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Structuring of a Jersey private equity deal

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Over the last few years Ogier has seen an increase in the use of Jersey incorporated companies within private equity structures, in particular as the 'topco' or holding company which a private equity investor uses to hold shares in a portfolio business. In this article, we look at how the Jersey entity fits into a typical private equity structure for a portfolio company acquisition.

A Jersey company offers numerous advantages and features which make it suitable for these structures. These include: (i) a flexible corporate law regime; (ii) similar legal concepts to other common law jurisdictions in particular English law; and (ii) tax neutrality.

Please see the Ogier insight into Jersey companies for further information: Private companies in Jersey.

From a Jersey point of view the main steps and key points are as follows.

Incorporation of Jerseyco

The first step is to incorporate a new Jersey company (**Jerseyco**) to complete the acquisition. It is usual to incorporate the company as a subsidiary of one of the proposed main investor entities with a nominal number of shares issued and a generic set of constitutional documents. The proposed board of directors may also be appointed at this stage. To avoid any delays, all parties should focus on clearing such requirements as early in the transaction as possible.

Incorporation can usually proceed quickly but the provision of client due diligence and anti-money laundering checks are a legal and regulatory requirement and could be the main timing issue for incorporation.

Preparing transaction documents

Once the Jerseyco has been incorporated, the acquisition structure below it, including the purchasing entity, can then be set-up.

Investment agreement / Shareholders' agreement

The proposed investors along with certain management or employee shareholders will typically enter into a form of investment agreement or shareholders' agreement in relation to their investment into the Jerseyco. This agreement can be similar to that used for an English company and there are likely to be few changes required from a Jerseyco's perspective.

Constitutional documents

The Jerseyco's articles of association should then be adapted to reflect the key terms of the investment agreement/shareholders' agreement including any corporate governance and share transfer restrictions.

Whereas the articles of association are publicly filed, the investment agreement/shareholders' agreement is a private document. However, similar to the position under English law, the investment agreement/shareholders' agreement may need to be publicly filed if it contains provisions that have been agreed to by all shareholders of the company and which, if it had not been agreed to by all members, would not have been effective for its purpose unless it had been passed as a special resolution. Therefore, care should be taken to ensure that the articles of association replicate the pertinent information in the investment agreement/shareholders' agreement. This does not exclude the possibility of including confidential or commerciality sensitive information in the investment agreement/ shareholders' agreement that is not included in the articles of association and we can provide advice as to how the documents can be structured to ensure such information remains private.

Jersey companies have a memorandum of association in addition to articles of association. The memorandum is a short document that sets out certain details of the company as well as, importantly, its 'authorised share capital'. The authorised share capital is the maximum number of shares that a Jersey company can issue without the memorandum needing to be amended to increase the authorised share capital. The memorandum will also need to set out the relevant share classes and par value of the shares.

Subscription documents

Subscription documents will also be needed between the Jerseyco and its intended shareholders. The relevant drafting can be contained within an investment agreement or in separate subscription documents. It is not unusual for foreign law documents to be used to effect the share subscription.

Corporate authorisations

A shareholder resolution of Jerseyco will be required to adopt the new memorandum and articles of association. At this point, the initial subscriber(s) will be the sole shareholder(s) of Jerseyco and so any further incoming shareholders will not need to execute this document.

A comprehensive set of board resolutions will be passed by the board of the Jerseyco to approve all corporate actions taken on completion. These would usually include approval of the transaction documents, issue of the shares to investors and changes to the board of directors.

Employee Benefit Trust (EBT)

It is usual for an EBT to be set up as a warehousing vehicle for shares in Jerseyco intended to be held by management. If one is intended to be used, the relevant trust documents will need to be put in place as part of the transaction.

Manager rollover

It is common for managers, who were previously shareholders in the target company, to be given consideration in loan notes, which are then 'rolled-up' the stack of companies via a chain issue of loan notes by each entity up to Jerseyco, which will issue shares in itself to such managers. In this way, managers will retain interests in the structure as a result of the transaction.

If any of the companies in the acquisition stack are Jersey companies and it is intended for such companies to issue loan notes to more than 10 holders (for example, there are more than 10 managers being 'rolled-up' as part of the transaction), then the administrative approval of the Jersey Registrar will be needed for this. This should be obtained early on the transaction as a formality.

TISE listing

Where, as part of a private equity acquisition (whether involving Jersey entities or not), loan notes are issued to investors, the issuing company often seeks to take advantage of the Quoted Eurobond Exemption which generally permits the interest to be paid on such loan notes without the issuer having to deduct income tax. This often involves the listing of the loan notes on The International Stock Exchange (**TISE**), which is a "recognised stock exchange" for HMRC purposes. Listing loan notes on TISE is a straightforward and cost-effective process that can be done efficiently (the loan notes normally need to be listed prior to the first interest payment date under such loan notes, so is often a post-completion work stream).

Please see the Ogier Briefing Note for more information.

Completion and funding

Once the transaction documents are in agreed form and are executed, completion will occur.

On the completion date, from the Jerseyco's point of view the main effect of completion is that shares will be issued to the investors and/or management.

The small number of shares issued on incorporation of Jerseyco will need to be taken into account at completion. These can be either: (i) factored into the proposed shareholdings in the cap table; (ii) redeemed; or (iii) repurchased. Any changes to the share capital can be effected in the same special resolution that will adopt the custom memorandum and articles of association.

At this stage, funds will also move down the structure through Jerseyco. This is usually done as a series of share subscriptions through the acquisition structure but can also be done as a loan.

Opening a bank account in Jersey involves a similar process to that undertaken in the United Kingdom and can be a time-consuming process. It is possible for another company's bank account within the structure be used for making payments on behalf of Jerseyco. A payment direction letter is an ideal way to minimise this administrative process.

Whilst third-party lending is often used to finance such private equity transactions, such lending and associated security typically takes place in the structure below the Jerseyco and it would be rare for security to be granted over the shares in Jerseyco.

Post-completion transactions

Once completion occurs, all investors will become shareholders in Jerseyco and the underlying portfolio investment will be held indirectly by the Jerseyco. This is just the start of the life cycle of the investment and post-completion transactions may be frequent.

The most common post-completion transactions will involve changes to management shareholders with new shares being issued to incoming management and shares of any management leavers' being transferred or repurchased.

Depending on the performance of the underlying business and whether any bolt-on acquisitions are proposed, cash injections from shareholders in return for further equity may be necessary. This may require changes to the shareholding structure of Jerseyco.

The final post-completion transaction will be a future sale of the underlying business. This usually occurs several years after the acquisition, depending on the strategy of the private equity fund and the performance of the business. At this point, the Jerseyco itself often becomes the target company for the future purchase. This then completes the lifecycle of the portfolio investment and the Jerseyco can be unwound or repurposed.

How we can help

Ogier has extensive experience with the offshore aspects of all kinds of private equity related transactions from acquisition of the underlying asset to disposal. In combination with Ogier Global, our affiliated corporate service provider, Ogier can see you through the entire lifespan of a private equity investment structure.

About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

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