INTERNATIONAL ASSOCIATION
OF YOUNG LAWYERS

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

## Corporate Acquisitions and Joint Ventures Commission
## Prague, 2014 – Working Session 04

## National Report of Spain


Pablo Vinageras

J&A Garrigues
Avenida Diagonal, 645
8034 Barcelona, Spain
T +34 93 253 37 00
pablo.vinageras@garrigues.com

Pablo Cubel

Cuatrecasas, Gonçalves Pereira
Avenida Aragón, 30
46021 Valencia, Spain
+34 96 339 04 40
pablo.cubel@cuatrecasas.com


January 31, 2014

**General Reporters:**


Kadri Kallas, SORAINEN, Tallinn, Estonia
(kadri.kallas@sorainen.com, +372 6 400 903)

Jesper Schönbeck, VINGE, Stockholm, Sweden
(jesper.schonbeck@vinge.se, +46 10 614 33 21)

The 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 questionnaire mainly concentrates on these two topics in relation to high growth companies, but will also cover commercial and regulatory opportunities and constraints.

## 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.?

The two main types of companies with limited liability in Spain are public limited companies ("SAs") and private limited liability companies ("SLs"). Both have legal personality, separate and distinct from that of their members, who are not personally liable for the company's debts.

Choosing between an SA or an SL is mainly determined by: (i) the scale of the business; (ii) the legal requirements (only SAs can be listed); (iii) the future ability to raise capital; (iv) the rules on transferability that the shareholders want to apply; and (v) a certain amount of corporate flexibility offered by the SL rules as opposed to the SA rules.

In 2012, 98% of the companies incorporated in Spain were SLs. Traditionally, small and medium-sized companies have chosen the SL form because its characteristics are more suitable. Basically, lower capital requirements (3,000 euros as opposed to 60,000 euros) and more flexibility and greater autonomy to decide on the company's structure and organization.

An investor may invest in the pre-existing company of an entrepreneur via any of the following mechanisms:

(i) Acquiring shares in the entrepreneur's company: the rule that generally applies is that all shares give the same voting rights in accordance with the par value of the shares. However, both SL and SA companies may issue non-voting shares up to a par value of less than half of the share capital. Holders of these non-voting shares are entitled to certain privileges with respect to holders of ordinary shares.

(ii) Acquiring warrants: these are securities that entitle the holder to purchase or sell the underlying shares of the issuing company at a fixed exercise price until the expiry date, among others.

(iii) Stock options: these are options that allow the members of the board of directors or key employees of the company to acquire a certain number of the company's shares at a fixed price or within a fix period of time.

(iv) Giving a loan to the entrepreneur's company: this mechanism is often combined with the acquisition of shares in the company of the entrepreneur.

(v) Concluding a silent partnership agreements ("*contrato de cuentas en participación*"): agreements under which the investors hold an interest in a business they do not manage by making a contribution in cash or in kind. This gives the investors the right to participate in the positive or negative results of the business. Agreements of this type should be negotiated carefully and thoroughly.

(vi) Creating a temporary joint venture ("UTE"): without a separate personality to that of its members, created to carry out specific projects or services, such as an engineering or construction project.

**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.)

(i) Non-voting (preference) shares: holders of these special shares will be entitled to receive the minimum yearly dividend, whether fixed and/or variable, established in the relevant bylaws. Once the minimum dividend has been approved, the holders of non-voting shares will be entitled to the same dividend as that paid for ordinary shares. Where distributable profits are earned, the company will be required to approve the distribution of the that minimum dividend. Where distributable profits are not earned or are insufficient for distribution, the unpaid portion of the minimum dividend must be paid over the following five (5) financial years. Until that minimum dividend has been paid out, the non-voting shares will be entitled to this right on the same terms and conditions as ordinary shares and retain their financial rights. In the event of liquidation of the company, non-voting shares will entitle their holder to reimbursement of their value before the distribution of any amount to the remaining shareholders. Also, non-voting shares will entitle their holders to the other rights attached to ordinary shares. Non-voting shares may not be pooled for the purposes of electing board members by proportional representation in SAs. The par value of such shares will not be taken into account for the purposes of the exercise of that right by the remaining shareholders. Non-voting shares will be subject to the provisions in the bylaws and additional legislation on transfer and pre-emptive rights. Any amendment to the bylaws that infringes, directly or indirectly, the rights attached to non-voting shares will be subject to the consent of the majority of the non-voting shares affected thereby.

(ii) Preferred shareholder: is entitled to receive a specified payment before the ordinary shareholders. Please bear in mind that, not all preferred shares confer the same rights. There may be preferred shares that confer a preferred dividend right, this is to say, priority for receiving payment arising from the distribution of dividends. There may also be preferred shares that confer preferred rights on liquidation and, therefore, the shareholder concerned will have a preferred right to receive payment out of the liquidation proceeds. Moreover, a preferred share may carry both preferred dividend and liquidation rights.

The main feature of preferred shares is that they usually give priority for payment, although they do not confer any special right regarding the management of the company. This alternative is commonly implemented in favour of shareholders who do not want to get involved in the ongoing business of the company and focus more on the financial return.

(iii) Warrants: warrant holders are entitled to purchase or sell the underlying asset at a fixed price in a specified period of time.

From the holders' side, warrants give a certain amount of certainty that they will recoup the investment made in the company, either by acquiring the underlying asset or by selling it.

From the company's perspective, you confer a right but do not allow control over a stake in the share capital. Hence, it provides flexibility and still gives assurance to the holder.

(iv) Stock options: stock options are a scheme granting management and other key employees the right to acquire a fixed number of shares at a given price within a specific period of time. They are usually part of a company's compensation policy or, otherwise, awarded as an incentive to management once certain targets have been achieved. These schemes usually provide a win-win situation for both parties.

Despite this, stock options have to be thoroughly assessed before they are implemented because they could cause hindrances for the company or jeopardise corporate needs at certain point in time. They should be granted to a limited number of personas and for a small amount of the share capital.

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

As a general principle, there are no constraints to the instruments used. However, Law 24/1988, of 28 July, on the Stock Exchange Market, establishes certain requirements for acquiring control of companies on the stock market.

It determines that obtaining control of a listed company, by acquiring thirty percent of its shares with voting rights, is considered a public takeover bid.

On the stock exchange, there are different criteria for determining the control of a company. While for non-listed companies control is considered to be obtained where more than fifty percent of the shares are acquired, for a listed company the threshold established by law is thirty percent.

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

As consequence of the lack of financing from traditional sectors (i.e. credit facilities, loans, subsidies from private banks and the public sector), crowdfunding, in its various forms, has arisen as an alternative source of funding. It appears that this trend will continue for some years.

There are different crowdfunding models. Below is a concise list of the most commonly used crowdfunding models and examples of on-line platforms:

(i) Equity model: The contributor receives in exchange for its contribution a share of the business. A platform for this model is www.crowdcube.com and www.sociosinversores.es.

(ii) Loan model - P2P Lending: The contributor expects to receive the repayment of the amount granted with or without interest. A platform for this model is www.fundingcircle.com and www.zopa.com

(iii) Reward model: the contributor receives some kind of benefit, economically tangible or otherwise, which does not match the amount of the contribution. A platform for this model is www.kickstarter.com and www.indiegogo.com

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:

(i) Risk of default by the platform;

(ii) Risk of default by the receiving party;

(iii) The contributors do not usually have experience in investing;

(iv) There is not the same protection as with a professional investment; and

(v) There is also a high risk of fraud.

The lack of regulation, not only carries the above risks, but also entails certain legal challenges:

(i) Fitting the crowdfunding activity in with the legislation in force. Since there are no specific rules on crowdfunding, this activity is governed by the rules for the traditional financing providers.

(ii) Reducing the risks for contributors, fundraisers and platforms. The current legislation in force may provide tools to reduce the risks associated with crowdfunding activities. However, there are specific issues associated with these activities which the legislation does not address.

(iii) Drafting a contractual framework that gives legal certainty.

(iv) Determining the liabilities of the contributors, fundraisers and platforms in the context of a liquidation or bankruptcy proceeding.

## 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)

To give a clearer picture of the different type of investors in Spain, I will divide the life of the startup into three (3) phases:

(i) Seed phase: the purpose of this phase is to find financing through what are known as "Family & Friends". The investors are close, and sometimes, close relatives of the founders of the startup. The investors usually contribute without expecting much interest yield.

(ii) Startup: in this phase, we have more sophisticated means of investment. For example, business angels (experienced business people with time and equity on their hands to invest in high growth companies) and venture capital (as described in detail herein below). Business angels tend to get involved with the project, bringing their business expertise to the startup.

(iii) Growth: the main feature of this phase, as regards the investment, is that it brings about a more complex scheme. A couple of examples are listed below:

- Venture capital: investments made by private entities which, in exchange, receive shares in the startup. They normally do not have the majority stake, however. Nor do they usually get involved in the day-to-day business of the startup. Nevertheless, it is customary for them to be board members of the startup.

- Private Equity: investments made by private entities which, in exchange, receive shares in the startup. In this case, they usually become majority shareholders of the startup. Their purpose is to sell their stake obtaining high medium-term capital gains.

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

No, there is no typical investment size. However, there are two facts that may determine the size of investment:

(i) The phase of the company: Beyond the phases referred to in section 2.1 above, the amount of the investment progressively increases throughout the life of startup for obvious reasons.

(ii) The investor: the investor's profile usually determines the size of the investment following the pattern mentioned above.

Additionally, there are other factors that will determine the size of the company, such as, the industry, the product, and its needs.

**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.)

The answer to this question depends on the type of investment we are dealing with. Since the most frequent investors acquire shares in the company or make contributions to the share capital, they become shareholders. Consequently, the first document that is usually implemented is a shareholders' agreement to regulate the main features of the development of company and the relationship between the relevant parties.

The profile of the investor will determine the rules on taking up a stake. Different rules usually apply to business angels (i.e. less strict rules) to those that usually apply to more sophisticated investors such as private equity investors (i.e. stricter rules).

The shareholders' agreement between the parties must contain, among others, the following covenants:

(i) share capital structure;

(ii) a forecast of the contributions to be made by the shareholders for the development of the project, as well as any financing needs;

(iii) terms and conditions to set the company's value for any future contributions not envisaged;

(iv) adoption of bylaws which shall include, among others, the rules applicable to the powers and procedures of the governing bodies, including the composition of the board of directors and the voting procedure at the general shareholders' meeting and at the board of directors;

(v) certain pre-emptive rights in the case of a change of control of a shareholder;

(vi) minority shareholders' rights (such as qualified majorities for the adoption of certain resolutions by the general shareholders' meeting and board of directors);

(vii) share transfer rules;

(viii) preferred rights and exclusivity undertakings, if any;

(ix) the dividend system;

(x) potential acquisition by third party investors of a minority interest in the share capital; and

(xi) regulation of a potential divestiture by any of the shareholders.

As a general principle, every party to an agreement must comply with the obligations it sets out. The shareholders' agreement is included in this principle, and therefore the signing parties must fulfil their obligations. The obligations are only apply to the signing parties (i.e. interparty effect). In the event of a breach of contract, the only action available is damages for breach of contract.

In order to have effect vis-à-vis third parties (i.e. *erga omnes*), 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 since the Spanish Capital Companies Act tends to be rigid and usually those provisions go beyond the applicable framework (e.g. unanimous majority for corporate decisions).

**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.)?

The Spanish government recently enacted Law 14/2013 of 27 September, to support entrepreneurs ("**LDE**"). This law intends to stimulate entrepreneurial activities. We do not have any feedback on the real impact of this law, however, because it has not been in force for long enough.

In addition, the Spanish Ministry of Industry Energy and Tourism launched, in 1982 a programme to stimulate innovative companies (the "**ENISA Programme**"). The ENISA **Programme** offers long-term participating loans to entrepreneurs and to startups up in the amount of EUR 75,000.

Under the ENISA Programme, companies receive a participating loan without providing any security. They also have a low fixed interest and a floating interest rate subject to the company's profitability. The pay-off is also subject to the company's profitability.

In order to obtain a participating loan under ENISA, companies must meet certain requirements:

(i) File the project plans and business plan evidencing the company's solvency and the likelihood of its success. Please note that every document filed must meet the established rules on form.

(ii) Have audited financial statements and have filed them with the appropriate commercial registry.

(iii) Companies in the real estate and financial sectors cannot participate in this programme.

Lastly, the Bank of Spain has recently adopted a less rigid and bureaucratic system as regards foreign exchange formalities.

**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?**

Under normal circumstances, an investor would 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 answer would be the same 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 as explained in section 6.2 below.

## 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?)

As mentioned in section 1, 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. While in certain companies (e.g. general partnership companies – "*sociedades colectivas*") the liability of the partners is unlimited and therefore goes beyond their contribution to the company; in the SL and in the SA the liability of their members is limited to their contribution to the company.

The main items to be taken into account concerning SL and SA companies are briefly described in section 1.1.

The **LDE**, however, introduced a new corporate form, aimed to stimulate entrepreneurial activities. This new type of company is called: "*Sociedad Limitada de Formación Sucesiva*" ("**SLFS**"). The SLFS is a sub-type of SL that allows a company to be formed without any share capital. However, there are certain obligations that the SLFS must fulfil:

(i) To allocate 20 percent of the profit obtained in the financial year to a legal reserve.

(ii) Not to distribute dividends until the minimum share capital for an SL is reached (i.e. EUR 3,000).

(iii) To restrict the remuneration paid out to shareholders and board members to 20 percent of the value of the company's net assets.

(iv) In the event of liquidation, the shareholders and board members will be jointly and severally liable up to an amount of EUR 3,000.

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

Spain is facing a boom in the sector of startups. We can identify a number of examples of now well-known companies that started in Spain and have become high growth companies (such as, eDreams, Gowex, Privalia, Lets Bonus, among others).

We believe the current trend for new startups is in areas involving information technology, communication technology, applications, software, health, biotech and the internet of things.

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

There are no incentive schemes for entrepreneurs to support high growth companies. Nevertheless, there are some companies that are called accelerator or incubators but there are no incentive schemes for these types of vehicles.

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

As I mentioned above (please see section 2.1) there are different ways to obtain financing. The instruments used in each of them will depend on the needs of the company, on the industry, on the phase of the company, among others.

Entrepreneurs 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.

## 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?**

Generally speaking, the investor seeks to achieve two goals: (i) keep a certain degree of control over the entrepreneur's company to minimise the risks of the investment; and (ii) not to interfere in the way the entrepreneur is driving the business.

We have to distinguish three separate levels:

(i) Shareholder's meeting. The role of the investor at the shareholder's meeting depends on the proportion of share capital he has acquired. If he has acquired a majority shareholding, he will try to prevent the entrepreneur from claiming reinforced majorities. If he has acquired a minority interest, he will try to get the entrepreneur to include in the bylaws and investment agreement some reinforced majorities for certain sensitive matters (e.g. changes to the bylaws, dividends, auditors, etc.).

(ii) Managing body. Generally speaking, the managing body will reflect the balance existing at the shareholder's meeting level. There are four alternatives to organise the managing body of a company: (i) a sole director, (ii) a number of joint and several directors that will act independently, (iii) a number of joint directors that will act jointly or unanimously, or (iv) a board of directors. In SLs, unless provided otherwise in the bylaws, minority shareholders do not have the right to be represented on the board in proportion to their stake in the company. In an SA, to the contrary, minority shareholders are entitled to be represented on the board in proportion to their stake in the company. Directors do not, per se, have the capacity individually to represent the company. The board must take decisions by majority vote. The board may grant powers to one or more of its directors to represent the company. Both the investor and the entrepreneur may have some directors on the board to gain more control and knowledge of the business but the board itself may grant powers to one or more of its directors for the actual day-to-day running of the business.

**and what is of particular importance to an entrepreneur?**

The following issues can be particularly important for the entrepreneur:

(i) If, as a consequence of the investment, the entrepreneur has been confined to holding a minority interest in the share capital of the company, he may find it advisable to ensure that the approval of certain relevant resolutions by the general shareholders' meeting is subject to a reinforced majority that necessarily requires the entrepreneur's affirmative vote (i.e. appointment of directors, amendments to the bylaws, appointment of auditors, transactions with related parties, dividends policy, etc.).

(ii) If the investor brings deferred financing over time, by means of scheduled capital increases and/or loans, he may find it useful to subject the shares of the investor to an ancillary contribution consisting in the financing for the company in accordance with a predefined schedule of payments. A breach of this ancillary obligation could be made subject to a penalty or a call option right.

(iii) To ensure tag-along or drag-along clauses (depending on each specific scenario and the size of the stake it has in the share capital of the company).

(iv) To ensure a put and/or call option right on the investor's shares if certain predefined thresholds are achieved.

**In particular, please elaborate on the following terms from the perspective of your jurisdiction and practice:**

a. Anti-dilution measures

The easiest way to protect entrepreneurs against a possible dilution that may occur through the approval of a capital increase by the shareholders' meeting is to require a reinforced majority for the approval of resolutions concerning capital increases. Additionally, it may be stipulated in the investment agreement or in the shareholders' agreement that capital increases must be performed by creating the least possible number of shares and the necessary share premium to inject the required funding into the company(e.g. an investor could inject 1 million euros by paying for 1 million shares with a par value of 1 euro or by paying for 1 share with a par value of 1 euro plus a 999k share premium).

b. First refusal, pre-emption , drag and tag along rights

*Limitations for SLs*: clauses in the bylaws allowing voluntary *inter vivos* transfer of shares to be performed with virtually no restrictions and by means of which the shareholder offering all or part of his shares is required to transfer a number other than that offered will be null and void. Clauses forbidding a voluntary *inter vivos* transfer of shares will only be valid if the bylaws acknowledge shareholders' right to exit the company at any time. The inclusion of such clauses in the company bylaws will be subject to the consent of all shareholders.

*Lock-up period*: notwithstanding the comments in the preceding paragraph, the bylaws may prevent voluntary *inter vivos* transfers of shares or the exercise of exit rights for not longer than five (5) years from the date of company's incorporation, or in respect of shares resulting from a capital increase, five (5) years from the date of formalization of the respective public instrument.

*Voluntary inter vivos transfers*: unless provided otherwise in the bylaws, voluntary *inter vivos* transfers of shares may be made without any restrictions among shareholders or to shareholders' spouses, ascendants or descendants or companies belonging to the same group as the transferor.

Where not regulated in the bylaws, voluntary inter vivos transfers of shares will be governed by the rules set out below.

(i) Any shareholder wishing to transfer his shares must inform the directors in writing, specifying the number and characteristics of the shares involved, the name of the transferee and the other terms and conditions of the transfer.

(ii) The transfer will be subject to the company's authorization, granted under a decision of the shareholder's meeting.

(iii) The company may only withhold its consent if it serves a notarised notice on the transferor, specifying the name of one or more shareholders or third parties wishing to acquire all the shares for sale.

(iv) If no shareholder or third party acquires the shares, the shareholder's meeting may decide that the company itself should acquire the shares.

(v) The price of the shares, the payment method and the other terms and conditions of the transaction will be as agreed to by the transferor and disclosed to the company.

(vi) The public instrument recording the transfer must be formalised within one month of the date of disclosure by the company of the name of the purchasing party or parties. The shareholder may transfer the shares on the terms and conditions contained in the notice initially served upon the company if, three months after such notice, the company fails to furnish the name of the purchasing party or parties.

*Limitations for SAs*: restrictions on or requirements for unrestricted transfers of shares will only be valid when applied to registered shares and explicitly stipulated in the bylaws. Where limitations are established through an amendment to the bylaws, any shareholders who are affected but voted against that amendment will not be subject to the limitation (or limitations) for three (3) months. Any clauses in the bylaws that render shares non-transferable in practice will be null and void. Share transferability may only be subject to the company's prior authorisation if the bylaws list the reasons for withholding such authorisation.

Unless provided otherwise in the bylaws, it will be incumbent upon company directors to grant or deny authorization. In any event, if the company fails to reply to a request for authorization within two months of the submission date, the authorization will be regarded to have been granted.

c. Protective provisions

Protective provisions are generally referred to as clauses that enable investors to veto certain actions that the company's managing body may take.

The investor may obtain, in practical terms, that veto in two (2) different but related manners.

*Contractual protection*. The investment agreement may establish that both the entrepreneur and the investment will obtain each other's consent before the managing body of the company takes certain material decisions.

*Corporate protection*. The investment agreement and the bylaws of the company may establish that certain material decisions are subject at the level of the board of directors to a certain reinforced majority. Therefore, these material resolutions could only be approved if the directors whose appointment was proposed by the investor vote in favour.

d. Information rights

*Right to information in SLs*. The shareholders of limited liability companies may request from the managing body in writing before the general meeting, or verbally at the meeting, any reports or clarification that they deem necessary in connection with items on the agenda. The managing body will have to provide such reports or clarification either verbally or in writing, depending on when and what kind of information is requested, except where, in the governing body's opinion, disclosing such information may be detrimental to the company's interests.

Information may not be withheld when requested by shareholders representing at least 25% of the capital.

*Right to information in SAs*. Shareholders may ask the directors to provide any information or clarification that they may need about the items on the agenda, or pose any questions they may have, in writing up until the $7^{th}$ day before the date on which the meeting is scheduled to be held. The directors will have to furnish the information in writing by the date of the general meeting. At the general meeting, the company's shareholders may verbally request any information or explanations that they may need with respect to the items on the agenda, and whenever their queries cannot be answered immediately, the directors will have to provide the information in writing not more than seven (7) days after the general meeting concerned. The directors will have to furnish the requested information, unless, in the chairman´s opinion, disclosing the requested information may be detrimental to the company's interests. Information may not be withheld where requested by shareholders representing at least 1/4 of the share capital.

e. Deadlock resolution

According to the Capital Companies Act, a capital company must be wound up by reason of a deadlock of the corporate bodies which prevents it from operating.

In practical terms, this means that any shareholder may apply to the commercial court for the company to be wound up by proving that the shareholder's meeting cannot be held or cannot adopt any resolution because of a deadlock situation (e.g. not achieving a reinforces majority). Proving the deadlock may require several general meetings to be held without any resolution being approved. We do not recommend relying only on the provisions in the Companies Act.

In fact, it is highly advisable (especially in 50/50 scenarios or in scenarios where certain material resolutions need to be approved by a qualified majority which implies, unanimous approval in fact) for the shareholders to include in the shareholders' agreement some additional mechanisms to resolve deadlock situations. Those deadlock clauses may be: put and call options, Russian roulette clauses, etc.

f. Board seats / observer rights

The shareholders' meeting must decide, by a simple or, where appropriate qualified majority, the way in which management is to be organised and who the directors are going to be. If the managing body is a board of directors, once they accept their appointment, the board members have to appoint the board chairman and secretary. In this connection, the investment agreement concluded previously by the investor and the entrepreneur would normally determine which director among those proposed by entrepreneur and the investor must fill each position.

In the particular case of an SL company, having a minority interest in the share capital does not allow the shareholder to appoint any director. In SA companies there are two distinctive rights: the Proportional Representation System and the Co-option System.

*Proportional Representation System*:

In SAs, shares that are voluntarily grouped to constitute share capital amounting to or exceeding the sum resulting from dividing the capital by the number of members of the board of directors, will be entitled to designate the number of members derived from the proportion of share capital so grouped, rounding off any fractions. If this power is exercised, the shares so grouped will not take part in the election of the remaining members of the board.

*Co-option System*

In SAs, if vacancies arise during the directors' term and no deputies have been appointed, the board may designate from among the company shareholders the person or persons who are to fill those vacancies until the next general meeting is held.

g. Any other terms specific/important in your jurisdiction?

N/A

## 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?

Generally speaking, this depends on the investor's profile. If the investor is a financial investor, the investor might strongly negotiate a drag along right or a put option if the valuation of the company exceeds a predefined threshold. With the appearance of the MAB ( e.g. a market for small cap companies looking to expand, with a special set of regulations designed specifically for them with costs and processes tailored to their particular characteristics), some investors have designed the acquisition with the ultimate intention to list the target company on the MAB. This MAB market, however, has not evolved as expected by those behind its creation.

**5.2 How are new investors dealt with in your jurisdiction? How would the issues set out in section 5 above be dealt with? Are initial investment and shareholders' agreements/shareholders' agreements upheld in the next round, or new agreement is entered into?**

It is common practice to include in shareholders agreements 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. This is frequently used when more than one investor invests in the same company and the incoming investor simply replaces the outgoing investor. When there is only one investor, the entrepreneur and the new incoming investor will normally prefer to negotiate a new investment agreement.

## 6. REGULATORY ISSUES

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

Royal Decree-Law 4/2013 on measures to support entrepreneurs, stimulate growth and create employment has introduced several tax measures relating to corporation tax and personal income tax, mainly aimed at stimulating entrepreneurial initiatives to further business activities. For example, a new reduced tax rate applies to newly created entities engaging in business activities and incorporated on or after January 1, 2013. The tax rate applicable in the first tax period in which these entities' taxable base is positive and in the following tax period is 15% on the first 300,000 euros of the taxable base and 20% on any amount over 300,000 euros.

**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.**

Exchange control and foreign investments are liberalised in Spain (except for certain specific sectors such as activities related to national defence). They are thus generally free from restrictions, but must be notified to the relevant authority (e.g. State Secretary for Trade or the Bank of Spain). These reporting obligations are imposed for statistical and tax purposes and to prevent infringements of the law. Failure to comply with these reporting obligations may result in serious monetary fines. Foreign investments in Spanish companies have to be notified to the State Secretary for Trade within one month from when it is made. As an exception, where the investment originates from a tax haven and exceeds 50% of the share capital of the Spanish company, a prior declaration is needed.

Generally, there are no restrictions for foreigners to invest in Spanish companies. Also, shareholders and directors can be Spanish or foreigners.

The only formal requirement for foreigners who intend to become a shareholder or to be appointed as a director of a Spanish company is the obligation first to obtain a foreigner's identification number ("NIE").

Royal Decree-Law 4/2013 on measures to support entrepreneurs, stimulate growth and create employment has introduced new legislation that is aimed at non-resident foreigners carrying out capital investments in Spain. Applicants may request a visitor's visa or, where applicable, a residence permit for investors. This includes legal entities that are not resident in a tax haven and in which the foreigner directly or indirectly holds the majority of voting rights and is entitled to appoint or remove the majority of the members of its managing body. The visitor's visa for investors is granted for one year and is sufficient authorisation to reside in Spain. Subject to compliance with a series of requirements, foreign investors wishing to reside in Spain for more than a year may obtain a residence permit for investors, which is granted for two years and may be renewed for a further two years.

Business and entrepreneurial activities are activities that are innovative, of particular economic interest to Spain. A one-year visa can be applied for to carry out the preliminary procedures for starting a business activity. When proof of the start-up of the business activity has been provided, applicants will qualify for a residence status for entrepreneurs, requiring no minimum stay.

## 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).**

Nil.