LEXOLOGY
Getting The Deal Through

PRIVATE M&A 2024

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STRUCTURE AND PROCESS, LEGAL REGULATION AND CONSENTS

Structure

1 How are acquisitions and disposals of privately owned companies, businesses or assets structured in your jurisdiction? What might a typical transaction process involve and how long does it usually take?

Typically, a contract, referred to as a sale and purchase agreement, is executed between the relevant parties to acquire or dispose of privately owned companies, businesses or assets. Privately owned companies can also be acquired by 'contractual offer' followed by a minority squeeze-out, provided that the offer is made in accordance with Part 28 of the UK Companies Act 2006 (the CA 2006), or by a 'scheme of arrangement' proposed by the company to be acquired in accordance with Part 26 of the CA 2006.

The process of acquiring a company, business or assets will often turn on the complexity of issues and the number of parties involved, as well as whether the transaction involves a bilateral negotiation or a controlled auction process with multiple potential buyers.

An auction process in which interest from several buyers is solicited will typically involve:

- drafting an information memorandum as the basis of marketing the company, business or assets, completion of vendor due diligence and drafting of a sale and purchase agreement and other sale documents (approximately six to eight weeks);
- 'round one' expressions of interest from potential buyers who will then be permitted to undertake due diligence (approximately four weeks);
- 'round two' offers by potential buyers with mark-ups of the transaction documentation (approximately four weeks); and
- negotiation of transaction documentation with one or more buyers until definitive terms are agreed with one party (up to two weeks).

The larger and more international the target company, business or assets, the longer each phase of a process can take. Up to three months will often elapse between the distribution of an information memorandum and the execution of definitive transaction documents. A bilateral transaction can take longer to complete owing to the lack of competitive tension in the process.

Legal regulation

2 Which laws regulate private acquisitions and disposals in your jurisdiction? Must the acquisition of shares in a company, a business or assets be governed by local law?

The CA 2006 sets out the regulatory framework for English limited liability companies. There are a range of statutes and regulations dealing with the transfer of employees, title to property, data protection, pensions and competition that are relevant to private acquisitions and disposals.

Although most sales of English companies will be governed by English law, it is possible for acquisitions to be governed by the law of an overseas jurisdiction. However, legal formalities applicable to the transfer of shares, and assets and liabilities that are subject to local law, will have to be complied with.

Legal title

3 What legal title to shares in a company, a business or assets does a buyer acquire? Is this legal title prescribed by law or can the level of assurance be negotiated by a buyer? Does legal title to shares in a company, a business or assets transfer automatically by operation of law? Is there a difference between legal and beneficial title?

Under the Law of Property (Miscellaneous Provisions) Act 1994, shares of an English company or assets located in England and Wales can be acquired with 'full title guarantee' or 'limited title guarantee' (referred to as title covenants). Subject to certain additional covenants that apply in respect of real property, a sale with full title guarantee means:

- the seller has the right to sell the property;
- the seller will (at its own cost) make reasonable efforts to give the buyer the property that is promised; and
- the property is free from charges, encumbrances and third-party rights, except those that the seller does not and could not reasonably be expected to know.

Limited title guarantee is the same except that the property is considered to be free from encumbrances from the time of the last sale for value.

Title covenants will not be implied if transaction documentation makes no reference to them. However, a buyer may be unwilling to accept the reasonableness and knowledge qualifications included in implied title covenants and prefer to negotiate unqualified title to shares or assets.

Title to shares in a company incorporated under the CA 2006 transfers upon the company's register of members being updated to reflect the buyer as the registered holder of the shares following receipt by the company of an instrument of transfer duly executed by the seller (and the buyer, if the nominal value of each share has not been paid in full). A buyer will often request a power of attorney from the seller of shares to enable it to control the shares (and therefore the company) pending an update of the company's register of members.

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The transfer of title to assets subject to English law may require notifications to be given, consents from third parties to be obtained and registrations to be made.

Legal and beneficial title are distinct interests in property. A person registered as holding the legal title to a share in a company incorporated under the CA 2006 may be a nominee with a different party having the right to receive the economic benefits of the share. Accordingly, the beneficial interest can be transferred without having to update the register of members of the company. Interests in other assets, such as real estate, can be held in the same way.

Multiple sellers

4 Specifically in relation to the acquisition or disposal of shares in a company, where there are multiple sellers, must everyone agree to sell for the buyer to acquire all shares? If not, how can minority sellers that refuse to sell be squeezed out or dragged along by a buyer?

Typically a buyer will prefer all sellers to sign the transaction documentation and agree to be bound by it.

Minority shareholders may, however, be required to sell their shares pursuant to 'drag-along' provisions contained in a company's articles of association or in a shareholders' agreement requiring the transfer of title to their shares if specified conditions are satisfied.

Further, if a private acquisition is structured as a contractual offer under the CA 2006, the buyer can compulsorily acquire minority shareholders who have not accepted the offer once the buyer has acquired at least 90 per cent in value and 90 per cent of the voting rights carried by the shares to which the offer relates. If structured as a scheme of arrangement, a scheme binds all minority shareholders provided a majority in number representing 75 per cent in value of those shareholders attending and voting approve an arrangement that is sanctioned by the English Companies Court.

Exclusion of assets or liabilities

5 Specifically in relation to the acquisition or disposal of a business, are there any assets or liabilities that cannot be excluded from the transaction by agreement between the parties? Are there any consents commonly required to be obtained or notifications to be made in order to effect the transfer of assets or liabilities in a business transfer?

As a matter of English contract law, a buyer can generally choose which assets or liabilities it wishes to acquire in a transaction that is structured as a business or asset sale.

However, a buyer cannot structure a transaction as a business or asset sale with a view to avoiding responsibilities to employees engaged in the target business. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended) (TUPE) apply to the acquisition of a business in the UK, and require that contracts of employment are automatically transferred to the buyer of a business and that employee benefits must be honoured. There are very few exceptions to TUPE, and attempts to exclude its application will be void.

A transfer of assets or liabilities may require customary third-party consents: for example, a landlord's consent to the assignment of a lease or a counterparty's consent to the assignment or novation of a contract.

Consents

6 Are there any legal, regulatory or governmental restrictions on the transfer of shares in a company, a business or assets in your jurisdiction? Do transactions in particular industries require consent from specific regulators or a governmental body? Are transactions commonly subject to any public or national interest considerations?

Selling shareholders may be subject to 'pre-emptive' and 'tag-along' rights. Pre-emptive rights require a shareholder to offer their shares for sale to other shareholders before they can be sold to a third party. Such rights may take the form of a right of first offer, whereby the selling shareholder must negotiate a sale with the other shareholders before approaching third parties, or a right of first refusal, whereby the selling shareholder must give the other shareholders the right to match the terms of a sale that has been negotiated with a third party. Tag-along rights restrict the ability of a selling shareholder to transfer its shares in a transaction that excludes other shareholders.

Acquisitions of companies and businesses in the UK are subject to the merger control regime set out in the UK Enterprise Act 2002, pursuant to which the UK Competition and Markets Authority (CMA) may investigate transactions that satisfy certain jurisdictional thresholds, either upon receipt of a notification from the parties or on its own initiative. The UK Enterprise Act 2002 provides two jurisdictional thresholds:

- a 'share of supply' test, which is satisfied when a transaction creates or enhances a 25 per cent share of supply or purchases of any goods or services in the UK (or in a substantial part of it) (this is not a market share test, and the CMA has a wide discretion in describing the relevant goods or services); and
- a 'turnover test', which is satisfied when the enterprise over which control is acquired has generated turnover in the UK in the preceding fiscal year exceeding £70 million.

For certain newspaper or broadcasting deals, the CMA, when directed to do so by the relevant Secretary of State, may also conduct a merger review where only one party has a share of supply of 25 per cent or more, even if there is no increase in share resulting from the merger.

Notification of a transaction to the CMA is voluntary. However, in practice, a large number of transactions are notified to give parties legal certainty, as the CMA may commence an investigation on its own initiative and subsequently refer a transaction to a 'Phase 2' review.

The CMA has a duty to refer transactions for a Phase 2 review where it believes there is, or may be, a relevant merger situation that has resulted in or may be expected to result in a substantial lessening of competition in the UK. If a transaction is subject to a Phase 2 review, without the CMA's consent, parties to a completed merger are prohibited from undertaking further integration, and parties to an anticipated merger are prohibited from acquiring an interest in shares in each other. The CMA also has the power to accept undertakings or

make orders preventing parties from taking an action that might prejudice the outcome of a Phase 2 reference.

Transactions meeting both the EU and UK merger control thresholds run the risk of being reviewed by the European Commission and the CMA in parallel.

The relevant Secretary of State also has the power under the UK Enterprise Act 2002 to intervene in transactions giving rise to public interest concerns relating to media quality, plurality and standards, financial stability, or the need to combat, and mitigate the effects of, public health emergencies.

Relatedly, under the National Security and Investment Act 2021, foreign direct investment in the UK is regulated by the Investment Security Unit (ISU) within the UK Cabinet Office. All transactions (from traditional mergers to incremental increases in shareholdings, minority share acquisitions of more than 25 per cent or where acquisitions of 25 per cent or less confer material influence over a target's commercial strategy and intra-group restructurings) are subject to scrutiny by the ISU where relevant jurisdictional thresholds are met. The ISU operates a hybrid mandatory and voluntary notification system, assessing whether a transaction poses a national security risk:

- under the mandatory regime, the ISU has jurisdiction to review share acquisitions above certain equity ownership thresholds where a target is active within one of 17 defined 'sensitive sectors'; and
- under the voluntary regime, the ISU may assert jurisdiction to review share acquisitions above certain equity ownership thresholds where a target is not active in a sensitive sector as well as asset deals, including those that relate to assets within one or more of the 17 sensitive sectors.

A party may not close a transaction without prior ISU clearance in circumstances where a mandatory notification is triggered. Most straightforward transactions will be reviewed and cleared by the ISU within an initial 30 working days review period. Where national security concerns are identified, the ISU will 'call in' the merger for in-depth review (30 to 75 working day assessment period), which is extendable by written agreement with the parties. The review clock is paused when information notices are issued. Similar to the CMA, the ISU has the power to accept undertakings or make orders preventing parties from taking an action that might prejudice the outcome of a review.

7 | Are any other third-party consents commonly required?

The need to obtain a third-party consent will depend on the law governing the transfer of the relevant assets and liabilities. With respect to assets and liabilities governed by English law to be transferred in connection with the acquisition of a business, the agreement of the counterparties to contractual arrangements will be required to transfer obligations of the seller to the buyer and the assignment of the benefits of contractual arrangements may be subject to counterparty consent.

The consent of landlords to transfer English leasehold property and the consent or waiver of rights of lenders to transfer English law-governed loans is ordinarily required in connection with the acquisition of a company, business or assets. Where security has been granted

pursuant to English law over the assets of a company or business, releases and non-crystallisation certificates will normally be required.

Where certain assets to be transferred are required to be registered under English law, the transfer of ownership will be completed only once the relevant register is updated.

Regulatory filings

8 Must regulatory filings be made or registration (or other official) fees paid to acquire shares in a company, a business or assets in your jurisdiction?

Where shares in an English company are to be transferred, the new holder of the shares will not be entered in the register of members of the company until all stamp duty has been paid.

Where certain assets to be transferred are required to be registered under English law, registration may not be completed by the relevant authority until the relevant registration or filing fees have been paid. These fees are generally of a nominal amount.

ADVISERS, NEGOTIATION AND DOCUMENTATION

Appointed advisers

9 In addition to external lawyers, which advisers might a buyer or a seller customarily appoint to assist with a transaction? Are there any typical terms of appointment of such advisers?

Parties will typically appoint a financial adviser and accountants to assist with a transaction. The financial adviser will provide strategic and valuation advice, and the accountants will assist with accounting matters, financial and tax diligence and tax structure. Strategy and business consultants may also be engaged to conduct commercial due diligence. If a party to a transaction has securities listed on a stock exchange, public relations advisers are often appointed to coordinate announcements that may have to be made to the public market.

Most professional advisers have standard terms of engagement that they will agree with the buyer or seller, as the case may be. The level of fees will typically depend on the monetary value of the deal, the complexity of the issues, the timetable for the transaction and the nature of any required work product. In aggregate, a buyer's financial, accounting and legal advisory fees may amount to several percentage points of the monetary value of the deal.

Duty of good faith

10 Is there a duty to negotiate in good faith? Are the parties subject to any other duties when negotiating a transaction?

English contract law does not impose a general duty to negotiate in good faith, so parties to a transaction are permitted to pursue their own self-interest. It is, however, possible for parties to impose an obligation to act in good faith, for example, pursuant to heads of terms that are expressed to be legally binding.

While there is no general duty to act in good faith, directors of a UK company are subject to fiduciary and statutory duties that include the duty to act in a way that such director considers, in good faith, promotes the success of the company for the benefit of its members as a whole, and financial advisers are subject to certain standards of professional conduct monitored by the UK Financial Conduct Authority.

Documentation

11 | What documentation do buyers and sellers customarily enter into when acquiring shares or a business or assets? Are there differences between the documents used for acquiring shares as opposed to a business or assets?

When acquiring shares, a business or assets, parties to a transaction will customarily enter into:

- a confidentiality agreement governing the exchange of confidential information relating to the transaction;
- a sale and purchase agreement setting out the terms of the transaction, which will be substantially similar whether shares, a business or assets are being acquired, except that in respect of a business or asset acquisition there will be detailed provisions defining the scope of the assets and liabilities that are to be transferred to the buyer, and mechanisms (a 'wrong pockets' clause) to address the misallocation of assets and liabilities between the seller and buyer;
- a disclosure letter in which general and specific disclosures are made by the seller qualifying the warranties included in the sale and purchase agreement;
- a transitional services agreement specifying the basis upon which the seller will ensure the continued provision of certain services to the target company or business by the seller or its affiliates following completion of the transaction; and
- documents to transfer or register title to assets that, in respect of the acquisition of shares in a UK company, will consist of a stock transfer form and, in respect of the acquisition of a business or assets, will consist of notifications to update registers of, for example, real property and intellectual property.

In addition:

- a buyer will often deliver one or more offer letters to a seller expressing its interest in the transaction and the terms, including the price, upon which it would be willing to proceed;
- in a bilateral transaction, the parties may negotiate heads of terms in an attempt to ensure that resources are not wasted evaluating a transaction before key terms are agreed; and
- key members of management in the target business may enter into new employment agreements to secure their continued employment following the completion of the transaction.

12 Are there formalities for executing documents? Are digital signatures enforceable?

English law draws a distinction between the execution of simple contracts and the execution of deeds. Certain documents must be executed as deeds, including transfers of interests in land, mortgages and charges and powers of attorney. The failure to observe any applicable formalities for execution could cause a document to be invalid and unenforceable.

Simple contracts require the signature of a suitably authorised person to be effective. Additional formalities must be observed for the execution of deeds, which include, in respect of execution by a natural person, execution in the presence of a witness and, in respect of execution by a company incorporated under the CA 2006, execution by two directors, a director and a company secretary, or a director, in the presence of a witness. It is best practice to be able to demonstrate that execution occurred when the relevant document had been finalised and fully assembled, either physically or electronically, in accordance with guidance issued by the Law Society of England and Wales ('Execution of documents by virtual means').

Electronic signatures are enforceable pursuant to Regulation (EU) No 910/2014 on electronic identification, authentication and trust services, as this regulation was incorporated into UK law by the European Union (Withdrawal) Act 2018 and amended by the UK Electronic Identification and Trust Services for Electronic Transactions (Amendment, etc) (EU Exit) Regulations 2019 (SI 2019/89). The Law Society of England and Wales issued guidance regarding the use of electronic signatures ('Execution of a document using an electronic signature') and a note on their position on the use of virtual execution and e-signature during the covid-19 pandemic. Wet ink signatures may still be required by certain UK governmental departments but they are no longer required by His Majesty's Revenue & Customs, where documents are submitted because stamp duty applies.

DUE DILIGENCE AND DISCLOSURE

Scope of due diligence

13 What is the typical scope of due diligence in your jurisdiction? Do sellers usually provide due diligence reports to prospective buyers? Can buyers usually rely on due diligence reports produced for the seller?

Due diligence provides potential buyers with the opportunity to evaluate the legal, financial, tax and commercial position of a company, business or assets. Legal due diligence will typically confirm title to the company or business, the legal structure, terms of financial obligations, ownership and use of information technology, intellectual and real property, physical assets, employee arrangements, litigation, and compliance with law.

Vendor due diligence reports are a common feature of controlled sales processes in the UK, enabling a seller to accelerate the sale process, minimise disruption to the target business and access to management, and explain any complexities associated with the transaction. It is customary for a successful buyer, and its lenders, to be able to rely on certain of such

vendor due diligence reports, although buyers will often also complete confirmatory due diligence to complete their evaluation of a transaction.

Liability for statements

14 Can a seller be liable for pre-contractual or misleading statements? Can any such liability be excluded by agreement between the parties?

A seller can be liable for pre-contractual misrepresentations although, except with respect to fraudulent misrepresentations, sale and purchase agreements usually limit a seller's liability to claims for breach of contract and exclude liability for pre-contractual and misleading statements.

Publicly available information

15 What information is publicly available on private companies and their assets? What searches of such information might a buyer customarily carry out before entering into an agreement?

English companies are required to make extensive filings with the Registrar of Companies that are made publicly available online, including:

- the company's articles of association;
- audited financial statements;
- details of the board of directors and people with significant control over the company;
- special shareholder resolutions (requiring approval by at least 75 per cent of participating shareholders);
- details of changes to the company's share capital;
- mortgages over the company's assets; and
- an annual confirmation statement confirming that all required information has been delivered to the Registrar of Companies.

Details of the ownership of real property, mortgages and charges and other attributes of real property are available at His Majesty's Land Register and through local authorities responsible for the area in which the real property is located. In addition, details of overseas entities that own, or have a lease of more than seven years over, land or property in the UK are available at Companies House (including details of people with significant control over such entities). Details of registered intellectual property, such as patents and trademarks, can be obtained from the UK Intellectual Property Office. Details of any authorisations held by a financial services business can be obtained from an online search of the UK Financial Conduct Authority's register.

A buyer of a company will typically carry out a search of the information filed with the Registrar of Companies and confirm with the Companies Court that a winding up petition has not been lodged in respect of the company. Searches may also be performed in respect of those registered assets that are regarded as being material to a transaction. Nominal fees are generally payable to carry out such searches.

Impact of deemed or actual knowledge

16 What impact might a buyer's actual or deemed knowledge have on claims it may seek to bring against a seller relating to a transaction?

A buyer's knowledge at the time of entering into an acquisition will preclude a claim for breach of implied title covenant. Otherwise, if a buyer is not explicitly precluded by the sale and purchase agreement from claiming in respect of matters about which it has knowledge at the time of entering into the agreement, then a claim would not be expected to be automatically excluded.

However, it is arguable that if a buyer has actual knowledge of a matter at the time of entering into a sale and purchase agreement, a claim cannot be preserved through a specific contractual provision. Accordingly, a sale and purchase agreement would usually specify whether a buyer's actual, constructive or imputed knowledge will qualify the seller's warranties.

PRICING, CONSIDERATION AND FINANCING

Determining pricing

17 How is pricing customarily determined? Is the use of closing accounts or a locked-box structure more common?

Closing accounts and locked boxes are commonly used to determine pricing. Auctions of companies, particularly conducted by private equity funds, typically use locked-box pricing, as this forces a buyer to diligence the accounts before agreeing the deal and provides greater certainty for the seller on an exit. Closing accounts may prove more suitable where a company or business is being carved out from the seller's group.

Form of consideration

18 What form does consideration normally take? Is there any overriding obligation to pay multiple sellers the same consideration?

Cash is the most common form of consideration in private M&A transactions. Other forms of consideration are principally driven by the tax position of the seller, who may defer a capital charge by receiving securities.

There is no statutory obligation to pay multiple sellers the same consideration in respect of an acquisition by way of a sale and purchase agreement. However, if the transaction is structured as a contractual offer, the same consideration must be paid to all shareholders in order for the buyer to avail itself of the statutory squeeze-out mechanism. If shareholders are offered different consideration in connection with a transaction structured as a scheme of arrangement, they will comprise different classes with each class participating in the scheme of arrangement having the opportunity to approve the proposal made to them.

Earn-outs, deposits and escrows

19 | Are earn-outs, deposits and escrows used?

Earn-outs and deposits are not common features of transactions. Earn-outs may be negotiated where pricing reflects expectations of significant growth, and deposits may be used if a buyer is based in a jurisdiction where there is a degree of uncertainty about its ability to proceed to completion. Escrows are commonly used as security for warranty claims although there has been a shift in recent years to the use of warranty and indemnity insurance for such claims.

Financing

20 | How are acquisitions financed? How is assurance provided that financing will be available?

Bank-led acquisition financing is a common feature of private M&A transactions. However, buyers increasingly borrow from alternative finance providers, such as direct lending funds and institutional investors. Where an acquisition is highly leveraged, payment-in-kind instruments may be included in the financing structure, and for acquisitions of a sufficient size, high-yield bond financing may be a financing component employed by a buyer.

In a controlled sales process, financing is often required to be provided on a 'certain funds' basis, broadly mirroring the approach taken on public takeovers in the UK. However, unlike in the context of public takeovers, there is no regulatory regime to comply with or oversight by a financial adviser with respect to certainty of funding, so documentation, conditionality and flexibility can vary significantly from deal to deal.

Where a newly incorporated entity is to be the buyer and requires capital, for example from a private equity fund, the seller will typically be provided with a directly enforceable equity commitment letter that will be conditional upon satisfaction of the conditions set out in the sale and purchase agreement and any debt financing arrangements. An equity commitment letter will typically require the buyer to draw on any debt financing that has been negotiated, but the provider of equity capital to the buyer will not usually be required to increase its equity contribution in the event that a lender defaults on its commitment to advance finance.

Limitations on financing structure

21 | Are there any limitations that impact the financing structure? Is a seller restricted from giving financial assistance to a buyer in connection with a transaction?

English private limited companies and public limited companies are prohibited from giving 'financial assistance' in connection with, among other things, the acquisition of shares of public limited companies. Financial assistance is not specifically defined but includes the giving of a gift, a guarantee, security and an indemnity, waiving or releasing obligations, and advancing a loan. It may be possible to avoid the consequences of this prohibition by reregistering a public limited company as a private limited company, provided that in giving any financial assistance that is not otherwise prohibited the directors of a private limited

company could conclude that doing so was consistent with their duty to promote the success of the company.

CONDITIONS, PRE-CLOSING COVENANTS AND TERMINATION RIGHTS

Closing conditions

22 Are transactions normally subject to closing conditions? Describe those closing conditions that are customarily acceptable to a seller and any other conditions a buyer may seek to include in the agreement.

Signing and completion of transactions can occur simultaneously in the absence of legal or regulatory obligations to satisfy before completing the transfer of title to shares or assets. A seller will accept conditions relating to such legal or regulatory obligations.

A buyer may seek conditions regarding the accuracy of fundamental (relating to a seller's title, capacity and authority) and business warranties at completion and the absence of any material adverse change since entering into the transaction. A seller may sometimes accept extending conditionality to include the accuracy of fundamental warranties.

It is very unusual for English law-governed transactions to be subject to any financing conditions.

23 What typical obligations are placed on a buyer or a seller to satisfy closing conditions? Does the strength of these obligations customarily vary depending on the subject matter of the condition?

All parties will be expected to exert at least their reasonable efforts to ensure the satisfaction of any closing conditions. A 'best efforts' standard may be agreed that is more onerous and can require the expenditure of money, but it is not an absolute obligation to achieve the specified outcome.

A seller, particularly when conducting a controlled sales process, will typically seek to impose a 'hell or high water' standard obliging the buyer to take whatever steps may be necessary to ensure the approval of applicable regulators. This could include disposing of parts of its business, disposing of parts of the target business and commencing litigation.

Pre-closing covenants

24 Are pre-closing covenants normally agreed by parties? If so, what is the usual scope of those covenants and the remedy for any breach?

A seller will typically agree to operate the target business in the ordinary course of business consistent with past practice, and will commonly agree to specify pre-closing covenants including:

- not to alter the share capital or make distributions to shareholders;

- not to acquire or dispose of assets, incur liabilities, enter into material agreements or commit to capital expenditure in excess of a specified value;
- not to create encumbrances;
- to maintain, without alteration, insurance policies;
- not to alter terms of employment or benefit entitlements or hire new employees on salaries in excess of a specified amount;
- not to commence litigation or waive any claims;
- to conduct the business in accordance with applicable law; and
- to grant access to the target company's books, records and premises.

A seller may also agree not to solicit competing proposals, to notify the buyer of any unsolicited approaches in respect of the target company or business and to assign the benefit of any confidentiality agreements entered into with other potential buyers.

In addition, the parties also typically undertake not to solicit senior employees, to maintain the confidentiality of the transaction and to make public announcements relating to the transaction only with the other party's consent.

A breach of covenant will result in a claim for damages, which, unlike a claim for breach of warranty, is typically uncapped. An English court may make an order for specific performance to the extent that damages are not an adequate remedy.

Termination rights

25 Can the parties typically terminate the transaction after signing? If so, in what circumstances?

Consistent with the concept that risk with respect to the company, business or assets passes to the buyer from the date of entering into the sale and purchase agreement, typically parties cannot terminate a transaction in advance of a negotiated long-stop date, except to the extent that any condition is, or becomes, incapable of satisfaction. It is very rare that a breach of warranty or covenant permits a buyer to terminate a transaction.

26 Are break-up fees and reverse break-up fees common in your jurisdiction? If so, what are the typical terms? Are there any applicable restrictions on paying break-up fees?

Break-up fees are not common in the acquisition of private companies, businesses and assets. It is possible for an English company's constitution to restrict or prohibit certain transactions, including the giving of break-up fees. If not so prohibited, directors of an English company must be satisfied that agreeing a break-up fee is consistent with their fiduciary and statutory duties, including to promote the success of the company for the benefit of its members as a whole. A break-up fee may constitute unlawful financial assistance to the extent it results in a material reduction of the net assets of an English public limited company. A reduction greater than 1 per cent is considered material.

The payment of a break-up fee by a listed company subject to the UK Listing Rules may constitute a class 1 transaction if the amount payable exceeds 1 per cent of the market capitalisation of the listed company.

REPRESENTATIONS, WARRANTIES, INDEMNITIES AND POST-CLOSING COVENANTS

Scope of representations, warranties and indemnities

27 Does a seller typically give representations, warranties and indemnities to a buyer? If so, what is the usual scope of those representations, warranties and indemnities? Are there legal distinctions between representations, warranties and indemnities?

A seller will typically give warranties and, subject to the negotiating position of the parties and specific issues arising from due diligence, indemnities but not representations.

Warranties given by a seller typically address:

- the capacity and authority of the seller to enter into the sale and purchase agreement;
- in respect of the acquisition of a company, the share capital of the target company and its direct and indirect shareholdings;
- the basis of preparation of the target's financial statements;
- the absence of changes to the condition of the business since the date of the warranted financial statements;
- operational aspects of the business relating to employees, pensions and benefits, real property, financial commitments, commercial contracts, litigation and investigations, compliance with law, intellectual property and information technology, and tax; and
- in respect of a business acquisition, the condition and adequacy of the assets to be acquired.

Where a company or business is sold in an auction process, a narrower scope of warranties would be expected. If the seller is a private equity fund, it will typically limit its warranties to title, capacity and authority, and a buyer may negotiate with the target company management to provide business warranties in a separate deed (often referred to as a management warranty deed).

An inaccurate warranty will give rise to a damages claim for breach of contract whereby a buyer will have to prove that it has suffered a diminution in value of the asset purchased that is causally related to the inaccuracy of the warranty and is not regarded by law as being so remote that it would be unreasonable for the seller to incur damages, subject to a buyer's duty to mitigate its damages.

Subject to the negotiating position of the parties, specific risks identified through due diligence or disclosure are typically subject to indemnities (as a buyer is typically precluded from bringing a warranty claim in relation to a matter it is aware of signing). For example, specific indemnities may be given in respect of the outcome of ongoing litigation, the cost of remediating environmental damage prior to the buyer's acquisition or product liabilities in excess of an agreed level relating to the period prior to completion of the acquisition.

Subject to the particular drafting, an indemnity is an undertaking to pay in specified circumstances and so is not subject to the causation, remoteness and mitigation rules of a claim for damages.

Claims for misrepresentation can result in damages calculated on a tortious basis or under the UK Misrepresentation Act 1967, so a seller will typically exclude representations from a sale and purchase agreement.

Limitations on liability

28 What are the customary limitations on a seller's liability under a sale and purchase agreement?

A seller's aggregate liability under a sale and purchase agreement will customarily be capped at an amount equal to the purchase price.

Business warranty claims will typically be subject to a separate regime whereby:

- each individual claim must exceed a materiality threshold (or de minimis) often up to 0.1 per cent of the purchase price;
- the aggregate value of claims must exceed a threshold, often between 1 and 2 per cent of the purchase price, with the entire value of claims then being recoverable;
- the seller's aggregate liability is capped, often at less than 25 per cent of the purchase price and can be as low as £1 where the primary recourse by the buyer for such claims is to transaction insurance; and
- the ability to bring warranty claims expires after an agreed period, often 12 to 24 months, following completion.

Fundamental warranties (and tax warranties) are often carved out of the limitation regime.

In addition, more general limitations on a seller's liability will customarily include:

- knowledge qualifications in warranties and materiality qualifications in warranties and covenants;
- qualifying warranties with disclosure contained in the disclosure letter and all information contained in a data room;
- provisions granting the seller the conduct of claims brought by third parties; and
- barring double recovery and requiring the buyer to exhaust other available remedies.

Transaction insurance

29 Is transaction insurance in respect of representation, warranty and indemnity claims common in your jurisdiction? If so, does a buyer or a seller customarily put the insurance in place and what are the customary terms?

Warranty and indemnity insurance is a common feature of private M&A transactions in the UK, particularly in a controlled sales process or where the seller is looking for a clean break from completion of the transaction.

The insurance is intended to cover losses suffered by the policyholder where a successful claim can be made for breach of certain warranties or under a tax covenant. Typically, a policy will not provide the policyholder with protection in respect of specific indemnities that may arise as a result of due diligence by the buyer or disclosure by the seller. However, it

is possible to negotiate insurance for known and specific contingent risks such as tax and environmental liabilities.

Insurance may be arranged by either a seller or buyer. A seller's policy may be suitable where the seller is selling a company or business and intends to invest or distribute to its shareholders the proceeds of the sale.

A buyer's policy secures greater financial recourse than is offered by a seller, which is of particular assistance in an auction where low caps on liability may be offered or the only financial recourse available in respect of business warranties comes from target management.

An English law-governed policy will typically exclude:

- issues that are known to the policyholder;
- financial obligations payable as a consequence of the selected pricing mechanism;
- fines and penalties that are uninsurable by law;
- financial obligations resulting from pension underfunding;
- liabilities arising from transfer pricing; and
- issues that are specific to a transaction, such as liabilities arising from the use of asbestos.

In addition, a seller's policy would exclude recovery in respect of fraud by the seller.

Subject to prevailing market conditions and depending on the size of the transaction, policy limits will typically be approximately 10 to 30 per cent of the enterprise value of the company or business being purchased and will be subject to a deductible in an amount equal to 0.3 to 1 per cent of the enterprise value. The premium to arrange a policy will often be equal to approximately 1 to 1.5 per cent of the value of the policy.

Post-closing covenants

30 Do parties typically agree to post-closing covenants? If so, what is the usual scope of such covenants?

Parties will often agree not to solicit each other's senior employees (or extend beyond completion any such undertaking effective from signing), and a seller will often covenant not to compete with the company or business that has been sold. To be enforceable, any non-compete covenant must apply to a reasonable geographic area for a reasonable time, typically considered to be up to two years.

TAX

Transfer taxes

31 Are transfer taxes payable on the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

Stamp duty (or stamp duty reserve tax) is generally payable at a rate of 0.5 per cent on the transfer of shares in a UK-incorporated company. Stamp duty land tax (or land and buildings transaction tax in Scotland and land transaction tax in Wales) is payable on transactions involving UK land at varying rates, from zero to 15 per cent, depending on the nature and value of the property and the status of the purchaser. These stamp taxes are subject to various reliefs and exemptions. Stamp taxes are customarily borne by the purchaser. Transfers of other business assets are not generally subject to stamp taxes.

Corporate and other taxes

32 Are corporate taxes or other taxes payable on transactions involving the transfers of shares in a company, a business or assets? If so, what is the rate of such transfer tax and which party customarily bears the cost?

A company or individual disposing of shares or of a business or other assets may be subject to tax on any chargeable gain arising (currently at a rate of 25 per cent for companies, and for most disposals at a rate of 20 per cent for individuals) subject to available exemptions or reliefs. Value-added tax (VAT) is due (generally at a rate of 20 per cent) on supplies of goods or services that are not exempt for consideration by taxable persons for VAT purposes. Generally, a sale of shares will be an exempt supply for VAT purposes. A sale of a business may be outside the scope of VAT if it qualifies as a transfer of a going concern for VAT purposes. The person liable to account for VAT will depend on the nature of the supply and of the parties, and on where the supply is treated as taking place for VAT purposes.

EMPLOYEES, PENSIONS AND BENEFITS

Transfer of employees

33 Are the employees of a target company automatically transferred when a buyer acquires the shares in the target company? Is the same true when a buyer acquires a business or assets from the target company?

The acquisition of an English company does not alter the employment relations a company has with its employees. Where a business in the UK is acquired, the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended) (TUPE) apply to transfer automatically to the buyer the employment and benefit obligations of the target business.

Notification and consultation of employees

34 Are there obligations to notify or consult with employees or employee representatives in connection with an acquisition of shares in a company, a business or assets?

TUPE requires that the seller and buyer notify and, if suitable, consult with trade unions or employee representatives (in the absence of a trade union) in respect of employees who may be impacted by a transfer of employment resulting from the acquisition of a business in the UK. The obligation to consult is triggered only where it is proposed that actions are to be taken that will impact employees who are subject to the business acquisition. A failure to comply with the obligations can result in compensation being payable equal to 13 weeks of salary.

Transfer of pensions and benefits

35 Do pensions and other benefits automatically transfer with the employees of a target company? Must filings be made or consent obtained relating to employee benefits where there is the acquisition of a company or business?

Pension and other employee benefit obligations remain the responsibility of the target company following its acquisition. The UK Pensions Regulator has the power to issue financial support directions (FSDs) or contribution notices (CNs) in respect of underfunded defined benefit pension schemes, which can be triggered by a change in control of a company that results in a material weakening of the employer covenant (ie, the ability of the employer with responsibility for the defined benefit pension scheme to honour obligations owing to pension scheme members). If a target company sponsors a defined benefit contribution scheme, it is possible for parties to a transaction to voluntarily apply for a clearance notice confirming that the UK Pensions Regulator will not exercise its powers to issue an FSD or CN in circumstances in which there is an event that is materially detrimental to the ability of the pension scheme to satisfy its obligations. Clearances can be in respect of a single transaction or on an ongoing basis (which are of assistance to private equity funds that may envisage a series of transactions following the completion of an acquisition, as well as a disposal or listing to realise their investment).

UPDATE AND TRENDS

Key developments

36 What are the most significant legal, regulatory and market practice developments and trends in private M&A transactions during the past 12 months in your jurisdiction?

Digital Markets, Competition and Consumers Bill

On 25 April 2023, the UK Government published the Digital Markets, Competition and Consumers Bill. The proposals set out in this Bill include:

- Strategic market status: the Competition and Markets Authority (the CMA) will gain powers to designate certain digital companies as having strategic market status. The CMA may impose one or more conduct requirements on designated companies in relation to a relevant digital activity. It may also require designated companies to report transactions above certain thresholds. The CMA will be able to impose penalties for non-compliance, including fines of up to 10 per cent of global turnover.
- Updated merger control rules: the CMA's jurisdictional turnover test will now apply a £100 million threshold to the target's UK turnover, revised upwards from the previous £70 million threshold. In addition to the existing target turnover and combined share of supply tests, a third alternative test has also been introduced. A new acquirer threshold will be added, allowing for review of deals where a party (individually) has a 33 per cent or more UK share of supply and UK turnover of £350 million or more, without the need for an increment to the parties' combined share of supply.

The legislation is expected to be enacted within the next few months and enter into force before the end of 2023.

Consultation on proposals to modernise stamp duty and stamp duty reserve tax

On 27 April 2023, His Majesty's Revenue and Customs (HMRC) published a consultation on proposals to replace stamp duty and stamp duty reserve tax with a single tax on securities transactions. These proposals include:

- requiring non-CREST transactions to be notified to, and single tax on securities transactions on such transactions paid via, a new HMRC portal, while for CREST transactions, single tax on securities transactions will be collected through CREST;
- requiring the chargeable point for single tax on securities transactions to be either the date of the sale agreement or the date on which the sale agreement becomes unconditional. Payment of the tax will be required within 14 days of the charging point;
- removing the de minimis threshold for stamp duties where small transactions with a consideration of less than £1,000 will be treated as exempt; and
- limiting the territorial scope of the single tax on securities transactions to UK securities, regardless of where they are traded and where the parties are based, to replace the more widespread stamp duty rules that can apply to non-UK securities.

Consultation on the UK listing regime

On 3 May 2023, the Financial Conduct Authority (FCA) published a consultation paper seeking views on major proposed reforms to the UK listing regime, some of which may be relevant to private M&A transactions. In particular, in relation to UK-listed companies, the FCA proposes to remove the requirement for:

- a shareholder vote or circular in connection with significant transactions (except for a reverse takeover); and
- an independent shareholder vote or circular in relation to any related party transactions.

Such significant or related party transactions can be private M&A transactions.

The FCA is aiming to issue a further consultation paper on these proposals and wider proposed changes to the listing regime in the autumn of 2023, which will include a draft instrument setting out the proposed revised listing rules in full.

Pension regulation – two new notifiable events

In June 2018, the government published a consultation paper on improving the Pensions Regulator's role in scrutinising corporate transactions. On 11 February 2019, the government published its response to this paper, confirming legislative proposals that it intended to take forward. On 7 January 2020, the Pension Schemes Bill was published, receiving royal assent on 11 February 2021 to become the Pensions Act 2021.

The Pensions Act 2021 introduces new criminal offences in respect of the avoidance of any debt due in relation to a defined benefit scheme, conduct risking accrued benefits in relation to a defined benefit scheme and failure to comply with a contribution notice. The offence of failing to comply with a contribution notice will be subject to an unlimited fine, while the other two offences will be punishable by unlimited fines or imprisonment for up to seven years. Alternatively, the Pensions Regulator will have the power to impose a civil penalty of up to £1 million in respect of any such offences.

The Pensions Act 2021 also contains a new duty to notify the Pensions Regulator of certain events that will have an impact on a defined benefit scheme. Such events are to be specified in regulations and are expected to include the sale of a material proportion of the business or assets of a scheme employer with funding responsibility for at least 20 per cent of a pension scheme's liabilities and in respect of the grant of security on debt in priority to the debt to the pension scheme.

While provisions of the Pensions Act 2021 began to come into force in the autumn of 2021, the final regulations to implement the new notifiable acts regime are still awaited.

Environmental, social and corporate governance

Increased focus on the part of regulators, investors and customers on environmental, social and corporate governance (ESG) considerations has resulted in greater scrutiny by bidders on such matters during their due diligence of targets. In particular, bidders are examining target companies' ESG history to assess risks relating to reputation, shareholder activism and potential litigation. To support their diligence, bidders are increasingly pushing for the inclusion of ESG-specific warranties in sale and purchase agreements; for example, on the target's ESG strategy and policies and whether they comply with applicable laws and regulations as well as 'soft law' and industry standards.

Negotiations of such warranties with the sell-side may be complicated by the use of transaction insurance as primary recourse for breach of warranties with a low or nominal liability cap for the warranties, as such insurance may be difficult to obtain for ESG-specific warranties. As a minimum, insurers will want to see robust diligence conducted on ESG ideally by a reputable external consultant, to determine whether they can cover such warranties. Insurance brokers should be consulted at an early stage in the sales process to assess insurer appetite for covering such warranties.

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Public Procurement
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