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Analysis of the active 2019/2021 IPO season

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With Euronext Amsterdam high on IPO stock exchange shortlists, recent market activity has brought a number of notable developments and innovations into Dutch legal practice. The wish to ensure the execution of IPOs, which generally suffer from a high cancellation rate, has meant that retail offerings have become rare and that cornerstone investors are a staple. Retaining control, one-tier boards, and special purpose acquisition companies may – in spite of everything that is being written on these topics – also be part of a longer term trend. In capital markets, the law of supply and demand is acutely felt, and transaction terms are adjusted rapidly where this can improve the chance of a successful deal.

1. Introduction

When making the last edits to the text of this article, an interesting event occurred. The Financial Times published a story[2] – in a line of publications called "London fights for its future" – about post-Brexit regulation in the UK, and in the text towards the bottom, among charts on a range of topics, there were three charts on IPO activity. They compared the EU, London and … Euronext Amsterdam; no Frankfurt, no Paris, no Nordics, no Madrid, no Milan, but Amsterdam.

Some 20 years ago, the first author of this article was kindly approached by a senior, widely respected, colleague, who suggested that with stock exchanges and financial institutions merging, and EU integration proceeding at rapid pace, he – the co-author of this article – would be well advised not to proceed with advising clients on matters like stock exchange listings. There was no future in it. Anything else would be better. And here we are, in 2021, and Amsterdam is seen, in what is by all means Europe's most prominent financial newspaper, as a threat to London.

We should not get carried away, of course. In its most recent quarterly global IPO report,[3] Ernst & Young provides an overview of the top 12 stock exchanges and Amsterdam is mentioned only as part of four Euronext and Alternext platforms, and even then it is nowhere to be seen on numbers of deals. The combined platforms are mentioned for total volumes: at number 12 for 2020, with a jump to place six in Q1 2021. Most of the action is in Asia and in the Americas. But there still is an interesting IPO story to be told when we look at the world from Amsterdam.

In this article, we describe what occurred from 2019 until 31 July 2021. We have included certain key aspects of the transactions during the period in tables 1, 2 and 3 at the end of this article. We do not discuss Dutch N.V. IPO activity on other stock exchanges, of which there was quite a lot actually. We analyse features and trends – large and small – that are worth mentioning, some of which are probably here to stay.

The main legislative event during the period was the entry into force per 21 July 2019 of the new Prospectus Regulation.[4] As widely expected, the changes did not substantially impact IPO practices. The main geo-political event during the reporting period was the "no deal" Brexit per 1 January 2021. From a regulatory perspective, this means that issuers from one side of the new border now need to go to a regulator on the other side for prospectus approval if they wish to list securities there (prospectus content requirements are still more or less the same). A commercial Brexit consequence could be that companies that want an EU listing will no longer consider the London Stock Exchange. We have the impression that London being outside of the EU is indeed an element routinely considered by IPO candidates comparing stock exchanges.

Global IPO activity was robust in 2020 and in the first half of 2021. Out of nowhere, the US witnessed a true SPAC IPO flood during 2020, which tapered off significantly in 2021, with some of the SPAC activity subsequently moving to Europe, and to Amsterdam in particular. Based on rumours in the market, the authors estimate that dozens of SPAC IPOs are being prepared for listing on Euronext Amsterdam in H2 2021. As SPACs are faced with adverse conditions on multiple fronts, it will remain to be seen how many of these projects will actually reach the finish line.

We believe that notable themes during the reporting period have included reducing execution risk as much as possible (of which the retail offering appears to have been the main victim and cornerstone investors the main beneficiary), ensuring major shareholder control, an increase in one-tier boards and executive committees, an increase of B.V. IPO vehicles (driven primarily by the increase in SPACs), and commercial terms in SPAC transactions shifting somewhat in favour of investors. A final remark concerns the capacity of the Dutch financial industry and services sector. Due to unprecedented levels of capital markets activity in 2020 and 2021, getting the right team

1 Jan Willem Hoevers, Josse Klijnsma, Noortje Engbers are attorneys in Amsterdam.

2 A. Mooney, 'City of London grapples with wave of post-Brexit regulation', *Financial Times* 1 August 2021.

3 EY Global IPO Trends, 2021, Q1, https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/ipo/ey-global-ipo-trends-2021-q1-v1.pdf.

4 Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017.

on a transaction has been a challenge for some issuers and in particular for SPACs. IPO transaction timelines appear to have lengthened by some two weeks.

2. General offering structure trends

Recent developments show a wish to de-risk the execution of IPO transactions as much as possible. The structure of IPOs also seems to have been influenced by investors having (had) a lot of choice between IPO investment opportunities, possibly combined with a perception that valuations in certain industries are high. Although the number of Euronext Amsterdam transactions on which we have based our observations is statistically too small for drawing reliable conclusions, we believe that observation of what happens elsewhere – as reported on a frequent basis in the international financial press – supports our findings. Some developments – such as the demise of the retail offering, internationalisation and cornerstone investors, B.V.s (at least for SPACs) and one-tier boards – may be with us for a prolonged period. Others – such as pure secondary listings without a concurrent share offering – may be short-lived. The trends observed for IPOs generally also apply, but subject to significant magnification, to SPACs. We have included a dedicated SPAC section at the end of our article. We believe SPACs will remain a fixture of IPO practice, as these structures to some extent reduce market risk for issuers.

2.1 *The demise of the retail offering*

One of the more interesting developments during the past period has been the sharp decline of retail offerings. Traditionally, subscription in IPOs in the Netherlands has been open for institutional as well as for retail investors. Retail investors tended to benefit from a so-called preferential allocation: a fixed percentage of the shares to be sold in the offering was reserved for retail investors; often 10% of the total offering, with a maximum – expressed in euros or as an absolute number of shares – per individual retail investor. The advantages of having retail investors participate in an IPO include having a more diversified shareholder base, as well as ensuring a higher trading volume on the stock exchange immediately after the IPO, as retail investors are generally perceived to be short term holders compared to long-only institutions.[5] Since retail investors must buy the shares that they subscribe for at any price (*bestens*; with the top of the announced price range being the maximum, albeit that it is technically possible after launch to adjust the price range upwards), a smaller number of shares needs to be placed in the IPO bookbuilding process, as a result of which – generally speaking – a smaller number of higher priced institutional orders allows for setting a (somewhat) higher overall IPO price than would be possible without retail demand. Issuers that have name recognition and/or that are active in retail industries may in their regular commercial activities benefit from a retail element, as these IPOs tend to be more visible in the media. These issuers should also attract more demand among the wider public due to the retail nature of their commercial business.

In the period from 2015 to 2018, only one IPO in Amsterdam did *not* include a retail offering.[6] Indeed, one could argue that without a retail offering, one cannot speak of a true initial public offering at all, as a private placement to a few dozen institutional investors in combination with a post-transaction trading facility has no or a very limited *public* element. And therein also immediately lies the attraction of excluding retail investors from the IPO process. Retail investors are considered more vulnerable and hence offerings directly involving retail investors are bound by additional safeguards. The Prospectus Regulation includes an exception from the requirement to publish a prospectus for offerings that are made exclusively to institutional investors.[7] An AFM-approved prospectus is still required for listing an institutional IPO on the stock exchange,[8] but even here, certain requirements for transactions involving retail investors do not apply. The exclusion of retail investors generates valuable flexibility with regard to timing, and thus speed of execution. The requirement that the offering period must run for at least six business days from the day of publication of the prospectus[9] does not apply. This allows the issuer to end the offering as soon as it has received sufficient subscriptions. In addition, should a prospectus supplement be required, publication of such supplement does not trigger a two-day withdrawal period in case retail investors are excluded. Both reduce market risk.[10]

In the period covered by this article, only four IPOs included a retail offering: CM.com, Fastned, Marel and NX Filtration. And not a single one of the SPACs described in section 4 included a retail offering. We believe this is evidence of a clear break with the past. Fastned, Marel and CM.com included a preferential retail allocation. NX Filtration limited its "retail offering" to investors subscribing for at least EUR 100,000 and in so doing – benefitting from another exemption in the Prospectus Regulation[11] – stayed outside the realm of a true public offering, allowing

5 Having one or more – often local based – banks with a retail network and a private banking business in the IPO syndicate may also play a role in the presence of a retail offering. It is hard to say whether these banks are invited when a retail offering grants clear benefits for the relevant issuer, or whether these banks more strongly advocate a retail offering than other banks when an IPO is being structured.

6 See J.W. Hoevers & V. Lee, 'Analysis of the successful 2015/2016 IPO season', *Ondernemingsrecht* 2017/24, section 3.2; and N.A.M. Offergelt & P.R. Schütte, 'Analyse van het wisselvallige IPO-seizoen 2017/2018', *Ondernemingsrecht* 2019/96, section 2.2.

7 Article 1 section 4 subsection a Prospectus Regulation.

8 Article 3 section 3 Prospectus Regulation.

9 Article 21 Prospectus Regulation.

10 We note that as Euronext Amsterdam requires a market notice to be issued at least two days prior to listing, the ability to accelerate an offering is to some extent limited.

11 Article 1 section 4 subsection d Prospectus Regulation.

the flexibility and speed described above. Accordingly, flexibility to more quickly execute and thus de-risk transactions seems to be winning out over the advantages of a retail offering.

We have asked ourselves whether this is a positive or a negative development. Capital markets exist primarily to offer financing to businesses. From that perspective, if more IPOs happen because retail investors are excluded, then that should be a good thing. Retail investors can still buy shares following the IPO – in secondary trading – so why worry about the absence of retail offerings from the IPO process? One of the alleged advantages of investing in an IPO would be that IPOs are often priced with an "IPO discount" so that when the shares start trading, there is a modest increase in price – the "IPO pop".[12] This creates confidence in the issuer and rewards the initial subscribers. In transactions without a retail offering, this potential advantage is not available to retail investors – changing the short to mid-term investment profile of the issuer for these investors. In the extreme, if retail investors would be put off from investing altogether because of a perception that "profits go to big institutions only", then that would probably not be a good thing; a market benefits from having as many participants as possible. The future will tell whether the retail offering will make a comeback, or if we have really seen the demise of the retail offering with the exception of IPOs of issuers with a (wish for) wide brand recognition.

2.2 *Unavoidable cornerstone investors*

The world of IPOs is fickle. Sudden developments, such as changes in market circumstances, can upend the best laid plans. Conducting an IPO – in particular of a relatively unknown business – can be challenging. A method to mitigate risk and overcome the challenge of anonymity is to secure cornerstone investments. Where cornerstones used to be an interesting but infrequent feature of the Dutch IPO market,[13] in the period covered by this article they have become much more common. The majority of the IPOs included cornerstone commitments, ranging from 25% to 50% of the total offering.

Cornerstone investments are commitments to invest in the IPO, made prior to the IPO, disclosed prominently in the prospectus and in marketing materials. In return, the cornerstone investors are ensured allocation for their total commitment. A clear market practice seems to have developed with cornerstone investors committing to subscribe for a fixed amount at the offer price wherever this falls within the announced offer price range.

Cornerstones can have a material positive impact on the success of an IPO, protecting issuers against disappointing interest during the offer period as a significant part of the book of subscription will already be covered pre-IPO. Cornerstones commitments also have a signalling function for the rest of the market, in particular, as is normally the case, when they are made by renowned institutional investors. The commitment conveys: "We have carefully considered the proposition, and we believe it is worth investing in this IPO". In some instances, such as in JDE Peet's, cornerstones include existing shareholders who in the process effectively acquire the shares of co-shareholders who are exiting the issuer at the IPO price.

Cornerstones do not receive a discount compared to other IPO investors (which does not exclude that they may still have insisted on a lower upper end of the price range in pre-IPO negotiations with the issuer – which should not be an issue for the market as any resulting lower IPO price will benefit all new investors alike), nor do they obtain other pecuniary or governance advantages. No lock-up applies and cornerstone investors are accordingly free to dispose of their shares whenever they see fit.

2.3 *Bookbuilding, pricing and innovative listing methods*

IPO pricing is an art rather than a science, and an IPO price turning out to have been much too high or much too low is an invariable source of controversy and calls for reform of the IPO process. Every now and then, an issuer declares to have found an innovative solution, but the authors – admittedly no experts – are sceptical about these alternatives to the bookbuilding process. Direct listings have proved feasible only for well-known businesses such as global technology companies – with so-so results – and in the context of restructurings of listed businesses where an existing diverse shareholder group receives shares in a new business, as was the case with Prosus. The recent IPO of Robinhood in the US which touted the innovative use of an app to offer shares in a whopping 35% retail offering was controversial (which the authors grant may also have been caused by it operating an "untested" business model for "democratising" finance). Trading had to be halted several times in the first week following listing due to volatility.[14] Of course, if novel methods to distribute shares among the public were to become successful more often, this might reverse the observed trend of reduced retail involvement in IPOs.

2.4 *Underwriting, stabilisation and "who pays the bill?"*

The key terms for an IPO are contained in the underwriting agreement between the bank syndicate, the issuer and any selling shareholders. Many of the arrangements – and especially those important for investors – are harmonised.

12 Comparison of widely accepted general stock indices and the price development of recent IPOs could demonstrate the existence of this IPO discount (see, e.g., Renaissance Capital LLC's comparison of the S&P 500 Index versus its own US IPO Index).

13 J.W. Hoevers & V. Lee, 'Analysis of the successful 2015/2016 IPO season', *Ondernemingsrecht* 2017/24, section 3.5.1, highlighting that cornerstones were conspicuously absent.

14 M. Darbyshire, E. Platt & M. Kruppa, 'Robinhood IPO: why believers failed to deliver the 'moonshot'', *Financial Times* 30 July 2021.

The nature of the underwriting commitment was, accordingly, the same in all IPOs reviewed: the underwriters commit to procure purchasers or subscribers, failing which, they purchase or subscribe for the shares themselves.[15] On the face of it, this appears to be a very strong commitment that guarantees that the IPO will not fail. To understand the true nature of the commitment, however, one must look at the moment from which it applies and the conditions to which it is subject.

Although the underwriting agreement is signed on the date of the prospectus at the beginning of the subscription period, the underwriting commitment is subject, among other conditions, to agreement on price between the issuer and the underwriters – if there is insufficient investor demand, there will be no agreement on price, no underwriting and thus no IPO. The underwriting commitment is "back-end": it covers the payment risk on investors who say that they will take part in the offering.[16] But even if all conditions are met and after as-if-and-when-issued/delivered conditional trading on the stock exchange has started, an IPO can still fail: for example, if a material adverse event occurs prior to shares and cash exchanging hands, the IPO is still capable of being cancelled.

Since getting the IPO price, the IPO size and allocation to individual investors right is complex, IPOs tend to have a mechanism that allows banks to remove supply and demand imbalances immediately after IPO by buying back shares in the market in an activity called "stabilisation". Because banks are not in the business of taking risk in a falling market, they need to be guaranteed that stabilisation does not result in a loss for them. This is difficult in IPOs involving Dutch N.V.s which are precluded by law from guaranteeing the price of their own shares. Accordingly, underwriting agreements contain (and are accompanied by) a complicated set of arrangements. These arrangements involve the stabilisation agent bank (invariably one of the underwriting banks) borrowing shares from a large shareholder, selling these shares short as part of the IPO at the IPO price, and returning the shares to the lender at the end of the transaction – whereby the shares that are returned are either derived from stabilisation purchases in the market, or, to the extent no stabilisation was needed, additional shares called by the banks pursuant to their over-allotment option granted by the issuer and/or selling shareholders. In case of B.V.s acting as IPO vehicles, this circus is not necessary. The rules on financial assistance for B.V.s are less strict, and in the reporting period we see stabilisation for some B.V. issuers being structured in the form of the issuer directly granting a put option to the banks for any shares bought back as part of stabilisation activities.

The underwriting agreements for the five IPOs that comprised a secondary offering element[17] differed on the division of bank syndicate fees between the issuer and the selling shareholders. Where the offering consisted of both a primary and a secondary offering, it was the issuer that paid all the underwriting fees, while in case of a secondary offering only, the underwriting fees were paid by the selling shareholders. We surmise that in a "mixed" offering the issuer boards considered the benefits of an IPO for the issuer to be such that bearing the cost for services rendered to selling shareholders was in its corporate interest. We know from experience that tax authorities carefully scrutinise the details of such arrangements when considering the deductibility by the issuer of IPO fees.

2.5 *The internationalisation of Euronext Amsterdam and secondary listings*

Two other trends – that likely are connected – have been noteworthy: a relatively high number (seven) of foreign entities has been listed on Euronext Amsterdam and a relatively high number (six) of secondary listings has taken place on Euronext Amsterdam.

The number of foreign legal entities listing on Euronext Amsterdam is a testimony, we believe, to the further internationalisation of the Amsterdam stock exchange and the recognition of Amsterdam as a hub for international (securities) trading.[18] Euronext Amsterdam rules reflect this, as, for example, the AEX-family indices are accessible to issuers of any origin, whereas in the past a link with the Netherlands was required.[19] The foreign entities also come from different places within Europe: France, Luxembourg,[20] Belgium, Iceland and the United Kingdom, with the latter accounting for three listings.[21]

The simplest form of dual listing consists of existing shares, already listed on a regulated market elsewhere, being admitted in Amsterdam based on a document of a

15 Another – in practice similar – arrangement consists of the underwriters buying all the shares in the offering, but only once all conditions have been met and on-sales to third-party investors are guaranteed.

16 Rights offerings (*voorkeursrechtemissies*) tend to have a stronger "front end" underwriting commitment.

17 Primary offerings are offerings where new shares are offered by the issuer. Secondary offerings are offerings where existing shares are sold by shareholders. In the CTP IPO, the offering was a primary, but the over-allotment option (which was eventually exercised) was granted by the selling shareholder. The selling shareholder paid the fees for the shares underwritten and sold in the over-allotment, and the company paid the fees for the underwriting of the primary offering.

18 See also: P. Stafford, 'Amsterdam ousts London as Europe's top share trading hub', *Financial Times* 10 February 2021.

19 For issuers with a listing on multiple Euronext platforms, the degree of nexus with the Netherlands is still relevant.

20 Although InPost S.A. is a Luxembourgish incorporated legal entity, its business is operated primarily in Poland.

21 One of these listings concerns Unilever Plc, following the unification that resulted in Unilever N.V. delisting from Euronext Amsterdam and being replaced by Unilever Plc.

few pages that does not require AFM approval.[22] Renewi plc states the reasons for its Amsterdam listing including bringing its brand closer to its Benelux business, increasing visibility in the region, expanding research coverage, widening investor interest and contributing to the liquidity of its shares. Only one of the secondary listings also included an offering: Marel. Looking at post-secondary listing trading volumes, which are generally modest, adding an offering accompanied by marketing activity appears to be beneficial if generating liquidity in Amsterdam is important.

Although this is hard to prove, it is tempting to connect the listing of three UK legal entities (and the further internationalisation of Amsterdam listings more generally) and Brexit. In previous years, businesses from Eastern Europe – often with a Dutch legal entity IPO vehicle – chose London for listing purposes, as did businesses from Commonwealth nations and businesses active in finance and mining. In any event, it is likely that London will have noticed with some concern the advent of the likes of Prosus, InPost, JDE Peet's, Allfunds and CTP to Amsterdam. The size of these transactions demonstrates that Amsterdam is perceived as able to generate the depth of investor demand and the trading volumes, required for optimal price discovery and sales of large numbers of shares in secondary trading. As we will see in more detail below, the large number of SPAC listings in Amsterdam compared to the number listed in London is not exclusively related to Brexit, but also due to London requiring the suspension of trading after announcement of a business combination and certain other differences between the London and Amsterdam markets. For a brief period after Brexit (as a result of a – probably temporary – regulatory situation caused by the no-deal Brexit), Euronext Amsterdam surpassed the London Stock Exchange as Europe's largest share trading centre.[23] It will be interesting to see whether the international popularity of Euronext Amsterdam will endure in the years to come. We are inclined to answer this question in the affirmative.

A final interesting question is whether foreign issuers in Amsterdam operate, or are able to operate, to some extent in a regulatory vacuum as regards provisions of mandatory law applicable to Dutch legal entities listed in Amsterdam. The most prominent example in this respect may be the – Dutch, EU based – rules relating to the mandatory public offer that must be made by persons that – alone or acting in concert – acquire a 30% or larger voting interest in an issuer. However, we see companies that are not subject to mandatory rules occasionally implementing comparable obligations in their articles of association. For example, the UK issuer Allfunds, to which no (mandatory) public offer rules apply as neither Dutch law nor the UK City Code apply to it, has voluntarily incorporated arrangements in its articles of association to approximate to some degree the (mandatory) public offer rules under Dutch law. Similarly, we see non-Dutch issuers voluntarily applying the Dutch Corporate Governance Code (the Code) that does not apply to foreign issuers. Luxembourg's InPost and Allfunds are examples of issuers that have done so.

3. Governance

In this section, we study the governance of the newly listed companies. We will focus primarily on the eight Dutch legal entities that obtained a listing in the period covered by this article.[24]

3.1 *Surge of the one-tier board*

Traditional Dutch listed companies have a two-tier board structure, with a management board and supervisory board. Remarkably, the majority of the new Dutch issuers implemented a one-tier board. Does this mean that the one-tier board has obtained a proper foothold in the Netherlands, or is this trend a result only of the cultural background of non-Dutch founders and shareholders of these new IPO companies (potentially related to the internationalisation of Amsterdam as a listing venue)? We cautiously conclude that the latter situation is the more likely reason for the one-tier trend. Related to this development (though not as its exclusive reason), most new Dutch issuers have also instituted a form of executive committee. As the one-tier board typically includes a small number of statutory executive directors (usually two), it is not surprising that these officials are assisted running the business by other senior executives. In this article, we use the term management board to also refer to the executive directors on a one-tier board, and the term supervisory board to also refer to the non-executive directors on a one-tier board.

3.2 *Appointment, dismissal, and qualified majority*

The management board is charged with running the company's business and it is responsible for determining the strategy of the company.[25] Given its key position, also in relation to potential (hostile) takeovers and shareholder activism, an important element of the governance structure of an issuer consists of the power to appoint and dismiss management board members and "set" the term of their appointment. All Dutch IPO issuers that we studied have a management board that can be appointed only upon a binding nomination by the supervisory board. There is some variety with respect to the majority required by shareholders in the general meeting to override a nomina-

22 Article 1 section 5 subsection j Prospectus Regulation provides a conditional exemption from the prospectus requirement for these types of secondary listings.

23 P. Stafford, 'Amsterdam ousts London as Europe's top share trading hub', *Financial Times* 10 February 2021.

24 Including for this purpose also CM.com and Huvepharma; even though these IPOs were aborted, they still give interesting insights into governance trends.

25 See, e.g., the discussion around AkzoNobel's defence against activist shareholders and the judgment of 29 May 2017 by the Enterprise Chamber in that respect: ECLI:NL:GHAMS:2017:1965.

tion, with the two main flavours being a simple majority with one-third of the share capital represented, or a two-thirds majority with half of the share capital represented (which is generally not in line with the Code). The arrangements for appointment of members of one-tier boards are generally also based on binding nomination, for executive as well as for non-executive members. An interesting feature can be found in CM.com's governance, where a super-majority is required to dismiss the founders, but where a simple majority suffices for the other management board members. As far as the term of appointment is concerned, most issuers have chosen a four-year term. CM.com, CTP and Prosus have a different arrangement, with certain executives having been appointed for an indefinite term (in deviation of the Code). In most SPACs it is near impossible to remove board members until after the business combination.

3.3 *Diversity – future legislation having an impact*

In February 2021, the lower house of the Dutch parliament (*Tweede Kamer*) adopted legislation – currently before the senate – requiring supervisory boards of, among other legal entities, Dutch listed companies to comprise at least one-third male and one-third female members. Although this bill was not yet in force for the IPOs considered in this article, the legislation nevertheless seems to have had an effect on Dutch issuers: where for the IPOs in 2019 and 2020, *none* of the issuers complied with the required quotum, for the IPOs in 2021 *all* issuers (with the exception of nearly all SPACs) complied. When we look at recent IPO company management boards, however, a similar trend towards gender diversity cannot yet be discerned.

3.4 *Remuneration and shareholder approval – ineffective legislation?*

Another relatively recent legislative development seems to have been less effective in the context of IPOs. As part of the implementation of the EU Shareholder Rights Directive II,[26] the adoption or amendment of an issuer's remuneration policy requires a 75% majority in the general meeting, *unless* the issuer's articles of association provide for a lower majority.[27] All Dutch IPO issuers that have published their prospectus following the entry into force of this requirement have made use of this latter possibility and instituted a simple majority for adoption of their remuneration policy.

3.5 *Share issue authorisation*

In recent years, there has been a push from institutional investors and proxy voting advisors to restrict board share issuance mandates.[28] For example, ISS has recommended that share issue authorisations without pre-emptive rights be limited to 10% of the issued share capital and for a period up to 18 months. At the analysed IPO companies, the limitation of the mandate to 18 months is generally observed (though exceptionally NX Filtration's management board has been authorised to issue shares for a period of three years). The majority of new Dutch issuers limits the authorisation to 10% of the issued share capital, though 20% is not unusual either (with the additional 10% typically being linked specifically to M&A). SPACs, due to their need to seek additional equity financing in the context of a future business combination and for issuing shares to sellers in the business combination, generally have near unlimited powers to issue shares without shareholder approval and without shareholder pre-emptive rights. Of course, at a SPAC, the business combination itself remains subject to majority shareholder approval and unhappy SPAC shareholder are permitted to exit and receive their money back.

3.6 *Retaining control*

Interestingly, all new Dutch issuers maintained majority shareholders following the listing. This may seem a logical result as most IPOs only involve the sale of between 25%-40% of the share capital. It is our impression, though, that many of the controlling shareholders of the companies listed during the period do not intend to relinquish their control in the short term, if at all. For example, in the IPOs with founders, there is a desire to allow the people that have made the company a success to continue to determine the course of the business in the future. At Prosus, South African regulation requires that Naspers retains control. We have looked at what measures, if any, major shareholders implemented to ensure that they retain some form of control (other than by virtue of holding a large number of the shares listed on the stock exchange).

One way to ensure continued control, also following dilution, is to implement a dual class voting structure,[29] with one class of shares offering multiple voting rights per share. This method has proven popular with large US tech companies, such as Facebook, but it also has examples in the Netherlands (e.g., Altice prior to its delisting). The UK currently considers creating more flexibility for companies with these structures to make London more competitive.[30] Of the new Dutch issuers, Prosus instituted a dual class voting structure which kicks in once the stake of its majority shareholder(s) drops below 50%.

A new way to ensure founders retain a certain degree of control post-IPO has been the founder committee at CM.com. This founder committee essentially constitutes a new corporate body, anchored in the articles of associa-

26 Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017.

27 Article 2:135 section 2 BW.

28 See ISS, *Continental Europe – Proxy Voting Guidelines and Benchmark Policy Recommendations*, last updated 12 March 2021 p. 17.

29 See for example T.A. Keijzer, 'Dual-class-aandelenstructuren', *Ondernemingsrecht* 2021/46 and, more elaborately, his doctoral thesis: T.A. Keijzer, *Vote and Value. An Economic, Historical and Legal-Comparative Study on Dual Class Equity Structures* (diss. EUR), Deventer: Wolters Kluwer 2020.

30 UK Listing Review (popularly known as the "Lord Hill review"), 3 March 2021, p. 11.

tion, in which only the founders of CM.com have a seat. The powers of the founder committee include approving any decision to amend the number of management board members (ensuring a continued minimum founder influence in the management board) and the power to appoint one-third of the supervisory board members, with the founders able to appoint themselves as supervisory board members (in case they no longer serve as member of the management board). To safeguard these arrangements, the founder committee also has approval rights for resolutions by the general meeting to amend the articles of association.[31] As described above, entrenchment of management board members is not uncommon.

Finally, Fastned B.V. has a unique ownership structure, in which its entire share capital – including the shares held by its founders (the sole managing directors and erstwhile majority shareholders) – is held by a foundation with an independent board, which also exclusively exercises all voting rights in the company's shareholders meeting. Investors hold non-exchangeable depositary receipts issued by the foundation, which indirectly grant them an economic interest in the shares of the issuer. In practice, investors cannot influence the composition of the management and supervisory boards. The foundation must safeguard the mission and independence of the company and the interests of the holders of depositary receipts. The foundation board members are appointed on the basis of a binding nomination by the foundation board itself, subject to a vote of the holders of depositary receipts, the great majority of which are owned by the founders. The founders thus have retained negative control over the constitution of the foundation board, which controls the general meeting of shareholder and, indirectly, the boards. An added advantage of this structure is that the full large company regime cannot apply to Fastned. Pursuant to the full large company regime, control over the boards of an issuer moves to a certain degree to the supervisory board.

External IPO investors could view as negative any measures that limit their influence beyond one-share-one-vote. As IPOs with these features succeed in large numbers, we do not have the impression that it is a major impediment from a commercial perspective. We believe that investors in founder-led companies active in certain industries, such as technology, appreciate their commitment and also their wish to be in control.

Retaining control also means that large shareholders cannot in practice sell their shares. Contrary to what the saying implies, there is a way to have your cake and eat it too: large shareholders can borrow money based on the value of their interest in the company. When such a margin loan is extended, the shares in the issuer do not have to be sold, but they are pledged in favour of a lending bank. There is a catch, though. If the share price should drop significantly, this may trigger enforcement of the loan and the bank could proceed to sell pledged shares in the market which might depress the share price even further, potentially triggering more sales by the bank, etc. Accordingly, investors in InPost were explicitly warned in the prospectus about the margin loan extended to its single largest shareholder.

In IPOs with large shareholders, a relationship agreement between them and the issuer will generally provide for information sharing, nomination of a minimum number of supervisory or non-executive board members, and practical support for future sell-downs. At JDE Peet's, the Investor Rights Agreement contains detailed additional arrangements on acting in concert, board committee composition, business decisions that must be approved by the board, and information sharing with shareholders also in situations where this is not strictly required for consolidation. The agreement ends with respect to a party that is a shareholder only once it no longer directly or indirectly holds any shares in the issuer.

3.7 *Protective measures out of vogue?*

A distinctive feature of Dutch issuers has been the presence of a preference shares '*stichting*', a foundation to protect the company against hostile takeovers and shareholder activism.[32] An independent foundation is granted a call option pursuant to which it can, if the continuity of the issuer is jeopardised, acquire up to – typically – 50% of the share capital in the form of preference shares. This allows it to block hostile takeover attempts for a period of up to two years.

In the period under review, of the Dutch issuers analysed, only Fastned instituted a protective foundation. An interesting alternative has been used at JDE Peet's: the board has been authorised to grant a preference share call option to a foundation, which gives the board up to five years after the IPO to decide whether it considers a protective foundation beneficial, possibly depending on whether or not the current major shareholders have significantly reduced their interest in the company.

So can we say that the hidden cost of defence has proven too high and that for this reason issuers steer clear from preference share foundations? We wonder. We rather believe that the absence of protective foundations must be seen in light of the (nature of the) majority shareholders: if a majority shareholder intends to retain its shares going forward, a protective foundation may not add much – it might even be considered a possible nuisance.

31 For a more elaborate description of the founder committee, see J.E. Devilee, 'En de macht blijft bij…', *WPNR* 2020/7282.

32 See, e.g., R.A.F. Timmermans, *Bescherming van beursvennootschappen door uitgifte van preferente aandelen (Serie vanwege het Van der Heijden Instituut deel 147)*, Deventer: Wolters Kluwer 2018.

3.8 *N.V. vs B.V. – has the B.V. finally arrived?*

With the introduction of the *Wet Flex-BV* in 2012, the requirement that shares of B.V.s be subject to transfer restrictions was dropped. As of that moment, it became possible to list a Dutch private limited liability company (a *besloten vennootschap*) on the stock exchange. As the traditional public limited liability company (a *naamloze vennootschap*) provides much flexibility and is subject to various mandatory rules that are useful in the context of a listing, it has been questioned frequently whether issuers would in practice ever choose a B.V. rather than an N.V. for their IPO.[33] Fastned was the first,[34] and for a long time only, stock exchange listed B.V., first on the Nxchange in 2016 and, since 2019, on Euronext Amsterdam. This has changed with the emergence of the SPAC boom. Some Dutch SPACs have recently been created in the form of a B.V. in light of their more flexible rules on financial assistance, the repurchase of own equity securities, share issuance mandates to the board, board appointment (and dismissal) rights for separate share classes, and the mandatory public offer, among other arrangements. It remains to be seen if the use of B.V.s for SPAC transactions will also translate to more traditional IPOs being structured as B.V. companies. If the last decade is anything to go by, this seems unlikely.

A final point of note relates to the timing of creation of the IPO vehicle and the institution of post-IPO governance. Pre-IPO, companies tend to exist in the form of a B.V. and they will be converted into an N.V. at IPO. Some issuers in our sample have converted on the day of the IPO itself (i.e., the day the issuer's shares are first publicly traded on the stock exchange on an as-if-and-when-issued/delivered basis), while others have only converted at settlement of the IPO (i.e., the day the shares are actually issued/delivered to subscribers/purchasers). We would think that, in any case from the perspective of the issuer, the latter would be preferable: should for some reason an issue arise and the IPO be aborted at the last moment, then the issuer will not be 'stuck' with governance arrangements for a listed company.

3.9 *(Non-)compliance with the Code*

We have studied to what extent new Dutch issuers deviate from the Code. As many readers will know, the Code applies on a comply-or-explain basis to Dutch companies with a listing on a stock exchange like Euronext Amsterdam, but also to listings on foreign stock exchanges. For example, Pepco Group (a Dutch N.V. which recently did an IPO on the Warsaw Stock Exchange, and strictly speaking outside the scope of this article) is subject to the Code, but it has decided to not apply the Code but rather the corporate governance code of the Warsaw Stock Exchange. Conversely, Euronext Amsterdam issuers Allfunds and InPost have declared they will voluntarily apply the Code even though it does strictly speaking not apply to them as foreign legal entities. Issuers that apply the Code generally report a limited number of deviations only. These are issuer specific, but most deviations – excluding deviations by SPACs – relate to (i) the independence of the supervisory board, and in particular the chair; (ii) the appointment, dismissal and appointment terms of board members; and (iii) the requirement that an issuer has a separate department for the internal audit function.

4. The coming of age of the SPAC – hype or indispensable M&A vehicle?

Special purpose acquisition companies, also referred to as "blank cheque companies", are incorporated specifically to raise capital for the purpose of entering into a business combination with an existing business.[35] The advent of the SPAC is interesting for the sellers of a target, as the large number of SPACs adds to existing competitive tension between potential private equity and industry peer buyers. For targets that wish to be listed on the stock exchange, SPACs offer the advantage of eliminating market risk: the transaction is subject to SPAC shareholder approval and the ability of the SPAC to raise additional PIPE (private investment in public equity) funds, but last minute negative sentiment in the equity markets will not derail the listing. Targets must weigh this advantage against negative aspects caused by the absence of customary IPO features, such as an elaborate marketing campaign among the investing public and more or less guaranteed analyst coverage.

As SPAC IPOs boomed in the US in 2020, why did SPAC promotors travel to Europe in great numbers only in 2021? We see two possible reasons. One reason could be that competition in the US for SPACs became significant only after a while and that at the same time the US SPAC environment became gradually less attractive from a regulatory, accounting and financing perspective. Another reason may regard stock exchange preferences of European targets. When a SPAC combines with its target, the target obtains the stock exchange listing from the SPAC. European targets (except those in certain industries such as luxury, technology and biotech) are possibly reluctant to end up with a relatively cumbersome US listing. Sponsors eying European targets may thus have decided to create European listed SPACs to be more attractive.

Amsterdam became the stock exchange of choice as it attracts a large international investor base and London had constraints on SPAC business combinations in the form of a

33 See M.T.A. Lumeij-Dorenbos, 'De Beurs-BV: kans of utopie?', *Tijdschrift voor Financieel Recht* 2012/11.

34 See A.A. Bootsma, J.B.S. Hijink & L. in 't Veld, 'De eerste beurs-BV', *Ondernemingsrecht* 2016/111.

35 See, for a general discussion, H.M. van Kessel & D.J.R. Lemstra, 'De SPAC (special purpose acquisition company)', *Ondernemingsrecht* 2020/143.

mandatory halt of trading.[36] In addition, London is located outside of the EU and Amsterdam does not typically consider a SPAC business combination to constitute a reverse listing which requires more disclosure. In the first half of 2021, ten SPACs have listed in Amsterdam with – according to market rumour – many dozens still in the pipeline for the remainder of the year. By comparison, in 2020 only one single SPAC was admitted to listing on Euronext Amsterdam. We believe that there will be continued interest for SPACs in the future, especially as some of the SPAC's teething problems have been resolved during the last 12 months: the accounting treatment of SPAC instruments has changed from equity to liability, conflicts of interest of sponsors and directors tend to be disclosed in great detail, SPACs will be more careful when conducting due diligence on targets and making forward looking statements regarding their targets (or so we expect based on US litigation), and there will be reluctance to acquire hyped but loss-making targets – at least the cash available at business combination should be sufficient to reach the point of break-even.

The selection of the country of incorporation of the SPAC legal entity is based on a sponsor tax analysis and the flexibility of local corporate law to permit conversion or legal merger of the SPAC into the legal entity of choice of the target. For example, quite a few European businesses acquired by US SPACs have chosen the Dutch N.V. form to continue life as a listed business. Dutch companies are very flexible in this respect. Other factors that may influence the choice for a particular jurisdiction include Euro accounts currently carrying negative interest, US dollar accounts that currently do not possibly triggering tax on currency fluctuations,[37] and the acceptance or not of currency risk. Overall, at the time of writing of this article, also taking into account what we know about deals in the pipeline for Amsterdam, Cayman legal entities, raising US dollars, and Dutch B.V.s, raising euros, seem to be popular.

The SPAC is formed by its initial investors, also known as sponsors or promotors, who often have extensive knowledge about a particular industry.[38] Consequently, the SPAC will search for a target business within that particular industry. However, many specialised SPACs also reserve the right to invest in any industry. This has lately lead the AFM to request that these SPACs do not have references to a particular industry (e.g., renewables) or business style (e.g., ESG) in their name.

When structuring the SPAC, one concern is the possibility that the issuance of additional securities during its lifetime will trigger an obligation to publish a prospectus. Depending on the transaction structure, one may deem this desirable – for example upon the business combination – but it would definitively be cumbersome prior to that moment. One of the mechanisms used to prevent a prospectus having to be issued, consists of creating sufficient numbers of securities in treasury at IPO. The securities that may be needed until and in the context of the business combination are issued pre-IPO, bought back by the issuer and listed at IPO on the basis of the SPAC IPO prospectus. We assume that the flexibility to issue large numbers of shares with a view to their repurchase and holding in treasury is one of the reasons why SPACs prefer the more flexible B.V. over the N.V. (during the period under review, only one SPAC was listed as an N.V.: New Amsterdam Invest N.V., which repurchased for holding in treasury slightly less than half of its issued share capital).

If the SPAC finds a suitable target, it will propose a business combination. This combination will require shareholder approval. Investors who do not wish to participate in the proposed business combination have the option to redeem their shares for a proportionate share of the monies in the escrow account. If the SPAC fails to complete a business combination prior to the business combination deadline, the SPAC will redeem the shares (other than shares held by the sponsors and directors), and will liquidate. The amounts raised by SPACs (EUR 100-500 million) are relatively modest compared to the size of their targets. This tends to be resolved at the moment of the business combination by the SPAC issuing (or selling in case already held in treasury) additional shares to PIPE (private investment in public equity) investors, and, lately, by SPACs issuing convertible bonds.

SPACs have rapidly evolved and continue to do so, with offering terms becoming increasingly more investor friendly. Negative interest due on euro IPO proceeds in the escrow account is now often born by the sponsors rather than by shareholders (which is mostly a liquidity issue, as the sponsors tend to be rewarded for bearing the interest expense with additional SPAC securities if a business combination occurs). Another relatively new feature is the staggered sponsor promote. Rather than having all sponsor shares convert immediately after the business combination, part of the sponsor shares convert only when the shares reach certain price levels. This way, the sponsors and directors have an added incentive to search for a target that they believe is capable of reaching these thresholds, rather than proposing – in the extreme – a business combination with just any target in order to avoid liquidation, possibly at the expense of shareholder value. Finally,

36 As of 10 August 2021, the Financial Conduct Authority is prepared to dis-apply the suspension of trading of the SPAC shares upon announcement of an acquisition target provided a number of conditions are met, the most far-reaching of which require publication of a prospectus upon business combination and the mandatory abstention for founders, sponsors and directors from voting their shares in the shareholders' meeting to decide on the business combination. Consultations are ongoing on a general review of the prospectus regime.

37 Dutch companies, for example, mandatorily use the euro as their reference currency for corporate tax purposes.

38 According to recent, maybe not altogether surprising, research, the degree of industry knowledge with the sponsors and with target management greatly determines the financial success of a business combination. Wolfe Research as included in Spotlight on SPACs, Mergermarket, 16 July 2021.

many SPACs have shortened their business combination deadline. While the business combination deadline was invariably set at 24 months with a possible extension of six months, some recent SPACs have cut the extension feature, or even decreased the business combination deadline to 18 months.

It will be interesting to see whether the SPAC IPO wave will also generate a European M&A boom. As many SPACs will be searching – alongside private equity funds and target industry peers – for a business combination, it seems possible that not all SPACs will succeed on favourable terms, if at all. The two year lifespan of SPACs means that the end of 2022 and the beginning of 2023 could see a lot of business combination proposals.

5. A look to the future

We are optimistic about the prospects for Amsterdam as a listing location. Economic conditions, low interest rates, plenty of liquidity, and high stock market valuations would seem conducive for significant numbers of IPOs in the near to medium term. Dozens of SPACs remain in the pipeline for a 2021 listing.

Table 1: Fully documented
(See page 599.)

Table 2: Simplified document
(See page 599.)

Table 3: SPACs
(See page 600.)

Table 1: Fully documented

Company	Country of incorporation	Listing date	Offer size (including greenshoe)	Price range	Offer price	Market cap	Free float	Primary/ secondary	Retail allocation	Greenshoe exercised	Code deviations	Defence mechanism	Issuance of shares	One-tier/ two-tier board	Cornerstone
Huvepharma	Netherlands	Aborted	€ 463m	€ 20.00-25.75	n/a	€ 4.5b	15.0%	Both	No retail offering	n/a	4.3.3	Foundation	10% + 10% M&A	One-tier	No
NX Filtration	Netherlands	11-6-2021	€ 190m	€ 10.00-11.00	€ 11.00	€ 550m	34.5%	Primary	Yes[39]	Yes	3.3.3	No	20%	Two-tier	Yes
Allfunds	United Kingdom	23-4-2021	€ 2.16m	€ 10.50-12.00	€ 11.50	€ 7.24b	29.9%	Secondary	No retail offering	Yes	2.1.7 (ii) (iii)	No	5%	One-tier	Yes
CTP	Netherlands	25-3-2021	€ 982.4m	€ 13.50-16.00	€ 14.00	€ 5.6b	17.7%	Primary	No retail offering	Yes	2.2.1, 4.3.3	No	10%	One-tier	No
Inpost	Luxembourg	27-1-2021	€ 3.2b	€ 14.00-16.00	€ 16.00	€ 8b	40.3%	Secondary	No retail offering	Yes	1.3.1-1.3.5, 2.1.7, 2.3.2, 3.1.2, 3.3.2, 4.3.3	No	Up to 10,000,000,000 shares	Two-tier	Yes
JDE Peet's	Netherlands	29-5-2020	€ 2.25b	€ 30.00-32.25	€ 31.50	€ 15.6b (w/o greenshoe)	16.5%	Both	No retail offering	Yes	2.1.7, 5.1.3, 2.2.2, 2.3.4	Potentially[40]	10%[41]	One-tier	Yes
CM.com	Netherlands	Aborted initially[42]	€ 100m	€ 15.00-19.00	n/a	€ 337.5m	43.0%	Both	250 shares[43]	n/a	2.2.1, 4.3.3	No	10%	Two-tier	No
Marel	Iceland	7-6-2019	€ 370,00	€ 3.40-3.90	€ 3.70	€ 2.82b	75.3%	Primary	1350 shares	Yes	n/a	No	235,000,000 ISK	One-tier	Yes
Fastned	Netherlands	21-6-2019	€ 30m	€ 10.00	€ 9.25	€ 136m	20.3%	Primary[44]	1000 DRs	No	1.3, 2.1.9, 2.5.3, 4.4.2, 4.4.8	Depositary receipts	10% + 10% M&A	Two-tier	No
Prosus	Netherlands	11-9-2019	n/a	n/a	n/a	€ 120.532b	26.2%	n/a	n/a	n/a	1.3.1, 1.3.2, 2.1.7, 2.1.9, 2.2.1, 2.3.4, 4.1.3	Yes[45]	5% + 5% M&A	One-tier	n/a

39 No preferential allocation, min. EUR 100,000 subscription
40 Board can grant call option for 5 years after listing
41 40% if pre-emptive rights are fully observed
42 Listing obtained later through combination with DSC1 SPAC
43 Max. 10% of the offering
44 Primary offering was cancelled; instead listing only of existing certificates. Market cap based on the reference price
45 Through the conversion of shares into shares carrying extra voting rights in case Naspers ceases to be entitled to at least 50% + 1 of the voting rights in Prosus

Table 2: Simplified document

Company	Country of incorporation	Listing date	Market cap	Free float	Applicable governance code	Defence mechanism	Issuance of shares	One-tier/two-tier board
Unilever	United Kingdom	30-11-2020	€ 177.98b	n/a	UK code	No	n/a	One-tier
Adux	France	4-9-2020	€ 8.6m	37,05%	n/a	n/a	n/a	One-tier
Renewi	United Kingdom	30-1-2020	€ 3.5b	n/a	UK code	No	n/a	One-tier
Aedifica	Belgium	7-11-2019	€ 2.7b	n/a	Belgian code	No	€ 374,000,000 (w. pre-emptive rights) or € 74,800,000	One-tier

Table 3: SPACs

Company	Country of incorporation	Listing date	Offer size (including greenshoe)	Offer price	Retail allocation	Greenshoe exercised	Issuance of shares	One-tier/two-tier board	Cornerstone
Energy Transition Partners	Netherlands	19-7-2021	€ 175m	€ 10.00	No retail offering	n/a	No limit	One-tier	Yes
VAM Investments SPAC	Netherlands	19-7-2021	€ 225m	€ 10.00	No retail offering	Yes	No limit	One-tier	No
Odyssey Acquisition	Luxembourg	2-7-2021	€ 300m	€ 10.00	No retail offering	n/a	Not prior to BC (except for PIPE)	One-tier	No
New Amsterdam Invest	Netherlands	6-7-2021	€ 50m	€ 20.00	No preferential allocation[46]	n/a	20% + 20% for BC	Two-tier	Yes
Climate Transition Capital Acquisition 1	Netherlands	30-6-2021	€ 200m	€ 10.00	No retail offering	Yes	No limit	One-tier	Yes
Crystal Peak Acquisition	Cayman Islands	22-6-2021	€ 150m	€ 10.00	No retail offering	n/a	500,000,000 shares for BC	One-tier	No
Hedosophia European Growth	Cayman Islands	15-5-2021	€ 460m	€ 10.00	No retail offering	Yes	250,000,000 Ordinary Shares, 250,000,000 Units and 30,000,000 Sponsor Shares	One-tier	No
Pegasus Acquisition Company Europe	Netherlands	29-4-2021	€ 500m	€ 10.00	No retail offering	Yes (put option)	No limit	One-tier	No
European FinTech IPO Company 1	Netherlands	26-3-2021	€ 415m	€ 10.00	No retail offering	Yes	No limit	One-tier	No
ESG Core Investments	Netherlands	12-2-2021	€ 250m	€ 10.00	No preferential allocation[47]	Yes (extension clause)	No limit	Two-tier	Yes
Dutch Star Companies TWO	Netherlands	19-11-2020	€ 110m	€ 60.00	No retail offering	Yes (extension clause)	No limit	One-tier	Yes

46 Retail offering only open for subscription of at least EUR 100,000
47 Retail offering only open for subscription of at least EUR 100,000