity investment and debt financing to meet their needs when expanding. Multiple instruments together are considered to work well to reduce the downsides of each instrument. The right ratio will vary according to the type of business, cash flow, profits and the amount of money it needs to expand its business.

In Peru, there is not necessarily a preference in what instruments are used. As mentioned above, companies in Peru are usually concentrated in few shareholders. The experience tendering of shares to the public is limited.

In Poland, the preferred form seems to be a joint stock company. A joint stock company allows raising capital from a wide range of investors, i.e. issuing shares on the capital market and the implementation of capital-investment plans.

In Spain, as mentioned above there are a number ways to obtain financing. Entrepreneurs normally prefer to grant ordinary shares because they grant the same right to every shareholder without any preference. The other preferred instrument of entrepreneurs is the profit participating loan because it benefits the equity of the company without giving a direct stake in its share capital. The interest earned on this type of loan is tied to the profits of the company and allows the entrepreneurs to carry out the project under a more flexible scheme.

In Sweden, the preference of the entrepreneur is rarely relevant since entrepreneurs normally are left to negotiate based on what they are offered.

In Switzerland, an entrepreneur would typically prefer investors to subscribe for ordinary shares.

In Turkey, there is no instrument particularly preferred from the point of view of the entrepreneur. However, lack of convertible notes makes it difficult for the entrepreneur in case of urgent need of cash since it is really difficult to convince all shareholders regarding the valuation of the company and to come to an agreement for the capital increase. Besides, tax and foreign exchange regulations make shareholder loans less preferable.

In Uruguay, entrepreneurs usually require investments in the form of equity as they do not have assets to operate as a guarantee for a loan and they do not have fixed income initially for repaying the loan. Therefore, it is usually more convenient for them to give the investor equity in their business and have the investor run the same risks and participate in the earnings of the endeavour.

4. CORPORATE GOVERNANCE – CONTROL ISSUES

4.1 In a typical investment into a high growth company, whether a loan related investment or equity investment, how much control would a typical investor take and what is of particular importance to an entrepreneur? In particular, please elaborate on the following terms from the perspective of your jurisdiction and practice:

All reporters agree that investors seek to have some controlling arrangements. However the level of control available to investors differs greatly. The issue of control typically arises with minority investments. The fact that a minority investor does not have direct power of decision does not mean that it cannot have substantial control over the company´s business.

In most jurisdictions the control available is dependent on the negotiating power of the parties and the circumstances of the transaction. Typically an entrepreneur will try to maintain as much freedom as possible in order to avoid burdensome authorisation procedures on a day-to-day basis.

Equity capital rather than loans (more rights co-determination).

Typically, the structuring of the investor´s position is based on the risk assumed by the investor, so an investor providing equity capital will have more codetermination rights than one providing loan financing.

In Poland, in a typical investment into a high growth company, whether a loan related investment or equity investment, a typical investor would take a controlling interest- the figure of 50% of the outstanding shares or voting shares, plus one.

(a) Anti-dilution measures

In many participating jurisdictions anti-dilution measures are common standard in transaction documents; however they are not usually subject to any type of legislation as such. The two jurisdictions that have included anti-dilution measures to their jurisdiction are Belgium[7] and Uruguay.

Anti-dilution measures are either full ratchet or weighted average method. The full ratchet anti-dilution clause is one where the investor is put in the position as if it had itself participated in the favourable valuation of the down round in the full, enabling it to maintain the stake it originally had in the initial investment. The weighted average method is the calculation of the average price of the two financing rounds.

The jurisdictions that indicated the use of both full ratchet and weighted average method are Luxembourg and Germany, while in Turkey only the latter is used. Anti-dilution measures are commonly used in Canada[8], Ireland, India, Sweden[9], Switzerland[10], Spain, France, Sri Lanka. Denmark indicated that the use of anti-dilution measures are crucial in their jurisdiction, while it is rare to find the measures used in Finland and Peru.

[7] This protection mechanism is authorised under Belgian law. However it requires the articles of association of the company to specify it when the privileged shares are initially issued.

[8] In Canada anti-dilution measures are used for any convertible or exchangeable securities.

[9] In Sweden anti-dilution measures are used for professional investors.

[10] Used from the seed financing phase.

The national reporters of the Netherlands cautioned to exercise some restraint in implementing anti-dilution measures. Since high growth companies are expected to continue to require additional rounds of funding, the use of anti-dilution measures can hinder growth opportunities for the benefit of a single investor.

The anti-dilution measures are usually included in documents such as, the investment agreement, the shareholders agreements, the articles of association, the participation agreement, the business plan etc.

(b) Rights for first refusal

As above this provision is also commonly used by most jurisdictions. The provision is often constituted in transaction documentation (i.e. the shareholders´ agreement). In Peru the right to first refusal for closed corporations is granted by law. In the Netherlands rights for first refusal used to be mandatory in private companies with limited liability; however since 2012 this is not the case.

Ireland and Spain indicated that rights for first refusal limits transfers of shares, except for transfers to permitted transferees such as close family or controlled company. The National Report of Luxembourg noted that such clauses are part of every package for investors in high growth companies to ensure continuity of the investors´ commitments.

(c) Pre-emption rights

Pre-emption rights are commonly used by the participating jurisdictions. In Peru, the rights are granted by law, however for open corporations the shareholders meeting may approve that this right is not applicable and set restrictions.

In Belgium pre-emption rights have to be limited in time and must always be in the corporate interest of the company.

(d) Drag and tag along

Commonly used by all states, however not incorporated into the national legislation. Often found in the shareholders´ agreement, but can also be included in the articles of association.

The National Report of Germany indicated that while tag along rights are used to protect a minority shareholder, in order to protect the other shareholders the drag-along right is normally only granted subject to certain conditions precedent or linked to a qualified majority shareholder resolution.

In Ireland the tag along provisions are included to protect minority in the event that the majority/founders seek to sell shares without invoking drag-along rights.

(e) Protective provisions

Protective provisions were found common in most jurisdictions except for France, where the use of such provisions was deemed rare. In Denmark´s report it was indicated that protective provisions are usually part of other provisions, not standalone provisions.

In England and Wales, the investment documentation will normally include undertakings on the part of the company and the management not to do various things without the consent of the investors, such as acquisition or disposal of significant assets and other non-ordinary course matters.

Typical protective provisions brought out in the reports are: good leaver/bad leaver , patents and intellectual property rights , certain reinforced majority , put and call option , special voting rights/ exclusive decision , veto , non-competition/non-solicitation.

(f) Information rights

The reports indicated that information rights are present in most jurisdictions. In Spain, Belgium, Brazil and Turkey, information rights are available under respective jurisdiction.

The common information rights are in Belgium's example, that any shareholder of a company has the right to be informed about the company (via the annual report, special reports, financial statements attached to such reports etc.) and the directors of the company are required by Belgian law to always act in the best interest of the company.

India, Sweden, Denmark, Estonia, Switzerland and France all stated that it was common to have further information rights. In Denmark information is mostly secured by a seat on the board for a minority shareholder/investor.

Countries that deemed information rights to be limited in the legislation include Switzerland, Germany, the Netherlands, Peru and Uruguay.

In addition to information rights provided by the law, in England and Wales, for example, private equity funds may require consent rights in respect of a number of actions and/or inactions of their portfolio company and the right to appoint external advisers to examine the company´s books and records. (England and Wales)

(g) Dead-lock resolution

Including a provision for dead-lock resolution does not provide a common practice among jurisdictions. Jurisdictions such as Germany and Spain have noted that it is advisable to have such a provision, whereas Switzerland and Estonia caution to avoid having it. Countries where dead-lock resolution was found common are Denmark, Germany, Spain, Belgium, France, Uruguay, England and Wales, Peru, and Sri Lanka. Sweden and Switzerland both found dead-lock resolutions to be uncommon.

In the Netherlands there is no specific requirement to have a provision for dead-lock resolution as in general, the entrepreneur will not allow the investor to break dead-locks in the latter´s favour unless the investor has obtained a majority interest in the company.

The dead-lock resolution methods mentioned were dispute resolution with arbitration being the most popular , Russian Roulette provision , Texas/Mexican shoot out clause , casting vote for chairman , put/call option , or granting a power of final decision to either one party or the other .

The National Report of Belgium indicated that in practice the dead-lock resolution provision is often used in joint-venture agreements to avoid their premature termination.

(h) Board seats/ observer rights

Board seat

Board seats are commonly requested in the following jurisdictions: Peru, Uruguay, Belgium, Turkey, England and Wales, Estonia, Ireland, and Luxembourg; while they are commonly granted in Brazil, Spain, Switzerland, Denmark, Sweden and India.

Observer seat

Observer seats were stated to be common in the following jurisdictions: the Netherlands, France, India, Ireland, England and Wales, and Sri Lanka. Peru and Uruguay both highlighted that such seats are not commonly available for investors.

For example in the Netherlands, it is common to allocate the seats in the board of managing directors in a Dutch private company with limited liability by the general meeting of shareholders. If an investor obtains any shares at all, he will be allowed to attend the general meeting of shareholders and observe the proceedings in that capacity.

The same is common in France, where board seats go to the most significant investors to keep boards as small and efficient as possible. Some investors (i.e. mezzanine investors) satisfy themselves with observer seats.

Other

In the National Report of Finland it was stipulated that it is quite typical in a shareholders´ agreement with fewer shareholders to agree that the minority shareholder have a cyclic nomination right where each minority shareholder has a right, one after another, to elect a board member for a period of one year.

In German GmbH an advisory board will be established to which investors can delegate one or more members. In German AG the investors are granted the right to designate supervisory board members by force of law.

(i) Any other terms

It was pointed out in the National Report of Belgium that under Belgian law it is unclear whether or not shareholder agreements can be entered into for an indefinite period.

It was highlighted that in Uruguay the relationship between the investor and the existing shareholder/s is generally governed by a shareholders agreement which is usually signed together with a share pledge agreement and a share deposit agreement with an independent third party who acts as depositary.

Other terms highlighted included co-signatures , appointment of managers , arbitration , good leaver/ bad leaver , restrictive covenants , liquidation preference , veto rights , provision regarding financing and dividends , a redemption clause , a consent clause , registration rights, granting of stock options to employees etc.

5. EXIT STRATEGIES AND TIME HORIZON

5.1 Type of exit which is most common (sale to venture capital/private equity firms/funds, trade sale, write-off, initial public offering)? Typical transaction length?

Sale to venture capital/private equity firms/ funds

Sale to venture capital/private equity firms/ funds was indicated as a common exit strategy by Luxembourg (for new investors), Turkey (private equity), Germany and Estonia (for both, most common together with trade sale), France, Uruguay, Brazil, Peru (most common), and Poland.

Trade sale:

Overall trade sale is commonly used or even the most common exit strategy among participating jurisdictions. Switzerland, Belgium, France, England and Wales, Ireland, Sweden, Finland, Turkey, Estonia and Germany all indicated that the use of trade sale was common in their jurisdictions.

Write off:

The National Report of England and Wales noted that failures were one of the most common ‘exits’ at the start of the recession, however this is changing.

Both Sweden and Finland pointed out that write offs are common in their jurisdiction.

Initial public offering

In general the initial public offerings (hereinafter IPO) are rare among participating countries.[11]

The National Report of Luxembourg indicated that the reason for IPO´s being less common lays in the heavy administrative procedures, high floatation costs and need for advance planning. Also in Luxembourg IPO cannot be undertaken by private limited companies.

In Uruguay IPO is accompanied with high cost and slow development.

However, Canada and Sweden both indicated that even though the IPO market is currently weak, this is changing. The National Report of Sweden pointed out that there

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[11] Peru, Uruguay, France, Estonia, Belgium, Switzerland, Sweden, Canada, Turkey, Luxembourg noted IPO´s to be rare in their jurisdictions.

has been higher activity on the IPO-market with respect to the smaller stock exchange lists and non-regulated markets.

Although most jurisdictions deemed IPO´s to be rare, both Sri Lanka and India indicated IPO´s to be a common exit strategy.

Also used:

In addition to the abovementioned exit strategies buyout[12], strategic acquisition[13], merger[14], l, liquidation[15], repayment of preference shares/loans[16], put option[17]/ call option[18], drag along/ tag along rights[19], buy back[20], redemption of shares[21] were also mentioned.

Denmark indicated that although there is no exit most commonly used, there is a trend of the smaller (and larger) equity funds swooping up minor companies, following which the companies are either floated on the stock exchange or sold to bigger players in the same line of business for consolidation.

In Spain the exit strategy used depends on the investor´s profile. In case of financial investor, a drag along right or a put option if the valuation of the company exceeds a predefined threshold, might be negotiated by the investor.

In Poland the alternative trading system of Warsaw Stock Exchange- NewConnect reached up to 55.6% of used types of exit from investments.

Typical transaction length

The national reports indicated that the typical transaction length varies greatly between jurisdictions. The variation is based on the complexity of the planned transaction and the transaction structure.[22]The length of the transaction can be a matter of weeks, months or even years as was indicated in the National Report of The Netherlands. The shortest transaction length indicated in the reports was 2-4 months in France and 3 months in Switzerland[23], while a typical transaction in Turkey takes 3-6 months[24] and at least 6 months in Peru.

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[12] Buyout by management: England and Wales, Ireland, Finland, France. Buyout: Belgium.

[13] Canada (87%)

[14] Luxembourg

[15] Ireland

[16] Finland (35% volume, 32% value)

[17] India, the Netherlands

[18] The Netherlands

[19] India

[20] India

[21] Poland

[22] National Report of Switzerland

[23] The report only indicated the typical transaction length for trade sale.

[24] The typical transaction length for share transfer to private equity and trade sale is 3-6 months. In case of an IPO the transaction length is at least 6 months.

5.2 How are new investors dealt with in your jurisdiction? How would the issues set out in section 4 above be dealt with? Are initial investment and shareholders' agreements/shareholders' agreements upheld in the next round, or new agreement is entered into?

In many jurisdictions new agreements are commonly entered into in the next round of investment, for example in England and Wales, Estonia, Turkey, Canada, Finland, Switzerland, Germany, and Brazil.

In others new agreements will be entered into dependent on how large the investment round is.[25] Jurisdictions such as Ireland, Sweden, Denmark, Belgium and France all consider the conditions of the specific situation such as the strength of the shareholders position before entering into new agreements binding all shareholders. The shareholders agreement will normally be renegotiated and rewritten if it is a larger investor while minor investors would commonly have to adhere to existing agreement on the terms and conditions as is.[26]

In Switzerland where the initial investor is only partially replaced in a secondary transaction, it is likely that the shareholders´ agreement entered into by the shareholders when the initial investor entered the stage is upheld in such second financing round and the new investor accedes to the existing shareholders´ agreement.

In Spain where there is only one investor usually a new investment agreement will be negotiated. But most shareholders agreements include a clause conditioning the effectiveness of the purchase of shares by investor third party on the acceptance by that third party of the shareholders´ agreement (the incoming shareholder simply replaces the outgoing investor).

Adherence to existing agreements occurs in Luxembourg, India[27] and Sri Lanka, and in case of minor investments in Ireland, Sweden, Denmark, and France, dependant on number of investors in Belgium, or on whether the incoming shareholder simply replaces the outgoing investor in Spain

In Uruguay a new agreement may be entered into or the new investor can request amendments to the existing shareholder agreement.

In the Netherlands the shareholders´ agreements usually provide that the existing shall arrange for a new shareholder to be bound by the provisions of the existing shareholders agreement. In case all parties agree, the parties are free to change either the articles of association or any shareholders agreements in place.

While there is no particular rule in Peru, one possibility is to execute a framework shareholders agreement into which new investors are bound by executing adherence agreements or amendments.

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[25] Sweden

[26] Sweden

[27] Initial investment and shareholders´ agreement are usually followed in the next round of investments; however, the shareholder rights may be re-negotiated depending on the change in shareholding.

6. REGULATORY ISSUES

6.1 Any tax implications (positive or negative) that a high growth company encounters in your jurisdiction?

Jurisdictions that indicated the existence of incentives and/or government aids are Ireland, Turkey, Canada, Spain, Belgium, Uruguay, and Sri Lanka. The reports on Sweden, Denmark and Switzerland noted that there are no positive or negative tax implications toward high growth company in their jurisdiction.

Specific Industries and Activities

In Canada tax incentives are provided on regional and federal level for certain industries. On regional level tax credits and tax holidays are provided for industries such as, aerospace, bioscience, computer animation and media; and for activities such as, mining exploration and scientific research and experimental development. On federal level Scientific Research and Experimental Development Tax Incentive Program is in place, which provides investment tax credits for expenditures such as wages, materials, machinery, equipment and some overheads. Similarly in Uruguay tax incentives can be applied for in specific areas.[28]

Research and Development

As was mentioned above there are positive tax implications in place for Research and Development (hereinafter R&D) in Canada. This is true also in Ireland, Turkey, Finland[29], Belgium and the Netherlands.

The National Report of Belgium indicated that in addition to R&D investment deduction or tax credit, they also offer a pay roll wage reduction, expat status for foreign executives and researchers temporarily assigned to Belgium.

New companies

Countries such as Finland, Ireland and Spain provide incentives for start-up companies and newly created companies.

For example in Finland investment incentive to invest in start-up is provided for Finnish residents.

Also in Ireland start-up companies encounter a number of tax advantages, whereas Spain has implemented a system where newly created companies pay reduced tax for the first years of its business.

In France in connection with high growth companies, the status of "Young Innovative Company" allows, under certain conditions, tax and social relief.

IP tax regime

[28] High growth companies can apply to be eligible for tax benefits under the Investment Promotion Regime. This regime allows the Executive Branch to promote certain investment projects or sectors that comply with the eligibility criteria set forth in the law. See the National Report of Uruguay.

[29] In Finland the tax implication is only temporary. See the National Report of Finland.

In Luxembourg favourable intellectual property tax regime is in place, offering an 80% tax exemption on income generated by the IP rights.

Patent income reduction is also available in Belgium, which provides 80% deduction for Belgian tax payers of their patent income.

Carry forward/ carry back of losses:

The National Reports of Finland, Germany and the Netherlands highlighted some possibility in relation to carry forward/ carry back of losses.

In Germany losses may be carried back to the preceding fiscal year up to 1 MEUR for corporate income purposes and carried forward for both.

In the Netherlands losses are available to be offset against for future profits for nine years, so also in profitable years losses carry forward could cause no corporate income tax to become due.

Carry-forward of losses: Finland (10 tax years), Germany (trade tax and corporate income tax).

Finnish tax regulation allows carry-forward of losses and setting the losses off later against income from the same source during the subsequent 10 tax years, which may facilitate deduction of losses generated in the starting phase of the company against future gains created in the mature stage.

Other

Other incentives brought out in the reports include: Special Economic Zone in India, Free Trade Zone in Uruguay, general tax benefits for smaller companies in Brazil, employment and investment incentive relief in Ireland, a foreign tax credit for royalty income and notional interest deduction regime in relation to equity funding in Belgium.

In the Netherlands the sale of shares is exempt in an operational high growth company for Dutch corporate income tax purposes.

The National Report of France noted that each financial instrument that a high growth company can put into place has its own tax regime.[30]

In addition Finland provides temporary tax incentives for 2013-2015.

General tax

The National Report of England and Wales indicated that there are various thresholds an investor should note, such as, VAT, filing full accounts pension etc.

It was noted that corporation tax in Ireland is set as follows: Trading Income 12.5%; Passive Income 25%; Capital Gains 33%.

Luxembourg brought out that they have an overall stable tax regime (i.e. lowest VAT in Europe), which should be an incentive itself for potential investors.

[30] Including stock options, free shares, warrants for subscription to business creation shares, convertible bonds, preferred shares, shares with warrants attached. See further in the National Report of France

In Finland the general corporate income tax has been lowered to 20% as of 2014.

Switzerland pointed out that they have a generally attractive tax regime.

In Belgium the general corporate tax income tax rate is rather high set at 33.99%.

In France Companies are taxed 15% for the part of their taxable profits below €38,120 and at 33.1/3% for the remaining part of their profits.

In Estonia, there is no annual corporate tax on income or profits. However, a tax of 21/79 applies to distribution of dividends and other similar payments, as well as certain costs. There are no thin capitalisation rules and no taxes incurred on market level interests, therefore acquisition finance is usually structured to a great extent as debt.

The National Report of Brazil pointed out that the general tax holds certain benefits for any company with a gross of up to USD $35,000,000.00.

6.2 In addition to any of the issues set out above, any other regulatory incentives or constraints with respect to high growth companies? Any constraints deriving from obligation for local participation in a high growth company? Co-investment obligation? etc.

Foreign participation

The most common constraint is that in several jurisdictions there are several sectors which are prohibited from 100% foreign participation.

For example in India, such sectors are telecommunication, multi-brand retail, insurance and defence. In addition to India, there are prohibitions from foreign participation in defence sector in Finland and in Spain. Similarly media and telecommunications are prohibited from foreign participation in the Netherlands, Brazil and in Uruguay.

In the Netherlands other such sectors include energy, mail, transport and healthcare. Health/medical assistance is also among sectors which prohibit 100% foreign participation in Uruguay, along with aviation, international road and maritime transport of goods and/or passengers.

In Brazil in addition to the before mentioned, aviation and nuclear energy were indicated to be among such sectors.

The National Report of Switzerland indicated that in fund sector foreign participation is restricted.

Other

In Finland at least one of the members of the board of directors of a limited liability company has to be a resident within the EEA[31].

I should be noted that in Germany an acquisition by a non-EU investor of a participation in a German company which leads to a voting rights share of at least 25% can be

[31] Same applies for deputy board members and to a managing director if elected.

prohibited by the Federal Ministry of Economics and Technology or granted subject to conditions.[32]

In Spain shareholders and directors can be Spanish or foreigners, however foreigners have to obtain a foreigner´s identification number ("NIE").[33] Also the relevant authority must be notified (e.g. State Secretary for Trade or the Bank of Spain.

The National Report of Sri Lanka highlighted that under and in terms of the Extraordinary Gazette No. 1733/19, there are certain terms and conditions that should be satisfied by the Debenture-Issuing Companies.

7. OTHER

7.1 Please elaborate on any other issues relevant to your jurisdiction with respect to high growth companies which have not been discussed in responses to earlier questions (if any).

The National Report of England and Wales indicated that in the event of a jurisdictional issue amongst investors and investees, UK jurisdiction is commonly used.[34]

The National Report of India noted that prevailing anti-bribery laws in India are not as stringent as compared to anti-bribery laws in many other jurisdictions, which therefore means that Indian companies have a lower level of awareness and compliance about anti-bribery, and can cause non-compliances by the Investee entity.[35] In addition, acquisitions which result in permissible threshold limits on assets/turnover being exceeded will require prior approval from the Competition Commission of India.

The National Report of Switzerland highlighted that the amount invested in the area of Swiss venture capital is rather low compared to international standards.[36]

According to the National Report of Uruguay, there is no restriction in the choice of law and competent jurisdiction if an arbitration clause is agreed.[37]

As of May 29, 2012 the “Brazilian Competition Law”, regulates competition in Brazil and establishes rules concerning the abuse of a dominant position. The Competition Law lists those anti-competitive practices that may constitute a breach of the economic order, and, therefore, could have an impact on the envisaged corporate transaction.

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[32] These measures may only be adopted in order to safeguard the public order or security of the Federal Republic of Germany.

[33] There is also a possibility for a visitor´s visa or residence permit for investors (includes legal entities).

[34] For example regarding US Investors in a European Investment Vehicle.

[35] Especially true in the case of foreign investors from the USA.

[36] This may also be due to the fact that there is only a limited number of Swiss and especially foreign-based VCs which are generally more active in later stage of financings.

[37] Foreign judgements and arbitral awards are enforceable in Uruguay in accordance with the provisions of the General Code of Procedures.

The National Report of Peru noted that in general, issues arising in the investment in high growth companies do not differ from issues arising in the investing in companies in general. However in general, it should be noted that Peru laws are very protective of employees.[38]

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[38] Employee protection does not only include labour costs in addition to the payment of monthly salary, but also the payment of compensation or the reposition of an employee if an employee is dismissed with no cause.