Private Equity in Ireland: Overview

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A Q&A guide to private equity law in Ireland.

The Q&A gives a high-level overview of the key practical issues including the level of activity and recent trends in the market; investment incentives for institutional and private investors; the mechanics involved in establishing a private equity fund; equity and debt finance issues in a private equity transaction; issues surrounding buyouts and the relationship between the portfolio company's managers and the private equity funds; management incentives; and exit routes from investments. Details on national private equity and venture capital associations are also included.

Market Overview

1. What are the current major trends and what is the recent level of activity in the private equity market?

Market Trends

Private equity (PE) M&A activity in Ireland slowed in 2022 compared to the exceptional levels of activity in the second half of 2020 and 2021. However, set against pre-pandemic trends, the 2022 numbers remain robust, with PE leading 62 deals worth EUR2.6 billion during 2022.

According to Preqin (an investment data company), the PE industry had cash reserves of USD1.96 trillion (EUR1.83 trillion) available for investment as 2022 drew to a close. That was a 21% increase on the December 2021 figure.

While PE firms continue to have significant capital at their disposal, inflationary pressures, rising interest rates and as a consequence, increased borrowing costs, require PE firms to continue to be creative in terms of how they deploy capital.

While PE investors took a more restrained approach in Ireland in 2022, the appetite for companies with a sound business model continues to prevail in 2023. Buy-and-build strategies continue to play out, with firms also prepared to do larger one-off transactions in sectors such as energy and infrastructure. As with previous years, financial services, TMT, pharma, medical and biotech transactions remained strong, with businesses in these sectors likely to be active in the M&A

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market in 2023 (although pricing and consideration structuring are factors in how deals are transacted).

Sustainability factors also continue to play a much greater role in the attractiveness of every funding opportunity throughout 2023 and beyond.

Before the pandemic, PE funds were developing their environmental, social and governance (ESG) strategies, both internally and with respect to portfolio companies and target groups. As of March 2022, more than 4,800 signatories representing about USD100 trillion are signatories to the UN-supported Principles for Responsible Investment. This is expected to accelerate, particularly as the pandemic highlighted various factors that are typically important to ESG investors, such as continuity planning, social responsibility and employee treatment and, separately, as ESG principles become better defined and therefore easier to implement.

Transactions

PE transactions predominantly take the form of leveraged buyouts, growth capital transactions, take-private transactions, bolt-on acquisitions and sponsor exits.

PE activity in Ireland continued to be a highly material feature of the Irish M&A landscape in 2022. PE accounted for a fifth of all deals by volume in 2022. While many of these were smaller mid-market transactions, seven of the 20 largest deals of the year were PE-related, with five buyouts and two exits. This level of activity is reflective of the vast amounts of "dry powder" global PE houses are still seeking to deploy despite the more challenging financial environment. Sellers are seeking to capitalise from the pricing situation, leading to an emerging trend of shorter PE hold times.

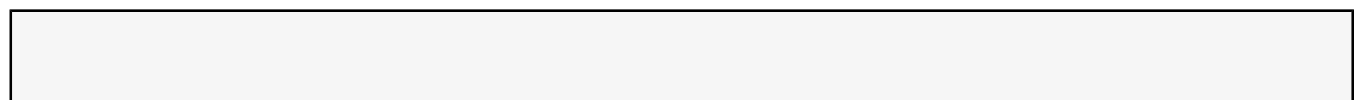
Notable 2022 deals include:

- Motive Partners' sale of Global Shares plc to JP Morgan for EUR665 million.
- Partners Group's acquisition of Version 1 Holdings for EUR800 million.
- Brookfield Asset Management's acquisition of Hibernia REIT for EUR1.1 billion.
- Asterion Industrial Partners' acquisition of a majority stake in National Broadband Ireland.
- Waterland's acquisition of a majority stake in MTM Engineering.

Exits

PE exits through initial public offerings (IPOs) have to date not been a feature of the Irish market.

Secondary buyouts remain a relatively small part of Ireland's PE history. Ireland has only seen a few secondary buyouts over the past ten years.



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2. What are the key differences between private equity and venture capital?

While PE and venture capital (VC) both refer to equity investments in companies that are not publicly listed or traded, they differ in a few key areas:

- PE typically focuses on mature and well-established companies with the goal of driving business growth through minimising existing inefficiencies, while VC investments are made into early-stage companies with significant growth potential.
- PE funds usually invest greater amounts in a single target company and seek to acquire full or near-full equity ownership, while VC firms make minority preference share investments.
- VC firms often seek to obtain equity ownership in a company progressively, investing in successive funding rounds (series A, B, C, D, and so on). By contrast, PE funds usually specialise in later-stage control investing, where no further funding rounds occur.
- VC investments are significantly more speculative, but this can be outweighed by a greater return multiple from investments that succeed.
- PE funds use a combination of equity and debt to fund their acquisitions, while VC firms typically convert equity raised from outside investors.

Funding Sources

3. How do private equity funds typically obtain their funding?

PE transactions are usually structured with a combination of debt and equity. Debt tends to be funded by a number of different banks to minimise risk exposure.

Irish PE funds also typically raise funds from:

- Financial institutions.
- Pension funds.
- Government agencies.
- Quasi-state bodies.
- Overseas development funds with a particular geopolitical interest in Ireland.

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- Corporate investors and private high net worth individuals.

Foreign sponsors and government-funded PE funds have played an increasingly important role in Irish PE transactions, as funding from financial institutions (and in particular Irish financial institutions) decreased dramatically as a result of the financial crisis and such funding has only recently begun to recover towards previous levels.

Tax Incentive Schemes

4. What tax incentive or other schemes exist to encourage investment in unlisted companies? At whom are the incentives or schemes directed? What conditions must be met?

Incentive Schemes

The Employment and Investment Incentive Scheme (EIIS) aims to encourage individuals to provide equity based finance to trading companies. Changes to the EIIS were announced in the most recent Finance Bill (October 2023), with tiered levels of relief to be introduced depending on the nature of the business raising EIIS funding. Previously, all EIIS relief was 40% in respect of investments made in certain corporate trades, but from 1 January 2024 the rate of relief will range from 50% down to 20%.

Under the EIIS Innovation Fund, from 1 January 2024, EIIS rates will be:

- 50% for businesses that 'have not operated in any market'.
- 35% for a business in its first EIIS fundraise within 7 years of its first sale.
- 20% for a business in its second or subsequent EIIS fundraise.
- 20% for a business expanding into new markets or regions.
- 30% for investments via a 'Qualifying Investment Fund'.

At Whom Directed

The EIIS allows an individual investor to obtain income tax relief on investments up to a maximum of:

- EUR150,000 per annum in respect of the years up to and including 2019.

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- EUR500,000 in respect of the years after 2019 subject to the shares being held for at least seven years or EUR250,000 in respect of the years after 2019 subject to the shares being held for at least four years.

Conditions

There are restrictions on what qualifies a company to raise EIIS. In general, a company must be unquoted and undertaking activities carried on in the course of a trade, the profits or gains of which are charged to corporation tax at the standard rate of 12.5% (certain trading activities are specifically excluded and professional advice should be obtained).

For an investment to qualify under EIIS, it must be an investment in shares in a qualifying company where the funds are used for qualifying purposes and contribute towards the creation and maintenance of employment. In addition, the investment must be based on a specific business plan.

The investment must generally be made within seven years of the company's first commercial sale.

An individual cannot get relief if they are connected with the company, that is, owns more than 30% of one of the company's Issued share capital or loan capital, voting power, or assets in the event of a winding-up. The connected party rules do not apply where the company's issued share capital and loan capital do not exceed EUR500,000.

Section 541C of the Taxes Consolidation Act 1997 (as amended) provides an attractive tax regime for Irish venture capital fund managers. The legislation treats the return (carried interest) received by VC fund managers from investment in relevant companies as chargeable gains and charges those gains at a special 15% rate for individuals or partnerships and at 12.5% for companies.

The regime applies to carried interest received from a qualifying VC fund. For such a fund, the following applies:

- The fund must be structured as a limited partnership (LP).
- The main purpose of the LP is to make investments in unquoted shares or securities of a private trading company that the partnership will hold for at least three years.
- The company's portfolio must carry on a business of research and development activities or the development of new technological, telecommunications, scientific or business processes.
- The individuals, companies or partnerships that invest in the fund must be either limited or general partners. They must provide capital sums for investment purposes over a period of time.

Other key incentives include Ireland's prevailing corporation tax rate (12.5%) and the availability of a knowledge box (6.25%) tax rate for profits from the commercialisation of certain intellectual property rights.

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Fund Structuring

5. What legal structure(s) are most commonly used as a vehicle for private equity funds?

A PE fund typically has two layers of structure and documentation in place to control PE investments in portfolio companies:

- The first layer, through which the PE fund raises, holds, manages, invests and distributes funding and the proceeds of investment, is typically an LP established under the Limited Partnerships Act 1907 (Limited Partnerships Act).
- The second layer sets out how the PE structure established and controlled by the PE fund actually invests the funds raised by the LP in target portfolio companies.

Fund structures used by PE firms in Ireland can be LPs, regulated funds and special purpose vehicles (either Irish private limited liability companies or public limited liability companies, under the Irish Companies Act 2014 (Companies Act)).

LP. An LP must consist of at least one general partner (GP) and one limited partner. The GP of the LP, who manages the LP's business, has unlimited liability (although the GP may be a limited liability company, effectively limiting the liability of the LP).

A limited partner's liability is generally limited to the value of the capital it contributed or which it has undertaken to contribute to the LP, save where the LP takes part in the management of the business of the LP (in which case, it is possible for the limited partner to lose its limited liability status). In this regard, while limited partners do not typically play a role in the management of the LP, it is usual for limited partners to participate in advisory committees which advise the GP on specific issues during the lifetime of the LP.

An LP is transparent from a taxation perspective. There are also fewer public filing requirements for an LP than a company.

ILP. Ireland's Investment Limited Partnership (ILP) legislation was updated by the enactment of the Investment Limited Partnership (Amendment) Act 2020 in late December 2020.

The ILP is a common law limited partnership fund structure which is authorised and regulated by the Central Bank of Ireland (CBI). The updates have modernised and enhanced features of Ireland's existing ILP structure, bringing it in line with comparable limited partnership vehicles in other leading fund domiciles.

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The updated legislation strengthens the provisions on limited liability status of limited partners and extends the safe harbours preventing loss of limited liability status, and provides for various other streamlining amendments. ILPs can now also be formed as umbrella-type structures with multiple segregated liability compartments or sub-funds with statutory segregation of assets and liabilities (that is, the assets of one sub-fund are not available to discharge the liabilities of other sub-funds within the same umbrella ILP).

The addition of the updated ILP vehicle alongside the existing option of establishing a fund as a limited partnership under the Limited Partnerships Act has contributed to an increase in the use by PE managers of Irish limited partnerships as funds and holding structures. PE managers also continue to use the Irish collective asset management vehicle or ICAV, a flexible corporate vehicle designed specifically for the structuring of Irish regulated funds and which caters for the typical features of PE funds.

There are two broad categories of regulated investment funds in Ireland. The first category comprises undertakings for collective investment in transferable securities (UCITS). The second category comprises alternative investment funds (AIFs).

AIF. AIF is broadly defined and essentially comprises all non-UCITS funds. AIFs are subject to the regulations implementing Directive 2011/61/EU on AIF managers (AIFM Directive), which applies to AIF managers that manage and market AIFs within the EU. An AIF can currently take one of five forms: unit trust, investment company, common contractual fund, investment LP and an Irish collective asset management vehicle (ICAV).

Due to the diversification and liquidity requirements of UCITS, PE funds are typically AIFs. AIF regulated fund structures are authorised as either retail investor AIFs or qualifying investor alternative investment funds (QIAIF). QIAIFs are the most flexible funds authorised by the *Central Bank of Ireland* (CBI) and are subject to few investment or borrowing limits. They are very well suited to PE arrangements. A QIAIF can only be invested in by professional investors (generally institutional investors) subject to a minimum initial subscription for EUR100,000 or the equivalent amount in a foreign currency.

ICAV. The ICAV is a bespoke corporate collective investment vehicle used in regulated fund structures. ICAVs have two clear advantages over other vehicles. From a corporate perspective, ICAVs need not comply with certain Irish company law requirements, which results in reduced administrative obligations and costs. For example, the ICAV need not produce consolidated accounts, and the ICAV can dispense with the ability to hold an annual general meeting by giving at least 60 days' written notice to all ICAV shareholders. However, as they are regulated by the CBI, there are higher establishment expenses and ongoing regulatory costs.

6. Are these structures subject to entity level taxation, tax exempt or tax transparent (flow through structures) for domestic and foreign investors?

LP

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LPs are transparent for tax purposes, that is, no tax will be chargeable at the LP level (see *Question 5*). Instead, the investors are subject to tax directly.

Others

Irish regulated funds are generally subject to the same taxation regime as they are designated as investment undertakings under section 739B of the Taxes Consolidation Act 1997. QIAIFs, including Irish collective asset management vehicles (ICAVs), benefit from special tax treatment in Ireland, for both the direct taxation of the vehicle itself and the taxation of the shareholders in those vehicles. Irish QIAIFs (including ICAVs) are exempt from Irish tax on income and gains regardless of where their investors are resident.

From a tax perspective, ICAVs can elect in their classification, under the US check-the-box taxation rules, to be treated as transparent entities for US federal income tax purposes. This may give rise to advantageous tax treatment for US investors in certain circumstances.

7. What foreign private equity structures are tax-inefficient in your jurisdiction? What alternative structures are typically used in these circumstances?

Foreign companies are generally not used for investment in Ireland. Due to the range of alternative structures in Ireland, tax issues can usually be addressed in an efficient manner.

Fund Duration and Investment Objectives

8. What is the average duration of a private equity fund? What are the most common investment objectives of private equity funds?

Duration

Most PE funds established in Ireland have a term of ten years, with the possibility of extending that term to liquidate the fund's interests in all portfolio companies. This ten-year term can be broken down into three stages:

- Initial investment period of three to five years to source and invest in new companies.

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- A period within which follow-on investments can be made (generally within seven years from the date the fund is established).
- A realisation period during which the fund seeks to dispose of its investments.

Investment Objectives

Generally, PE funds look for returns of between 30% and 40% each year by way of capital gain. The success of a PE is generally measured by two performance metrics, that is, the internal rate of return and total money multiple.

Fund Regulation and Licensing

9. Do a private equity fund's promoter, principals and manager require authorisation or other licences?

The level of regulatory involvement by the CBI in a PE fund depends on whether the fund is structured as a regulated fund, that is, an undertaking for collective investment in transferable securities or QIAIF. The QIAIF regime applies only to the extent a fund is structured in this manner.

Before the AIFM Directive was implemented, Irish PE funds structured as LPs and their managers operated without authorisation or registration with the CBI on the basis that the general partner of an LP carried out the management function directly. Where the manager role was provided by a separate entity, a manager was regulated in Ireland under the European Communities (Markets in Financial Instruments) Regulations 2007 (as amended), implementing Directive 2004/39/EC on markets in financial instruments (MiFID) in relation to the carrying on of investment services.

Directive 2014/65/EU on markets in financial instruments (MiFID II) applied from 3 January 2018. However, firms that were authorised as alternative investment fund managers (AIFMs) under the AIFM Directive are outside the scope of MiFID II when carrying out the activity of managing (or marketing) the AIFs for which they act as the AIFM. Under the AIFM Directive, a manager of a fund must be authorised or registered with the CBI (or other EU regulator) as an AIFM (and in accordance with the European VC funds regime, where applicable). The view is generally taken that a MiFID authorisation should no longer be required, although there may be exceptions.

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10. Are private equity funds regulated as investment companies or otherwise and, if so, what are the consequences? Are there any exemptions?

Regulation

Whether a fund is regulated as an investment company depends on its form. Typically, PE structures do not involve investment companies. Funds structured as limited partnerships, QUAIFs and VC funds that are registered in accordance with Regulation (EU) 345/2013 on European VC funds (EuVECA Regulation), can be marketed to professional investors under a cross-border notification procedure. This involves a standardised regulator-to-regulator notification to the home state regulator (that is, the CBI), which then notifies the host state regulator within 20 business days of receipt of a complete notification.

Exemptions

Under the AIFM Directive, AIFs can only be marketed to professional investors. In terms of the EuVECA Regulations, qualifying venture funds can be marketed to professional clients as defined in MiFID. They can only be marketed to other investors, such as high-net worth individuals, if those investors commit a minimum of EUR100,000 and state in writing that they are aware of the risks associated with the investment. These restrictions do not apply to executives, directors or employees involved in the management of the qualifying venture funds.

11. Are there any restrictions on investors in private equity funds?

There are no restrictions on the identities of investors in PE funds outside of money laundering and know-your-customer requirements. LPs that are structured as AIFs, QIAIFs and European VC funds can only be marketed to professional investors (as defined in MiFID. Marketing to other investors, such as high-net worth individuals, is only allowed if they commit a minimum of EUR100,000 and state in writing that they are aware of the risks associated with the investment. A QIAIF can only be invested in by professional investors subject to a minimum initial subscription for EUR100,000 or the equivalent amount in a foreign currency.

12. Are there any statutory or other maximum or minimum investment periods, amounts or transfers of investments in private equity funds?

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There are no statutory requirements on investment periods, amounts or transfers for PE funds structured as limited partnerships.

13. How is the relationship between the investor and the fund governed? What protections do investors in the fund typically seek?

If using an LP, the relationship between the investor and the fund is governed by a limited partnership agreement (LPA). The LPA will contain a number of provisions that address the relationship between the fund manager, the fund and the investor including:

- The role of the fund manager, the fees paid to it and the decisions it can take.
- Provisions for the removal of the fund manager for cause and, increasingly, without cause.
- Provisions relating to the drawdown of investors' commitments, the investment (and potential reinvestment) of those amounts and default provisions to deal with non-funding investors.
- The waterfall that deals with the allocation of profit between investors and the fund manager.
- Regulation of conflicts of interests.
- Information, reporting and governance provisions.

Investors are typically passive and have no management rights in relation to a fund. Any involvement in the management of the business of an LP may lead to investors losing their limited liability status.

Interests in Portfolio Companies

14. What forms of equity and debt interest are commonly taken by a private equity fund in a portfolio company? Are there any restrictions on the issue or transfer of shares by law? Do any withholding taxes or capital gains taxes apply?

Most Common Form

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PE funds invest for a combination of equity (in the form of ordinary and preference shares) as well as debt instruments such as loan notes. The advantages of loan notes over preference shares are:

- Interest accruing on the loan note can be paid to the holder while a dividend payable on a preference share can only be paid if the portfolio has profits available for distribution.
- Loan notes can be redeemed at any time provided that the portfolio company has sufficient cash whereas shares can only be redeemed if the portfolio has profits available for distribution.
- A portfolio company may be able to claim a tax deduction on interest due on the loan notes.

Statutory pre-emption rights on the allotment of shares apply unless these are expressly disapplied, which is done contractually in the constitutional documentation. There are generally no statutory restrictions on the transfer of shares (subject to insolvency and bankruptcy laws, encumbrances that may exist over the shares and contractual restrictions).

Other Forms

In certain circumstances (for example, where the portfolio company requires short-term bridging finance), PE funds can also lend money, either by way of a straight loan or convertible securities such as convertible loan notes, which convert into shares at a later point in time.

Restrictions

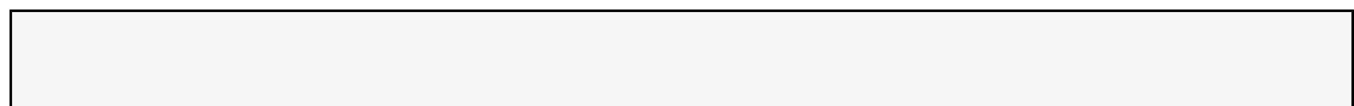
Issues of securities, such as equity or types of debt instrument, can be subject to statutory pre-emption requirements to the extent relevant as well as any restrictions set out in constitutional documents.

Taxes

Capital gains tax can arise on the sale of shares. However, angel investors may be able to benefit from reduced capital gains tax (16% for individuals and 18% for partnerships) that invest in innovative start-ups and SMEs, as announced in the most recent Finance Bill. Individual investors may be able to benefit from Employment and Investment Incentive Scheme if the relevant conditions are satisfied (see also *Question 4* and *Question 33*).

Stamp duty is payable by the purchaser following the transfer (not the issue) of shares or marketable securities at the rate of 1% of the higher of the consideration or the market value of the shares.

Buyouts



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15. Is it common for buyouts of private companies to take place by auction? Which legislation and rules apply?

Auction processes are common in the Irish market. The process is typically managed by an investment bank working with the sell side and is governed by contractual arrangements rather than by statute. Bidders that enter into consortium or similar arrangements with potential buyers of the same asset should give careful consideration to any competition issues that may arise as a result of these arrangements in particular, bid-rigging arrangements, which are a criminal cartel offence under Irish law.

16. Are buyouts of listed companies (public-to-private transactions) common? Which legislation and rules apply?

Public-to-private transactions by financial sponsors are very rarely seen in the Irish market: there is rarely more than one or two a year (and often none).

A public-to-private transaction is regulated by the provisions of the Irish Takeover Panel Act 1997 (as amended), the Irish Takeover Rules 2013 (Rules) and the European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations 2006. The rules regulate the conduct of takeovers of Irish companies listed on certain stock exchanges. The Irish Takeover Panel oversees the application of the rules to specific transactions. While PE funds often participate in public-to-private transactions in Ireland, the rules impose a rigid framework on such transactions and engagement by PE investors with the panel will be required.

Principal Documentation

17. What are the principal documents produced in a buyout?

Acquisition of a Private Company

The main documents used in a PE investment are:

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- A sale agreement (between the PE investment vehicle and the relevant selling shareholders) or, more usually, a subscription and shareholders' agreement (between the PE investment vehicle, the continuing shareholders and other key management).
- A loan note instrument if the PE investor is also subscribing for loan notes in the portfolio company.
- The portfolio company's constitution, which sets out the rights attaching to the various classes of shares in the capital of the portfolio company, including the PE investor's equity, which normally include, among other things, dividend rights, liquidation preference rights, anti-dilution rights, drag-along rights and tag-along rights.
- Any employment or service agreements for the senior management of the portfolio company.
- The tax deed from the shareholders or portfolio company, in favour of the PE investment vehicle providing an indemnity for pre#investment tax liabilities of the portfolio company.
- Share option arrangements.
- Any finance documentation where the PE investor is raising bank debt to finance investment.

Acquisition of a Listed Company

Any transaction to acquire an Irish incorporated listed company will likely take the form of either a court-sanctioned scheme of arrangement under Part 9 of the Companies Act or a public tender offer.

In a scheme of arrangement, the portfolio company controls the process as it issues the scheme circular to its shareholders, prepares court papers, convenes class meetings, holds class meetings and seeks court's sanction. A detailed transaction agreement is normally negotiated, the key purpose is to give the buyer rights of consultation in relation to management of the scheme process.

A recommended offer is one that is unanimously recommended by the directors of the portfolio company. Under the Irish Takeover Rules 2013 (Rules), the buyer and the portfolio company usually make a joint announcement (rule 2.5, Rules). Following the issue of a rule 2.5 announcement the buyer must proceed to make the offer. A detailed offer document or circular must be issued to shareholders of the target within 28 days of the announcement.

Buyer Protection

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18. What forms of contractual buyer protection do private equity funds commonly request from sellers and/or management? Are these contractual protections different for buyouts of listed companies (public-to-private transactions)?

The increased use of W&I insurance has been a major development in the structuring of M&A transactions in Ireland in recent years, particularly where:

- The seller is a PE firm.
- The sellers desire a clean exit free of residual liabilities.

A PE buyer typically looks for W&I protection from both the seller and management. Warranties from the seller are typically operational warranties. Warranties from the management are often business warranties limited to future performance, projections and the business plan. The key rationale for the warranties is to elicit full disclosure regarding the portfolio company during the due diligence process. However, the warranty package may form the basis for W&I insurance protection. A tax deed providing an indemnity for pre-completion tax obligations is also commonly expected.

In an auction sale, a locked box mechanism is also common as it offers certainty in the purchase price from the outset, greater control over financial information, fixing the date of economic transfer of the target before completion and prompt distribution of sale proceeds to sellers after completion. However, completion accounts remain an important price adjustment mechanism and protection for the buyer, allowing for an upward or downward adjustment of the purchase price based on deviations from the reference balance sheet or accounts drawn up before completion.

If an acquisition is structured as a subscription for shares in the portfolio company, the PE fund typically subscribes for preference shares, benefitting from some or all of the following rights:

- Fixed preferential dividend often set as a percentage of the subscription price per year and on a cumulative basis.
- Liquidation preference giving priority on distribution of proceeds of any liquidation or deemed liquidation. The holder receives a return of its original investment in priority to all other shareholders plus a pro-rata balance of any exit proceeds.
- Redemption rights.
- Conversion rights.
- Voting rights equivalent to ordinary shares.
- Anti-dilution protections against any future down-rounds (often involving the issue of further shares to the VC fund paid-up from profits, for example, share premium account or subscription at par (low nominal value)).

On secondary buyouts, a PE seller usually only provides warranties regarding title to its own shares, capacity and authority. The management team (on the basis that they are best placed to do

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so) will often provide business warranties. In these circumstances, W&I insurance is becoming the norm.

PE funds also look for restrictive covenants from management or corporate sellers, to preserve the goodwill of the portfolio company. PE sellers are rarely, if ever, willing to give restrictive covenants on a sale.

The contractual protection available on public-to-private deals is extremely limited.

19. What non-contractual duties do the portfolio company managers owe and to whom?

The statutory duties imposed on company directors are codified in the Companies Act. Directors must act in good faith in what they consider the best interests of the company. They must also exercise care, skill and diligence and have regard to the interests of the company's members and avoid conflicts of interest. In the context of management buy-outs (MBOs), directors aligned with one bid are particularly concerned with conflicts and must absent themselves in relation to competing potential bids.

Under the Irish Takeover Rules 2013, if an offer is an MBO or similar transaction, the directors involved in making the offer must co-operate with the independent directors and their advisers in relation to competing bids.

20. What terms of employment are typically imposed on management by the private equity investor in an MBO?

The principal areas of concern for a PE investor are garden leave and notice, restrictive covenants including non-compete, non-solicitation and confidentiality obligations (generally for between six and 12 months after employment ends).

In a share purchase agreement, the non-compete period for sellers (which may include senior managers) can be up to three years when the transfer of the undertaking includes the transfer of customer loyalty in the form of both goodwill and know-how.

In equity documents involving a financial sponsor, the typical period for key managers is between 12 and 24 months.

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The duration and reach of restrictive covenants must be carefully considered to ensure that they are enforceable. The investment agreement can also contain lock-in, good leaver and bad leaver provisions.

21. What measures are commonly used to give a private equity fund a level of management control over the activities of the portfolio company? Are such protections more likely to be given in the shareholders' agreement or company governance documents?

The subscription and shareholders' agreement or investment agreement usually contain measures to give a PE fund a level of management control over the activities of the portfolio company. The PE fund typically has the right to control the composition of the board of directors of the portfolio company and any committee of the board. It may also have observer rights, veto rights over material business decisions and non-ordinary course matters such as:

- The acquisition or disposal of assets.
- The issue of shares, options or the redemption of shares.
- Changes to constitutional documents.
- Increasing indebtedness.

The PE fund also typically has discretion over the timing of and form of exit mechanism.

Debt Financing

22. What percentage of finance is typically provided by debt and what form does that debt financing usually take?

Irish PE transactions typically involve a mixture of debt and equity with the ratio driven by the following:

- Relevant sector.
- Geography.

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- Size of the deal.
- Market conditions.
- Cost and availability of debt.

There has been increasing competition between traditional bank lenders and non-bank (or alternative) lenders and funds, which has resulted in a wide array of other debt products being offered to market participants to replace or supplement traditional senior secured bank loans. These include term loan B facilities, mezzanine and unitranche loans and second lien loan products. For certain transactions, some market participants have also been able to turn to direct lending funds.

Lender Protection

23. What forms of protection do debt providers typically use to protect their investments?

The most common forms of protection are security, and contractual and structural mechanisms.

Security

A debt provider typically requires a full security package comprising security from the portfolio company over its assets, charges over the shares in the portfolio company and cross-guarantees from any material trading subsidiaries. The security granted usually includes fixed and floating charges over all the trading group's assets and undertakings.

Contractual and Structural Mechanisms

Contractual subordination is common in Ireland and can be achieved through inter-creditor and subordination deeds entered into between debt providers or with other creditors that can determine, contractually, the ranking on an insolvent liquidation. Such arrangements will often prohibit the payment of dividends or redemption of share capital or repayment of equity loans until the external debt has been repaid. Another form of contractual subordination is waterfall arrangements (see *Question 13*) set out in company constitutional documents.

Structural subordination is achieved by inserting an intermediate holding company or a number of intermediate holding companies between the acquisition vehicle and the PE fund. Senior debt is lent to the acquisition vehicle and any higher yield debt instruments or equity funds are lent to those intermediate companies higher up the acquisition structure. Any payments up the structure are only made once the senior debt is paid.

Financial Assistance

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24. Are there rules preventing a company from giving financial assistance for the purpose of assisting a purchase of shares in the company? If so, how does this affect the ability of a target company in a buyout to give security to lenders? Are there any exemptions?

Rules

Under the Companies Act, a company cannot provide financial assistance (whether by loan, guarantee, the provision of security or otherwise) for the purchase of the company's own shares or shares in its holding company, unless the company undergoes a summary approval procedure (SAP). There are certain exceptions, however, these are generally not applicable in the context of PE transactions and the assistance is generally whitewashed using the SAP.

Under the SAP the directors make a declaration (which must be publicly filed in the Irish Companies Registration Office) and the members pass a special resolution giving the directors authority to carry out the restricted activity. If directors make a declaration without reasonable grounds, they can be personally responsible for the debts of the company.

A public limited company cannot provide financial assistance in any context, that includes a subsidiary providing financial assistance in connection with the purchase of, or subscription for shares, in its holding company (Companies Act). In connection with public-to-private deals, the public holding company re-registers as a private company to subsequently provide assistance.

Exemptions

The Companies Act sets out various exemptions to the financial assistance regime. The main exemptions are as follows:

- Principal purpose exemption: where the company's principal purpose in giving the financial assistance is not for the purpose of the acquisition but is incidental to a larger purpose of the company.
- Summary approval procedure (SAP): the SAP or "whitewash" procedure is not available to public limited companies.
- Refinancing exemption: where the company is refinancing an existing arrangement which constituted financial assistance and was the subject of a previous SAP procedure.

Insolvent Liquidation

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25. What is the order of priority on insolvent liquidation?

In an insolvent liquidation the debt providers take priority over the shareholders in any distribution of assets. The order of priority (in broad terms) is:

- Creditors holding a fixed charge over assets of the portfolio company.
- Costs and expenses of winding up.
- Fees, costs and charges of an examiner.
- Fees due to a liquidator.
- Preferential creditors ranking *pari passu* with each other (certain taxes, rates, redundancy payments, payments due to employees).
- Creditors holding a floating charge.
- Ordinary (unsecured) creditors ranking *pari passu* with each other.
- Subordinated creditors and other deferred debts.
- Certain preferential shareholders.
- Ordinary shareholders and (occasionally) deferred shareholders.

Shareholders can also vary priority rank as between themselves through waterfall (see *Question 13*) or other ranking arrangements in the constitutional documents of an Irish company.

Equity Appreciation

26. Can a debt holder achieve equity appreciation through conversion features such as rights, warrants or options?

A range of convertible debt instruments are permitted under Irish law including payment in kind notes, warrants and options. These instruments typically include trigger events, on the occurrence of which the instrument automatically converts to equity.

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Portfolio Company Management

27. What management incentives are most commonly used to encourage portfolio company management to produce healthy income returns and facilitate a successful exit from a private equity transaction?

Various incentivisation plans can be established, including share options and certain revenue approved and unapproved plans however, a typical management equity plan in a PE context includes:

- Management can roll a portion of its equity stake or any sell-side transaction bonus into the portfolio company's new holding company (often referred to as roll-over equity). This can help provide an alignment of incentives. The roll-over element is usually in equivalent securities to the investment made by the PE fund.
- Management can be invited to acquire "sweet equity" shares in the holding company so that they can participate in future equity growth, having minimal value at the outset.
- Management can be further incentivised by a "ratchet" mechanism by which they receive an increased economic entitlement if certain performance targets and/or exit metrics are met, usually by reference to the IRR and/or multiple achieved by the PE fund.

Management equity is also typically subject to good leaver/bad leaver provisions, by which, in circumstances where a member of the management team leaves the business before an exit, such shares can be bought from the relevant manager at an agreed price. The valuation will depend on the circumstances in which the manager leaves, that is whether the manager is a:

- Good leaver, in which case the market value will typically be paid.
- Bad leaver, in which case, only a nominal amount will be paid for those shares.

Share options are the most common form of management incentive. The portfolio company grants options to subscribe for shares in the capital of the portfolio company. Such options normally have a vesting period before they can be exercised, thereby ensuring that the option holders are incentivised to drive the portfolio company's performance for the required PE investment period. The options will also normally be subject to good-leaver or bad-leaver provisions.

In addition to equity incentives, it is common for PE investors to agree cash bonus arrangements with key management or employees, again linked to the portfolio company's target performance.

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28. Are any tax reliefs or incentives available to portfolio company managers investing in their company?

See *Question 4*.

29. Are there any restrictions on dividends, interest payments and other payments by a portfolio company to its investors?

The Companies Act requires companies to have profits available for distribution to lawfully declare and pay dividends to shareholders. In declaring a dividend, the directors of an Irish company must be satisfied that the company will be solvent after the dividend. Contractual arrangements for the order of priorities of payments such as waterfalls (see *Question 13*) or inter-creditor arrangements are binding on a company.

PE funds that are AIFs must have regard to the asset stripping provisions of the AIFM Directive. Under the asset-stripping restrictions, AIFMs must use their best efforts to prevent, for a period of 24 months following the acquisition, any reduction in capital, any share redemption, any distribution or share buyback in circumstances where the net assets of the company fall below its issued share capital and non-distributable reserves, and any distribution to shareholders greater than available profits. These restrictions do not apply to small and medium-sized enterprises, or to special purpose real estate companies.

30. What anti-corruption/anti-bribery protections are typically included in investment documents? What local law penalties apply to fund executives who are directors if the portfolio company or its agents are found guilty under applicable anti-corruption or anti-bribery laws?

Protections

The Criminal Justice (Corruption Offences) Act 2018 introduced a strict liability offence under which a company can be criminally liable for corruption offences carried out with the intention of obtaining business or a business advantage for the company by (among others) the:

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- Directors.
- Managers.
- Employees.
- Parties connected to the company, such as subsidiaries and agents of the company,.

A company can defend such a prosecution if it can prove that it took all reasonable steps and exercised all due diligence to avoid the commission of the offence.

The Act also directors, managers, secretaries and other officers personally liable where a company an offence under the Act was committed with the consent or connivance of, or was attributable to any wilful neglect by a person who was a senior manager or purporting to act in that capacity.

A person can be fined up to EUR5,000 or given a prison sentence of up to a year if convicted summarily of one of the main corruption offences under the Act.

If convicted on indictment, a person can receive an unlimited fine or receive a prison sentence of up to ten years.

A person can also, on conviction, be required to forfeit any benefit obtained in connection with the offence, or have land, cash or property of an equivalent value to the benefit obtained forfeited.

However, if the portfolio company is convicted it could materially impact the value of the PE fund's investment resulting from, among other things, the potential termination of material contracts, large fines or reputational risk.

Investment documents therefore typically contain both representations as to past behaviour and behavioural covenants. These covenants are usually geared towards ensuring that appropriate business procedures are followed.

PE funds can seek to:

- Conduct anti-bribery due diligence.
- Include anti-bribery warranties in the sale and purchase agreement.
- Ensure adequate anti-bribery controls are assessed, and if necessary, enhanced, post-completion.
- Include anti-bribery compliance covenants from management in the **shareholders' agreement**.

In relation to a PE fund's fundraising stage, certain types of investors can seek side letter assurances that the sponsor and the fund will not breach applicable anti-bribery and corruption laws. Sponsors typically disclose details of their anti-bribery and corruption policies in the due diligence materials provided to potential investors.

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Penalties

See above.

Exit Strategies

31. What forms of exit are typically used to realise a private equity fund's investment in a successful company? What are the relative advantages and disadvantages of each?

Forms of Exit

If the investment in a portfolio company is successful, the most common forms of exit currently are either trade sales, or secondary sales to other VC or PE funds.

Advantages and Disadvantages

Although IPOs tended to achieve higher exit values for investors, they are not currently common in Ireland.

A trade sale conducted as an auction or competitive process can greatly increase the price payable for the company. It also allows the PE fund to retain greater control over the process than in other exit options and ensures an immediate cash return to the fund. A trade buyer will generally seek extensive warranties or indemnities that PE funds will resist. W&I insurance is becoming more popular. Reputational risks may arise in a trade sale if the sale does not complete or if there are job losses as a result of the sale.

A management buyout incentivises management involved in the buyout to ensure completion of a successful exit for the PE fund, and may be less likely to facilitate a sale to a competing bidder. A successful buyout is usually dependent on the management team securing funding that can be provided by a PE fund who will take a controlling stake in the company.

A secondary buyout involves a sale of a portfolio company to another PE fund. These sales generally complete very quickly with limited warranties or indemnities coverage provided. However, the exiting fund is exposed to potential market embarrassment if the acquiring fund achieves a swift exit with a significant return.

A successful IPO can maximise the price payable for shares in the company. Most investment agreements generally include a lock-in period in which PE funds are restricted from disposing of their shares for a set period. The costs, time and risk of an IPO are also substantial and may not permit a full and timely exit for the VC fund. The cash return to the fund is therefore delayed and the fund may be exposed to adverse price variations between the IPO and the final cash realisation.

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Asset sales and portfolio sales are less common in Ireland.

32. What forms of exit are typically used to end the private equity fund's investment in an unsuccessful/distressed company? What are the relative advantages and disadvantages of each?

Forms of Exit

If an investment is not successful, the most common forms of exit are either the sale of the portfolio company to another investor or to the portfolio company's management, or the liquidation of the portfolio company.

A members' voluntary liquidation can be availed of if the company is solvent. The process involves appointing a liquidator to the company who is charged with realising the assets and discharging the liabilities of the company and distributing the balance (if any) to the company's shareholders.

If the PE fund holds preferred shares or loan notes that carry redemption rights, the company can redeem the fund's loan notes if it has sufficient cash. For shares, the redemption is also subject to compliance with the provisions of the Companies Act.

On an unsuccessful exit, investors will want to maximise the recovery of their investment, their market reputation and, if they have a director on the portfolio company's board, directors' duties. The main relevant duties are to act in the best interests of the portfolio company and its creditors and prevent the portfolio company from trading while insolvent, which can expose the directors to personal liability.

Advantages and Disadvantages

Sale is normally more attractive to a PE investor as it allows it to recover some of its investment while avoiding the exposures and complexities involved in an insolvent liquidation.

If the company becomes insolvent, an insolvent liquidation will be required and any return for the VC fund on its investment is unlikely.

A company redeeming shares must have sufficient profits available for distribution (or distributable reserves) to do so. Therefore, due to these constraints, redemption is often not possible if the company is unsuccessful.

Reform

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33. What recent reforms or proposals for reform affect private equity?

The Competition (Amendment) Act 2022 (2022 Act) was signed into law on 29 June 2022 and gives significant and wide-ranging new powers of intervention to Ireland's competition regulator, the Competition and Consumer Protection Commission (CCPC).

Key changes include the following:

- New powers for the CCPC to require parties to a below-threshold deal to notify the CCPC and to impose interim measures on the parties to primarily notified deals in each case if it thinks that the deal may have an effect on competition in Ireland.
- Currently, a deal that is put into effect before it is approved by the CCPC is void under the Competition Act 2002 (as amended). As a result of the 2022 Act, it will also be an offence to put such a deal into effect before CCPC approval. The undertakings or persons in control of such undertakings who knowingly and wilfully permit the breach, are guilty of an offence and are subject to fines of up to EUR250,000 (plus daily default fines).

In line with international developments, the Irish Government has proposed to introduce a new foreign investment screening regime in Ireland. An initial draft of the Screening of Third Country Transactions Bill 2022 (Bill) was published on 2 August 2022 and an updated draft of the Bill was published on 25 January 2023. The Bill sets out a framework to enable the Minister for Enterprise, Trade and Employment (Trade Minister) to review, for the first time, transactions involving foreign investment that may impact on security or public order in Ireland.

The Bill is designed to implement the EU Foreign Direct Investment (FDI) Screening Regulation (EU) 2019/452 and ensure all member states have the legal tools to screen investments by non-EU/EEA undertakings and individuals of certain key infrastructure assets with an Irish nexus, in particular concerning foreign investments into:

- Critical utilities and infrastructure sectors.
- High-tech and personal data focused businesses.
- Media businesses.

Once enacted, the legislation will give the Trade Minister the power to mitigate the effect of transactions in sensitive sectors identified as problematic or, if necessary, prohibit them outright. As the Bill is still working its way through the legislative process, it may undergo further amendments before it is enacted.

The introduction of a mandatory and suspensory foreign investment screening regime in Ireland will be a significant development in the regulatory landscape in Ireland.

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Once the Bill is enacted, parties to transactions will need to assess the applicability of the new regime to their transaction and, where a filing obligation arises, plan for a potentially lengthy review period and its impact on the deal timetable. This includes transactions that have not completed by the time the Bill is enacted and commenced. Parties will also need to consider the potential implications of the Trade Minister's ability to retrospectively review transactions that have already completed when the new regime comes into operation.

The Bill (expected to be enacted in Q4 2023) allows the Department of Enterprise, Trade and Employment to review (from a national security perspective) certain transactions (including financing transactions) that involve non-EEA people or companies and critical infrastructure assets or companies.

The Irish approach to implementation is expected to seek to maintain Ireland's attractiveness as a location for inward investment, while reflecting the need to take into account national security and public order considerations in certain strategically important sectors.

Contributor profiles

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Professional qualifications. Ireland, Solicitor, 1996; England and Wales, Solicitor (non-practising), 1998; New York Bar, Attorney, 1999

Areas of practice. Corporate; commercial contracts and agreements; mergers and acquisitions; company compliance and corporate governance; international and FDI; insurance and reinsurance.

Recent transactions

- Acting for:
  - Orbcomm Inc. on the acquisition of Blue Tree Systems;
  - Viasat Inc. on the acquisition of Aronics Limited;
  - Applied Systems on the acquisition of Relay Software;
  - Trimble Diagnostics on the acquisition of Nexala Software;
  - Swegon Group on the acquisition of Safeguard Systems Limited;

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  - Zoetis Inc. on the acquisition of Nexvet;
  - LSG Sky Chefs on the acquisition of the Retail in Motion group;
  - Centrica on the acquisition of Bord Gáis Energy;
  - Bain Capital and Sankaty Advisers on the acquisition of certain loan portfolio assets.
  - Blackstone on the acquisition of certain loan portfolio assets.
  - various other leading US private equity houses for the acquisition of certain Irish assets;
  - Life Technologies on the acquisition of Stokes Bio;
  - Irish counsel to Thoma Bravo in relation to its acquisition of LANDesk Software, and in relation to a number of reorganisations for LANDesk Software;
  - Qualcomm on the acquisition of Xiam Technologies and related transactions;
  - MasterCard on the acquisition of Orbiscom;
  - Wolters Kluwer on the acquisition of Ci-3 Consultancy;
  - the Irish Department of Finance on due diligence of specific Irish financial institutions;
  - Fyffes in the demerger of its General Produce and Distribution business into Total Produce and the consequent listing of Total Produce on the IEX and AIM markets;
  - the shareholders of mTLD Top Level Domain (Vodafone, Microsoft, Nokia, Google, Visa, Ericsson, Samsung, Deutsche Telekom, Telecom Italia and others) on its sale to Afilias;
  - KBC on the sale of its Irish asset management business to Kleinwort Benson;
  - Blackrock on the restructuring of the EMPG Group.

- Advising Montreux Equity Partners on an investment and joint venture in relation to Global Consolidated Aesthetics.

Professional associates/memberships. Bar Association of the City of New York; New York Bar Association; American Bar Association; Irish Chamber of Commerce in the US; Board of Directors and Chair Emeritus, Lex Mundi.

Publications

- *Lex Mundi Guide to Doing Business in Ireland*.
- *Chambers Europe Country Overview: Ireland*.

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Professional qualifications. Ireland, Solicitor, 2012

Areas of practice. Corporate; commercial contracts and agreements; mergers and acquisitions; company compliance and corporate governance.

Recent transactions

- Advising:
  - Montagu on its agreement to acquire a strategic stake in Waystone;
  - Bridgepoint and Astorg on their acquisition of Fenergo Group Limited;
  - Eurazeo on its co-investment in Planet Payment with Advent International;
  - Welltel on its private equity investment by Livingbridge;
  - MTM Engineering on a strategic investment by Waterland Private Equity;
  - the shareholders of Poolville Limited on the sale of all the issued share capital of Poolville Limited to Accent N.V. (Waterland);
  - the National Broadband Ireland financial sponsor consortium on the tender, fundraising and rollout of the National Broadband Plan (EUR3 billion);
  - FIRE1 on a USD25 million extension round led by Novo Holdings and Andera Partners;
  - HT Materials Science on a EUR15 million investment round which was led by Barclays, Saudi Aramco Energy Ventures, CDP and Progress Tech Transfer;
  - Scurri on a EUR9 million investment round which was led by Gresham House;
  - Mercuria Energy Trading SA in relation to its investment in TechMet Limited;
  - Ally Bridge Group (HK) Limited on its equity investment in Mainstay Medical Holdings plc;

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- Illumina Ventures and HLM Venture Partners on a EUR70m investment in Let's Get Checked;
- a search fund led by Mission Spring Ventures and Pacific Lake Partners on its acquisition of ETU;
- Gilde Healthcare and Lightstone Ventures on leading a EUR30 million Series A investment round in ProVerum Limited;
- RedBird Capital in relation to the establishment of various Irish limited partnerships and related section 110 vehicles;
- Earlsfort Capital in relation to the establishment of a debt fund;
- Cool Planet Group on its USD31 million capital raise from Tikehau Capital;
- Scottish Equity Partners on its EUR25 million investment in Immedis ;
- Kohlberg Kravis Roberts & Co L.P. in relation to its acquisition of Pepper Group Limited;
- Granahan McCourt on the disposal of a majority stake in Airspeed and Enet by AMP Capital;
- CapVest on Irish legal matters, including investments in the Mater Private Hospital Group and Valeo Foods
- Centerbridge Partners, LP on its minority equity investment in syncreon Holdings Ltd;
- Blackstone on various acquisitions and disposals including the acquisition and subsequent sale of the former Burlington Hotel to DekaBank and the sale the operating company to Dalata.

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