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Paul Burton, Simon Hopwood, Tim Morgan and David Allen
Maples Group

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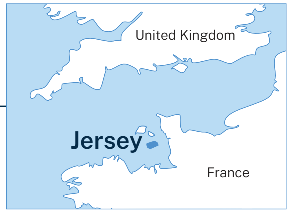

Law and Practice

Contributed by:
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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. For more information, please visit: maples.com/services/legal-services.

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1. Transaction Activity

1.1 Private Equity Transactions and M&A Deals in General

Following this cycle's all-time peak, reached in 2021, the global M&A market turned in its second-weakest year in exactly a decade in 2023. However, the more normal deal activity levels seen in the latter part of 2023 have created an environment in which we are now seeing global M&A bouncing back in 2024.

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 and sector-focused institutional sponsors.

In line with global market conditions, strong top-sponsor appetite remains for renewable energy/resources and infrastructure opportunities, which have 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 that they have the potential to achieve. The acute focus on ESG seen across all sectors means that renewable energy and resources asset targets are in focus.

The mid-market landscape continues to be the most competitive, and possibly the most overcrowded, segment of the global private equity market in recent years. This is compounded by the need for many sponsors to access alternative credit solutions to complete leverage buyout transactions, which has added to the considerable pressure and focus on increasing investor returns. As a result, the fast pace and large number of participants involved in pre-emptive bid and conventional auction processes persist.

This chapter provides an overview of the key trends and features of private equity 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 private equity fund).

1.2 Market Activity and Impact of Macro-Economic Factors

Domestic market activity in Jersey is dominated by private equity involvement in financial services sector businesses, such as professional corporate services and trust company businesses, which are the target of primary, secondary or tertiary private equity investment. Furthermore, 2024 has also seen reasonable levels of M&A trade sale locally. Certain standout transactions have triggered significant consolidation in the trust and corporate services industry. Global banking businesses with a Jersey footprint also provide non-core business carve-out opportunities for private equity sponsors in the local financial services sector.

Separately, sustained use of Jersey vehicles by leading private equity sponsors investing in larger-scale primary cross-border deals across 2023 saw a spread of activity across the following asset sub-classes:

- professional services, advisory and consultancy;
- wealth management-related financial services;
- enterprise software and business-to-business services; and
- renewable energy.

Rising interest rates, general equity market volatility and tightening credit market conditions (particularly in the leveraged loan space) have meant that private equity activity in the Jersey market, and in cross-border transactions where Jersey vehicles are used, has increasingly been focused on legal, tax and financial due diligence, closer examination of target growth strategies and a realignment of expectations on valuation.

Higher costs of borrowing in the UK and European market have led mid-market, and some top, sponsors to access leverage via alternate credit providers. This has positively impacted the credit markets by enabling borrowers to fund acquisitions on more flexible terms, given that most alternate financiers are not constrained by the kind of regulatory capital and covenant criteria that constrain mainstream bank lenders.

It remains to be seen how global M&A markets may be affected by changes of government in the UK, other major European economies and the United States.

2. Private Equity Developments

2.1 Impact of Legal Developments on Funds and Transactions

Anti-money Laundering (AML) Supervisory Regime

In mid-2023, the practical effect of the changes made to Jersey's AML supervisory regime (known as the Schedule 2 regime) was felt by local corporate service providers. Although significant to Jersey's own efforts and contribution to the global combatting of financial crime, M&A market participants transacting in Jersey or utilising Jersey acquisition vehicles for cross-border transactions will not have been impacted by the changes to the Schedule 2 regime. The main difference in the new regime is the shift in primary responsibility for AML regulatory compliance away from Jersey corporate service providers to Jersey vehicles directly involved in certain types of financial services activities, leading to their appointment of Jersey Financial Services Commission (JFSC)-regulated AML service providers.

Jersey Funds Regimes for Private Equity Funds

The Jersey Private Fund (JPF) regime, which was introduced by the JFSC in 2017 and last updated in July 2024, has become an increasingly popular regulatory regime for structuring private equity funds in Jersey. More than 700 JPFs had been established by March 2024, with the regime having particular application to funds with up to 50 investors.

The JPF regime is streamlined and flexible, with a 48-hour online authorisation procedure, and is subject to a light regulatory touch but without compromising investor protection. JPFs are aimed at professional investors, high net worth investors and investors committing at least GBP250,000 (or equivalent). For more widely marketed private equity funds, the Jersey Expert Fund regime also remains popular – it has no upper limit on the number of investors and a commitment level of at least USD100,000.

Recent enhancements include the following:

- co-investment arrangements that are part of a fund's carry/incentive scheme are now excluded from the investor count; and
- certain family and incentive arrangements are not treated as JPFs, and the definitions of employees and family connections have been further widened.

As private equity funds are typically closed-ended, the attraction of JPFs and expert funds in terms of speed of establishment, together with appropriate and proportionate regulation suited to the sophisticated investor base, continues to position Jersey favourably for fund establishment by both existing and new sponsors, and the majority of new structures tend to be JPFs.

3. Regulatory Framework

3.1 Primary Regulators and Regulatory Issues

Private Equity Fund Regulation

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

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

AML/KYC

Relevant sanctions and the usual AML/KYC rules apply to private equity transactions; there are no Jersey-specific restrictions. The alignment of Jersey's AML regulatory regime with current Financial Action Task Force standards and recommendations has not had any impact on private equity transactions in Jersey or the use of Jersey-registered acquisition vehicles.

National security regulation in Jersey is very similar to that in the UK. Financial investors are screened by local authorities in accordance with international standards. There is no particular focus on sovereign wealth fund (SWF) investors, although many SWFs are, in the ordinary course, subject to robust checks either as principal deal counterparties (including as co-investors) or as fund investors/limited partners.

Takeover Code

The 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 LSE and the Alternative Investment Market. A Jersey company that has shares listed on other exchanges, such as the NYSE and Nasdaq, may also be subject to the Takeover Code if the Panel considers that the company's management and control are in the UK, the Channel Islands or the Isle of Man.

Domestic competition and antitrust regulation applies where merging businesses meet relevant thresholds. Where applicable, the approval of the Jersey Competition Regulatory Authority may be required.

EU Foreign Subsidies Regulation (FSR)

The EU FSR does not directly apply in Jersey and so is not relevant to local M&A transactions therein. However, Jersey financial services businesses that form part of wider UK and European or global groups may be tangentially impacted.

One general observation regarding EU FSR is that, in addition to the usual M&A considerations (such as the completion timetable, closing conditions and risk allocation in deal documents), the EU FSR regime is likely to introduce additional and potentially significant disclosure requirements for private equity sponsors.

4. Due Diligence

4.1 General Information

The focus of due diligence 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 they require 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 **4.2 Vendor Due Diligence**). 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 that may be available via UK sources, such as public announcements issued by the target.

4.2 Vendor Due Diligence

Vendor due diligence (VDD), as part of private equity transactions, depends almost entirely upon the shape of the target group structure and the target asset or business.

VDD is often not comprehensive and, in Jersey, it 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. Typically, sell-side legal advisers present VDD reports as being based on a risk review mandated by the seller/target group, in contrast to a deeper-dive diligence exercise.

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 that may arise as part of financing or the writing of a buyer's W&I policy.

5. Structure of Transactions

5.1 Structure of the Acquisition

Most private equity acquisitions in Jersey are structured as private treaty sales with purchase agreements negotiated between the parties. However, there has been an increase in the use of the Jersey statutory merger procedure to effect both private and public acquisitions in recent years. 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 a process governed by the Takeover Code. The Takeover Code, and the appointment of the Takeover Panel to administer provisions thereof, have been adopted in Jersey through the enactment of domestic legislation. 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 private equity sponsors and co-investors.

Tiered Jersey debt and equity acquisition structures involving a topco (top holding company), midco (intermediate financing vehicle) and bidco (bid vehicle) are typical. Such structures have the following attributes:

- they enable structural subordination of intra-group/external financing;
- they facilitate the requirements of both private equity sponsor and target management;
- they provide UK-resident-non-UK-domiciled target management with remittance-based taxation options for future exit (eg, capital gains taxation);
- they allow for simplified dividend flows to private equity fund investment vehicles and ultimately limited partnership (LP) investors; and
- they 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 private equity sponsor.

Recent years have seen a significant increase in the use of MIP vehicles for the many incentivisation-restructuring rounds that have occurred where portfolio company assets are in the buy-and-build phase.

5.3 Funding Structure of Private Equity Transactions

Generally, private equity transactions are financed via a mix of equity contributions sourced from investing private equity funds and external debt/leverage provided by syndicate banks, institutional financiers and a range of alternate credit providers. For larger transactions, 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, has also proved attractive to private equity sponsors.

Interest rate movement and the high margin cost of vanilla leveraged financing options has led the most active sponsors to seek out alternative and mezzanine-style credit solutions. This has impacted credit committee consideration of new money transactions, resulting in more protracted come-to-market periods. For alternate credit funding of private equity acquisition transactions, it is relatively common for private debt funds to have agreed to provide committed capital at signing. The efficiency associated with not having to syndicate or take out bilateral debt post-completion has driven this particular behaviour. Overall, the market has coped well in the past 12 months, wherein leverage terms for private equity transactions have changed.

Both fund-level and leverage financing options feature significantly in downstream private equity transactions involving Jersey vehicles. Market conditions have enhanced the attractiveness for private equity sponsors of participating in leverage financing solutions as alternate credit providers. The prominence of subscription line, net asset value and hybrid fund financing facilities (used to finance short-term settlement disparities between general partner calls on investors for committed capital and the need for available capital at the bid or portfolio company acquisition stage) has only continued to grow in recent years.

At signing, an equity commitment letter is used to provide contractual certainty of funds for sponsor contributions. For higher-value transactions, it is common to see debt and security documents agreed by signing (but left unexecuted) and confirmations given by the buy-side in relation to this to provide comfort to sellers.

5.4 Multiple Investors

Both joint venture and syndicated consortium investor transactions are common in Jersey, particularly in infrastructure asset deals. While not entirely "commonplace", the steady rise in pre- or post-closing co-investments involving multiple private equity sponsors, or sponsors and their most valued limited partners, is starting to represent a greater proportion of all private equity deals.

Co-investment structures are an increasingly popular way to syndicate the sponsor equity contribution to be made. It is not uncommon to see primary investment opportunities initially involve private equity sponsors acquiring minority interests in target groups pending enterprise valuation adjustments and similar. Joint venture-style arrangements between private equity fund sponsors and corporate investors are increasing in frequency.

Towards the end of 2023, there was a definite uptick in North American sponsors involving corporate or sovereign co-investors in the early stages of a proposed transaction. It is understood that this assists with bidder profiling in granting exclusivity, or as part of participating in a competitive auction process.

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 transaction, for a mandatory offer, the consideration must be cash, or be accompanied by a cash alternative, and it must comply with minimum consideration requirements.

The nature of the underlying asset, sponsor approach/appetite and certain transaction-specific requirements are all factors that contribute to the form of consideration structure used in Jersey private equity deals. No predominant form of consideration structure is used in these types of transactions: fixed-price, locked-box and completion accounts mechanisms are variously seen.

The protection afforded by private equity buyers and sellers in relation to the consideration mechanism is generally the same as the protection provided by corporate buyers/sellers. This includes earn-outs, deferred consideration, anti-embarrassment mechanisms and (less frequently) consideration collateral or security.

6.2 Locked-Box Consideration Structures

The use of locked-box consideration structures in Jersey private equity transactions is not predominant. The specific features and uniqueness of each separate transaction generally determine whether a completion accounts or locked-box consideration mechanism 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 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 expert or 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 private equity transactions and would include any necessary shareholder and regulatory (including competition or antitrust) approvals and other matters that are not within the bidder's control, or are dependent solely on the bidder's subjective judgement. Conditionality for financing and other kinds of third-party consents is 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 the target share capital to which the offer relates enables the bidder to engage in the compulsory acquisition procedure available under Jersey company law.

Material adverse change/effect (MAC) provisions are common and have been a focus during the COVID-19 pandemic. The acceptance of generic MAC provisions in the current climate is unlikely, but a MAC provision that addresses a specific risk or issue may be acceptable.

6.5 "Hell or High Water" Undertakings

It is not common for a private equity-backed buyer to agree to "hell or high water" provisions in transactions that are subject to regulatory approvals (including competition and antitrust). 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 M&A context.

6.6 Break Fees

Deal-protection measures like break fees have not featured in Jersey transactions involving private equity-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 private equity-backed buyers. However, as they are not prohibited by the Takeover Code, they are permissible subject to Jersey 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 private equity transaction participants, so parties (and private equity-backed buyers in particular) will typically only permit the 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) that are not satisfied by a certain long-stop or "sunset" date. A typical long-stop period may run to, for example, six months.

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 of the allocation of risk between parties to a private equity 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 private equity investment, as well as secondary and tertiary management buy-outs (MBOs) and management buy-ins. In the majority of these deals, it is common for risk to be shared between the parties, although on balance, private equity sellers prioritise minimising their exposure to liability during the sale of a portfolio company.

The impact of this is that the extent to which private equity 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 private equity sellers.

The main ways a private equity 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 any loss suffered.

6.9 Warranty and Indemnity Protection

Warranty coverage in private equity transactions in Jersey is generally limited to the title of target shares or assets, the capacity and authorisation to enter into the transaction, solvency, and the accuracy and completeness of the information provided to the buyer. Warranties are usually limited in duration to a 12- to 24-month claim period. While most primary private equity 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 private equity-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 private equity 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, further allowing the allocation of risk between buyer and seller. Dollar-for-dollar recovery for unexpected tax liabilities arising from pre-completion profits or events occurring prior to completion provides buyer protection.

Buyer (W&I)-insured deals are becoming increasingly common, following the trend in the UK and elsewhere. W&I coverage increases the relatively low level of protection that management teams are able to provide, and which private equity sellers are not prepared to consider. The additional diligence and input from a seller on an insured deal is often accepted as being necessary from a buyer's perspective. The cost of insuring known risks is generally prohibitive, so is less common. W&I cover typically seeks to reduce buy-side risk in relation to certain fundamental and business warranties, but not tax matters.

Escrows and retentions are rarely used in Jersey private equity transactions to back the obligations of private equity 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 financial services business. This trend continued into 2022. Extension of the financial services regulator's enforcement powers (including the power to levy financial penalties) is the subject of a current industry consultation. Another form of exception to an escrow retention arrangement 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 private equity transactions in Jersey or involving Jersey entities. The limited contractual liability of private equity 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-Private

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 the NYSE, Nasdaq and the Toronto Stock Exchange, a number of those listed companies have become targets in take-private transactions. The trend seen in 2022 and 2023 of take-privates gaining traction where there has been private equity interest in UK-listed businesses has continued into 2024.

The following kinds of transactions are common in a private equity acquisition context.

- A take-private or takeover offer involving a bidder who makes an offer to the listed tar-

get'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 for cash or equity (and including cross-border mergers if the other relevant jurisdictions permit mergers).

In the absence of targeted institutional investor activism, the role of the target and its board of directors in public-to-private transactions is to facilitate transparent and meaningful negotiation to elicit shareholder value in line with the strategic objectives of the target business.

7.2 Material Shareholding Thresholds and Disclosure in Tender Offers

If the Takeover Code applies prior to the announcement of a bid or a possible bid, all persons privy to confidential information concerning the bid or possible bid, particularly price-sensitive information, 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 in such a manner as 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) achieves one of the following (Rule 9 of the Takeover Code):

- 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) acquires an interest in any other voting shares in the target.

7.4 Consideration

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

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

There are no other specific minimum price rules that apply to tender offers in relation to Jersey businesses.

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 private equity-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. No conditions are permitted in the case of a mandatory bid, except with the consent of the Panel (other than that the bidder obtains acceptances that give it more than 50% of the voting rights of the target company).

7.6 Acquiring Less Than 100%

Jersey company law gives private equity bidders the legal right to compulsorily acquire shares in a target that it does not seek or ultimately obtain as 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, they 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 the target's 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.

Six weeks after 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; upon 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.

There are no particular threshold acquisition levels or mechanisms that are typically required for a private equity-backed bidder to achieve a debt push-down into the target following a successful offer.

7.7 Irrevocable Commitments

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

8. Management Incentives

8.1 Equity Incentivisation and Ownership

Unsurprisingly, the incentivisation of management teams is a key feature of private equity transactions in Jersey and those that involve Jersey-registered vehicles. Different drivers and expectations from both the private equity sponsors and the management team come into focus where the market is moving to a more "patient capital" model, compared to shorter hold periods typically associated with private equity (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 more entrepreneurial management teams have been able to command a higher proportionate equity ownership share. On primary investment transactions, founders generally retain more substantial equity ownership interests.

8.2 Management Participation

There are a number of different ways of structuring management participation in private equity transactions in Jersey. It is common for managers to 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 private equity sponsor.

Preference shares (disenfranchised as to voting/any blocking trigger) are also used in 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 or retirement. Vesting provisions are typical for management equity in Jersey. Four or five years is the usual vesting period; otherwise, vesting on an exit event is most common. Full vesting on an exit event that takes place earlier than anticipated generally means that everyone benefits.

Alignment of management and private equity 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 outside 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 private equity transactions in Jersey include non-compete, non-solicitation and non-disparagement. Such covenants are normally part of the portfolio company group employment contract arrangements for executives and senior management; however, they 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. Where former manager shareholders with specific knowledge of the operations of a Jersey target business are free of restrictive covenants, it is not uncommon to see prospective bidders in secondary and tertiary transactions engaged by the appointed financial advisory team to provide specialist consultancy input on the process.

8.5 Minority Protection for Manager Shareholders

Management shareholders in private equity 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 teams 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 that a private equity sponsor may wish to adopt in relation to a portfolio asset.

9. Portfolio Company Oversight

9.1 Shareholder Control and Information Rights

Where private equity 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 private equity 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 private equity sponsor control rights are regulated in a shareholders' agreement that governs their relations as shareholders in the portfolio company. This will likely include the following provisions, among others:

- covenants from management with regard to the conduct of the business of the portfolio company;
- extensive veto rights for the private equity 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 private equity 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 or 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 private equity investment, given that the private equity 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.

Statutory (shareholder) information rights in relation to private companies in Jersey are limited.

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 private equity sponsor being liable for the actions of its portfolio company. 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 private equity sponsor (majority portfolio company shareholder), is unlikely to be capable of being successfully engaged as a matter of Jersey law based on customary private equity transaction structuring, as discussed in **5.1 Structure of the Acquisition**.

The same concept of limited liability applies to limited partners of Jersey LPs, 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.

10. Exits

10.1 Types of Exit

Portfolio asset-holding periods stretch from five 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 over the last five or so years has meant that competitive auction processes (including with pre-emptive offers) have become very common.

As most private equity transactions in Jersey are of financial services sector/regulated businesses, auction sales to strategic trade buyers and other private equity sponsors (in secondary or tertiary transactions) are all normal. Since 2021, given the COVID-19-induced volatility in capital markets and in relation to FX currency trading, an IPO has been the least attractive form of exit strategy. Dual-track processes (IPO and private sale) running concurrently have become more common in Jersey in the last four to six years.

However, it is interesting to note that, during this time, only three Jersey private equity-owned portfolio companies have conducted successful IPOs, implying that a higher rate of success has been achieved with private sale processes. Reinvestment by private equity sponsors (save for an IPO exit scenario) is not typical. It is expected that a number of Jersey listed businesses that have been exited via an IPO will be the subject of take-private acquisition activity in the next 12 to 18 months.

Trade sale exits are also becoming more common and demonstrative of the level of consolidation that has occurred in the financial and corporate services sectors in the Jersey M&A market.

10.2 Drag and Tag Rights

Drag-along rights (ie, the right of a private equity sponsor to force other shareholders, including management, to sell their shares in a portfolio company) are usual in the equity capital structuring arrangements for private equity-sponsored transactions. There are no typical drag-along or tag-along thresholds in Jersey. It is rare for drag-along rights to be exercised; however, where there is a large number of non-institutional sellers (eg, management shareholders), a drag provision might be relied upon for administrative convenience and to avoid the need to convene a large number of parties to a sale and purchase agreement.

10.3 IPO

The appetite for IPO exits by private equity 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 private equity 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 private equity sponsor seller and the listed company.

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