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Cross-Border Acquisition Financing: Navigating "SunGard" Conditionality and Certain Funds Requirements

By Margaret S. (Meme) Peponis, Duane McLaughlin, Amy R. Shapiro, Ed Aldred, Matthew Mao, Alexander van der Gaag and Elise Toscano*

In this article, the authors examine the key similarities and distinctions between U.S. "SunGard" conditionality practices and European "Certain Funds" requirements for acquisition financings, providing practical guidance for structuring competitive bids and managing closing processes in cross-border transactions.

As cross-border M&A and private equity activity between the United States and United Kingdom/European markets continues to grow, it is increasingly important for buyers and sellers alike to understand the key similarities and distinctions between U.S. "SunGard" conditionality practices and European "Certain Funds" requirements for acquisition financings and how successful deal execution depends on financing conditionality.

The primary differences lie in the timing for definitive documentation at the bid and binding commitment stages and the scope of conditions:

- U.S. sellers are comfortable relying on debt commitment letters with detailed term sheets (often anchoring the definitive documentation to an agreed upon precedent credit agreement), including a prescribed list of funding conditions that are within the control of the buyer or are otherwise consistent with any conditions in the acquisition agreement.
- UK and European sellers, on the other hand, typically require "certain funds" standard documentation with an agreed interim facilities agreement and minimal funding conditions (which are satisfied or in agreed form) focused solely on the borrower, not on the target.

This fundamental divergence requires careful strategic planning when U.S. buyers pursue UK and European targets and vice versa.

UK AND EUROPEAN MARKET PRACTICE: CERTAIN FUNDS

UK and European "Certain Funds" market practice evolved out of the UK's City Code on Takeovers and Mergers, which governs acquisitions of UK-listed entities and requires bidders to demonstrate the ability to pay 100% of the cash

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consideration before announcing a takeover tender offer. Over time, this practice became standard for acquisitions of privately-held UK and European targets. Consequently, sellers in UK and European markets expect bidders to demonstrate full financing certainty at the signing of the acquisition agreement.

This certainty is accomplished primarily through:

- *Interim Facilities Agreement* (IFA). A debt commitment letter will typically attach an interim facilities agreement (IFA) in agreed form, the terms of which require lenders to sign and fund thereunder at the borrower's request. IFAs are fully fundable instruments (although in practice it would be very rare to draw under the IFA itself and in the ordinary course the acquisition would be funded under the definitive credit documentation agreed prior to closing, with the IFA serving as a backstop in the event the definitive credit documentation cannot be agreed);
- *Limited Financing Conditions*. All material conditions to funding the acquisition are satisfied or in agreed form prior to or at signing, with the exception of certain limited material conditions (e.g., illegality or insolvency) which relate solely to the borrower or buyer; and
- *Lenders' Consent Rights Over Adverse Waiver or Amendments Of Acquisition Agreement Conditions*. The borrower cannot waive any conditions under the acquisition agreement that, taken as a whole, would materially and adversely affect the interests of the lenders without their consent, so as to protect the lenders from any material and adverse changes to the transaction between signing and closing.

U.S. MARKET PRACTICE: SUNGARD CONDITIONALITY

In the U.S. market, acquisition agreements historically included a "financing out" condition whereby a buyer could walk away from the closing of an acquisition if it did not have sufficient financing available. Due to the particularly seller-favorable M&A market of the early 2000s, sellers began to successfully reject these "financing out" conditions and shift the financing risk to buyers. "SunGard" conditionality provisions (named after the landmark 2005 SunGard Data Systems buyout) developed as a response to this market shift and aim to minimize the buyer's risk that the financing will not be available at closing. SunGard provisions are now standard in most U.S. debt commitment letters.

The SunGard provisions emulate the "Certain Funds" practice in the UK and Europe by limiting lenders' ability to refuse to fund based on conditions relating to the target company. This approach requires substantially back-to-back conditionality between the debt commitment letter and the acquisition agreement, which is often referred to as reducing "daylight" between the two agreements. Under this approach, financing conditions are primarily tied to the following:

- Accuracy of specified representations and warranties of the borrower, typically limited to certain fundamental representations (such as enforceability against the borrower and validity of the security interests);
- Accuracy of specified acquisition agreement representations of the target, limited to matters that are material to the interests of the lenders and for which the buyer has a corresponding right to terminate or decline to close the acquisition upon breach;
- Absence of a "material adverse effect" with respect to the target, as defined in the acquisition agreement, but only to the extent such a condition is included in the acquisition agreement (i.e., lenders rely on the same MAE definition negotiated between buyer and seller, without a separate lender MAE condition);
- Consummation of the acquisition substantially simultaneously with funding, on the terms set forth in the acquisition agreement as in effect at signing, without amendment, waiver or modification that is materially adverse to the lenders unless consented to by the lenders; and
- Delivery of customary closing certificates and legal opinions.

As SunGard conditionality became the market standard in U.S. acquisition financings, credit agreements began incorporating "limited condition transaction" (LCT) provisions, which adopt a similar approach by limiting conditionality for future acquisition-related financings. Under these provisions, a borrower electing LCT treatment may incur incremental debt under its existing credit facility by fixing satisfaction of key incurrence tests (e.g., leverage ratios or availability tests) at the time the acquisition agreement is signed, while limiting typical funding conditions to a narrower set consistent with SunGard – e.g., to fundamental "specified representations." Crucially, this structure allows the borrower to avoid bringing down the full suite of representations and warranties in the credit agreement at the time of funding, thereby reducing execution risk. In practice, LCT provisions give sponsor-backed portfolio companies financing certainty on terms that mirror the protections available under third-party SunGard commitment letters, enabling them to compete on a level playing field in competitive auctions.

HYPOTHETICAL CASE STUDY: U.S. PORTFOLIO COMPANY'S ADD-ON ACQUISITION OF EUROPEAN TARGET

Consider a hypothetical scenario in which a U.S.-based portfolio company buyer seeks committed financing via an incremental amendment to its existing

USD credit facility to finance its acquisition of a European target entity. The buyer could structure the transaction as a LCT under its existing credit agreement, thus enabling the buyer to benefit from limited conditionality despite the conditions to funding (e.g., bringdown of representations) that would otherwise apply to a borrowing under the credit agreement.

To improve the attractiveness of its bid, a buyer could also adopt a hybrid approach incorporating practices typical to both US and UK/European-style financings and leveraging advantages of each market to meet the seller's expectations. A competitive buyer's bid package would then include the following:

- A standard U.S. style debt commitment letter, pursuant to which lenders commit to provide 100% of debt financing required to consummate the acquisition.
- A fully-drafted agreed-form incremental amendment to its existing credit agreement (in lieu of a term sheet), attached as an exhibit to the debt commitment letter.
- An agreement from the lenders to pre-fund their financing into an escrow account to facilitate the currency exchange from USD to EUR.
- A UK/European style conditions precedent satisfaction letter confirming all funding conditions have been satisfied, which would require that all ancillary closing deliverables are drafted and in agreed form prior to signing.
- The accuracy of specified acquisition agreement representations of the target entity should not be included as a condition to funding.
- The accuracy of specified representations and warranties of the borrower and the absence of a payment or bankruptcy event of default should remain conditions to be satisfied at closing.

Such an approach would eliminate any perceived documentation risk from the seller's perspective because the commitment letter attaches the full terms of the financing agreement to be executed and delivered at funding rather than a term sheet.

PRACTICAL RECOMMENDATIONS

U.S. Buyers Financing the Acquisition of UK and European Targets in U.S. Loan Markets

- *Early Lender / Counsel Engagement*: Negotiate credit documentation and any necessary prefunding mechanics well before bid deadlines as well as early engagement with UK and European counsel to navigate market conditions and transaction dynamics (e.g., notarial closings).

- *Full Documentation*: Provide (interim) facility agreements or amendments, as applicable, in final form rather than term sheets.
- *Currency Exchange and Hedging*: Address currency exchange issues, hedging and funding timing if borrowings will be made in a currency other than the currency to be paid in the acquisition.
- *Condition Satisfaction*: Frontload all ancillary closing workstreams in order to deliver comprehensive condition satisfaction letters at bid stage.

U.S. Buyers Financing the Acquisition of UK and European Targets in UK or European Loan Markets

- *Full Documentation and Conditions Satisfaction*: The same recommendations above in relation to providing final form interim facility agreements and frontloading conditions satisfaction workstream apply here as well.
- *Differences in Typical Guarantee or Security Package*: Prepare for different market practice in granting security or guarantees and execution. Local law requirements (e.g., financial assistance limitations) may impact the security and guarantees that may be granted by target entities on a post-closing basis. Signing formalities and perfection requirements are different across UK and European jurisdictions (another reason to engage counsel early) and can be fairly onerous (e.g., notaries, powers of attorney, legalization and apostille requirements).
- *Early Advisor Engagement*: In addition to engaging UK or European counsel early given UK or European counsel will be leading most aspects of the transactions in the UK or European market, on any public or public to private (P2P) transaction it is also important to engage a financial advisor early on as the financial advisor is required to give a cash confirmation, confirming the bidder has available to it sufficient cash resources to satisfy full acceptance of the offer while it is live.

UK and European Buyers Financing the Acquisition of U.S. Targets in U.S. Loan Markets

- *Condition Management*: Buyers should make an early strategic decision to document the transaction under NY law and accordingly prepare for a different approach to conditionality under the SunGard practices, ensuring that funding conditions are within the control of the buyer or otherwise consistent with any conditions in the acquisition agreement.

- *Currency Exchange and Hedging*: Address currency exchange issues, hedging and funding timing if borrowings will be made in a currency other than the currency to be paid in the acquisition.
- *Documentation Timeline*: Expect an accelerated schedule to signing, but allow additional time for negotiation and drafting of definitive documentation.

UK and European Buyers Financing the Acquisition of U.S. Targets in UK and European Loan Markets

- *Full Documentation and Conditions Satisfaction*: The same recommendations above in relation to providing full documentation and front-loading conditions satisfaction workstream in UK or European Loan Market to make sure the financing is fully fundable apply here as well. To the extent the transaction is an add-on acquisition, there should be an agreed form additional facility notice.
- *Differences in Typical Guarantee or Security Package*: Prepare for different market practice in granting security or guarantees and execution. Multiple state specific local counsel may be required depending on the state of organization of the loan parties (and borrower's counsel typically gives the requisite opinions in the U.S. market). Lien searches in certain states may also cause additional delay.
- *Currency Framework*: Decide on structuring from currency perspective. Currency of the facility would usually match target's cash flow and avoid FX risk on debt service.
- *Cross-Border Tax Planning*: Optimize structure upfront for the group's needs (for example, any intra-group on-lending or incorporating a U.S. co-borrower) to minimize withholding taxes which may apply for direct or on-lending between the UK or Europe and the U.S.

CONCLUSION

Successfully navigating cross-border acquisition financing requires understanding and nimbly adapting to different market practices and legal frameworks. U.S. buyers must demonstrate UK/European-level financing certainty through comprehensive documentation, and UK/European buyers must adapt to U.S. commitment letter practices and conditionality.

The key to success lies in early planning, lender engagement and careful attention to timing and documentation requirements specific to each jurisdiction. As cross-border M&A activity continues to grow, mastering these hybrid approaches will become increasingly critical for competitive deal execution.