Private Equity

Contributing editor
Bill Curbow

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Private Equity 2017

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Singapore

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1 Types of private equity transactions

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

The growth of the Singapore private equity market mirrors the development of private equity in more sophisticated markets. The presence of global private equity houses in Asia such as Blackstone, KKR and TPG has helped to stimulate the private equity market as various funds look to put their money to work in Asia. In this regard, Singapore continues to be one of the few markets in the Asia-Pacific region where transactions can be executed efficiently and successfully in a manner that provides comfort and familiarity to private equity sponsors. Leveraged financing and security arrangements are available to support many of the leveraged transactions that are favoured by such investors. There is also a preference for techniques and structures that have been tried and tested in the United States and Europe – for example, the use of covenant-lite financing structures for Asian deals was quite prevalent before the credit crisis, and has re-emerged recently.

Take-private transactions are commonly carried out using one of the following structures:

- scheme of arrangement under section 210 of the Companies Act (Chapter 50 of Singapore) (Companies Act);
- general offer pursuant to the Singapore Code on Takeovers and Mergers (Takeover Code), coupled with compulsory acquisition under section 215 of the Companies Act; and
- voluntary delisting pursuant to Chapter 13 of the Listing Manual of the Singapore Exchange Securities Trading Limited (SGX) (which also requires an exit offer governed by the Takeover Code), coupled with compulsory acquisition under section 215 of the Companies Act.

Other forms of transactions that are typical in this market include start-up investments and venture capital-type activities, as well as management buyouts (MBOs), management buy-ins or buy-in management buyouts with management roll-over arrangements.

2 Corporate governance rules

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

Companies listed on the SGX are subject to enhanced corporate governance rules, including the following:

- the Guidebook for Audit Committees in Singapore identifies the key regulatory responsibilities and best practices of audit committees and addresses practical issues of concern to audit committee members, including the implications of the requirements under the Companies Act, the SGX listing rules as well as the principles and guidelines of the Code of Corporate Governance;
- the SGX listing rules contains rules intended to enhance corporate governance practices and foster greater disclosure to safeguard shareholders' interests. For example, the SGX listing rules require, inter alia, the following:
  - in respect of the appointment of key officers, listed companies are required to obtain the SGX's approval prior to the appointment of directors, chief executive officers and chief financial officers under certain circumstances and directors and key executive officers are to inform the SGX of any irregularities in the listed company in relation to the cessation of service of any director or key executive officer and to disclose when an independent director of the listed company is appointed to or has ceased to be on the board of the listed company's principal subsidiaries based outside of Singapore;
  - in respect of share pledging arrangements, a listed company is required to disclose loan covenants linked to controlling shareholders and obtain undertakings from its controlling shareholders to notify it of share pledging arrangements entered into by such shareholders and to disclose such share pledging arrangements where enforcement over these arrangements may result in a possible change in control of the listed company or may cause the listed company to breach its loan covenants; and
  - in respect of the holding of general meetings, since 1 January 2014, all listed companies (whether incorporated in Singapore or elsewhere) with a primary listing in Singapore are required to hold their general meetings in Singapore to promote more active participation and engagement of shareholders. Where there are legal constraints preventing them from holding their general meetings in Singapore, alternative modes of engagement such as webcast and information meetings should be provided so that public shareholders have access to the board and senior management; and
- the Code of Corporate Governance (the 2012 Code) which contains provisions relating to the composition of the board of directors in specified circumstances and disclosures in annual reports relating to financial years commencing from 1 November 2012. In relation to the composition of the board of directors, the 2012 Code requires the board of directors of a listed company to meet more stringent independence requirements. For example, the definition of 'independent director' has been refined to mean a director who does not have any relationship with the company, its related corporations, its 10 per cent shareholders or its officers that could interfere or be perceived to interfere with his or her independent business judgment. This is a notable change from the previous position where a director could be considered independent even if there is a relationship with the shareholders. In addition, under the 2012 Code, the independence of any director who has served beyond nine years from his or her first appointment will be subject to particularly rigorous review. Another significant amendment is the introduction of new guidelines requiring directors of a listed company to give an opinion on the adequacy and effectiveness of the internal controls within the company. There is also now a similar requirement under the SGX listing rules for such an opinion to be disclosed in the annual report of the listed company.

In 2015, the SGX increased its scrutiny on the compliance by listed companies with the 2012 Code. On 29 January 2015, the SGX released

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a disclosure guide in a Q&A format to assist listed companies in complying with their obligations under the 2012 Code, with listed companies being encouraged to enclose the same in their annual reports. On 12 October 2015, the SGX further announced the appointment of an external auditor to conduct a review of listed companies' compliance with the 2012 Code (the Compliance Review), as part of the SGX's drive to raise corporate governance standards. In July 2016, the SGX announced the results of the Compliance Review. According to the Compliance Review, adherence to guidelines of the 2012 Code can be improved, deviations should be better explained and disclosures on remuneration matters were most in need of improvement, particularly the amount of remuneration paid to directors, CEOs and key management personnel, the details on the performance metrics for directors and key management personnel and how performance and remuneration are aligned. The SGX also introduced sustainability reporting on a 'comply or explain' basis in June 2016, requiring companies to publish a sustainability report at least once a year, no later than five months after the end of each financial year beginning on the financial year ending on, or after, 31 December 2017.

The corporate governance framework discussed above applies to all companies listed on the SGX and will cease to apply when the company is delisted. Likewise, the SGX listing rules will only cease to apply to a company that has been privatised and delisted from the SGX. In light of this, one key benefit of a going-private transaction is the cost-saving associated with the reduced regulatory, audit and compliance costs. For the private equity sponsor that takes the company private, there is the added advantage of limited public disclosure requirements and greater flexibility in appointing directors to the board of the target company.

3 Issues facing public company boards

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

The directors of a Singapore public listed company owe fiduciary duties to act in the best interests of the company, including in the context of a going-private transaction. Similar fiduciary duties apply to directors of a Singapore private company involved in a private equity transaction.

The critical issue that directors need to grapple with in a going-private transaction is to determine whether there are conflicts of interest that may affect certain members of the board by reason of their participation or shareholding in the bidding vehicle or as part of the MBO. This is important for private equity transactions as private equity investors are typically concerned with ensuring management continuity and seek to do so by incentivising management to participate in the bidding vehicle. In this regard, they would need to consider what role (if any) the existing management would play in the bidding vehicle. To address the issue of a potential conflict of interests, a company that is subject to an MBO (or going-private transaction) will typically establish a special committee of directors comprising directors who are independent for the purpose of the offer to have oversight of the transaction.

Pursuant to the Takeover Code, the special committee is expected to appoint an independent financial adviser to assist in the recommendation that has to be made by the directors on the transaction. In some recent transactions, the special committee may involve a financial adviser at an early stage in the process if a decision is made to undertake a going-private transaction by way of an auction. In such circumstances, a separate independent financial adviser will be appointed to opine on the transaction from a financial perspective and advise the independent directors for the purposes of the transaction. The early involvement of an independent financial adviser is also recommended where the going-private transaction is structured as a voluntary delisting proposal, since the SGX expects the independent financial adviser's opinion on the reasonableness of the exit offer to be included in the delisting application submitted by the target company to the SGX and in the shareholders' circular.

In the context of an MBO, the special committee will need to be mindful as to how information is disclosed to a bidding vehicle that includes members of the management team. If the disclosure process is not carefully managed, any inadvertent disclosure to such a bidding vehicle may result in the target company being compelled under the Takeover Code to disclose the same information to a competing offeror that may subsequently surface. The independence of a director will also affect his or her ability to make a recommendation on the transaction to the shareholders of the target company for the purpose of the Takeover Code. As a starting point, the Takeover Code requires all directors of the target company to make a recommendation on the transaction. Where a director wishes to be exempted from making such a recommendation, the consent of the Securities Industry Council (SIC) must be sought. The SIC has made clear in note 1 to rule 8.3 of the Takeover Code that they will normally exempt a director who is not independent from assuming any responsibility for making a recommendation on the offer to the shareholders of the target company. However, such a director will still need to assume responsibility for the accuracy of the facts stated in the announcements and documents that are despatched to the shareholders of the target company.

In the context of a going-private transaction, one query that has frequently been raised by the special committee relates to the requirement on, or ability of, the special committee to seek competing offers. The Takeover Code was amended by the SIC in February 2016 (the 2016 Takeover Code Amendments) to clarify that, inter alia, offeree boards may consider the feasibility of soliciting a competing offer or running a sale process and that doing so will not amount to frustration of the initial offer.

Finally, boards of public listed companies should bear in mind that, Takeover Code issues aside, any material price-sensitive information disclosed in the course of the transaction may also give rise to concerns of insider trading under the Securities and Futures Act (Chapter 289 of Singapore) (the Securities and Futures Act).

4 Disclosure issues

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

The disclosure requirements in a going-private transaction are the same whether the transaction is implemented by way of a general offer under the Takeover Code or by way of a scheme of arrangement under section 210 of the Companies Act.

The Takeover Code prescribes the relevant information that needs to be disclosed (in the context of a general offer) in an offer document issued by the bidding vehicle and the circular issued by the target company to its shareholders; and (in the context of a scheme of arrangement) in the scheme document to be issued by the target company. For example, details of any shareholdings in the target company and any dealings in such shares by parties involved in the going-private transaction and their concert parties during the three-month (in the case of a voluntary offer) or six-month (in the case of a mandatory offer) period prior to and during the offer period must be disclosed in the offer document and the circular issued by the target company to its shareholders. For securities exchange offers, the same information relating to shares of the bidding vehicle must be disclosed.

The Takeover Code also requires prompt disclosure of securities dealings by parties involved in the going-private transaction and their associates during the offer period, which essentially commences when a possible takeover offer is made known to the public. Depending on the nature of the dealings, a party may either be compelled to make a public disclosure or a private disclosure to the SIC.

Previous amendments to the Takeover Code in 2012 introduced enhanced disclosure requirements that include the requirement for the bidding vehicle to disclose if the shares it holds in the target company are charged, borrowed or lent, and the requirement for disclosure of dealings in convertible securities, options, warrants and derivatives during the offer period by persons holding or controlling 5 per cent or more of the underlying class of securities, where such instruments cause the holder to have a long economic exposure to the underlying securities. The 2016 Takeover Code amendments further require prompt disclosure of any material changes to information previously published in connection with the offer and any material new

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information that would have been required to be disclosed in any previous document or announcement published during an offer period, had it been known at the time.

The Companies Act and the Securities and Futures Act impose separate disclosure obligations on parties who become substantial shareholders of a Singapore public listed company (namely, upon acquiring 5 per cent or more of the voting rights of the company) and any subsequent percentage level changes in their substantial shareholding. Under the Securities and Futures (Disclosure of Interests) Regulations 2012, promulgated to facilitate the new streamlined disclosure regime implemented by the Monetary Authority of Singapore (MAS) on 19 November 2012, a bidding vehicle is exempted from complying with disclosure obligations under the Securities and Futures Act in respect of any change in its interest in the securities of the target company during the offer period, provided that the bidding vehicle complies with the disclosure obligations under the Takeover Code.

Prior to 1 December 2015, companies listed on the SGX or its listed shareholders had to, depending on the circumstances, privately notify the SGX where its board was either aware of discussions or negotiations of a potential proposal, or in discussion or negotiation on an agreement or document that might lead to a takeover, reverse takeover or a very substantial acquisition by the company (Selected Transaction). Companies listed on the SGX were also required to maintain a list of persons who were privy to a selected transaction in a prescribed format and furnished to SGX upon request. With effect from 1 December 2015, companies listed on the SGX or its listed shareholders need not privately notify the SGX of such transactions prior to a public announcement and the privy persons list requirement has now been extended to all material transactions.

5 Timing considerations

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

In general, the timing of a private equity transaction in Singapore depends to some extent on the scope of due diligence and on the requirement to clear specific regulatory issues, for example, merger control issues under the Competition Act (Chapter 50B of Singapore) (Competition Act). The merger control regime in Singapore may potentially extend a transaction by three months or more in a case where the transaction is subject to review by the Competition Commission of Singapore.

A going-private transaction may be structured either as a general offer subject to the Takeover Code or a scheme of arrangement subject to both the Takeover Code and the Companies Act. In the case of a general offer that is subject to the Takeover Code, a specific timeline is set out in the Takeover Code that prescribes when the bidding vehicle is required to do certain acts and when a response is expected from the target company. On the other hand, a scheme of arrangement, with the consent of the SIC, is typically exempted from the timeline prescribed under the Takeover Code.

In the case of a general offer under the Takeover Code, the parties are expected to adhere strictly to the timeline in the Takeover Code once a firm intention to make an offer is announced by the bidding vehicle. This announcement will set the timeline in motion and the bidding vehicle must despatch the offer document setting out the terms and conditions of the offer as well as the acceptance procedures to the target company's shareholders, no earlier than 14 days and no later than 21 days from the offer announcement date. The target company is then obliged to respond with a circular to its shareholders containing the advice of an independent financial adviser and the recommendation of the directors of the target company. Such circular is to be despatched within 14 days of the date of posting of the offer document. The Takeover Code also imposes a timeline with respect to how long the offer can remain open and the circumstances under which the offer may be extended. Depending on whether the general offer is made subject to specific conditions that are permitted by the SIC, the offer will either lapse from a failure to satisfy such conditions or close successfully.

If at the close of the offer, the bidding vehicle acquires sufficient shares in the target company (either pursuant to valid acceptances of the offer or market purchases during the offer period) to cross the 90 per cent threshold under section 215 of the Companies Act, the bidding vehicle may proceed to 'squeeze out' the remaining non-accepting shareholders by invoking the compulsory acquisition procedure under the same section. This process typically extends the transaction timetable by another two months before all the remaining shares are transferred to the bidding vehicle and the target public company becomes a wholly owned subsidiary of the bidding vehicle. The bidding vehicle has up to four months from the making of the general offer to cross the 90 per cent threshold under the Companies Act to avail itself of the compulsory acquisition rights under section 215 of the Companies Act. With effect from 3 January 2016, section 215 of the Companies Act has been amended to allow the bidding vehicle to also acquire options and other interests in shares. It should be noted that the 90 per cent threshold only applies to Singapore-incorporated target companies. For foreign target companies listed on the SGX, the bidding vehicle would have to refer to the squeeze-out mechanism and timing considerations under the laws of incorporation of such foreign target companies.

A bidding vehicle may also effect a going-private transaction by way of a scheme of arrangement under section 210 of the Companies Act. Unlike a general offer where the bidding vehicle may find itself unable to achieve the 90 per cent requirement to squeeze out the minority shareholders despite its success in acquiring a majority stake in the target public company, a going-private transaction undertaken by way of a scheme of arrangement guarantees an 'all or nothing' result. The key timing consideration of a scheme of arrangement relates to the preparation of the scheme document that has to be reviewed by the SGX before its despatch to shareholders. The drafting and review process may take up to eight weeks following the joint announcement by the bidding vehicle and the target company of the proposed scheme of arrangement. Once cleared by the regulators, the target company will have to apply to the High Court of Singapore for leave to convene a meeting of the shareholders to consider and vote on the proposed scheme of arrangement. Upon the granting of leave, the target company has to despatch the scheme document to its shareholders and give at least 14 days' notice to convene the meeting. The scheme of arrangement must be approved by a majority in number representing 75 per cent in value of the shareholders present and voting at that meeting. The SIC will normally require the bidding vehicle and its concert parties and the common substantial shareholders of the bidding vehicle and the target company to abstain from voting on the scheme of arrangement. Once approved by the requisite number of shareholders, the target company has to obtain the consent of the High Court for the scheme. A scheme of arrangement approved by shareholders and the High Court will bind all the shareholders in the target company and will take effect upon the lodgement of the relevant court order with the Accounting and Corporate Regulatory Authority. Unless an objection is raised at the Court hearing, a going-private transaction undertaken by way of a scheme of arrangement is likely to complete within four months of the date of the initial joint announcement, subject to the schedule of the SGX and the High Court.

A third structure for implementing a going-private transaction in Singapore is via a voluntary delisting proposal and exit offer. However, this structure is more commonly adopted by a private equity sponsor who already has an existing majority stake in the target company and where the minority shareholders either do not hold significant shareholding blocks or the bidding vehicle is confident of garnering the support of significant minority shareholders. From a timing perspective, this process will still typically take longer to complete when compared to a general offer under the Takeover Code as the SGX and shareholders' approval at a general meeting will need to be obtained. In some going-private transactions in Singapore, a voluntary delisting proposal is used as a follow-up step to take the target public company private following an initial voluntary offer that does not result in the bidding vehicle receiving sufficient acceptances to enable it to squeeze out the minority shareholders under the compulsory acquisition provisions in the Companies Act.

Where the Takeover Code does not apply to a private equity transaction, there will generally be no fixed timeline that a bidding vehicle must comply with.

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6 Dissenting shareholders' rights

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

Depending on how the going-private transaction is structured, dissenting shareholders may exercise their voting rights to vote against the transaction or apply to the Singapore courts for relief.

In respect of a scheme of arrangement, a majority in number representing 75 per cent in value of the shareholders present and voting at that meeting must approve the scheme, with the bidding vehicle and its concert parties and the common substantial shareholders of the bidding vehicle and the target company normally being required to abstain from voting. Given the need to satisfy the 'majority in number' approval requirement, a sufficient number of dissenting shareholders turning up at the meeting may still 'block' the scheme from being approved. In addition, notwithstanding that such approval is obtained, a dissenting shareholder still has the right to attend and raise objections at the court hearing in respect of the scheme.

In respect of a voluntary delisting, a delisting resolution must be approved by a majority of shareholders holding at least 75 per cent in value, present and voting (on poll). However, the voluntary delisting cannot proceed if dissenting shareholders holding at least 10 per cent in value attend the meeting and vote against the delisting resolution.

Where the general offer or voluntary delisting is coupled with compulsory acquisition under section 215 of the Companies Act dissenting shareholders may apply to court within one month of the date on which the notice of compulsory acquisition is given, to object to the transaction.

As a general principle under the Takeover Code, rights of control over the target public company must be exercised in good faith and the oppression of the minority is wholly unacceptable. In addition, if the going-private transaction is carried out in a manner that is oppressive to minority shareholders, the Companies Act provides minority shareholders statutory recourse to seek the intervention of the court.

Given the options available to dissenting shareholders discussed above, it is not uncommon to find potential acquirers analysing and taking into account the current shareholding spread of the target company to determine the most suitable going-private structure that maximises deal certainty and, at the same time, achieves the objective of taking the target company private with minimal execution risk. If there are significant minority holdings concentrated in a single or a few shareholders, potential acquirers will generally consider procuring irrevocable undertakings from these shareholders to support the going-private transaction to increase deal certainty.

7 Purchase agreements

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

While most buyers in a mergers and acquisitions transaction would typically insist on comprehensive representations and warranties in the purchase agreement, going-private transactions in Singapore that are implemented following an auction process are normally concluded with minimal representations and warranties as a consequence of the competitive tension between bidders. This is particularly stark in the context of transactions implemented by way of a scheme of arrangement, as the private equity sponsor may not even be able to obtain similar comfort from the management team or a controlling shareholder to the extent that these parties do not have any agreement with the private equity sponsor.

The private equity sponsor is expected to conduct its own due diligence to get comfortable with the risks associated with the investment – vendor due diligence reports remain fairly uncommon in Singapore mergers and acquisitions transactions although there appears to be a gradual increase in its acceptance, particularly for managed auction sale processes.

A private equity sponsor would typically prefer a financing condition to be imposed as part of the purchase agreement, such that its obligations are conditional upon the availability of debt financing. However, recent Singapore private transactions suggest that such a condition would not be acceptable to most vendors. If the transaction is subject to the Takeover Code, the SIC's approval is required if the bidding vehicle wishes to include any conditions other than the normal conditions relating to the level of acceptances, approval of shareholders for the issue of new shares or the SGX's approval for listing. In particular, the SIC will normally wish to be satisfied that fulfilment of the condition does not depend to an unacceptable degree on the subjective judgment of the private equity sponsor as such conditions can create uncertainty. In addition, once an offer is announced under the Takeover Code, the SIC's consent is required before the offer can be withdrawn.

In the context of going-private transactions, the bidding vehicle's financial adviser or financier is obliged to provide a written confirmation as to the sufficiency of financial resources available to the bidding vehicle to complete the acquisition. Such a confirmation must be reflected in the announcement and the offer or scheme document to be despatched to shareholders. In a number of auction transactions, the request for financial resources confirmation is even made at the bid submission stage.

A provision of a break fee could be included in the purchase agreement of a going-private transaction. This break fee will be payable on the occurrence of certain specified events (for example, where a superior competing offer becomes or is declared unconditional as to acceptances within a specified timing or the recommendation by the board of the target public company to the shareholders to accept a superior competing offer). Under the Takeover Code, the target public company is allowed to pay a break fee of up to 1 per cent of the transaction value. The 1 per cent cap is not applicable to a private company transaction or to a break fee payable by a party other than the target public company. The directors of the target company (both public and private) must also consider their fiduciary duties in agreeing to such break fees as well as the possible breach of any financial assistance prohibition under the Companies Act. For a public transaction, the financial adviser to the target company would also be required to confirm that, inter alia, he or she believes the fee to be in the best interests of offeree company shareholders.

A private equity sponsor will also be keen to have strong indemnification provisions, often with definitive monetary limits, in order to protect his or her capital investment and calculate their minimum return. In leveraged buyouts, there is often a need to protect cash flow against unforeseen expenses and liabilities. In this regard, there is an increasing interest in exploring warranty and indemnity insurance (W&I insurance), which may be used to provide comfort to a buyer for that part of the transaction value not covered by representations and warranties or indemnities.

Finally, a private equity sponsor will also typically look to greater commitment and support for the transaction from the management of the target company to ensure management continuity. As such, it is not uncommon to find private equity sponsors insisting on the terms of the transaction giving them the right to negotiate with or offer to the existing management of the target company the opportunity to participate with an equity stake in the bidding vehicle or enter into new service agreements.

8 Participation of target company management

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

In a Singapore going-private transaction where the management team is actively involved in the transaction or is expected to continue its role within the target company group going forward, they are generally offered the opportunity to participate (with an equity stake) in the bidding vehicle to align its interests with the private equity sponsor. Essentially, this would typically involve the management, who hold shares in the target company, agreeing to swap their shares for equity in the bidding vehicle or tender their shares towards acceptance of the takeover offer, and thereafter apply the proceeds towards subscription for shares in the bidding vehicle. As shareholders in the bidding vehicle, the management is likely to be subject to the usual restrictions that a private equity sponsor will expect to impose in terms of voting rights and transferability of shares. On some occasions, new service agreements may be executed to document the employment terms.

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A key concern in putting together management incentives in a going-private transaction is whether such incentives will constitute a 'special deal' under rule 10 of the Takeover Code, particularly where the management team are also shareholders of the target company. In this regard, note 4 to rule 10 of the Takeover Code makes it clear that the SIC will adopt the principle that the risks as well as the rewards associated with an equity shareholding should apply to the management's retained interest. Accordingly, an option arrangement that guarantees the original offer price as a minimum would normally not be acceptable. The SIC should be consulted if the management is to remain financially interested in the target company's business after the offer. The SIC may also request an independent financial adviser to issue an opinion on whether the management incentives are fair and reasonable.

The arrangements with the management would also have to be disclosed in the formal documentation that is issued to shareholders in relation to a takeover offer.

The other concern with management incentives in a going-private transaction relates to the potential conflict of interests that the management team may face in agreeing to the terms of these incentives that are applicable post-completion while the company is still publicly listed. Good corporate governance practice dictates that certain decisions on a going-private transaction may have to be dealt with by directors (or a committee of directors) who are independent for the purpose of the offer. Further, the management team may also need to abstain from participating in some of these decision-making processes.

9 Tax issues

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

From a transactional perspective, most private equity bidders would be keen to ensure the following:

- minimal tax costs associated with the implementation of the transaction – for example, whether stamp duty savings are available in the context of a share transaction or if goods and services tax relief is available in the context of an asset transaction. In relation to the former, subject to certain criteria being met, the transfer of shares for certain qualifying mergers and acquisitions transactions involving Singapore companies executed between 1 April 2015 and 31 March 2020 (both dates inclusive) will be eligible for stamp duty relief, which is capped at S$40,000 per year;
- interest deductibility on the debt financing that is taken for the purpose of the acquisition – where appropriate, some form of debt 'pushdown' may be explored to allow for debt refinancing at the operating company as opposed to the financing at the bidding vehicle level; and
- minimal tax leakage at the operating level post-completion – tax-related issues that are identified as part of the tax due diligence that is undertaken prior to the going-private transaction are likely to be addressed as part of the overall group restructuring that is implemented post-completion (for example, transfer pricing).

As part of any discussion on management incentives, parties would typically explore how such incentives can be provided with a view to minimising the likely increase in income tax exposure for the individual employee.

10 Debt financing structures

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

Most debt financing structures in Singapore would comprise senior secured debt in multiple tranches as well as mezzanine (and subordinated) debt. Global private equity sponsors have brought with them their preferred American or European debt financing structures when negotiating and implementing the financing structure for a Singapore going-private transaction.

Given the increasing demand by vendors to have bidders provide funding confirmation, private equity sponsors will now put in place a combination of bridge and term facilities via interim facilities agreements with their preferred banks at the point of the announcement of the going-private transaction. Refinancing may be expected within 12 months after the initial interim facilities.

While there are generally no restrictions on the use of debt financing for private equity transactions in Singapore, it is important to ensure that any debt financing structure to be implemented does not run afoul of the financial assistance provisions in section 76 of the Companies Act. On this note, it is worth pointing out that under the amendments to the Companies Act, which came into force on 1 July 2015, the financial assistance prohibition for private companies (which are not subsidiaries of public companies) has been abolished. As such, it would no longer be necessary for a private company to undergo a whitewash process before undertaking any form of debt push down or refinancing, in line with other major jurisdictions such as England. Additionally, although the prohibition is retained for public companies and their subsidiaries, a new exception will be introduced to permit a public company and its subsidiary to, subject to satisfaction of certain prescribed conditions, provide financial assistance in connection with the acquisition of its own shares if such assistance does not materially prejudice the interests of the company or its shareholders, or the company's ability to pay its creditors.

11 Debt and equity financing provisions

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

Recent going-private transactions suggest that in an auction process a private equity sponsor will need to be able to show the vendor or target company the equity commitment letters and bank financing confirmation as early as the bid submission stage. This compels the private equity sponsor to line up the financiers at the outset of the transaction and have them sign up to commitment letters and interim facilities agreements to establish the requisite debt financing. The financial adviser to the private equity sponsor will need to review these documents and be satisfied that the bidding vehicle has sufficient financial resources to satisfy the consideration payable for the target company. This review is necessary as the financial adviser is usually expected to issue a confirmation of financial resources and a request for such confirmation can be made as early as the bid submission stage. The review also addresses in part the financial adviser's due diligence obligation under the Takeover Code on the issue of adequacy of financial resources.

Once the going-private transaction is announced, the lenders and the private equity sponsor will then move on to negotiate the formal loan documentation and the security documentation. Singapore lenders have come to accept that they may not always have the security in place at the point of completion of the acquisition because of the need to either convert the delisted public company into a private company or to complete financial assistance whitewash procedures. In many instances, parties agree to a time frame pursuant to which the delisted public company is either converted into a private company or the financial assistance whitewash procedure must be undertaken and the security documentation executed thereafter.

12 Fraudulent conveyance and other bankruptcy issues

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

Singapore insolvency laws allow liquidators and judicial managers of a Singapore company to exercise limited powers to have a Singapore court set aside certain transactions that may be regarded, for example, as transactions at an undervalue or transactions where unfair preferences are given. These concepts are based on UK insolvency legislation. We would expect representations and warranties to be given to the contrary in the financing documentation.

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13 Shareholders' agreements and shareholder rights

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

A private equity sponsor will typically focus on provisions in shareholders' agreements that facilitate transfer of their shares via the usual exit mechanisms. To the extent that the management team rolls over its equity and participates in the bidding vehicle, the private equity sponsor can be expected to impose lock-up arrangements, as well as pre-emption rights over the shares of the management team and restrict their ability to control the decision-making process over the management of the target company. The 'reserved matter' list for the management team is usually kept short. The concepts of 'good leavers' and 'bad leavers' are commonly found in the shareholders' agreement to deal with the exit price payable to a member of the management team who leaves the group. Registration rights are usually incorporated for the benefit of private equity sponsors looking to exit via a public offering in the United States. Non-compete and non-solicitation provisions are also commonly found in the shareholders' agreements for private equity sponsors.

With regard to the issue of statutory or other legal forms of protection available to minority shareholders, the memorandum and articles of association (M&AA) provides a basic layer of protection for minority shareholders. A company cannot act in breach of its M&AA and an aggrieved minority shareholder may commence legal action to prevent a threatened breach. The Companies Act protects the minority shareholders against unbridled variations of the provisions in the M&AA by requiring a special resolution to be passed by a majority of not less than three-quarters of the shareholders of the company who are present and voting at the meeting to vary any provision in the M&AA.

Minority shareholder protection against oppression is provided for in section 216 of the Companies Act, which allows minority shareholders to seek the intervention of the court where the following is true:

- the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more shareholders, or in disregard of his or her or their interests as shareholders; or
- some act of the company has been carried out or is threatened, or that some resolution has been passed or is proposed that unfairly discriminates against or is otherwise prejudicial to one or more shareholders.

The Singapore courts have wide powers to remedy or put an end to the matters of complaint. The Companies Act also empowers the minority shareholders by allowing such an aggrieved shareholder to bring an action on behalf of the company against wrongdoers where a wrong is done to the company (instead of the minority shareholders directly) pursuant to the common law right of derivative action. This avoids the situation where the minority shareholders are unable to seek a judicial remedy owing to the majority's efforts in stifling any potential claims against themselves. The statutory derivative action under section 216A of the Companies Act supplements the common law right. However, the statutory derivative action is not available to shareholders of public listed companies.

Other statutory and legal protection accorded to minority shareholders include the various requirements under the Companies Act for shareholders' approval by special resolution for certain major corporate actions proposed to be undertaken by the company. For example, such shareholders' approval is required for capital reductions, share buybacks and winding up. Shareholders are also given the basic rights to inspect the statutory registers and minute books, as well as the audited accounts of the company.

14 Acquisitions of controlling stakes

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

The ability of an acquirer to acquire control of a private or public company may be subject to the usual merger control regulations and relevant regulatory approvals being obtained in the case where the target company is operating in a tightly regulated industry, such as banking, broadcasting and newspaper publications.

With regard to public companies where the Takeover Code applies, the relevant requirements depend on the structure of the transaction contemplated.

An acquisition or consolidation of effective control of a target public company (or registered business trust, business trust and real estate investment trust) will trigger an obligation under rule 14 of the Takeover Code for the bidding vehicle and its concert parties to make a mandatory general offer for the rest of the shares in the target public company. Effective control of a public company is acquired if the aggregate shares acquired would result in the bidding vehicle and its concert parties holding 30 per cent or more of the voting rights of such company. If the bidding vehicle and its concert parties already hold not less than 30 per cent but not more than 50 per cent of the voting rights of a public company prior to such acquisition, any increase of 1 per cent of the voting rights of such company in any six-month period will trigger the obligation to make a mandatory general offer under rule 14 of the Takeover Code. Acquisition of options and derivatives in a public company which causes the bidding vehicle to have a long economic exposure to changes in the price of securities of the public company will normally be treated as an acquisition of such securities. If the bidding vehicle and its concert parties will breach the thresholds under rule 14 of the Takeover Code as a result of acquiring such options or derivatives, or acquiring securities underlying options or derivatives when already holding such options or derivatives, they must consult the SIC beforehand to determine if an offer is required, and, if so, the terms of such offer.

A mandatory general offer must not be subject to any condition other than that acceptances received pursuant to the offer will result in the bidding vehicle and its concert parties holding more than 50 per cent of the voting rights. In addition, the offer price for a mandatory offer must be at least the highest price paid by the bidding vehicle (or any of its concert parties) for such shares during the offer period and within six months prior to its commencement.

A voluntary general offer, on the other hand, must be conditional upon a level of acceptance exceeding 50 per cent of the total voting rights unless the bidding vehicle and its concert parties already hold more than 50 per cent of the total voting rights, in which case the voluntary general offer can be unconditional. If the intention of the bidding vehicle is to privatise the company, it will usually make the voluntary offer subject to the receipt of acceptances of not less than 90 per cent of the relevant total number of shares within four months from the commencement of the offer, so as to entitle it to invoke the compulsory acquisition procedure under section 215 of the Companies Act to squeeze out the remaining non-accepting shareholders after the close of the offer. In this respect, it should be noted that in calculating whether the 90 per cent threshold has been reached, shares acquired by the acquirer, its related company, or a nominee of such acquirer or its related company before the general offer cannot be counted, while shares subject to an irrevocable undertaking by the shareholders of the target company to be tendered into the general offer can be counted. The SIC does not usually allow a voluntary offer to be subject to conditions that require subjective judgments by the acquirer. The offer price must be at least the highest price paid by the acquirer (or any of its concert parties) for such shares during the offer period and within three months prior to its commencement.

Some private equity firms prefer to privatise a public company by way of a scheme of arrangement under section 210 of the Companies Act because of its assurance of a binary 'all or nothing' outcome. A scheme of arrangement that is approved by a majority in numbers of the shareholders present and voting at the statutory scheme meeting representing at least 75 per cent in value of the shares voted will, if sanctioned by the High Court, be binding on all shareholders. The 3 January 2016 amendments to the Companies Act makes it possible for a section 210 scheme of arrangement to be binding on holders of options and convertibles instead of having to exercise their options or convertibles before being able to participate In a scheme. However, it should also be noted that as a condition for granting exemptions from complying with certain rules of the Takeover Code, the SIC typically requires the bidding vehicle and its concert parties as well as common

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substantial shareholders of the bidding vehicle and the public company to abstain from voting at the statutory scheme meeting.

With regard to private companies, the relevant requirements or restrictions typically arise from the M&AA of the companies or the shareholders' arrangements between the existing shareholders. The M&AA or shareholders' agreements relating to private companies usually confer upon the shareholders' (or certain shareholders') pre-emption rights in the event of a transfer of shares by an existing shareholder to a third party. In addition, the presence of tag-along or drag-along provisions in the shareholders' agreements may mean that a bidding vehicle may find itself having to acquire a larger than originally contemplated equity stake. One of the most common considerations in the acquisition of control of a private company is the ability to obtain the necessary consents and waivers from third party customers, suppliers, landlords or financiers where change in control provisions are found in the relevant contracts.

15 Exit strategies

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

In recent years, private equity investors continue to show a preference to sell their portfolio holdings to a strategic buyer, rather than take their chances on a public offering. Private negotiations with a strategic buyer offer vendors a greater level of control. However, both exit methods carry with them different types of challenges. In the case of a trade sale, finding buyers can be difficult in view of the current macroeconomic climate where buyers continue to be prudent. In addition, the ability of a private equity firm to give commercial warranties about the portfolio company, its business, assets or liabilities in the purchase agreement is typically limited owing to a lack of direct management involvement in the business of the company; if not because of the general reluctance of private equity players to do so in a bid to limit post-closing recourse, as will be further discussed below. A trade buyer will usually also require certain consents in respect of the proposed sale to be obtained from third-party vendors of the portfolio company, and that key management personnel be retained post-sale, so as to ensure minimal disruption to the business of the portfolio company after the completion of the sale. In the case of an IPO, the main challenge, apart from pricing and book-building issues, is that the listing exercise can be a rigorous process that entails a significant diversion of management resources from the business operations of the portfolio company.

In connection with a sale of a portfolio company, private equity vendors typically insist that they give only minimal operational warranties about the portfolio company itself, its business, assets or liabilities, so as to limit the possibility of any post-closing recourse. Generally, buyers will reluctantly accept this condition, and where the management of the portfolio company is selling their stake as part of the trade sale, the focus inevitably falls on them. If the management sellers have a significant stake in the portfolio company, warranties from those management sellers may offer a material degree of comfort to the buyer. However, if the management sellers own a relatively small stake, such warranties given by them are unlikely to be sufficient from a buyer's perspective as the liability exposure of such management personnel is unlikely to be higher than the proceeds for the management stake. A compromise that is gaining popularity in Singapore is the use of W&I insurance, which, in some circumstances, is employed to give comfort to a buyer for that part of the value of the sale proceeds not covered as a result of the private equity vendors not providing operational warranties.

To the extent that private equity vendors are required by the buyer to take on the risk in the purchase agreement for specific liabilities or risks identified during due diligence, indemnity provisions tightly crafted around specific liabilities or risks are preferred over the giving of open-ended warranties. It is not unusual for buyers to require that a portion of the purchase consideration be set aside in an escrow account for the duration of the claim period stipulated in the purchase agreement, although this will limit the ability of the private equity vendor to distribute the purchase proceeds to its investors and to liquidate the special purpose vehicle that previously held the relevant equity stake. In this regard, there has been an increasing trend in recent times to explore W&I insurance to bridge impasses in deal negotiations as it offers parties a third-party alternative in the risk allocation process. A sell-side W&I insurance policy for the vendor would typically provide cover for the vendor's liability in the event of a claim under an indemnity provision or arising out of a breach of a warranty, after application of the policy excess. From a liability perspective, the vendor remains liable to the buyer under the purchase agreement but the vendor will bring in the insurers in the event of a relevant claim being made by the buyer. A buy-side W&I insurance policy allows the buyer to recover losses from warranty and indemnity claims directly from the insurer, plugging the gap in a buyer's inability to recover under the warranties or indemnity provisions under the purchase agreement, whether as a result of the negotiated cap on the vendor's liability or the vendor's inability to meet any claims.

16 Portfolio company IPOs

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

Typically, for a listing on the SGX, rights and restrictions set out in a shareholders' agreement will terminate upon an IPO together with the initial shareholders' agreement. This is particularly the case as shareholders are likely to be regarded as parties acting in concert with each other under the Takeover Code if the shareholders' agreement continues to be in effect. Thereafter, the Code of Corporate Governance will provide guidance on the standard of corporate governance to be maintained by companies listed in Singapore. For example, principle 4 of the 2012 Code states that '[t]here should be a formal and transparent process for the appointment and re-appointment of directors to the Board.' Guideline 4.1 of the 2012 Code further provides that the board should establish a nominating committee to make recommendations to the board on all board appointments, with written terms of reference clearly setting out its authority and duties.

Registration rights are generally not required for post-IPO sales of shares on the SGX.

In the case of SGX Mainboard companies that satisfy the profitability test, the promoters' entire shareholdings at the time of listing will be subject to a lock-up restriction of at least six months after listing. In the case of SGX Mainboard companies that satisfy the market capitalisation test or catalyst companies, the promoters' entire shareholdings at the time of listing will be subject to a lock-up restriction of at least six months after listing, and at least 50 per cent of the original shareholdings (adjusted for any bonus issue or subdivision) will also be subject to a lock-up restriction for the next six months. In the case of investors each with 5 per cent or more of the company's post-invitation issued share capital and who had acquired their securities and made payment for their acquisition less than 12 months prior to the date of the listing application, a certain proportion of their shareholdings will be subject to a lock-up restriction for six months after listing. On the other hand, for investors each with less than 5 per cent of the company's post-invitation issued share capital and who had acquired their securities and made payment for their acquisition less than 12 months prior to the date of the listing application, there will be no lock-up restriction on the number of shares that may be sold as vendor shares at the time of the IPO. However, if these investors have shares that remain unsold at the time of the IPO, a proportion of such remaining shares will be subject to a lock-up restriction of six months after listing. In addition, subject to certain exceptions, investors who are connected to the issue manager for the IPO of the company's securities will also be subject to a lock-up restriction of six months after listing.

The purpose of such lock-up restrictions is to maintain the promoters' commitment to the listed company and align their interest with that of public shareholders.

Following an IPO, a private equity sponsor may dispose of its remaining shareholdings via a block sale.

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17 Target companies and industries

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

Going-private transactions involving private equity sponsors are typically focused on industries where the financiers are able to obtain appropriate security arrangements to secure the financing required for the leveraged transaction. There is typically a preference for private equity sponsors to look for companies with a strong cash flow and a strong management team that is prepared to continue post-completion. Companies with the ability to reduce expenses and with less leverage are also attractive buyout candidates as there is greater opportunity to realise the value in the leveraged buyout.

The number of going-private transactions in Singapore involving private equity firms in 2016 was small, with no particular industry standing out as a preference. Notable deals include the proposed privatisation of ARA Asset Management Ltd by a consortium consisting of Warburg Pincus and other investors, as well as Temasek Holdings (Private) Ltd's privatisation of SMRT Corporation Ltd via a scheme of arrangement, which involved the fastest scheme of arrangement to ever be completed by a Singapore listed company as well as what is likely to be the largest turnout for a shareholder meeting in Singapore's corporate history.

Other private equity deals in Singapore (apart from going-private transactions) typically involved companies in various industries as with previous years. Some of the more notable transactions include the sale by Temasek Holdings (Private) Ltd of their stakes in Intouch Holdings PLC and Bharti Telecom to Singapore Telecommunications Ltd; Canada Pension Plan Investment Board's US$375 million investment into Raffles City China Investment Partners III; and Standard Chartered Private Equity's acquisition of a stake in Phoon Huat & Co Pte Ltd.

Certain industries are strictly regulated and the acquisition of shares above a certain threshold in these industries requires approval from the relevant governmental agency or regulator. Examples of such restricted industries include banking, broadcasting and newspaper publications. Accordingly, private equity firms may find it more difficult to take companies in these industries private. Investments in these companies may also require the cooperation of one or more co-investors.

Separately, merger control regulations could also potentially limit the ability of a private equity firm to acquire a Singapore company if that firm has an interest in another major competitor in the same industry.

18 Cross-border transactions

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

Tax-related considerations tend to shape the deal structure on a cross-border going-private or private equity transaction as parties seek to minimise the tax costs of the acquisition as well as tax leakages in the existing operations. Specifically, the impact of withholding taxes on dividends, local taxes, distributions and interest payments and restrictions on the private equity sponsor's ability to repatriate earnings should be taken into account when structuring such cross-border transactions.

The ability of a private equity fund to implement a leveraged transaction may be limited by foreign laws prohibiting companies in their respective jurisdictions from providing financial assistance in the form of security arrangements or guarantees. These limitations may compel the private equity fund to procure separate bank financing at the operating company level (rather than at the bidding vehicle level) to provide the lenders with an acceptable security arrangement to support the credit assessment.

Update and trends

While interest by private equity firms in pursuing acquisitions remained high in 2016, investors have been generally circumspect and have taken time to ensure that diligence, business models and pricing concerns are all addressed to their satisfaction prior to closing deals. The Singapore government's continued focus on developing its start-up and fintech ecosystem (the MAS organised the Singapore Fintech Festival, the world's largest fintech event in November 2016) has also led to increased interest from mainstream private equity firms in the technology sector, with venture capital and growth capital investors having to adjust to the increased competition.

19 Club and group deals

What are the special considerations when more than one private equity firm (or one or more private equity firms and a strategic partner) is participating in a club or group deal?

The members of a club or group deal should be mindful of changes in the shareholdings of the members of the group. While the SIC accepts that the concept of persons acting in concert recognises a group as being the equivalent of a single person, the membership of such groups and the shareholding of the members in the target company may change at any time. As such, there will be circumstances where the acquisition of voting rights by one member of a group acting in concert from another member or other non-members will result in the acquirer of the voting rights triggering a mandatory offer obligation. In situations like these, the SIC should be consulted in advance.

Participants in a club deal should also be mindful that their conduct in the club or group deal is not regarded as anticompetitive under local competition regulations. Appropriate documentation should be executed between the parties to deal with decision-making procedures, sharing of information, funding commitments and obligations, termination events, exit strategies, confidentiality obligations and dispute resolution mechanisms.

While the compulsory acquisition rules under section 215 of the Companies Act previously only allowed a single legal entity to exercise the squeeze-out rights, since 3 January 2016, amendments to the Companies Act have come into force that allow two or more persons who act as joint offerors to exercise the compulsory acquisition rights.

20 Issues related to certainty of closing

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

It is common for a private equity buyer to seek to have in place closing conditions that enable it to walk away from a deal without penalty should certain prescribed events occur prior to closing or if the necessary approvals and waivers cannot be obtained. Common conditions to closing include material adverse change (MAC) clauses) under which the private equity buyer will be allowed to terminate the transaction in the event of a MAC to the target's overall business, assets, financial condition or results of operations.

In addition, a private equity buyer will typically insist on the inclusion of certain pre-closing covenants to exercise a certain level of control over the target prior to the private equity buyer assuming control. MAC clauses and 'best efforts' covenants are not new and are often the subject of long negotiations between the vendor and the private equity buyer. Certainty of closing will be compromised if such MAC clauses or best efforts covenants are not drafted in precise or quantifiable terms, allowing the vendor to subsequently rely on the vagueness or subjectivity of the language to terminate the transaction without penalty.

To improve deal certainty, parties may try to discourage any walk-out by agreeing up-front on a break fee payable in the event the transaction is aborted because of certain specified events that have the effect of preventing the transaction from proceeding or causing it to fail (for example, where a superior competing offer becomes or is declared unconditional as to acceptances within a specified timing or

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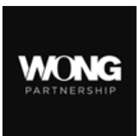
the recommendation by the target board company of a higher competing offer). However, in cases where the Takeover Code applies, certain obligations and restrictions would apply to break fee arrangements, such as the requirement for any break fee to be kept minimal, usually at 1 per cent of the transaction value.

The private equity buyer may also impose on the vendor exclusivity restrictions for a specified period in the purchase agreement with the aim of preventing the vendor from soliciting competing bids or putting an end to ongoing talks with other interested bidders. However, it should be noted that the Takeover Code mandates equality of treatment of competing offerors. Any information provided to one bidding vehicle must be provided equally and promptly to any other bona fide offeror.

Where shareholders' approval for the sale is required, the private equity buyer may seek irrevocable undertakings from certain existing shareholders (usually members of management or a substantial shareholder, or both) to increase its chances of obtaining sufficient votes for the approval. In the context of going-private transactions, as highlighted above, the bidding vehicle's financial adviser is usually obliged to provide a written confirmation as to the sufficiency of financial resources available to the bidding vehicle to complete the acquisition. To minimise the risk of payment default, in some cases such confirmation is provided at the bid submission stage to provide comfort to the vendor as to the certainty of closing.

To avoid prolonged uncertainty, it is also common for purchase agreements to stipulate a long-stop date before which all conditions to closing must be fulfilled.

It should be noted that in a going-private transaction subject to the Takeover Code, the termination of the purchase agreement is subject to the SIC's approval being obtained even where the condition giving rise to the termination right has been triggered.



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