Private Equity

Contributing editor
Bill Curbow

2019

GETTING THE DEAL THROUGH

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Private Equity 2019

Contributing editor

Bill Curbow

Simpson Thacher & Bartlett LLP

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Preface

Private Equity 2019

Fifteenth edition

Getting the Deal Through is delighted to publish the fifteenth edition of *Private Equity*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on the British Virgin Islands, Canada, Colombia, Egypt and Thailand. The report is divided into two sections: the first deals with fund formation in 22 jurisdictions and the second deals with transactions in 23 jurisdictions.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Bill Curbow of Simpson Thacher & Bartlett LLP, for his continued assistance with this volume

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February 2019

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United Kingdom

David Billington, Michael Preston and Michael James

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1 Types of private equity transactions

What different types of private equity transactions occur in your jurisdiction? What structures are commonly used in private equity investments and acquisitions?

A buyout typically involves acquiring a controlling stake in a business, although there are a significant number of transactions in which a minority interest is obtained. In order to enter into a buyout of a private company the private equity sponsor will incorporate one or more 'newcos' or special purpose vehicles. Funding will be provided in the form of equity (provided by the private equity sponsor and often by existing management) and, in most cases, debt. The inclusion of debt will provide the sponsor with the benefit of 'leveraging' its equity investment.

Most private equity transactions are purchases of shares in a private company by way of a private sale and purchase agreement. Where the target is a UK company, mergers (ie, where one of the bidders or the target ceases to exist as a result) are generally not available as a transaction structure.

The City Code on Takeovers and Mergers (the Takeover Code) will apply to a going-private transaction where the target is a UK (or Channel Islands or Isle of Man) company that has securities admitted to trading on a regulated market in the UK (eg, the Main Market of the London Stock Exchange) or a multilateral trading facility in the UK (eg, AIM). The Takeover Code also applies to certain other companies registered in the UK or another member state of the European Economic Area (EEA) (eg, a UK public company that has its 'place of central management and control' in the UK, whether or not its securities are listed in the UK; a UK company that has securities admitted to trading on a regulated market in another member state of the EEA, but not in the UK; or an EEA company that has securities admitted to trading on a regulated market in the UK, but not in its own EEA member state, if the UK listing is its only, or first, listing in an EEA member state).

Where there are many sellers, such as in the case of a listed target, the purchase will take place by way of a contractual takeover offer or, alternatively, by way of a scheme of arrangement under the Companies Act 2006. A scheme of arrangement is, in this context, a court-sanctioned arrangement between the target company and its shareholders pursuant to which all of the shares of the company are transferred to the bidder. A scheme of arrangement is therefore only available for recommended (ie, not hostile) transactions.

2 Corporate governance rules

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

Private companies are required to comply with the provisions of the Companies Act 2006 and associated companies legislation. Public companies are subject to more stringent regulation as are listed public companies. Listed public companies must comply not only with companies legislation but also with relevant listing, transparency, disclosure and stock exchange rules. For those companies listed on the London Stock Exchange, these regulations will be the Listing Rules, Prospectus Rules, Disclosure Guidance and Transparency Rules as well as the Admission and Disclosure Standards. Owing to this increased regulatory burden, private equity sponsors who acquire listed public companies will generally seek to delist the target company. Another advantage for sponsors of going private is that they avoid the UK's prohibition on a public company giving financial assistance to purchasers who are acquiring shares in that public company (eg, by the target company becoming an obligor under the bidder's debt facilities).

Private equity (and 'private equity-like') sponsors who are members of the British Venture Capital Association (BVCA) will also be required to comply with the Walker Guidelines in respect of controlled UK-based private portfolio company meeting relevant thresholds (whether acquired in a going-private transaction or a secondary or non-market transaction). The Walker Guidelines contain recommendations regarding governance and enhanced disclosure and operate on a 'comply or explain' basis.

Private equity funds that are managed from or marketed within the EU will likely be subject to requirements arising from the Alternative Investment Fund Managers Directive (AIFMD). Certain of these requirements may be directly applicable to private equity transactions in the UK, including notifications to regulators to be made when significant stakes are taken in unlisted companies (or if such stakes are disposed of) and other requirements surrounding the acquisition of control of unlisted companies, relating to the establishment of safeguards against the erosion of capital (or asset stripping) and the production of development plans and policies in relation to a portfolio company.

3 Issues facing public company boards

What are some of the issues facing boards of directors of public companies considering entering into a going-private or other private equity transaction? What procedural safeguards, if any, may boards of directors of public companies use when considering such a transaction? What is the role of a special committee in such a transaction where senior management, members of the board or significant shareholders are participating or have an interest in the transaction?

Directors of all UK companies must consider their statutory and fiduciary duties when entering into any transaction. The statutory duties, which to a large extent codify existing common law duties, require directors to act in a way that promotes the long-term success of the company for the benefit of its shareholders as a whole. This duty also requires the directors to consider the interests of the company's employees. Directors also have a duty to use reasonable care and skill, avoid conflicts of interest and declare any direct or indirect interest in the proposed transaction.

For going-private transactions there are additional considerations, in particular those contained within the Takeover Code (where applicable – see question 1 for when the Takeover Code applies). The Takeover Code does not limit the factors that the board of directors of the target may take into account in giving its opinion on the offer, but does require the board to publish its views on the effect of implementation of the offer on all the company's interests, including, specifically, employment, and its views on the bidder's strategic plans for the target.

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The Takeover Code provides for six general principles that all parties to a going-private transaction (including the target and its board) must adhere to, as follows:

- all shareholders in the target must be treated equally;
- all shareholders in the target must have sufficient time and information to assess an offer and the board of the target must give its view on the offer;
- the board of the target must act in the interests of the target as a whole and not deny the shareholders the opportunity to decide on the merits of an offer (eg, by taking frustrating action such as 'poison pills');
- a false market must not be created in the target's shares;
- the bidder must make an offer only once it can satisfy the offer in full and in cash; and
- the target's business must not be hindered for longer than is reasonable as a result of any offer.

It is not uncommon for a target company's board to form a special committee of directors to be responsible for day-to-day conduct of the bid. Where executive directors or members of senior management are participating in the transaction either by taking a stake in the bid vehicle, rolling over their current interests or being appointed by the private equity sponsor (which may be an existing shareholder) the bid committee is usually formed of independent directors. Every director will be required to disclose to the bid committee all relevant facts relating to him or herself (and close relatives and related trusts) that may be relevant to the proposed transaction (and may be required to be disclosed in the bid documentation) and appropriate arrangements must be in place to enable the board as a whole to monitor the bid and the committee's conduct thereof.

Any proposed incentivisation arrangement between a bidder and management of a target company is regulated by the Takeover Code. See question 8 for further information.

4 Disclosure issues

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

The Takeover Code's disclosure regime is intended to provide the market with a greater degree of transparency during the course of a takeover as compared with the disclosure rules applicable at other times (eg, the Disclosure Guidance and Transparency Rules). The Takeover Code's disclosure rules can be divided into three subsets:

- disclosure of the existence of a potential offer;
- disclosure relating to the offer itself and the parties to the offer (eg, in the bid documentation); and
- disclosure of shareholdings and trading by the parties to the offer and other substantial shareholders during the offer period.

The Takeover Code provides that, prior to an offer being announced, from such time as the bidder begins to 'actively consider' a possible offer, if there is any rumour or speculation regarding the possible offer, or an untoward movement in the target's share price, the Takeover Panel may require the target or the potential bidder to make an immediate announcement either confirming that the bidder is considering making an offer or stating that the bidder will not make an offer. An announcement of a possible offer automatically triggers a 28-day 'put-up or shut-up' deadline on the bidder to announce a firm offer or announce that it will not make an offer. If a potential bidder makes a statement that it will not make an offer, the potential bidder and its concert parties will be restricted from announcing an offer and taking certain other actions, for a period of six months (subject to certain carve-outs, for example if a third party announces a firm bid for the target). Announcement of a possible offer will commence an 'offer period' in relation to the target.

At the start of an offer period, the bidder and the target must disclose, via a regulatory information service (RIS), their respective interests in target securities in the form of an 'Opening Position Disclosure'. For this purpose 'interest' includes, broadly, any long exposure to the target's securities, including via derivatives. The Opening Position Disclosure must also include any interests held by the parties' respective concert parties (eg, directors and advisers). Any person who holds an interest in 1 per cent or more of any class of the target's securities at the start of the offer period must also make an Opening Position Disclosure on the same basis. During the offer period, the parties to the offer and any person who holds (or, as a result of any dealing comes to hold) 1 per cent or more of any class of the target's securities must disclose the details of any dealing in the target's securities via a RIS by 12 noon on the business day following the dealing.

The formal offer document (or scheme document, in the case of a scheme of arrangement) must detail, among other things:

- the terms and conditions of the offer;
- background information on the bidder and its financing arrangements;
- the bidder's strategic intentions for the target (including its employees, places of business, fixed assets and any research and development functions);
- any irrevocable undertakings received from target shareholders; and
- any arrangements between the bidder and the target, or their respective concert parties, including any management incentivisation or rollover arrangements.

The AIFMD may require a private equity sponsor to make notifications to regulators when significant stakes are taken in unlisted companies (or if such stakes are disposed of).

5 Timing considerations

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

There are a number of timing considerations to think about for a going-private transaction to which the Takeover Code applies (see question 1 for when the Takeover Code applies). If the transaction is not subject to the Takeover Code, then there is no formal timetable. There are, however, usual process points that are common whether or not the Takeover Code applies: prior to signing (or, in the case of a takeover, announcing a firm offer), the bidder will need to evaluate the likely length of any due diligence process, whether any competition or sector-specific regulatory approvals will need to be sought and the timetable for arranging any financing. Any regulatory or competition approvals sought will have to be obtained prior to closing.

Takeover offers to which the Takeover Code applies must comply with the strict timetable and procedures set out in the Takeover Code. The Takeover Code sets deadlines for publishing formal offer documentation, announcing acceptance levels and satisfying offer conditions (including the acceptance condition and regulatory and competition conditions) and specifies minimum and maximum periods for which the offer must be kept open. However, the Takeover Code timetable that applies to schemes of arrangement is much less prescriptive (principally because a scheme of arrangement is largely controlled by the UK court and the board of the target company).

6 Dissenting shareholders' rights

What rights do shareholders of a target have to dissent or object to a going-private transaction? How do acquirers address the risks associated with shareholder dissent?

Under English law, a shareholder's rights usually depend on his or her percentage shareholding in the target company. With a large enough holding a single shareholder or a group of shareholders acting together may be able to block a going-private transaction. The percentage required to block a transaction depends on whether the bid is structured as a contractual offer or a scheme of arrangement and, in the case of a contractual offer, the percentage threshold at which the bidder has set its acceptance condition.

A scheme of arrangement must be approved by a majority in number of each class of the target's shareholders voting on the scheme representing at least 75 per cent of the value of the shares voted. A shareholding of more than 25 per cent of any class of target shares therefore guarantees the ability to block a scheme, although the actual percentage required to block the scheme is usually lower in practice because turnout (including proxies) at the relevant meeting will almost always be lower than 100 per cent. This relatively low

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threshold is occasionally exploited by investors who buy into the target's stock during the offer period and agitate for an increased price by threatening (whether explicitly or implicitly) to vote down the scheme ('bumpitrage'). In addition, shareholders who disagree with the proposals may attend the court sanction hearing and seek to challenge the scheme on procedural grounds, although successful challenges are rare.

In a takeover offer, the bidder sets the acceptance threshold, which must be more than 50 per cent of the target's voting rights. Typical thresholds are 90, 75 or 50 per cent plus one share. The prospect of enough target shareholders blocking the bid by refusing to accept the offer depends, therefore, on the bidder's acceptance threshold, and whether the bidder is prepared to lower the threshold during the course of the offer. In a takeover offer, once the bidder has acquired or agreed to acquire 90 per cent of the shares to which the offer relates, it can invoke a statutory process to squeeze out the remaining minority shareholders. Squeeze-outs can be challenged by dissenting shareholders, but the UK court sets a high bar and challenges are therefore rare.

The primary protection that a bidder has against an offer being rejected or a scheme being voted down is to obtain irrevocable undertakings from target shareholders to accept the offer or vote in favour of the scheme. These undertakings are usually 'hard' (ie, the shareholder has no ability to terminate the undertaking, even in the event of a higher bid), 'soft' (ie, the shareholder can terminate the undertaking in a number of circumstances, including a higher bid), or 'semi-hard' (ie, the shareholder can terminate the undertaking in the event of a higher bid, but only if the bid is at least a specified premium to the recipient's bid, if the recipient bidder does not match or exceed the higher bid within a specified time or both).

Under English law, minority shareholders have additional protections (eg, against unfair prejudice or to enforce the directors' duties), but these protections are relatively difficult to enforce in the UK courts and are almost never invoked during the course of a bid. Disputes during a bid, including complaints by target shareholders, are resolved by the Takeover Panel and its appellate bodies – the UK courts are reluctant to intervene in bid situations and usually limit their involvement to involvement to the extent strictly necessary for the administration and sanction of a scheme of arrangement and, rarely, reviewing decisions of the Takeover Panel after the bid has concluded.

7 Purchase agreements

What notable purchase agreement provisions are specific to private equity transactions?

In secondary buyouts, private equity sponsors will typically ask existing management for a wide-ranging list of warranties as to the target business as the exiting sponsor is unlikely to give any business warranties. Management will typically try to qualify these warranties by introducing caps, time limits and a number of other general limitations or seek to ensure that a buyer's recourse is under warranty and indemnity insurance.

Private equity sponsors will also seek to avoid any significant 'tail liability' on any sale and so will not agree to escrows or holdbacks of purchase price, will not give an indemnity for taxes, and will commonly provide for any residual liability to be covered by warranty and indemnity insurance (whether a buy-side policy or a sell-side policy).

Private equity purchasers will need to ensure that the purchase agreement works with any financing commitments made by lenders to the sponsor. These may include undertakings to assist with the financing, for example by:

- preparing an offering document for bonds issued to finance the transaction;
- assisting the sponsor in negotiating carve-outs from the covenant package included in the financing to ensure it is appropriate for the target's business; and/or
- ensuring that existing debt owed by the target (and any security interests granted in relation to that debt) can be dealt with appropriately at closing.

8 Participation of target company management

How can management of the target company participate in a going-private transaction? What are the principal executive compensation issues? Are there timing considerations for when a private equity acquirer should discuss management participation following the completion of a going-private transaction?

The retention and incentivisation of management is frequently a key part of any private equity buyout or going-private transaction, and management will often be invited to acquire shares in the target or acquisition vehicle that will enable them to participate in a proportion of future equity growth (known as 'sweet' equity). Usually this is under a formal management equity plan set out in the shareholders' or investment agreement and the constitutional documents of the target, and management will typically be separately advised.

The portion of total equity allocated for management as sweet equity will depend on the specific transaction, but is usually around 10–20 per cent. Sweet equity is typically subject to transfer restrictions, a three to five-year vesting schedule and leaver provisions that determine the price at which management's shares may be bought on or in a period following their departure (known as 'good' or 'bad' leaver provisions). If a 'ratchet' mechanism is included, the economic entitlement of the sweet equity holders increases if certain performance targets are reached. There are a number of different ways that ratchets can be structured. Participation of management in different forms of future exits, including the impact of those exits on unvested sweet equity and the operation of tag-along and drag-along provisions, are always heavily negotiated issues.

As the sponsor will typically make the majority of its investment in the form of shareholder loans (or similar debt or quasi debt instruments in other jurisdictions), the sweet equity will always rank behind those instruments and may also rank behind any shares held by the sponsor. Managers who hold equity in the target prior to the buyout may be able to roll over that investment into the new structure, or may, in addition to their sweet equity allocation, be invited or required to re-invest a portion of their sale proceeds alongside the sponsor in debt or quasi-debt instruments and shares that rank pari passu with, and are on the same terms as, the sponsor (known as the 'institutional strip').

UK tax-paying managers will be keen to ensure that any future equity growth is taxed as a capital gain instead of employment income. Depending on the circumstances, the sponsor may consider a structure that accommodates entrepreneur's relief planning or employee shareholder status.

There are additional considerations if management already holds shares or outstanding share-incentive awards in the target and the Takeover Code applies to the transaction (see question 1 for when the Takeover Code applies). The bidder is required to treat all shareholders of the target equally (ie, no special treatment can be given to existing management shareholders). If the sponsor has entered into or reached an advanced stage of discussions on incentivisation arrangements with pre-existing management shareholders, details of such arrangements must be disclosed in the offer documentation and the target's financial adviser must state publicly whether, in its opinion, the arrangements are 'fair and reasonable'. Where the value of the arrangements is significant or the nature of the arrangements is unusual, either in the context of the relevant industry or good practice, the Takeover Panel's consent must be obtained in advance (and the Takeover Panel may require, as a condition to its consent, that the arrangements be approved at a general meeting by the target's independent shareholders). Where any management shareholders are being rolled over into bidder securities (on a basis that is not being made available to all target shareholders), the arrangements must be approved at a general meeting by the target's independent shareholders. Where no incentivisation arrangements are proposed, this must also be stated publicly.

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9 Tax issues

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

The principal tax issues fall into four broad categories, as follows:

- transaction tax costs of the acquisition;
- the tax profile of the target group (including its historic tax risks) and the extent to which it is possible to obtain and use tax deductions for the costs of acquisition finance;
- tax-efficient incentivisation of management; and
- preparing for a tax-efficient exit.

We cover below a high-level summary of some aspects of these issues as they relate to an acquisition of a UK target company by a UK newco. Many other tax issues are likely to be relevant and full due diligence and tax structuring should be undertaken in light of the particular circumstances. In many private equity transactions it will also be necessary to consider tax rules in other jurisdictions, including in all countries where the target operates and where the sponsor or fund investors are based.

The main transaction tax cost of the acquisition of shares in a UK company will be a UK stamp duty charge, payable by the newco, of 0.5 per cent of the consideration. An acquisition of shares in a UK company does not attract VAT. Although most costs incurred by a UK newco that relate to the acquisition (such as adviser fees relating to the share acquisition) will not be immediately deductible for UK tax purposes, they may form part of the capital gains tax base cost and therefore reduce the newco's chargeable gain upon exit. It may be possible to recover some VAT incurred on transaction costs, although the position is complex and detailed advice would need to be taken.

Certain costs relating to acquisition finance (including interest expense) may be deductible under the UK rules on the taxation of loan relationships. To the extent such deductions are available, they may give rise to losses that can be surrendered to the target company (under the UK's 'group relief' rules) to shelter its operating profits. A private equity sponsor will often also consider whether, in addition to third-party acquisition finance, it will be possible to generate further deductible interest expense by introducing shareholder loans. Under current UK tax law there are various rules limiting the availability of tax deductions for interest and other finance expenses. In the case of shareholder loans, these include transfer pricing rules that limit deductible interest to an arm's-length amount and hybrid mismatch rules, which may limit deductions in the target if, broadly, there is a hybrid instrument (ie, an instrument that is treated as debt in one jurisdiction and equity in another) or hybrid entity (ie, an entity that is recognised as a taxable person in one jurisdiction, but not in another) anywhere in the financing structure. In response to the Organisation for Economic Co-operation and Development's Base Erosion and Profit Shifting initiative, the UK government has also introduced further restrictions on interest deductibility, under which permissible net interest deductions are limited, broadly speaking, to a fixed ratio of the EBITDA of the borrower entity or its group.

Interest on acquisition debt or shareholder loans is subject to 20 per cent UK withholding tax, unless an exemption or reduced rate applies. An exemption may apply if the lender is within the charge to UK corporation tax. An exemption or reduced rate may apply if a non-UK lender qualifies for relief under a double tax treaty with the UK. Alternative exemptions under domestic UK law that may be considered include the 'quoted eurobond' exemption for debt listed on a recognised stock exchange or the recently introduced 'private placement' exemption. Dividends paid by UK companies are not subject to UK withholding tax.

As discussed in question 8, the management team may participate in the equity of the target group. As a general rule, the acquisition of shares by management should not be taxable provided the shares are acquired for full value for UK tax purposes. The UK tax authorities and the British Private Equity & Venture Capital Association published a memorandum of understanding in 2003 in relation to management participation and, where the conditions in that memorandum are complied with, the UK tax authorities generally accept that the price paid by management for its shares is equal to the full value for UK tax purposes. It is common practice, therefore, for management to request that the incentive package is structured in accordance with this memorandum. Upon exit, where the relevant conditions are satisfied, management may be able to benefit from a reduced rate of capital gains tax under the UK's entrepreneur's relief rules.

It is important that the tax implications of potential exit scenarios are considered when establishing the acquisition structure. Where an exit is at the level of a UK newco, relief from UK tax on capital gains may be available under the UK's participation exemption (the 'substantial shareholding exemption') provided that certain conditions are satisfied. Unlike participation exemption regimes in other jurisdictions, the relevant conditions look to the activities of the target, not merely minimum shareholding requirements. If the UK newcos are owned by a non-UK resident parent company, it may be preferential for the parent company to be the seller since the UK does not have a non-resident capital gains tax on share sales. A targeted non-resident capital gains tax on certain disposals of interests in 'UK property-rich' entities is, however, to be introduced in April 2019. Other relevant matters to be considered from the outset include the tax treatment of management on exit, and of holders of carried interest in the private equity fund. There are also likely to be tax implications of any pre-sale restructuring, including, for example, the insertion of a new parent company in anticipation of an IPO.

Transactions structured as share acquisitions by a newco cannot be classified as asset acquisitions for UK tax purposes.

10 Debt financing structures

What types of debt financing are typically used to fund going-private or other private equity transactions? What issues are raised by existing indebtedness of a potential target of a private equity transaction? Are there any financial assistance, margin loan or other restrictions in your jurisdiction on the use of debt financing or granting of security interests?

Private equity sponsors use a variety of methods to finance their acquisitions. The nature of the financing used will, to a large extent, depend on the sort of transaction that the private equity sponsor is entering into (eg, the acquisition of a whole or just minority interest), as well as its ability (and willingness) to fund the transaction solely on an equity-only basis. In the first instance there may be existing indebtedness at the target company level. The sponsor will have to look at the terms of the existing indebtedness and specifically at the repayment schedule, any mandatory prepayment events (such as those triggered by a change of control) and whether additional leverage can be incurred under existing leverage baskets. Typically, leveraged buyouts will require refinancing of the entirety of the existing secured debt of the target group, which will be acquired 'cash-free and debt-free'. Senior bank debt will usually be provided in the form of a syndicated facilities agreement that could include a term loan A, term loan B and a revolving credit facility which will be repayable and amortise differently. Term loans A, which are typically amortising, have been less common in recent times with private equity sponsors preferring the bullet repayment profile of term loans B. Facilities of this type will be secured against the target's assets, with security granted initially at the bidco level only. A more fulsome security package from the target group companies would be granted some time after closing (often 90–120 days afterwards), subject to a set of 'agreed security principles'. The facility documentation will also include a negative pledge, as well as other positive and negative covenants. As the balance of power has shifted in favour of sponsors in recent years, those covenants have been heavily negotiated, and will likely allow the borrower a good degree of flexibility. Financial covenants in leveraged loan agreements have historically been on a maintenance basis, assessed quarterly. However, recent years have seen the increasing prevalence of loans with fewer maintenance covenants ('cov-loose' loans) or incurrence covenants only (ie, a true 'cov-lite' deal, in which case the financial covenants will be tested only when debt is incurred rather than every quarter). Cov-lite loans now dominate the market, especially for larger deals or deals with a large sponsor backing the investment.

Additional leverage may come from more junior forms of financing: mezzanine debt, second lien debt and subordinated or unsecured

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high yield debt or payment in kind (PIK) notes. Mezzanine debt will rank behind the senior debt and will consequently bear a higher interest rate to reflect this risk. Second-lien debt or second-lien notes will rank pari passu with the senior debt, but will only be entitled to proceeds of a collateral enforcement after the senior debt has been paid. PIK notes are instruments that can be issued whereby interest payments are paid in kind (ie, by way of additional loans or notes) rather than in cash. These junior forms of financing are often structurally subordinated to the senior debt (ie, they are issued by an entity that sits higher up the acquisition structure, and so further away from the key operating assets of the group).

Unitranche loans have also been used for recent mid-market transactions. A unitranche loan replaces both the senior secured debt and junior debt with a single layer of debt, provided at a 'blended' interest rate (broadly equivalent to the effective weighted average interest rate that a private equity sponsor might otherwise pay in a senior secured debt and junior debt structure). These are provided by 'direct lenders' (often debt funds or other non-traditional lending entities) rather than traditional banks. A unitranche deal may involve a single lender or multiple lenders. Where there are multiple lenders, the lenders may agree to apportion the loan and interest allocation into tranches of varying seniority between themselves with an 'agreement among lenders'. This agreement is 'behind the scenes' and is not typically disclosed to the borrower.

As mentioned in question 2, there are special rules relating to financial assistance under the Companies Act 2006. Under this regime it is unlawful for:

- a public company to provide financial assistance for the purchase of its own shares or the shares of the private holding company of a public company; or
- a private company to give financial assistance for the purchase of shares in a UK public parent company.

Financial assistance has been broadly interpreted to include the giving of guarantees, indemnities and other quasi-security arrangements in support of financing arrangements used for the purchase of such shares. Where the target is a public company, it will be reregistered as a private company it order that after such reregistration it is able to give guarantees and security.

11 Debt and equity financing provisions

What provisions relating to debt and equity financing are typically found in going-private transaction purchase agreements for private equity transactions? What other documents typically set out the financing arrangements?

Where the Takeover Code applies to a transaction (see question 1 for when the Takeover Code applies) a bidder must not announce a firm offer unless it has every reason to believe that it can and will continue to be able to implement the offer. One consequence of this principle is that, where the bid is in cash or includes an element of cash consideration, the bidder must have sufficient cash available to finance the cash consideration in full, such cash must be available on a 'certain funds' basis and the offer must not be subject to any financing conditions. This principle is common to going-private transactions in many European jurisdictions. In addition, in going-private deals in the UK, the bidder's financial adviser must state in the firm offer announcement and offer or scheme document that the bidder has sufficient cash resources to finance the offer in full (the 'cash confirmation statement'). The bidder's financial advisers can, in extreme circumstances, be required by the Takeover Panel to make whole any shortfall in cash consideration, so the cash confirmation statement will rarely be provided until the financial adviser has received the sponsor's equity commitment letter, lenders' commitment letters, has completed its own due diligence and the conditions precedent to the lender's commitment papers have been satisfied.

There will, of course, be a gap between a lender (or indeed the underwriters who plan to syndicate the debt if the transaction progresses) providing its initial commitment to fund, and the transaction closing.

At the time an offer is announced or a binding bid is made in a private company auction process, the documentation is likely to be very advanced, including an equity commitment letter and certain funds financing commitments in the form of full facility documentation or an 'interim facility agreement', which is capable of being drawn to fund the transaction along with an executed commitment letter that includes a term sheet for the full facility documentation. All documentation relating to the financing of any UK going-private transaction must be put on display during the offer period.

12 Fraudulent conveyance and other bankruptcy issues

Do private equity transactions involving debt financing raise 'fraudulent conveyance' or other bankruptcy issues? How are these issues typically handled in a going-private transaction?

Transactions that are entered into by the directors of the target company in breach of their statutory and fiduciary duties may be voided or subject to challenge under English common law principles and statutory provisions.

English insolvency law (primarily the Insolvency Act 1986) will seek to unwind certain transactions entered into by the now-insolvent company in the period leading up to the commencement of insolvency. Transactions at an undervalue can be unwound for a period of up to two years if the transaction was entered into with a 'connected' person (which has a specific statutory definition) or six months if with others. Transactions at an undervalue can be unwound for a period of up to two years, whether with a connected person or otherwise. Transactions which defraud creditors are not subject to any such statutory time limits (except for the ordinary rules of limitation), but place a higher evidential burden on the party seeking to set aside the transaction than transactions at an undervalue and unlawful preferences. Transactions involving the avoidance of floating changes can be unwound for a period of up to two years if the transaction was entered into with a connected person or 12 months if with others.

In a private equity context, the above could relate to guarantees, indemnities and other types of quasi-security that are provided by the target or subsidiaries to the bidder or persons providing financing for the transaction.

13 Shareholders' agreements and shareholder rights

What are the key provisions in shareholders' agreements entered into in connection with minority investments or investments made by two or more private equity firms or other equity co-investors? Are there any statutory or other legal protections for minority shareholders?

The shareholders' agreement, also sometimes called an investment agreement, will set out the terms on which the sponsor will make its investment. Understandably the sponsor will want to exert a significant amount of control over the target. Typically, the shareholders' agreement and the target's articles of association (which will be revised or drafted afresh by sponsor's counsel) will provide the sponsor with veto rights over certain 'reserved matters'. These rights will delineate the decisions that can be made by the management on a day-to-day basis and those that have to be referred to the sponsor. Such veto rights will extend to acquisitions and disposals by the target; transactions outside the ordinary course of business and the right to conduct any litigation or arbitration on behalf of the target. The reserved matters will enable the sponsor to prevent certain actions from being taken by the board without the sponsor's prior approval.

Where a minority interest is acquired by the sponsor or several sponsors invest together, 'deadlock' provisions are commonly included in the shareholders' agreement. 'Deadlock' refers to situations where shareholders cannot agree on a material issue. These clauses can be drafted in a number of ways but it is common for the matter on which there is deadlock to be escalated by referral to the senior management of the parties or an independent third party, such as an arbitrator or expert before shareholders are allowed to terminate the shareholders' agreement or for one party to sell (or be required to sell) their stake to another.

Sponsors will also need to agree on a timeline for and means of exit. Transfer provisions (including 'drag' and 'tag' and 'right of first offer' or 'right of first refusal') provisions and 'call rights' or 'put rights' will be a key feature of any exit mechanism, together with rights to require an IPO of the target or force a sale of the target's entire business. A metric to determine the valuation of the target in connection with the exercise

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of such rights will also need to be included in the documentation will need to be carefully considered so as to avoid the potential for disputes.

Limited legal protections for minority shareholders (outlined in question 6) are provided for by the Companies Act 2006. A shareholders' agreement will not be effective as a matter of law so as to modify certain statutory provisions (eg, the requisite percentage required to pass a special or ordinary resolution) though a shareholder may be able to enforce any agreement made in a shareholders' agreement contractually against other shareholders. In addition, minority shareholders may bring derivative actions in the name of company if they feel that the company has been wronged but the directors refuse to bring such an action. The requirements to establish a derivative action are fairly onerous and consequently it is rarely used. Shareholders may also bring a statutory unfair prejudice claim if they believe that the business of the company is being conducted in a way that is unfairly prejudicial to its members. In practice, however, a successful unfair prejudice claim is typically remedied by the court making a purchase order forcing the majority shareholder to purchase the minority shares.

14 Acquisitions of controlling stakes

Are there any legal requirements that may impact the ability of a private equity firm to acquire control of a public or private company?

Stake building is the strategic purchase of shares in the target by the bidder. If the Takeover Code applies, the bidder and parties acting in concert with it will be required to make a mandatory offer to each shareholder of the target if they acquire shares that carry 30 per cent of the voting rights in the target (other than via a formal takeover offer). Acquisitions of shares giving the bidder and its concert parties 30 per cent or more of the target's voting rights are also prohibited by the Takeover Code in certain circumstances. A mandatory offer is required to be made in cash (or to include a cash alternative) and at a price that is equal to the highest price paid by the bidder for any interest in target securities in the 12 months prior to the announcement of the mandatory offer.

The price paid for any purchases of target shares by the bidder (or any of its concert parties) in the three months before the offer period will set a floor price for the bid. Additionally, all dealings during the offer period by the bidder and its concert parties will need to be disclosed (see question 4 for further details).

If the bid is being implemented by way of an offer, shares held by the bidder (whether purchased during the course of the bid or not) will count towards satisfaction of the bidder's acceptance condition, but shares purchased by the bidder before the offer document is posted do not count towards the 90 per cent threshold for the purposes of the statutory squeeze-out rules. Shares held by the bidder (whenever purchased) do not count towards the 75 per cent threshold for shareholder approval of a scheme of arrangement.

A bidder must also be alert to the market abuse rules prescribed under the EU Market Abuse Regulation and the restrictions on insider dealing in the UK Criminal Justice Act 1993, both of which restrict acquisitions of target securities when the bidder is in possession of inside information.

There are no specific legal requirements relating to the acquisition of control of a private company other than the need for applicable competition and regulatory approvals.

15 Exit strategies

What are the key limitations on the ability of a private equity firm to sell its stake in a portfolio company or conduct an IPO of a portfolio company? In connection with a sale of a portfolio company, how do private equity firms typically address any post-closing recourse for the benefit of a strategic or private equity acquirer?

The commercial limitations on the choice and timing of an exit strategy in the UK are the same as those common to most jurisdictions. Legal aspects to be considered are the restrictions on the transfer of shares in the company's memorandum or articles of association; any pre-existing shareholders' agreements and whether drag-along and tag-along provisions will apply.

Update and trends

In common with global M&A trends in 2018, the UK has experienced robust deal volumes in 2018. As such, private equity sponsors seeking to access UK transactions are increasingly faced with a competitive, seller-friendly market and have shown a willingness to adopt different approaches to structuring acquisitions in order to deploy significant amounts of unused capital, including entering into club deals and executing a greater number of minority or non-controlling investments.

In the European leveraged loan market, the trends in 2018 have been reflective of those in 2017. In particular, the continued availability of sponsor-friendly covenant packages (including the popularity of cov-loose and cov-lite lending as compared with the more traditional multiple maintenance financial covenant model that was the norm earlier in the decade) remains a dominant theme in the market.

If an IPO is chosen (as discussed in question 16) a prospectus will be prepared in accordance with the rules of the relevant stock exchange and listing authority. If a prospectus is prepared then liability may arise for the existing private equity sponsor based on the information disclosed in that document. Additionally, the underwriters will require the private equity sponsor to enter into a lock-up agreement in relation to any retained stake. The underwriting agreement will also require warranties as to title, authority and capacity of the private equity sponsor.

In a sale to a corporate or upon a secondary buyout the private equity sponsor will resist giving warranties (save as those to title, authority and capacity). Existing management is likely to have given warranties to the private equity sponsor on acquisition so it is likely that they will be required by the private equity sponsor as a term of their investment in the target to give similar warranties again, typically capped at a percentage of management 'money out' or rollover proceeds. Private equity sponsors will typically to seek to avoid any escrow arrangements or contingent consideration, and will often require the buyer to seek warranty and indemnity insurance to provide post-closing recourse for breach of warranties, which might be the buyer's sole financial recourse, or which provide a layer of financial recovery after the management layer .

16 Portfolio company IPOs

What governance rights and other shareholders' rights and restrictions typically survive an IPO? What types of lock-up restrictions typically apply in connection with an IPO? What are common methods for private equity sponsors to dispose of their stock in a portfolio company following its IPO?

The private equity sponsor will want certain rights over the company after its IPO. Where the offering is listed on the premium segment of the London Stock Exchange and the sponsor and its associates retain a significant shareholding (usually more than 30 per cent), a relationship agreement will be need to be entered into between the sponsor and the company. It is common practice to produce such a document when listing on AIM as well. A relationship agreement will be required to contain undertakings as to the independence of the company and to ensure that it trades on an arm's-length basis with significant shareholders to comply with the Listing Rules. Additionally, the Listing Rules require that if a company has such a significant shareholder, the appointment of any director who is to be considered an independent director must be approved by the shareholders of the company as a whole and the shareholders of the company excluding the significant shareholder. That being said, there are no legal restrictions on rights (such as board appointment rights or veto rights for board representatives) that may subsist after an IPO and the ability for the private equity sponsor to retain such rights will largely depend on their retained equity stake, the requirements of the Listing Rules, UK Corporate Governance Code (in each case if applicable) and any negative marketing implications foreseen by the underwriter.

A lock-up agreement will prohibit the sponsor from disposing of its retained interest in the business without the underwriters' consent. Some agreements will be more restrictive in preventing the sponsor from engaging in any similar dealings (ie, derivatives transactions). The length of the lock-up period will also be heavily negotiated but

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typically last for between six and 12 months. The purpose of the lock-up is to give investors comfort that the shares sold in the IPO will not fall in value owing to large sales of shares not sold in the IPO. In addition to lock-ups, private equity sponsors may also enter into 'orderly market' undertakings under which they agree, for an additional period, to only sell shares through a designated broker on a 'best price and execution basis' and, in certain circumstances, agree to retain a minimum shareholding for a certain period. A consortium of private equity sponsors might also agree to give each other the opportunity to sell down on a proportionate basis, either for a particular period of time or until a particular shareholding floor is reached.

17 Target companies and industries

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

The UK market has continued to remain popular among private equity sponsors and there continues to be great sector diversity in the deals that are coming to the market. However financial services, technology and healthcare as well as consumer goods and services remain particularly strong areas of focus.

There may be additional due diligence, regulatory, disclosure and timing considerations for private equity sponsors looking to invest in the financial services, consumer credit and energy sectors, although UK regulators are generally familiar with and receptive to private equity investment.

18 Cross-border transactions

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

The takeover regime does not have a specific set of rules that apply to cross-border investments by private equity sponsors. However, laws relating to foreign investment in the UK are subject to significant change. The Enterprise Act 2002 currently provides the power for the Secretary of State for Business, Energy and Industrial Strategy to intervene in certain takeovers or transactions (whether public or non-market) on national security and other public interests grounds. Following certain high-profile foreign investments in the strategic sectors, the UK government has issued a white paper on material reforms on the UK government's power to intervene in foreign investments giving rise to national security risks; the scope of the primarily voluntary regime will be significantly broader (and is expected to give rise to many more investigations) than the existing regime.

19 Club and group deals

What are some of the key considerations when more than one private equity firm, or one or more private equity firms and a strategic partner or other equity co-investor is participating in a deal?

The impact of bidders clubbing together and sharing information and due diligence will need to be considered in particular in the context of applicable competition laws; the acquisition of joint control could have a significant impact on the application of relevant turnover tests. Club deals may also trigger the concert party rules of the Takeover Code that attribute the actions of one member of a concert party to other members. If, for example, the bidder, together with parties acting in concert with it, acquires shares that together represent more than 30 per cent of the target then it will be required to make a mandatory offer for the target. Finally, particular care will need to be taken when structuring any club or group deal through a commonly held entity so as to ensure compliance with AIFMD and applicable domestic laws regulating the operation of collective investment schemes.

20 Issues related to certainty of closing

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

Sellers will rarely accept any conditions other than mandatory competition and regulatory approvals and other deal specific conditions (eg, pre-closing restructurings). In some cases, even the potential impact of mandatory conditions is heavily curtailed. For example, a competition condition might require a buyer to take all possible measures to avoid the deal being blocked, such as the obligation to divest other assets held by the buyer (the 'hell or high water' obligation). In addition, 'financing outs' (ie, where the purchaser's commitment to close is subject to obtaining the required financing) are very rare. This means that the conditions to the financing have to be tailored to the conditions to the completion of the sale of the target's shares.

Where a transaction is subject to the Takeover Code, the bidder's ability to invoke offer conditions is subject to a materiality test that is administered by the Takeover Panel. In practice, this means that a bidder will usually only be able to invoke its acceptance condition, its UK or EU antitrust conditions (none of which is subject to the materiality test in the Takeover Code) or its other material regulatory conditions. A general 'material adverse change' condition has never been successfully invoked in a UK going-private transaction.

The ability of a public company to pay termination fees is restricted by financial assistance rules. If the transaction is subject to the Takeover Code then break fees payable by the target are generally prohibited.

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