Private Placements in Europe: Mapping the alternatives

European Leveraged Finance Client Alert Series: Issue 7, September 2019

September 2019

Authors: **Jill Concannon**, **Gilles Teerlinck**, **Cenzi Gargaro**, **James Greene**, **Robert Becker**

The term "private placement", while having a relatively settled meaning in US financings, can have a variety of meanings in Europe. White & Case's European leveraged finance practice guides you through. This article should be read alongside the focus on Schuldscheine recently published by White & Case[1].

Background—What is a Private Placement?

In very basic, layman's terms, a "private placement" is a placement of securities that is not done by way of public offering (which would typically require a registration statement if done in the US or with a US distribution or a prospectus-directive compliant prospectus if done in Europe or marketed to the public in Europe, for example).

Section 4(a)(2) of the Securities Act of 1933, as amended (the "**Securities Act**") states that "transactions by an issuer not involving any public offering" are exempt from the registration requirements of Section 5 of the Securities Act (which would require US registration). However, Section 4(a)(2) offers no other significant definitions or means to interpret what falls within its scope. Based on case law, further safe-harbours set up under the scope of Section 4(a)(2) and common market practice, the following deal elements are generally accepted as qualifying a transaction to fall under the Section 4(a)(2) exemption: (i) limiting the number of offerees; (ii) generally smaller size; (iii) no general solicitation or advertisement; (iv) experience of the proposed investors; (v) nature of information and negotiation; and (vi) resale restrictions. For placements outside of the United States, the safe harbour afforded by "Regulation S" may also be available for use, although market practice is generally the same as for a 4(a)(2) private placement.

In the US, the term "private placement" (which we'll refer to in this note as a "**US-Style Private Placement**") has a number of very specific meanings, namely the distribution (typically, to insurance companies, who are permitted to invest some of their assets in private placements if they meet specific risk criteria, and other large institutional investors), and the documentation (which is typically based off a model form agreed in the US market). We will go into these aspects in more detail below. In Europe, when we are talking about private placements, we are sometimes talking about US-Style Private Placements, but also may be talking more generally about private placements of unregistered debt securities, which can take any number of forms, including the now common practice of "tapping" high-yield bond indentures privately, which we will discuss in more detail below.

---

[1] Please *see* https://www.whitecase.com/publications/alert/schuldscheine-global-alternative-product-future.

Elements Common to Any Private Placement

Direct Investor Interaction

In a private placement, there is a direct interaction between the investors and the issuer. In some private placements (in particular, where the issuer is tapping its existing high-yield bond indenture), the relationship with the investors is mediated through a placement agent. This role is usually played by an investment bank who will liaise with the relevant potential investor pool, gathering feedback and advising the issuer on best practices and pricing. The placement agent does not underwrite the bonds and therefore does not face the same risk as it would in a traditional bond deal.

Flexibility in Disclosure and Limited Due Diligence

Private placements are completed without a full offering memorandum as would be used in a Rule 144A transaction or more widespread offering. In some deals, circumstances arise where listing the notes is still desired (either required by the investors or due to tax treatment, as is the case in Italy). In such cases, a very thin disclosure document may be prepared to get a listing on a stock exchange (very often Vienna), but which looks quite different from the 300-400 page offering memoranda used for bond listings in Ireland, Luxembourg or other stock exchanges. In other circumstances, particularly where a placement agent is involved, at times a private placement memorandum is prepared to introduce the company to investors. More commonly now, a presentation similar to a set of roadshow slides is used rather than a memorandum, but in either event, the main purpose is to give headline information rather than provide a full picture of the company. For a private placement by an existing bond issuer (or for a private placement by the parent of an existing bond issuer of subordinated or PIK notes), the distribution of the privately placed notes is often to investors that invested in the original bond issue (where a full offering memorandum was prepared), so diligence is basically on a "bring-down" basis only. Any information given to prospective investors in the private placement is then released to the market upon the pricing of the private placement to "cleanse" prospective investors of any material non-public information. If the offering of the notes is also marketed to new investors, the new investors will customarily receive the offering memorandum that was prepared for the original bond offering, together with any quarterly or annual reports prepared since the distribution of the original offering memorandum.

As the investors are usually interacting directly with the issuer or able to have their voices heard through the placement agent, management due diligence (if any) is done ad hoc, while through term sheet negotiation and investigation into the company as a possible investment, the investors are able to ask questions and make an informed decision about whether to proceed with the deal.

Without underwriters, there is no entity for which 10b-5 liability attaches who can avail themselves of the due diligence defense, therefore no 10b-5 negative assurance letter is prepared by the lawyers involved and no full scope legal due diligence is completed; diligence is limited to ensure there are no contractual conflicts or structural issues that would be an impediment to the deal.

Greater Transparency on Pricing

Pricing a private placement is usually done early on in the process. Given that the diligence is completed early and directly between the investors and the issuer as mentioned above, the investors can usually discuss internally their appetite for investing and at what price. The investors, through the placement agent (if any), usually propose an interest rate (or, issue price, in case of a tap of existing high-yield notes) which, once agreed to by the issuer, is reflected in the pricing documentation (in particular, the notes purchase agreement) and closing documentation.

Often times, this early pricing feature ensures that the issuer will be fully committed to getting the process done with certainty about the deal. This confirmation is quite different from the high-yield process, where pricing is known only after the whole deal is negotiated and significant time and cost has been poured into preparing the relevant marketing documents.

US-Style Private Placements

Market Accepted Standard Form

Unlike other transactions where the first step in preparing legal documents is to make a decision as to an acceptable precedent from which to start negotiations, in US Private Placements, the starting point on each deal is the Note Purchase Agreement Model Form prepared and periodically reviewed and updated by the American College of Investment Counsel. The most commonly used form is the Form X-2 (available at https://www.aciclaw.org/forms), which is suitable for credits BBB- rated or higher.

The standard form is a result of discussions and agreements by a number of experienced players in the US Private Placement market from law firms, academia and investor in-house teams who monitor market trends. The standard form contains a disclaimer up front that reminds the reader that modifications are expected. In fact, the standard form is annotated with helpful guidance regarding where modifications are typically seen. Most notably, in the preface to the document the notes clarify that financial covenants are to be agreed amongst the parties and are not included in any fashion in the model form. Additionally, as the form was developed for US issuers, several modifications are required to make the notes purchase agreement work for a foreign issuer. However, using this model form as a starting point for covenants, closing procedure and similar (each which has been tested thoroughly on the market and is purportedly and commonly accepted as "fair") allows the parties to focus negotiation on key terms.

Covenants and Maintenance Financial Covenants

US Private Placement covenants are generally designed to protect investors from specific corporate actions that may deteriorate credit quality, while allowing existing management and shareholders to carry on normal business and to create value. In particular, there is a focus on ensuring continued parity for the US Private Placement instrument with bank debt, as well as limiting structural subordination created by liens or subsidiary debt.

More specifically, US Private Placement financial covenants are maintenance tests, similar to bank lending, as opposed to incurrence tests found in high-yield bonds. Therefore, US Private Placement covenants provide for general tests to be met (with certain exceptions) on regular testing intervals (often quarterly or semi-annually). The most common ratios to be met are an interest coverage ratio (EBITDA/interest expense) and a leverage ratio (Net Financial Debt/EBITDA), but other ratios may be included based on the nature of the issuer's business and any particular concerns with an issuer's current financial condition. These ratios are more tailored to the transaction than the standard covenants in a high-yield bond, where variation usually comes in size of basket rather than components.

Most Favoured Lender Clauses

As the investors in US Private Placements tend to be sophisticated and have strong bargaining power, one of the most common additions they are able to make to the standard form is the inclusion of Most Favoured Lender clauses. There are a variety of "Most Favoured" clauses across different types of contracts, such as Most Favoured Nation or Most Favoured Customer, each with generally the same objective: to allow the contract to automatically be modified in favour of the counterparty should the principal actor negotiate more favourable terms with a third-party. In the case of US Private Placements, the focus is on financial covenants.

European-Style Private Placements

An additional instrument that has evolved over the last several years in Europe to become a common feature is the European-style private placement ("**Euro PP**") which should not be confused with a US Private Placement as described above. It developed largely as a response to the lack of funding available from the traditional banking sector to small- and medium-sized European corporates as a result of the financial crisis. It has been supported by market organisations such as ICMA and AMAFI. The AMAFI is a French association representing financial professionals which, together with other French bodies, published a Charter in 2014 recommending guidelines to be adopted to ensure a minimum of market-acceptable features on both the buy and sell sides. While it is true to say that a Euro PP is seen in a different light from a more traditional style Regulation S-style bond, the documentation largely mirrors what is used in traditional Regulation S bond issues and the guidelines are heavily inspired by the long-standing ICMA recommendations for bond issues. What marks the Euro PP out is that the number of investors is much more limited with a more buy-and-hold approach. The issue sizes are much lower and the terms and conditions contain a few additional financial

covenants beyond the typical negative pledge. Occasionally they are secured. A Euro PP is also less likely to be listed (and, if it is, typically on less regulated markets) or rated. It can be seen as a hybrid between normal bonds and bank debt. Indeed, the LMA has produced Euro PP documentation which can switch from bank debt to bond instrument as often at the start of the deal it is not entirely clear which form of financing will actually be adopted. As the number of investors is more limited and more likely to be involved from the start, an initial feature of the Euro PP is the need to enter into a confidentiality agreement to cover the communication and use of confidential information. It has generally been regarded as a successful initiative bringing needed funding and funding variety to the smaller end of the corporate market.

Private High-Yield Taps and Bespoke Financing Instruments

The term “private placement” in Europe has also evolved to mean privately placed securities of any type.

For example, in recent years it has become relatively common practice in Europe to “tap” existing high-yield indentures by privately placing additional notes with institutional investors. These investors are frequently investors that already hold the securities, so a private placement is an easy way to access the market without the additional expense of another publicly marketed transaction, requiring an offering memorandum, increased fees for counsels to the issuer and underwriters, underwriting fees (which tend to be higher than those for placement agents, if any), as well as fees associated with comfort letters.

Covenants are the same as for the publicly marketed deal and the form of the agreement that investors execute directly with the issuer is often based off the underwriting (or “purchase”) agreement used for the publicly marketed deal, with appropriate modifications, both to save drafting time but also as the issuer is already generally familiar with the form.

Alternatively, “private placement” may mean a bespoke financing instrument included as part of a wider financing. This may be a PIK-note or preference share or any commercially agreed instrument included as part of the capital structure. These are typically privately placed on a “take-and-hold” basis by investors, with bespoke features negotiated on a case-by-case basis.

Conclusion

The features of a private placement can be extremely attractive to certain businesses for a variety of reasons, often giving the opportunity for first-time debt issuers to have a direct relationship with their investors and have unique requirements that can be better explained over time than on a standard roadshow. For European issuers that are accessing the private placement market to “tap” existing indentures, private placements can be a valuable tool to take quick and cost-effective advantage of favourable market conditions. Because potential issuers may be unaware of the characteristics of private placements (or their existence as a debt raising option), it is important for advisors to include this product amongst the suite of possibilities at the initial planning stages of a possible transaction. But first — ask what they mean by private placement!

EMEA leveraged finance partners

Jill Concannon ●
Partner, London
T +44 20 7532 1534
E jconcannon@whitecase.com

Christopher Czarnocki ■
Partner, London
T +44 20 7532 1201
E cczarnocki@whitecase.com

Jeremy Duffy ■
Partner, London
T +44 20 7532 1237
E jduffy@whitecase.com

Gareth Eagles ■ ●
Partner, London
T +44 20 7532 1251
E geagles@whitecase.com

Jacqueline Evans ■
Partner, London
T +44 20 7532 1404
E jevans@whitecase.com

Martin Forbes ■
Partner, London
T +44 20 7532 1229
E martin.forbes@whitecase.com

Emma Foster ■
Partner, London
T +44 20 7532 1299
E efoster@whitecase.com

James Greene ■ ●
Partner, London
T +44 20 7532 1439
E jgreene@whitecase.com

James Hardy ■
Partner, London
T +44 20 7532 2728
E james.hardy@whitecase.com

Colin Harley ■
Partner, London
T +44 20 7532 1200
E colin.harley@whitecase.com

Monica Holden ●
Partner, London
T +44 20 7532 1483
E mholden@whitecase.com

Richard Lloyd ■
Partner, London
T +44 20 7532 1247
E richard.lloyd@whitecase.com

Shane McDonald ■
Partner, London
T +44 20 7532 2698
E shane.mcdonald@whitecase.com

Jeffrey Rubinoff ■
Partner, London
T +44 20 7532 2514
E jeffrey.rubinoff@whitecase.com

Shameer Shah ■
Partner, London
T +44 20 7532 1215
E shameer.shah@whitecase.com

Gilles Teerlinck ■ ●
Partner, London
T +44 20 7532 2232
E gilles.teerlinck@whitecase.com

Justin Wagstaff ●
Partner, New York
T +1 212 819 2694
E jwagstaff@whitecase.com

Ben Wilkinson ■
Partner, London
T +44 20 7532 1276
E ben.wilkinson@whitecase.com

Thierry Bosly
Partner, Brussels
T +32 2 239 25 09
E tbosly@whitecase.com

Hadrien Servais ●
Local Partner, Brussels
T +32 2 239 2544
E hadrien.servais@whitecase.com

Claire Matheson Kirton ■
Partner, Dubai
T +971 4 381 6218
E cmathesonkirton@whitecase.com

Rebecca Emory ●
Partner, Frankfurt
T +49 69 29994 1432
E rebecca.emory@whitecase.com

Thomas Flatten
Partner, Frankfurt
T +49 69 29994 1233
E tflatten@whitecase.com

Florian Degenhardt
Partner, Hamburg
T +49 40 35005 298
E fdegenhardt@whitecase.com

Vanessa Schuermann ■
Partner, Frankfurt
T +49 69 29994 1431
E vanessa.schuermann@whitecase.com

Gernot W. Wagner ●
Partner, Frankfurt
T +49 69 29994 1430
E gernot.wagner@whitecase.com

Florian Ziegler
Partner, Frankfurt
T +49 69 29994 1575
E florian.ziegler@whitecase.com

Tanja Törnkvist
Partner, Helsinki
T +358 9 228 64 351
E ttornkvist@whitecase.com

Güniz Gökçe
Partner, Istanbul
T +90 212 355 1311
E guniz.gokce@gkcpartners.com

Fernando Navarro ■
Partner, Madrid
T +33 1 5504 1551
E fernando.navarro@whitecase.com

Yoko Takagi
Partner, Madrid
T +34 91 7876 320
E yoko.takagi@whitecase.com

Iacopo Canino
Partner, Milan
T +39 020 068 8340
E icanino@whitecase.com

Gianluca Fanti
Partner, Milan
T +39 02 00688 390
E gianluca.fanti@whitecase.com

Michael Immordino ●
Partner, London
T +44 20 7532 1399
E mimmordino@whitecase.com

Alessandro Nolet ■
Partner, Milan
T +39 020 068 8420
E alessandro.nolet@whitecase.com

Natalia Nikitina
Partner, Moscow
T +7 495 787 3027
E nnikitina@whitecase.com

Samir Berlat
Partner, Paris
T +33 1 5504 1551
E samir.berlat@whitecase.com

Colin Chang ●
Partner, Paris
T +33 1 5504 5815
E cchang@whitecase.com

Denise Diallo ●
Partner, Paris
T +33 1 5504 1518
E ddiallo@whitecase.com

Tomáš Jíně ■
Partner, Prague
T +420 255 771 233
E tomas.jine@whitecase.com

Jan Linda
Partner, Prague
T +420 255 771 271
E jlinda@whitecase.com

David Plch
Partner, Prague
T +420 255 771 298
E dplch@whitecase.com

Jonathan Weinberg ■
Partner, Prague
T +420 255 771 262
E jweinberg@whitecase.com

Oscar Liljeson
Partner, Stockholm
T +46 8 506 32 379
E oscar.liljeson@whitecase.com

Carl Hugo Parment
Partner, Stockholm
T +46 8 506 32 341
E carlhugo.parment@whitecase.com

Magnus Wennerhorn
Partner, Stockholm
T +46 8 506 32 370
E magnus.wennerhorn@whitecase.com

Nicholas Coddington ■
Local Partner, Warsaw
T +48 22 50 50 160
E ncoddington@whitecase.com

Tomasz Ostrowski ■
Partner, Warsaw
T +48 22 50 50 123
E tostrowski@whitecase.com

■ English Qualified ● US Qualified

White & Case LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom

T +44 20 7532 1000

In this publication, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.

This publication is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.