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RESCUE FUNDING IN THE TIME OF CORONAVIRUS

Financial investors are giving urgent consideration to providing additional funding to some investments as they consider short and medium term liquidity needs and business plan revisions. In this briefing, we outline some of the key considerations.

KEY CONSIDERATION 1: BE ON TOP OF THE AGREEMENTS

Debt Facilities Documents

- What is permitted under the debt facilities documents and are lender consents required? (Some facilities may permit short term funding that can be recycled.)
- Check what form such shareholder injections can take (including as to terms of any shareholder loan) and which companies are allowed to be the recipient?
- Check how shareholder loans are treated as to tenor, prepayment rights, debt servicing rights and subordination?

Shareholders' Agreement

- **Investors**: Typically the shareholders' agreement legislates for the injection of emergency capital by Investors. It may limit the form, process and cost of such funding.
- **Managers**: Check the "Reserved Matters" in the shareholders' agreement. Management Consent is unlikely to be required for emergency funding but catch-up or pre-emption rights may need to be operated.
- **Consortium partners**: Consider consortium partners and their willingness to invest. It may require changes to the shareholders' agreement or they may be diluted.

KEY CONSIDERATION 2: INSTRUMENTS

Investors will need to consider what form their money should take (e.g. shareholder loan, convertible instrument, strip or other equity) and its ranking with existing funding. Before reaching this decision, Investors should check:

- Are there any restrictions in the shareholders' agreement in relation to the instruments it can use? For example, if investing via strip equity, there may be a requirement to invest in the same strip ratio of ordinary and coupon bearing instruments and with the same coupon as at completion.

- The dilutive impact on the MIP if Investors invest in the strip equity.

KEY CONSIDERATION 3: WHERE IN THE STRUCTURE TO FUND?

Investors should consider where in the capital structure to invest. Some points may have an advantage structurally yet the security, intercreditor agreement and shareholders' agreement need to be checked.

KEY CONSIDERATION 4: VALUATION

What valuation considerations (if any) in the shareholders' agreement need to be complied with?

- New investment will typically need to be made at FMV, particularly where Management has the opportunity to invest alongside Investors.
- How is FMV determined and supported?

KEY CONSIDERATION 5: BORROWER DIRECTORS

Consider the fiduciary duties for directors of a group subsidiary if it is to become a borrower of new debt or shareholder loans. Do not assume in the UK that the proposed "wrongful trading" relaxation provides a completely free pass in terms of conduct.

KEY CONSIDERATION 6: BOARD APPROVAL

Consider the requirements for necessary board meetings and the position if physical attendance is required. Maintaining substance requirements in this environment is a challenge.

KEY CONSIDERATION 7: SIGNATORIES

Lockdown of populations is widespread across many countries to address the spread of Covid-19. To ensure that documentation can be executed quickly, Investors should consider the following:

- Is the list of authorised signatories up to date and readily available?
- Is it sensible to add extra persons to the list of authorised signatories or provide powers of attorney?
- If the usual signatories are unavailable do any additional authorisations or approvals need to be put in place, including any approvals for the use of electronic signatures?

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