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1. Trends

1.1 M&A Transactions and Deals

As a well-regulated international finance centre, Jersey continues to deliver innovative and high-quality downstream acquisition and investment fund structuring solutions to global private equity (PE) and sector focused institutional sponsors.

Strong top sponsor appetite remains for infrastructure opportunities that attract greater potential for value creation over the life of an asset. Such transactions may involve more upfront cost and complexity. One key attraction for maintaining a stable of infrastructure assets is the "best in class" investor return prospects which they have the potential to achieve.

An increasing number of sponsors are putting investor capital to hard work through innovative minority (GP) stakes deals. In these deals, a larger sponsor acquires economic rights in smaller scale PE operators. Drivers behind these types of investments include the optimisation of GP/manager and performance-related income streams and a need for permanent capital by mid-market buyout groups.

The mid-market landscape has been the most competitive and possibly overcrowded segment of the global PE market in recent years. The considerable pressure on increasing investor returns continues unabated. As a result, the constant pace and number of participants involved in pre-emptive bid and conventional auction processes persists.

This chapter provides an overview of the key trends and features of PE transactions in Jersey and those involving Jersey-registered vehicles, ie, an acquisition (or disposal) where the buyer (or seller) is a special purpose vehicle owned and controlled by a PE fund.

1.2 Market Activity

Domestic market activity in Jersey is dominated by PE involvement in financial services sector businesses, such as professional corporate services and trust company businesses, which are the target of primary, secondary or tertiary trade investment. Global banking businesses with a Jersey footprint also provide non-core business carve out opportunities for PE sponsors in the local financial services sector.

Separately, a sustained use of Jersey vehicles by leading PE sponsors investing in larger scale primary cross-border deals across 2019 and 2020 has seen the most significant sector growth in infrastructure and, in particular, in the following asset sub-classes:

- biotech;
- broadband internet service provision;
- refuse and recycling;
- midstream O&G; and
- transport and motorway services.

2. Legal Developments

2.1 Impact on Private Equity

Jersey Private Funds Regime

In April 2017, the Jersey Financial Services Commission (JFSC) introduced a new private investment fund regime establishing the Jersey Private Fund (JPF). The introduction of the JPF amalgamated and replaced three other historic Jersey private fund products, with a single JPF product for 50 or fewer investors.

The JPF regime is more streamlined and flexible, with a 48-hour online authorisation procedure and subject to a light regulatory touch, but without compromising investor protection. JPFs are aimed at professional investors, high net worth investors or investors committing at least GBP250,000 (or equivalent).

While a Jersey designated service provider must be appointed, there is no requirement to appoint a custodian or for investment manager to be approved. No investment or borrowing restrictions, and no audit requirement, are imposed on JPFs.

As PE funds are typically closed-ended funds, the attraction of the JPF for speed of establishment, together with appropriate and proportionate regulation for the sophistication of the investor base, are the unique selling points of the JPF product.

Limited Partnership Continuance

On 17 July 2020, the Limited Partnerships (Continuance) (Jersey) Regulations 2020 (LP Regulations) took effect. The LP Regulations provide for a straightforward statutory procedure to allow non-Jersey unincorporated limited partnerships to continue or migrate into Jersey as a Jersey limited partnership under the Limited Partnerships (Jersey) Law 1994.

A limited partnership formed or registered under a foreign law without legal personality, may apply for continuance in Jersey, as long as the foreign governing law does not prohibit it. Under the LP Regulations, the limited partnership must not be the subject of any insolvency proceedings or have any receiver or manager appointed over its assets and not be de-registered, other than for the purpose of continuance in Jersey.

If the non-Jersey limited partnership is an investment fund (including a PE fund), certain additional approvals or consents may be required from the JFSC for migration of the fund to Jersey. These approvals or consents may be obtained as part of the

application for continuance and where a promoter wishes to use, for instance, the JPF regime, the application process should be quick and straightforward. Exemptions from regulatory licensing are generally available for the general partners of JPFs.

As limited partnerships are now the favoured vehicles for closed-ended PE funds it is expected that this change facilitating the continuance in Jersey of PE funds registered in other jurisdictions is likely to be of interest to certain sponsors and managers.

Economic Substance
Jersey implemented The Taxation (Companies – Economic Substance) (Jersey) Law 2019 ("ES Law"), which came into force with effect from 1 January 2019.

The ES Law applies to a company incorporated or tax resident in Jersey, which generates income from a "relevant activity", including, among other activities, fund management business, holding company business or financing and leasing business.

In the context of private equity, some downstream PE acquisition vehicles will potentially be subject to the ES Law and have to meet the economic substance test in Jersey depending on the activities which they conduct (for example, holding company business or intra-group financing).

As Jersey tax resident companies are generally fully administered and managed companies, certain activities conducted by the Jersey administrator in Jersey will assist the company to meet the economic substance test under the ES Law with limited additional impact or burden.

Competition/Antitrust Regime
It has been proposed that the Jersey acquisition and merger control regime be changed from its existing "share of supply" test to a "turnover" test. The purpose of which is to narrow the category of M&A transactions that are notifiable to the Jersey competition authority. This is to ensure only those mergers that might impact the local market are referred.

Takeover Regime
It is also worth noting that any amendments made in the UK to The City Code on Takeovers and Mergers will be applicable in Jersey (see **3.1 Primary Regulators and Regulatory Issues**).

3. Regulatory Framework

3.1 Primary Regulators and Regulatory Issues

PE Fund Regulation
The principal legislation governing the regulation of PE funds in Jersey is the Collective Investment Funds (Jersey) Law 1988 and, for private funds, the Control of Borrowing (Jersey) Order 1958. Funds which are marketed into Europe are also subject to the Alternative Investment Funds (Jersey) Regulations 2012 (AIF Regulations). Funds that are marketed in the EU are subject to the code of practice for alternative investment funds and AIF services business (AIF Code).

In addition, all funds are subject to the requirements of Jersey's anti-money laundering regime, which applies anti-money laundering rules to all financial services businesses in Jersey. Jersey-based service providers to funds are generally subject to regulation under the Financial Services (Jersey) Law 1998 ("FS Law"), unless an exemption applies. Providers of fund services business must be registered and regulated by the JFSC pursuant to the FS Law.

AML/KYC
Relevant sanctions and the usual anti-money laundering and Know Your Customer (KYC) rules apply to PE transactions, there are no Jersey specific restrictions.

Takeover Code
The UK City Code on Takeovers and Mergers (Takeover Code) applies to certain transactions involving Jersey companies. Takeover Code compliance is implemented by the UK Takeover Panel, as the designated authority under primary Jersey legislation.

A Jersey company is subject to the Takeover Code if any of its securities are listed on a regulated market or multilateral trading facility in the UK or on any stock exchange in the Channel Islands or the Isle of Man. This includes being listed on the main board of the London Stock Exchange (LSE) and on the Alternative Investment Market. A Jersey company that has shares listed on other exchanges, such as NYSE and NASDAQ, may also be subject to the Takeover Code if the Panel considers that the company's management and control is in either the UK, the Channel Islands or the Isle of Man.

Domestic competition and anti-trust regulation applies where merging businesses meet relevant thresholds. Where applicable the approval of the Jersey competition authority may be required.

4. Due Diligence

4.1 General Information

The focus in Jersey is on verifying corporate existence, maintaining solvency and other corporate governance related matters. Typically, buy-side legal due diligence involves utilising publicly available information and any information made available by the seller as part of the tender/auction process. Where a target is prepared to support the offer, bidders may also present separate requests in respect of matters on which it requires further information. Such legal due diligence is usually secondary to financial (including taxation) due diligence.

With a hostile bid, legal due diligence is generally limited to information in the public domain (see below). However, a bidder may be able to obtain information from the target that has been provided to a competing bidder if the Takeover Code applies. This is because the target has a duty to provide equal information to rival bidders in a competitive situation.

Public information available to bidders in Jersey includes:

- audited accounts (for public companies only);
- memorandum and articles of association;
- details of directors and shareholders (for public companies only);
- prospectuses; and
- other information may also be available via UK sources, such as public announcements issued by the target.

4.2 Vendor Due Diligence

Vendor due diligence (VDD) reports featuring as part of PE transactions depends almost entirely upon the shape of the target group structure and the underlying asset class.

VDD is often not comprehensive and in Jersey is not generally considered a substitute for a buyer's own due diligence. A VDD report may provide a helpful start to the due diligence process. An obvious advantage is where a vendor is prepared to make representations and warranties, or provide indemnities, in the transaction documents in relation to information contained in the VDD report.

It is not common in Jersey for advisers to permit reliance on buy-side diligence reports in Jersey to financiers or warranty and indemnity (W&I) insurers. However, it is typical for buy-side advisers to liaise with both financiers and insurers on behalf of bidders to address and provide comfort around specific legal issues which may arise as part of a financing or writing a buyer's W&I policy.

5. Structure of Transactions

5.1 Structure of the Acquisition

Most PE acquisitions in Jersey are structured as private treaty sale with purchase agreements negotiated between the parties. Competitive auction processes are common in the infrastructure space, where prime assets are coveted. Larger transactions involving a Jersey target company or listed targets may proceed by way of a court-sanctioned scheme of arrangement or Takeover Code governed process. Other acquisition types include statutory mergers and business asset transfers, although these are less frequently encountered.

5.2 Structure of the Buyer

Straight line Jersey private company acquisition structures are preferred by PE sponsors and co-investors.

Tiered Jersey debt and equity acquisition structures involving a Topco (top holding company), Midco (intermediate financing vehicle) and a Bidco (bid vehicle) are typical. Such structures:

- enable structural subordination of intra-group/external financing;
- facilitate requirements of both PE sponsor and target management;
- provide UK resident non-UK domiciled target management with remittance-based taxation options for future exit (eg, CGT);
- allow for simplified dividend flows to PE fund investment vehicles and ultimately LP investors; and
- should not be subject to onshore tax/stamp duty on future disposal.

In addition, the use of Jersey management incentive planning (MIP) vehicles for manager incentivisation aligns target management objectives with those of the PE sponsor.

5.3 Funding Structure of Private Equity Transactions

Generally, PE transactions are financed via a mix of equity contributions sourced from investing PE funds and external debt/leverage provided by syndicate banks, institutional financiers and a range of alternate credit providers. For larger transactions, refinancing by accessing funding from the debt capital markets, ie, bridge to bond, is attractive from a cost of funds perspective. Unitranche financing, which involves a hybrid loan structure combining senior and subordinated debt into one loan facility at a blended interest rate, have also proved attractive to PE sponsors.

Most PE deals in Jersey, or those involving Jersey acquisition structures, target majority PE fund ownership. Co-investment

structures are an increasingly popular way to syndicate the equity contribution to be made. However, it is not uncommon to see primary investment opportunities initially involve PE sponsors acquiring minority interests in target groups pending enterprise valuation adjustments and similar.

5.4 Multiple Investors

Both joint venture and consortium investor transactions are common in Jersey, particularly in infrastructure asset deals. While not entirely "commonplace" at the time of writing, the steady rise in pre or post-closing co-investments involving multiple PE sponsors or sponsors and their most valued limited partners are starting to represent an increased proportion of overall PE deals.

6. Terms of Acquisition Documentation

6.1 Types of Consideration Mechanisms

There is generally no restriction on the type of consideration that can be offered on a private treaty sale or negotiated offer. Consideration can therefore include, among other things, cash, loan notes and shares. In a Takeover Code governed deal, for a mandatory offer, the consideration must be cash, or be accompanied by a cash alternative, and comply with minimum consideration requirements.

The nature of the underlying asset, sponsor approach/appetite and certain transaction specific requirements are all likely factors that will contribute to the form of consideration structure used in Jersey PE deals. There is no predominant form of consideration structure used in these types of transaction. Fixed price, locked-box and completion accounts mechanisms are variously seen on Jersey PE transactions.

Protection afforded by PE buyers and sellers in relation to the consideration mechanism is generally the same in terms of the protection provided by corporate buyers/sellers. This would include earn-outs, deferred consideration, anti-embarrassment mechanisms and (less frequently) consideration collateral or security.

6.2 Locked-Box Consideration Structures

Use of locked-box consideration structures in Jersey PE transactions is not predominant. The specific features and uniqueness of each separate transaction generally drives whether completion accounts or a locked-box consideration mechanic is employed. Levying interest charges on any value leakage that is not permitted leakage is not common or market standard in Jersey.

6.3 Dispute Resolution for Consideration Structures

In many private equity transactions, locked-box consideration structures do not usually have specific dispute resolution mechanisms. In deals where completion accounts are required, specific dispute resolution mechanisms are more common where either party may refer a dispute for determination by an independent auditor. General dispute resolution provisions under a share sale and purchase agreement often refer to arbitration proceedings as agreed between the parties.

6.4 Conditionality in Acquisition Documentation

Conditionality is standard in PE transactions and would include any necessary shareholder and regulatory (including competition or anti-trust) approvals and other matters that are not within the bidder's control or dependent solely on the bidder's subjective judgement. Conditionality for financing and other kinds of third-party consents are less frequent.

Takeover Code governed offers must include a condition that the offer will lapse if the bidder does not acquire (or contract to acquire) more than 50% of the voting share capital of the target. In Jersey, acquiring or contracting to acquire 90% of target share capital will enable the bidder to engage the compulsory acquisition procedure available under Jersey company law.

Material adverse change/effect (MAC) provisions, which are common, are likely to be a focus post COVID-19. We would expect acceptance of generic MAC provisions in the current climate to be unlikely. A MAC provision that addresses a specific risk or issue may be acceptable.

6.5 "Hell or High Water" Undertakings

It is not common in transactions that are subject to regulatory approvals (including competition and anti-trust) to have a PE-backed buyer agree to 'hell or high water' provisions. Agreements to absolute obligations of this kind, which may result in divestitures or require certain outcomes in the context of pending litigation, are more common in a public merger and acquisition context.

6.6 Break Fees

Deal protection measures like break fees have not featured in Jersey transactions involving PE-backed buyers. In larger cross-border transactions with a Jersey element, break fees were more common prior to their abolition, as a result of changes to the Takeover Code in September 2011.

Reverse break fees are not customary in Jersey transactions involving PE-backed buyers. However, as they are not prohibited by the Takeover Code, they are permissible subject to Jer-

sey law rules on excessive penalties which are broadly speaking similar to those that apply under English common law.

6.7 Termination Rights in Acquisition Documentation

Deal execution and completion risk remains high on the agenda for PE transaction participants so, typically parties will (and PE-backed buyers in particular) only permit termination of an acquisition agreement in Jersey in very specific (and narrow) circumstances. Termination rights are, in general, limited to mandatory conditions (outside of the control of each party) and which are not satisfied by a certain long stop or "sunset" date. Otherwise, MAC provisions, as discussed in **6.4 Conditionality in Acquisition Documentation**, potentially allow a party to terminate or adjust its obligations in the event of a change in circumstances that significantly affects the value of the target. Automatic termination triggered by a contractual provision in an acquisition agreement is rare.

6.8 Allocation of Risk

In Jersey, market practice is a more powerful driver in respect of the allocation of risk between parties to a PE acquisition transaction than the type or nature of the parties involved. For example, numerous trust company and corporate services businesses in Jersey have been the subject of primary PE investment as well as secondary and tertiary management buy-outs (MBO) and management buy-ins (MBI). In the majority of these deals, it is common that risk is shared between the parties, although on balance, PE sellers prioritise minimising their exposure to liability in the sale of a portfolio company.

The impact is that the extent to which PE sellers assume ongoing liability in a divestment is very limited. On buyer-insured transactions, nominally capping seller liability will result in only theoretical risk for PE sellers.

The main ways a PE seller will look to limit liability include negotiating:

- caps on financial exposure;
- time periods by which claims can be made (eg, 12 to 24 months);
- de minimis claim levels (individual and aggregate);
- regulating the conduct of a dispute regarding a breach of warranty or any third-party claims; and
- obligations on buyers to mitigate loss suffered.

6.9 Warranty Protection

Warranty coverage in PE transactions in Jersey is generally limited to title of target shares or assets, capacity and authorisation to enter into the transaction, solvency and accuracy and completeness of information provided to the buyer. Warranties are usually limited in duration to a 12 to 24 month claim period. While most primary PE investment transactions in Jersey involve a management team standing behind the deal terms and providing certain limited warranties, other deal protection measures such as earn-outs and lock-ins provide more comfort to PE-backed buyers.

Full disclosure of the data room is typically allowed against the warranties. See **6.8 Allocation of Risk** regarding customary limitations on liability for warranties in Jersey.

6.10 Other Protections in Acquisition Documentation

Indemnities from a PE seller and/or management team are not common in an MBO context. Earn-outs, lock-ins and price adjustment provisions are often negotiated as part of the management specific terms of an acquisition agreement. A tax covenant and deed of indemnity is also a relatively common feature and further allows the allocation of risk as between buyer and seller. Dollar-for-dollar recovery for unexpected tax liabilities arising as a result of pre-completion profits or events occurring prior to completion provides buyer protection.

Buyer (W&I) insured deals are increasingly common following the trend in the UK and elsewhere. W&I coverage increases the relatively low level of protection which management teams are able to provide and which PE sellers are not prepared to consider. The additional diligence and input from a seller on an insured deal is often accepted as necessary from a buyer's perspective. The cost of insuring known risks is generally prohibitive, and so, is less common.

Escrows and retentions are rarely used in Jersey PE transactions to back the obligations of PE sellers. An exception may be a financial services business that is subject to regulatory examination, given that in 2019, the financial services regulator in Jersey levied its first civil penalty against a registered FS business. Another exception may be where there is a known risk or prospect of settling pending or threatened litigation against the target.

6.11 Commonly Litigated Provisions

Litigation is not common in connection with PE transactions in Jersey or those involving Jersey entities. The limited contractual liability of PE sellers means that the appetite for transaction counterparties to look to litigate disputes is limited. Alternative dispute resolution pathways often mean that disputes in relation to earn-outs, consideration calculation and related matters are resolved at an early stage. Expert determination on completion account disputes is generally provided in acquisition agreements to be binding and conclusive.

7. Takeovers

7.1 Public-to-Privates

Public-to-private transactions (also known as take privates) are not common in Jersey from a domestic utility or infrastructure asset point of view. However, as many Jersey companies are listed on stock exchanges throughout the world, including the main board of the LSE and increasingly North American stock markets, including NYSE, NASDAQ and TSX, a number of those listed companies have become targets in take private transactions.

The following kinds of transactions are common in a PE acquisition context:

- A take private or takeover offer involving a bidder who makes an offer to the listed target's shareholders to acquire their shares in the target. After the takeover is complete, the bidder and the target remain separate companies and the target becomes a subsidiary of the bidder. The bidder may compulsorily acquire the remaining shares if it acquires at least 90% of the shares to which the offer relates.
- An alternative form of public company acquisition transaction is a Jersey court sanctioned scheme of arrangement. This is a statutory court process involving a compromise or arrangement between a company and its members. It results in the bidder holding all of the target's shares.
- Jersey also has a statutory merger regime, which may also be used in a takeover situation, whether for cash or equity (and including cross-border mergers, if the other relevant jurisdictions permit merger).

7.2 Material Shareholding Thresholds

If the Takeover Code applies prior to the announcement of a bid or a possible bid, all persons privy to confidential information, and particularly price-sensitive information, concerning the bid or possible bid must treat that information as secret and may only pass it to another person if it is necessary to do so and if that person is made aware of the need for secrecy. All such persons must conduct themselves to minimise the chances of any leak of information (Rule 2.1 of the Takeover Code).

If the Takeover Code does not apply, Jersey law does not otherwise specify any secrecy or material shareholding disclosure obligations. However, it may be prudent to maintain secrecy for commercial and/or other reasons. In addition, the laws and regulations of other jurisdictions (for example, the rules of the stock exchange on which the target company is admitted to trading) might impose secrecy or disclosure obligations on the bidder and/or target company.

7.3 Mandatory Offer Thresholds

Where the Takeover Code applies, a mandatory offer to acquire the entire issued share capital of a target must be made when the bidder (or parties acting in concert) achieve one of the following (Rule 9):

- acquires an interest resulting in the bidder holding a stake of 30% or more of target voting rights; or
- intends to acquire an interest in shares carrying between 30% and 50% of the target's voting rights and the bidder (or concert parties) acquire an interest in any other voting shares in the target.

7.4 Consideration

Cash consideration is common in Jersey, however, there are no restrictions on the form or type of consideration in a voluntary offer. Consideration can therefore include among other things cash, loan notes and shares.

If the Takeover Code applies, for a mandatory offer the consideration must be in cash, or be accompanied by a cash alternative and comply with applicable minimum consideration requirements.

7.5 Conditions in Takeovers

If the Takeover Code does not apply, Jersey law does not specify any particular obligations or duties in relation to conditions or pre-conditions. However, financing conditions are generally not accepted in PE-backed takeover offers.

If the Takeover Code applies, a voluntary bid can be made subject to the satisfaction of pre-conditions. In such cases, the Panel must be consulted in advance about any proposal to include in an announcement any pre-condition to which the bid will be subject. As a general rule, the Panel will not consent to the inclusion of a pre-condition if it depends solely on subjective judgements by the directors of the bidder or the target.

Except with the consent of the Panel, a bid must not be announced subject to a pre-condition unless the pre-condition relates to a decision that there will be no reference to the competition authority or initiation of proceedings by the European Commission, or it involves another material official authorisation or regulatory clearance relating to the bid. In the case of a mandatory bid, save with the consent of the Panel, no conditions are permitted (other than that the bidder obtain acceptances that give it over 50% of the voting rights of the target company).

7.6 Acquiring Less Than 100%

Jersey company law provides PE bidders with the legal right to compulsorily acquire shares in a target that it does not seek or

ultimately obtain a part of its offer (known as a "squeeze out right"). In a takeover offer, if the bidder has acquired or contracted to acquire 90% in nominal value of the shares to which the offer relates, the bidder can acquire the remaining 10% by giving notice to the relevant shareholders.

No compulsory acquisition notice can be given unless a bidder has acquired or contracted to acquire 90% of target shares within four months of an offer. The shareholder notice must be served within two months of the bidder acquiring or contracting to acquire the 90%. A copy of the notice must be sent to the target. Bidders are bound to acquire the remaining shares on the terms of the original offer.

After six weeks from the date of the notice, a bidder must pay the target for the remaining shares it wishes to compulsorily acquire. A share transfer form, executed on behalf of the non-selling shareholder by the bidder, must be sent to the company with payment whereupon receipt, the company must register the bidder as shareholder. Inverted rights of non-selling (minority) shareholders also exist to require their shares to be acquired by a bidder who has acquired (or contracted to acquire) 90%. The Jersey court has general jurisdiction to hear relevant applications about compulsory acquisition matters.

7.7 Irrevocable Commitments

In situations where an offer is recommended by the board of directors of the target, a PE bidder obtaining irrevocable undertakings or commitments from the main shareholder(s) is common. Irrevocable undertakings/commitments and letters of intent are permitted by, and must comply with rules in, the Takeover Code. Achieving a certain level of irrevocable commitments in the pre-bid stage is often key to the PE bidders advancing offers. Irrevocable commitments customarily oblige a shareholder making such a commitment to accept the PE bidder's offer by a certain time.

7.8 Hostile Takeover Offers

Hostile takeover offers are permitted but are not common in Jersey. They carry significant additional deal execution risk and complexity. For example, less information will be available than on a recommended bid. The Takeover Code requires target board directors to act in the best interests of the target, ie, its shareholders as a whole, and not deny shareholders the opportunity to decide on the merits of a bid (General Principle 3). However, in practice, a range of defence tactics may be available in the context of an approach by an unwelcome bidder.

Downstream PE acquisition activity (MBOs and MBIs in particular) is predicated on cooperation from both the founders and any management team rolling over, who sponsors look to partner with to implement post-deal development and growth plans. A hostile takeover process is not generally aligned with the approved investment strategy of PE sponsor.

8. Management Incentives

8.1 Equity Incentivisation and Ownership

Unsurprisingly, incentivisation of management teams is a key feature of PE transactions in Jersey and those that involve Jersey registered vehicles. Different drivers and expectations from both PE sponsors and management team come into focus where the market is moving to a more "patient capital" model, compared to shorter hold periods typically associated with PE, ie, in the seller friendly landscape of the last five or six years. Up to 10% of equity participation by management is common but certain and more entrepreneurial management teams have been able to command a higher proportionate equity ownership share.

8.2 Management Participation

There are a number of different ways of structuring management participation in PE transactions in Jersey. It is common that managers subscribe for sweet equity on primary investments and for part of the institutional strip on secondary buyouts where managers roll over on the same terms (and equity to debt ratio) as the PE sponsor. Preference shares (disenfranchised as to voting/any blocking trigger) are also used as the following arrangements where incentivisation is planned for a larger number of managers/executives:

- long-term incentive plans;
- share options plans;
- management incentive plans;
- deferred share plans; and
- joint ownership equity plans.

8.3 Vesting/Leaver Provisions

If managers leave the portfolio business before a certain date, they will normally forfeit their sweet equity. Good and bad leaver provisions are typical, with preferential terms applying to individuals who leave for "good" reasons. Generally, this includes managers who leave due to illness, death, disability and retirement. Four or five years are typical vesting periods, or otherwise, an exit is the most common. Full vesting on an exit event that takes place earlier than anticipated generally means that everyone benefits.

Alignment of management and PE sponsors on exit timing is critical. Where sponsors seek to exit early, there is often little value in management's sweet equity which can damage an otherwise good relationship. Management increasingly look to secure certainty regarding exit timing. Where an exit takes place out of this timeframe, one option is that management are

compensated for the lost "opportunity" however, this approach is not favoured by sponsors.

8.4 Restrictions on Manager Shareholders

Customary restrictive covenants agreed to by management in PE transactions in Jersey include non-compete, non-solicitation and non-disparagement. Such covenants are unenforceable unless they are reasonable as between the parties and in respect of the public interest.

In practical terms, enforcement of these types of covenants is not straightforward.

8.5 Minority Protection for Manager Shareholders

Management shareholders in PE transactions are not afforded greater or different rights than minority shareholders in other situations under Jersey company law. The standard legal protections that exist include claims in relation to minority oppression and unfair prejudice, etc.

It is usual for contractual pre-emption rights in favour of management to exist in relation to sweet equity. Such rights are intended to offer some kind of anti-dilution protection to management. However, if significant additional equity funding is obtained or if a larger number of new or existing management are offered and take up sweet equity, limited pre-emption may not fully or effectively operate as anti-dilution protection. Limited rights of veto may exist in relation to a narrow range of matters specifically concerning the portfolio business.

Management would not typically have any right to control or influence the time, form and mode of exit a PE sponsor may wish to adopt in relation to a portfolio asset.

9. Portfolio Company Oversight

9.1 Shareholder Control

Where PE sponsors hold a majority ownership position in a portfolio company asset, they normally enjoy significant veto rights over major corporate, commercial and financial matters pertaining to the portfolio company business, although thresholds are commonly set to ensure that day-to-day decisions can be taken by management. In other words, management will have operational control of the business whereas PE sponsors will have oversight and ultimate influence over management by being able to control the board of the holding company of the portfolio business.

Management business operation and PE sponsor control rights are regulated in a shareholders' agreement that governs their relations as shareholders in the portfolio company. This will likely include, among other provisions:

- covenants from management with regard to the conduct of the business of the portfolio company;
- extensive veto rights for the PE sponsor;
- restrictions on the transfer of securities in the portfolio company; and
- provisions regarding further issuances of shareholder equity/debt.

In addition, the constitutional documents may include governance arrangements, particularly with regard to the transfer of shares. The extensive veto rights in favour of PE sponsors will typically be split between director veto rights and shareholder veto rights. Such veto rights (or reserved matters) would include amendments to the capital structure, constitutional documents, entering into, amending or terminating material contracts, changing the nature of the business or entering into new business lines, and commencing or settling litigation.

In a minority PE investment, given the PE sponsor is unlikely to have board control, it is usually much more focused on veto controls to the extent that, in certain cases, a minority investment may result in more veto control than might be the case in a majority investment.

9.2 Shareholder Liability

Jersey company law contains the concepts of separate legal personality and limited liability. It recognises that the legal personality of a company is separate to that of its shareholders and that, fundamentally, a shareholder's liability is limited to the amount invested in a company.

A corollary of this is that in exceptional circumstances, a Jersey court might be prepared to "lift the corporate veil" which may result in a PE sponsor being liable for the actions of its portfolio company. In order to pierce or lift the veil, there needs to be a deliberate evasion of an existing legal obligation or liability by the shareholder concerned. The remedy of piercing the corporate veil, so as to impute liability to a PE sponsor (majority portfolio company shareholder), is unlikely to be capable of being successfully engaged as a matter of Jersey law, based on customary PE transaction structuring discussed above.

The same concept of limited liability applies to limited partners of Jersey limited partnerships where limited partners will generally only be liable for debts of the partnership if they have participated in the management of the partnership (excluding a number of specific safe-harbour activities) thereby jeopardising the limited liability inherent in such structures.

9.3 Shareholder Compliance Policy

The strategy and makeup of the PE fund shareholder (including specific investment criteria and the mandate to invest) will drive any decision by a sponsor to impose its own environmental, social and governance policies on a portfolio company business in which it has invested.

10. Exits

10.1 Types of Exit

Portfolio asset holding periods stretch from three to eight years, depending on the nature of the asset and other prevailing market conditions. Also, the seller friendly nature of the market in Jersey in the last five or so years has meant that competitive auction processes (including with pre-emptive offers) have become very common.

As most PE transactions in Jersey are of financial services sector/regulated businesses, auction sales to strategic trade buyers, other private equity sponsors (in secondary or tertiary transactions) are all normal. In 2020, given the COVID-19 induced volatility in the capital markets and in relation to FX currency trading, IPO has been the least attractive form of exit strategy. Dual track (IPO and private sale) processes running concurrently have, in the last four to six years in Jersey, become more common. However, it is interesting to note that during this time, only three Jersey PE owned portfolio companies have conducted successful IPOs, implying that a higher rate of success has been achieved with private sale processes. Reinvestment by PE sponsors (save for an IPO exit scenario) is not typical.

10.2 Drag Rights

Drag along rights, ie, the right of a PE sponsor to force other shareholders, including management, to sell their shares in a portfolio company, are usual in the equity capital structuring arrangements for PE sponsored transactions. There is no typical drag along threshold in Jersey. It is rare for drag along rights to be exercised, however, where there are a large number of non-institutional sellers (eg, management shareholders), a drag provision might be relied upon for administrative convenience and not needing to convene a large number of parties to a sale and purchase agreement.

10.3 Tag Rights

Management shareholders do typically enjoy tag along rights in the event of a PE sponsor selling some or all of its strategic stake in a portfolio company asset. As with drag rights, there is no usual or market threshold in Jersey.

10.4 IPO

Appetite for IPO exits by PE sponsors will be dictated by equity capital market conditions and it is envisaged that COVID-19 induced volatility will reduce the attractiveness of an IPO exit from a portfolio company asset in the medium term.

In a successful IPO exit, a PE sponsor (as selling shareholder) will be "locked up" for up to six months with management locked up for a somewhat longer time, eg, 12 months. Relationship agreements covering lock-up and other management and transitional matters are generally entered into between the PE sponsor seller and the listed company.

The Maples Group, through its leading international law firm, Maples and Calder, advises global financial, institutional, business and private clients on the laws of the British Virgin Islands, the Cayman Islands, Ireland, Jersey and Luxembourg. With offices in key jurisdictions around the world, the Maples Group has specific strengths in the areas of corporate commercial, finance, investment funds, litigation and trusts. Maintaining relationships with leading legal counsel, the Group leverages this local expertise to deliver an integrated service offering for global business initiatives.

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