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Private Equity 2023

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Ireland: Law & Practice

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IRELAND

Law and Practice

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1. Transaction Activity

1.1 Private Equity Transactions and M&A Deals in General

Despite the headwinds presented by rising interest rates, high inflation, the ongoing war in Ukraine and global supply chain disruption, Irish M&A activity remained strong in 2022: while deal value was down, it was only marginally below the bumper year of 2021.

The mid-market was particularly dominant in 2022, focusing on key sectors such as financial services, technology, tech-enabled services, fintech, pharmaceuticals, medicals, biotechnology and engineering.

While there has been a somewhat slower start to 2023 for Irish M&A activity, Ireland continues to attract inbound investment from private equity (PE) buyers, particularly from the UK and US. These PE transactions predominantly take the form of leveraged buyouts, growth capital transactions, take-private transactions, bolt-on acquisitions and sponsor exits.

In 2022, PE firms accounted for a fifth of all deals by volume. This level of activity is reflective of the vast amounts of "dry powder" global PE houses are still seeking to deploy, notwithstanding the more challenging financial environment.

1.2 Market Activity and Impact of Macro-Economic Factors

In recent years, M&A activity in Ireland has revolved around the areas of technology, healthcare, financial services and increasingly, the energy and infrastructure space. Tech-adjacent sectors such as heating, ventilation and air condition (HVAC) are also active, particularly those which have built up competencies in the data centre space.

Financial services accounted for more than half of Irish M&A by value in 2022 while technology, media and telecoms accounted for 22% of all deals by volume in 2022.

Rising interest rates have impacted the structuring of deals, resulting in lower leverage and a greater need for equity. Interest rate hikes have also led to an increased use of deferred consideration structures, including earn-outs.

Despite global economic uncertainty, there is cautious optimism that Ireland's M&A market will continue to be busy in H2 2023. More cautious buyers – together with the anticipated enactment of the Screening of Third Country Investments Bill into law (see **2.1 Private Equity Developments** for further detail) – may lead to increased regulatory scrutiny and lengthened deal timelines.

It is also expected that there will be an increase in the level of US PE activity in the Irish market. While large US PE sponsors have historically been active in the market for larger assets, expansion in the number of mid-market US PE sponsors and growth equity providers – similar to the emergence of the UK mid-market PE sponsor activity in the Irish market – is anticipated.

2. Private Equity Developments

2.1 Impact of Legal Developments on Funds and Transactions

Investment Limited Partnerships

In a positive development for PE managers seeking to establish PE funds in Ireland, 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.

The updated legislation (i) strengthens the provisions on limited liability status of limited partners and extends the safe harbours preventing loss of limited liability status and (ii) provides for various other streamlining amendments. ILPs may now also be formed as umbrella-type structures with multiple segregated liability compartments or sub-funds with statutory segregation of assets and liabilities (ie, 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 Irish Limited Partnerships Act, 1907 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 avail themselves of 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.

ESG

Environmental, social and corporate governance (ESG) matters remain high on the legislative agenda. The EU's Sustainable Finance Disclosure Regulation (SFDR) and the EU's Taxonomy Regulation (EUTR) form part of the EU's Action Plan on Sustainable Finance and seek to re-orient capital flows towards sustainable investments.

This legislation seeks to introduce a classification system listing environmentally sustainable economic activities and to apply disclosure and other requirements on EEA funds and their managers, and managers of third-country funds raising capital in the EEA. This has driven investor demand for PE funds to invest more sustainably, and for funds to avail themselves of classification under the SFDR as funds which either promote ESG characteristics or funds which make sustainable investments. This, in turn, is impacting the portfolio management activities of PE managers, as increased importance is being placed on ESG and sustainability considerations. It is also impacting the information PE managers need to gather from portfolio companies in which their PE funds have invested, in order to be able to meet the investor transparency requirements of the European legislation.

The Taxonomy Climate Delegated Act (TCDA) came into force in Ireland on 1 January 2022 with the aim of implementing the EUTR, although its scope relates only to environmental and climate-related objectives.

Competition/Antitrust

The Competition (Amendment) Act 2022 was signed into law in June 2022 and gives significant and wide-ranging new powers of intervention to Ireland's competition regulator, the Competition and Consumer Protection Commission (CCPC). While the Act has not yet entered into force, a commencement order is expected in the short-term.

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 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). This change significantly increases risks for businesses which complete deals prior to CCPC approval.

Foreign Subsidies Regulation

The EU's Foreign Subsidies Regulation (FSR) came into force on 12 January 2023 and grants sweeping new powers to the European Commission to tackle harmful non-EU subsidies. It allows the Commission to scrutinise companies making certain acquisitions, engaging in public procurement and otherwise carrying out economic activities in the EU which have benefited from such non-EU subsidies.

The Commission can require redressive measures, accept commitments and impose fines of up to 10% of turnover for certain breaches. The FSR has applied since 12 July 2023 and will have an important impact on M&A and public procurement activity in the EU.

The FSR is likely to represent a complex regulatory hurdle for companies and PE funds (whether or not based in the EU) before they can complete certain acquisitions within the EU.

Screening of Third Country Transactions Bill 2022

The Screening of Third Country Transactions Bill 2022 (SofTCT) will introduce a screening regime for foreign direct investments in Ireland by parties established in third countries. The SofTCT is partly in response to the EU Investment Screening Regulation and concerns by EU member states regarding the purchase of strategic EU companies and interests by non-EEA owned businesses and individuals.

Once enacted, the SofTCT will represent a tough and very wide-ranging system for scrutiny by the Irish government of a range of investments by parties established in third countries in critical technology and infrastructure business in Ireland. Crucially, the UK will be a third country for the purposes of the SofTCT, which is significant given the level of investment by UK PE sponsors in Ireland.

The SofTCT contains strict notification obligations for prior approval of triggered transactions with signification sanctions for failure to comply (including fines of up to EUR4 million).

The SofTCT is currently progressing through the Irish legislative process and, once completed, will need to be officially enacted and formally commenced.

3. Regulatory Framework

3.1 Primary Regulators and Regulatory Issues

The key statutory bodies/persons responsible for monitoring M&A activity in Ireland are:

- the Irish Takeover Panel (the "Panel") – which is responsible for monitoring and supervising the takeover of public companies in Ireland;
- the CCPC – which regulates compliance with the Competition Acts 2002–2022 (the "Competition Acts");
- the CBI – which regulates compliance through certain regulated financial services companies that have shares listed on the Irish Stock Exchange (ISE), trading as Euronext Dublin, with applicable EU legislation including Regulation (EU) 2017/1129 (the "Prospectus Regulation") and the Transparency (Directive 2004/109/EC) Regulations 2007 (as amended) (the "Transparency Directive");
- the ISE – which has issued rules that any entity with shares listed on either its main securities market or enterprise securities market must comply with;
- additional statutory bodies may be involved, depending on the relevant industry in which an entity operates (eg, the Commission for Aviation Regulation in the aviation sector and
- the Minister for Enterprise, Trade and Employment, who will be responsible for screening foreign direct investment once the SofTCT is enacted.

PE-backed buyers are not generally subject to enhanced regulatory scrutiny in Ireland. The regulatory issues that usually arise in M&A transactions will be similarly relevant to PE deals, most commonly merger control clearance from the CCPC and industry-specific approvals or consents (eg, approval from the CBI in relation to certain investments in regulated financial services businesses).

The Screening of Third Country Investments Bill and Foreign Subsidies Regulation

As mentioned in **2.1 Impact of Legal Developments on Funds and Transactions**, the SofTCT has been published and once enacted, will introduce Ireland's first domestic screening regime for foreign direct investment (FDI). The Bill will allow the Minister for Enterprise, Trade and Employment (the "Minister") to scrutinise a wide range of transactions involving a non-EU/EEA/Swiss undertaking (person, company, or other entity) and relating to the control of Irish businesses and assets in key sectors, including critical technology and infrastructure. Certain deals will be subject to mandatory notification, while the Minister will have the right to call in other deals for review. The Minister can block or impose conditions on deals. The proposed 90-day ministerial review period is significantly longer than the current 30-day domestic competition review period. The potential for such a long period between signing and completion of a transaction is likely to lead buyers to seek increased gap protection provisions.

In addition, the FSR commenced application on 12 July 2023 and is expected to have an important impact on M&A and public procurement activity in the EU. The FSR allows the EU Commission to scrutinise companies making certain acquisitions, engaging in public procurement and otherwise carrying out economic activities in the EU, which have benefited from harmful non-EU subsidies. The FSR is anticipated to be an important aspect of Irish due diligence processes going forward.

4. Due Diligence

4.1 General Information

The level of diligence conducted will vary from transaction to transaction, and will depend on factors such as the nature and size of the target company, and the timeline available for diligence.

Due diligence will involve a review of most legal and business aspects of the target, including investigations into title, assets, material contracts, ESG, intellectual property, litigation, real estate and compliance. These investigations tend to be conducted on an issues-focused "red-flag" basis, and to be governed by materiality thresholds aligned to the size of the deal in question.

In warranty and indemnity (W&I) transactions, close attention will be paid to the insurance policy to ensure that coverage is obtained across all key areas.

4.2 Vendor Due Diligence

Legal vendor due diligence (VDD) reports typically form part of competitive auction processes run by PE sellers. VDD may take the form of a traditional report or legal fact-book. The VDD report will provide a narrative description of the business and an overview of consents required or other potential impediments to the proposed transaction. The purpose of a VDD report is to expedite the diligence process of all the bidders, by minimising the amount of work bidders need to do to understand the business.

Even where VDD is provided by the seller, PE buyers will conduct their own buy-side diligence as well, to interrogate the VDD and also to analyse how best to deal with any impediments or liabilities identified.

VDD reports are provided to bidders and the ultimate buyer on a non-reliance basis and the contents of such reports are generally disclosed in the disclosure letter.

5. Structure of Transactions

5.1 Structure of the Acquisition

The majority of acquisitions are by way of a sale and purchase agreement, although preferred structures are typically driven by a number of factors, including:

- the tax and other requirements of the PE funds investing in the transaction;
- the requirements of the lenders financing the transactions (eg, as to any required subordination);
- the overall tax efficiency of the post-acquisition group (eg, maximum deductibility of interest expenses); and
- the need to allow any future sale proceeds on exit to be returned to the PE sponsor (and its investors) on exit with minimal delay.

Auction processes are increasingly common and, by their nature, where there is substantial interest in the target, can lead to a more favourable outcome for the seller(s) as a more aggressive approach can be adopted. Prospective purchasers in these competitive processes are typically keen to distinguish themselves from other bidders and this often translates into a willingness to accelerate timelines, leading to shorter due diligence and negotiation periods and the deal terms weighing more heavily in favour of the seller(s).

However, in 2023 the competitiveness of sell-side auction processes has depended on the sector in question. In certain sectors, sellers have had to work harder to create competitive tension and some sales processes have become "flexible processes" with less clear timelines as a result.

5.2 Structure of the Buyer

PE transactions in Ireland are typically structured using an Irish or UK private limited company limited by shares (Topco), commonly owned by the PE fund and management executives, which acts as the holding company for a chain of corporate entities. The bottom entity in the acquisition chain (Bidco) acts as the purchaser of the target shares and may act as borrower under any financing arrangements. A series of entities are typically incorporated between Topco and Bidco for tax and financing purposes, so as to allow financing by junior lenders to be structurally subordinated to that by senior lenders.

Where transactions involve an Irish target, Bidco would typically be an Irish-resident limited company. However, the jurisdiction of incorporation is largely driven by tax and capital structuring considerations, although all-Irish acquisition stacks are emerging.

5.3 Funding Structure of Private Equity Transactions

It is typical for PE deals to be financed using a mixture of both debt and equity funding.

Debt Finance

Traditional bank-led leveraged loan financing remains the most common source of debt finance used to fund both mid-market and large PE transactions in Ireland. However, in recent years, there has been increasing competition between traditional bank lenders and private credit for PE transactions.

It is common to have certain debt funds committed at signing and the Irish market would reflect the UK market in this respect. If a debt fund has not committed at signing, comfort is typically given via a debt/equity commitment letter in respect of the debt-funded portion; however, there has been increased reluctance to provide such letters in recent times given the general volatility in the market.

Participants in mid-market transactions have also increasingly looked to implement “unitranche” financing structures, pursuant to which traditional senior and junior debt tranches are replaced by a single tranche term facility carrying a single, blended rate of interest, usually on a floating rate.

Other forms of acquisition financing such as high-yield bonds and payment-in-kind (PIK) facilities have not been a feature of acquisition financings for Irish targets in recent years. In line with the increased prevalence of ESG in the wider financial markets, sustainability-linked loans have become an increasing feature of buyout loans.

Equity Finance

Typically, PE sponsors will provide an equity commitment letter (ECL) in respect of the equity portion of the consideration. In certain circumstances, sellers may request an ECL in respect of the entire consideration but this is less common (although uncertainty in debt markets may impact this in the future).

The ECL is typically addressed to the buyer’s Bidco and sometimes also addressed to the sellers. The ECL provides certain covenants to fund the Bidco with sufficient equity capital to cover the relevant portion of the purchase price, subject only to satisfaction of the conditions in the acquisition agreement and “certain funds” debt financing being available.

Majority v Majority Stakes

PE funds are increasingly prepared to take a minority stake in businesses. While traditionally

PE funds have focused on acquiring controlling stakes in targets, in recent years a number of UK and US PE funds have introduced minority funds which allow them to take minority stakes in acquisition targets and, for the right type of assets, it is expected that similar opportunities will be seen in the Irish market.

5.4 Multiple Investors

The most common structure in Ireland is one PE sponsor co-investing with the management team in the acquisition of the target.

In larger scale transactions, it is not unusual to see consortium buyers comprised of a mega-PE fund and more traditional funds (eg, national pension funds) or consortiums made up of two mega-PE funds. This type of structure is becoming more common in the Irish market, often for the purposes of complying with regulatory requirements or alternatively, within strategic Propco/Opco structures.

6. Terms of Acquisition Documentation

6.1 Types of Consideration Mechanisms

Both locked-box and completion accounts consideration structures are popular in an Irish context; however, the locked-box structure has become increasingly popular in recent years. Rollover structures are also a common feature of PE transactions in the Irish market.

Locked-Box Consideration Accounts

"Locked-box" consideration structures remain the preferred option for PE sellers in the Irish market, largely due to the ease of negotiation and the certainty they provide with respect to the final consideration paid. Combined with the shorter leakage periods currently being obtained by PE sponsors, they present a highly attractive proposal when compared to a traditional completion accounts consideration structure.

An additional benefit of a "locked-box" deal is that because there is no post-closing adjustment, funds can be distributed immediately following closing.

Completion Accounts

Completion account structures are also commonly used. These involve a post-completion adjustment to the purchase price by reference to the working capital and/or net debt position of the target at completion, as compared with an agreed target position on which the purchase price was based.

Where a completion accounts consideration structure is used, it is common to see a portion of the purchase price placed into escrow at closing as security for any post-closing payment that is required to be made by the seller as a result of the completion accounts adjustment, or to be held as security for warranty and/or indemnity claims.

Some PE funds like to use completion accounts in buyouts as a mechanism to test the balance sheet at completion, as opposed to relying on locked box accounts at an earlier point in time. The opposite is true upon an exit where PE fund sellers lean heavily toward locked box structures, which allow for immediate cash repatriation on closing.

Deferred Consideration

On the buy-side, PE sponsors can try to ensure that a portion of the consideration is paid on a deferred basis, most commonly pursuant to an "earn-out" where the performance or growth of the acquired business is measured against an

objective criterion (usually a financial criterion during a defined time period) in order to determine what portion of the deferred consideration will be payable.

It is normal practice in Ireland therefore for the buyer to give covenants and undertakings in relation to the running of the business during the period from completion to the last payment date for the earn-out/deferred consideration in order to give the sellers comfort that the buyer will not manage the business in such a way as to avoid having to pay the additional consideration.

The use of deferred consideration or earn-out structures has become more common in 2023 due to increased uncertainty over business performance in a volatile macroeconomic market.

6.2 Locked-Box Consideration Structures

Interest would not normally be charged on leakage where a locked-box consideration structure is used. Only where there is a lengthy period between signing and closing, is it typical for the concept of a ticker to be introduced.

6.3 Dispute Resolution for Consideration Structures

It is typical to have a specific dispute resolution mechanism in place for both locked-box and completion accounts consideration structures. The sale and purchase agreement will typically include provisions stating that any dispute arising between the parties in relation to any portion of the consideration (or adjustment to the consideration) will be referred to an independent expert for determination if it cannot be agreed by the parties in a specified time period.

This independent expert would normally be an independent accountant of high standing whose decision will be binding in all respects.

This process would often be adopted for earn-outs or deferred consideration mechanisms as well.

6.4 Conditionality in Acquisition Documentation

Irish transaction closing timetables are largely driven by regulatory approvals, most commonly merger control clearance from the CCPC and industry-specific approvals or consents (eg, approval from the CBI in relation to certain investments in regulated financial services businesses).

As mentioned in **2.1 Impact of Legal Developments on Funds and Transactions**, the Screening of Third Country Investments Bill has been published and once enacted, will introduce Ireland's first domestic screening regime for FDI. The notification and approval process will mean split signing and completions for a greater number of FDI transactions in Ireland. Given the relatively lengthy review period under this proposed legislation (which is significantly longer than that under Irish merger-control legislation), gap protections are likely to be an important feature in affected transactions.

The imposition of conditionality in relation to the acquisition of debt financing is not common in Irish PE transactions and, more generally, the parties seek to avoid conditionality in the transaction documentation to give greater deal certainty.

In any transaction involving the change of ownership of an entity, the parties will need to consider any change of control provisions contained

within contracts to which the target is a party (eg, customer contracts). These provisions will need to be waived by, or the consent to the acquisition obtained from, the relevant parties.

Material adverse change provisions are unusual, unless the transaction has a significant US element (where such clauses are common) or the business has significant revenues or presence in the emerging markets (again, where such clauses are common).

6.5 "Hell or High Water" Undertakings

PE-backed buyers have traditionally not accepted a "hell or high water" undertaking in Irish deals which involve a regulatory condition.

In a very competitive auction, however, PE buyers may be willing to accept a hell-or-high-water undertaking where the fund has no overlapping business, and on the basis of advice from their competition counsel that there is no prospect of any substantive competition issue.

At present, it is more common for hell-or-high-water undertakings to be utilised in relation to merger-control/anti-trust conditions as distinct from foreign investment conditions. However, this position may evolve as and when the Screening of Third Country Investments Bill is enacted into law in Ireland (see **2.1 Private Equity Developments**).

6.6 Break Fees

Both break fees and reverse break fees are uncommon in PE transactions, and indeed, in the acquisition of private companies in Ireland generally.

While there may be transactions where the acquiring party agrees to cover the costs of both the buyer and the seller(s) in the event the transaction completes, PE buyers will strongly resist the requirement to pay such costs in the event of non-completion of the transaction.

While break fees are common in the case of public company takeovers, these are subject to the Irish Takeover Rules (the "Rules") which limit the target break-fee amount to specific quantifiable third-party costs only, subject to a limit of 1% of the value of the offer at the time of the announcement of a firm intention to make an offer payable, only where the target board withdraws or modifies its recommendation of the transaction to which the break fee relates, or where a competing offer is declared wholly unconditional or completes.

6.7 Termination Rights in Acquisition Documentation

Where the transaction is conditional on the occurrence of certain events – eg, regulatory approval from the CCPC/CBI – the acquisition agreement will be terminable in the absence of such approvals being obtained. Parties may also agree a long stop date by which, if completion has not occurred, either party may terminate the agreement.

If various completion obligations (such as payment of the purchase price, and/or delivery of executed documents such as stock transfer forms) have not been complied with at the planned time for completion, then the non-breaching party can usually elect to postpone completion.

Long stop dates have lengthened in recent times (sometimes to up to 12 months) due to the increasing complexity of regulatory conditions and/or multi-jurisdictional transactions.

6.8 Allocation of Risk

A PE seller will always seek to minimise its risk – whether the buyer is a PE buyer or not. A PE fund will generally be required to return value to its investors shortly after reselling a stake and so will not want to be burdened by escrow arrangements, changes in the completion accounts, etc, as a "normal" seller would.

A PE seller takes very little liability under the sale and purchase agreement and, as noted in **6.9 Warranty and Indemnity Protection**, will only give limited warranties.

6.9 Warranty and Indemnity Protection

A PE seller will generally only provide fundamental warranties, relating to its title to shares, capacity and authority to sell. A PE seller will only provide business and operational warranties relating to the target in limited circumstances and this is becoming rarer under the current market conditions.

Business and operational warranties are usually given by certain members of the senior management team of the target who are involved in the day-to-day running of the business and so are best placed to do so. These are usually given subject to relatively low liability caps. A full disclosure process will be carried out to disclose against these warranties.

Given the low liability caps that generally apply to these warranties from management, a buyer will typically seek to obtain coverage for these warranties above the liability cap of the management warrantors by putting in place W&I insurance.

Limitations

Given that a PE seller's warranties will generally be limited to certain fundamental warranties as mentioned above, a PE seller's liability for these warranties is typically capped at the purchase price. Such fundamental warranties are not usually subject to additional financial limitations, such as a de minimis or threshold (ie, excess). The fundamental warranties are typically given subject to time limitations of between one to two years from closing.

The management team's liability for business and operational warranties is normally limited by applying an aggregate liability cap (which will depend on the transaction value and the availability of W&I insurance) and de minimis and basket thresholds (ordinarily set at 0.1% and 1% of the purchase price, respectively), below which no claim can be made (which can be on a "tipping basket" or "excess only" basis). Such warranties typically survive for one to three years post-closing and between four to six years for claims under tax warranties and a tax covenant (reflecting the time periods in which the Irish tax authorities can assess tax liabilities).

Management may further limit their liability by giving the warranties on a several/proportionate basis and subject to their actual awareness – however, these limitations will be strongly resisted by a buyer.

Full disclosure of a data room has traditionally not been accepted in Ireland, with buyers arguing strongly against it. However, there is an increasing trend towards sellers (particularly non-Irish sellers) seeking a greater degree of disclosure and full disclosure of certain sections of the data room has recently been a feature of Irish transactions.

6.10 Other Protections in Acquisition Documentation

If there is a specific known issue the quantum of which is unknown or relates to a potential liability, then a specific indemnity is occasionally provided. This might be backed by an escrow to reassure the buyer that the seller is able to meet any liability under the indemnity. While any form of escrow arrangement is strongly resisted by PE sellers, the shift to a more buyer-friendly market has led to the re-emergence of escrow/deferred consideration arrangements and PE sellers having to accept them.

It is increasingly common, if not the norm, for W&I insurance to be procured on transactions involving PE sellers. Insurance is used to increase the protection provided by business warranties, from the low level of protection management sellers can provide (see **6.9 Warranty and Indemnity Protection**).

Tax covenants, pursuant to which the seller agrees to indemnify the buyer for all unpaid taxes up to completion, are commonly provided by corporate sellers. PE sellers do not give tax covenants, but the management team may do so, subject to the usual limitations. This limit may also be topped up by insurance.

6.11 Commonly Litigated Provisions

Litigation is not common in relation to PE transactions. The potential for disputes is limited where PE sellers are involved, given the limited nature of their contractual obligations.

Warranty claims are also relatively infrequent, especially where the warrantors are the management team. PE funds are usually slow to claim against the management team, who are seen as partners in the business, other than in extreme situations such as fraud.

Disputes relating to consideration structures are usually settled or determined via referral to an expert, rather than litigated (see **6.3 Dispute Resolution for Consideration Structures**).

7. Takeovers

7.1 Public-to-Private

Public-to-privates involving PE bidders are relatively common in Ireland. There have been a number of high-profile, PE-backed, public-to-private transactions in the Irish market in the last five years.

Generally speaking, the role of the target company and its board is to consider offers and approaches by bidders and determine whether or not it is appropriate to make a recommendation to the public shareholders of the target in respect of an offer. An independent sub-section of the board will need to be created where there are conflicts of interest at board level (eg, where directors also have substantial shareholdings).

The target company and the board will have strict obligations not to disclose details of any offer in advance of a public announcement and will be required to maintain insider lists. Where an offer is recommended to shareholders and announced publicly, the target company will convene an extraordinary general meeting (EGM) in order to obtain required shareholder approvals for a takeover scheme pursuant to Irish company law. The target company will also be required to run the Irish High Court process required to approve a takeover scheme in Ireland.

Relationship agreements are not typically used in Irish public-to-privates. The bidder and target company will enter into what is called a transaction agreement prior to deal announcement,

which will set out, amongst other things, the manner in which the takeover process will be conducted following the public announcement. The bidder and target will also typically enter into an expenses reimbursement agreement, pursuant to which the target company agrees to reimburse the bidder's expenses in certain limited scenarios.

7.2 Material Shareholding Thresholds and Disclosure in Tender Offers

The following shareholder disclosure requirements apply in Ireland.

Companies Act 2014

Under the Companies Act 2014, a person is obliged to disclose a change in shareholding interest in an Irish public limited company in the following circumstances:

- where that person acquires or disposes of an interest in shares of a class carrying voting rights which brings that person's interest in shares of that class equal to, above or below 3% the nominal value of the issued share capital of that class; or
- where that person already has an interest in shares of a voting share class equal to or greater than 3% in nominal value of the issued share capital of that class and that person acquires or disposes of an interest in shares which results in that person's interest in shares of that class increasing or decreasing by 1% or more (although their interest is still 3% or more of the relevant share capital).

The notification must be in writing and must be made to the company itself within five business days of the duty to notify arising.

Substantial Acquisition Rules (SARs)

The SARs – which are issued by the Panel – are also applicable.

SARs 3 and 4 provide that a person may not (subject to certain exemptions), in any period of seven days, acquire securities (or rights over securities) carrying 10% or more of its voting rights in a company if – following the acquisition – that person would hold securities (or rights over securities) carrying 15% or more, but less than 30%, of the voting rights in the company (a "substantial acquisition").

Under SAR 6, a person must disclose to the company, the Panel and the relevant stock exchange by noon of the following business day where a person either increases its holding to over 15% of the voting rights in a company or increases an existing holding that is already over 15% by a whole percentage point.

Irish Takeover Rules – Interests and Dealings Disclosures

With effect from 22 July 2022, the Rules require that bidders, the target company and any person interested in 1% or more of any class of relevant securities of any securities-exchange bidder or of a target, make an "opening position disclosure", detailing their interests (including short positions) in those securities, shortly after an offer or possible offer is announced.

The Panel can request shareholder details from both securities exchange bidders and targets to enable it to monitor compliance with these new requirements

Transparency Rules

Transparency rules issued by the CBI require a shareholder to notify a public limited company once the percentage of voting rights acquired by

that shareholder reaches, exceeds or falls below 3%, and then each 1% thereafter.

7.3 Mandatory Offer Thresholds

The Rules contain a mandatory offer requirement in the following circumstances:

- a person (or persons who are actually, or are deemed to be, acting in concert) acquires a holding of 30% or more of the voting rights of a company; or
- a person (or persons who are actually, or are deemed to be, acting in concert) holds 30% or more, but less than 50%, of the voting rights of the company and increases its stake by more than 0.05% in any 12-month period.

The mandatory offer must be in cash (or include a cash alternative) at a price per share not less than the highest price per share paid by that shareholder in the 12 months prior to the announcement of the offer. The Panel may waive the mandatory offer requirement in certain circumstances.

Rule 3.3(b) of the Rules sets out the circumstances in which persons will be presumed to be acting in concert with one another (until the contrary is established) and this includes associated companies, fund managers, and persons controlling, controlled by or under common control as such fund managers.

7.4 Consideration

While cash offers are more common than offers of shares as consideration, a mixture of both cash and share consideration can be used. For voluntary offers, the offer price must be equal to the highest price paid by the bidder during the three months prior to the offer period.

If the intention is to satisfy the consideration by both a payment of cash and the issuance of shares, a buyer must be careful that the correct information is disclosed to the shareholders of the company. For instance, if transferable securities are to be issued, the purchaser entity may be required to issue a prospectus as required under the Prospectus Regulation.

7.5 Conditions in Takeovers

A takeover offer will be conditional on the bidder entity obtaining the consent of the existing shareholders of the company. Following the announcement of its intention to make an offer the bidder entity must provide the existing shareholders with details of the proposed acquisition. The existing shareholders will then have a period of time to either accept or reject the offer for their shares. In Ireland it is common for this acceptance condition to be set at the approval of 80% or 90% of the issued shares of the company, as these are the thresholds for invoking the statutory minority “squeeze-out” procedure.

If the consideration is to be paid in cash (or partly in cash) the offer document must contain a “cash confirmation” from the bidder entity’s financial advisers confirming that it has the necessary cash reserves to fund the acquisition. If the intention is to use debt to finance the acquisition, the necessary documents will need to be in place before the offer document is published.

As mentioned in **6.6 Break Fees**, these fees are common in the case of public company takeovers, however, these will be subject to the Rules. A bidder could also seek protection by way of irrevocable commitments to accept the offer – see **7.7 Irrevocable Commitments**.

7.6 Acquiring Less Than 100%
An Irish public limited company can be acquired by way of takeover offer or by way of scheme of arrangement. The respective squeeze-out mechanisms are set out below.

Scheme of Arrangement
The advantage of a scheme of arrangement is that, once a bidder entity has the approval of a majority in number (representing at least 75% in value) of the members of each share class, it can petition the Irish High Court to approve the offer.

If approved, such approval will be binding on all the shareholders so the bidder entity can then acquire 100% of the issued shares of the target entity.

Takeover Offer
In Ireland, the acceptance threshold to invoke the minority "squeeze-out" procedure is 80% for all entities (other than those that are listed on a regulated market which have a 90% threshold).

A bidder must notify the dissenting shareholders confirming that it intends to exercise its squeeze-out rights within three months from the closing date of the offer. Once the notice has been served, any dissenting shareholder may make an application for relief to the Irish High Court within 21 days.

Debt Push-Down
Commonly, tax efficient financing of an acquisition in Ireland would involve an Irish Bidco being able to obtain a tax deduction for interest on sums borrowed for the purposes of a share acquisition (subject to conditions) and then surrendering excess interest costs down to the target group for it to be able to use against its trading income. To effect such a surrender of excess costs there is a requirement that the Bidco and target are in a corporation tax "group". A corporation tax group is comprised of a parent entity and all its 75% subsidiaries – which looks to holdings of ordinary share capital, entitlement to distributable profits and to surplus assets on a winding up.

7.7 Irrevocable Commitments
It is common for PE-backed buyers to seek irrevocable commitments from major shareholders confirming that they will accept the terms of the offer and commit to sell their shares to the bidder entity.

Such commitments are binding on the shareholders and generally require shareholders to accept the offer within a certain timescale, and usually also prohibit any action that could prejudice the outcome of the offer.

With effect from 22 July 2022, the Rules contain a more comprehensive regime for the disclosure of such irrevocable commitments.

8. Management Incentives

8.1 Equity Incentivisation and Ownership
Equity incentivisation of the management team is a common feature of PE transactions in the Irish market.

Management typically holds between 5% and 15% of the equity, although this will vary between transactions. This is commonly referred to as "sweet equity".

Transaction documents invariably include a right for the PE investor to acquire a manager's equity following the termination of their employment with the relevant portfolio company.

8.2 Management Participation

The management team will normally subscribe for ordinary shares in the buyer entity acquiring the target, otherwise known as "sweet equity".

In some cases, key management will also be given the opportunity to invest in (or roll-over into) the institutional strip.

8.3 Vesting/Leaver Provisions

Typically, a "good leaver" will receive fair market value for their vested shares, and cost for their unvested shares. A "bad leaver" will receive costs for all their shares.

Vesting provisions are common and will often determine the proportion of a good leaver's shares that will qualify for good leaver treatment. This will generally be based on the expiry of a specified vesting period, typically three to five years, following the transaction to the termination of employment. Vesting may take place on a straight-line or cliff vesting basis, and would usually be accelerated in full on a successful exit.

The conditions for good leavers and bad leavers are transaction-specific and are typically heavily negotiated on any deal.

Good Leavers

Good leavers are typically those who cease to be employed by reason of their death or disability, retirement or, in some cases, involuntary termination without cause (eg, redundancy).

Generally, the board will also have discretion to treat a management equity holder as a good leaver notwithstanding that the person does not fall within the criteria for a good leaver.

Bad Leavers

Resignation and dismissal for gross misconduct are typically bad leaver events, as well as any other such events negotiated on a specific deal.

Additional concepts of "intermediate leavers" and "very bad leavers" are increasingly common.

8.4 Restrictions on Manager Shareholders

It is typical for management shareholders in Ireland to be subject to non-compete and non-solicitation restrictive covenants. Such covenants can form part of both the equity package and employment contracts.

Non-compete and non-solicitation provisions will be upheld and enforced in Ireland provided that they are limited to the extent reasonably necessary in the circumstances. Any non-compete or non-solicitation provisions that go beyond this and are overly broad in terms of territory, sector and timeframes, may be deemed to be unenforceable by the Irish courts as an attempt to unfairly restrict trade.

Post-termination restrictions on management shareholders are generally permitted for up to two years, but a 12-month restriction is more commonly put in place.

8.5 Minority Protection for Manager Shareholders

Minority protection for management will typically comprise a combination of the following:

- the right to collectively appoint a director where they hold a significant portion of equity;
- a tag-along right pursuant to which management can require a majority shareholder to include management's stake in any sale of the

majority stake to a third party, on the same terms as the sale of the majority stake;
- rights to transfer their shares to family members or trust/holding companies for the purposes of estate management;
- pre-emption rights/anti-dilution rights in relation to fresh issues of shares in the company;
- the right for all ordinary shares (including management "sweet" ordinary shares), to be treated on an equal basis upon a liquidity event, after payment of external and shareholder debt;
- restrictions on changes to the economics including:
  - (a) changes to the waterfall/liquidity provisions in the company's constitution; or
  - (b) issuances of shares of a higher or more preferential ranking;
- upon departure from the company (ie, ceasing to be management):
  - (a) a right to transfer institutional shares to the majority investors at market value in order to secure liquidity at departure date; or
  - (b) a right to retain shares until a future exit event in order to participate in and realise the growth value the management team has created – although this will be subject to management leaver provisions;
- automatic issuance of unallocated sweet equity shares to management upon an exit event, although this can be resisted by PE majority shareholders; and
- restrictions on dealings between the PE firm and its affiliates and the company.

9. Portfolio Company Oversight

9.1 Shareholder Control and Information Rights

Governance arrangements for PE portfolio companies are typically documented in a shareholders' agreement. These agreements normally cover day-to-day management appointments and behaviour, how the business is conducted (usually through vetoes for the PE shareholder), covenants relating to management, share transfers, information rights for the PE shareholder, and raising equity and share capital.

PE shareholders also typically control the board via majority director appointment rights and/or weighted voting rights for PE shareholder directors.

PE shareholders typically enjoy a wide range of veto rights over major corporate actions and decision making. These usually include control over the business plan and strategy, acquisitions and disposals, and major litigation, among others. PE investors exercise these powers through shareholder veto rights and, if available, by director veto rights through their nominee director. There is a balance that needs to be struck between the need for the PE shareholder to protect and manage its investment and control strategic issues, and the ability of management to manage the company day to day.

Where a PE shareholder has a minority position, the veto rights tend to be focused on protection of economic interests, and only fundamental strategic matters – ie, anti-dilution, exit below an agreed valuation, and fundamental change of business – similar to a control transaction.

9.2 Shareholder Liability

It is a fundamental principle of company law in Ireland that shareholders will not be liable for the actions of the company and may only be liable up to the paid-up amount on their shares.

The corporate veil can, however, be lifted in certain limited circumstances (ie, in the case of fraud), although this is highly unusual in Ireland.

10. Exits

10.1 Types of Exit

The timeframe for holding an investment will vary from PE fund to PE fund; however, PE funds typically seek to exit their position within four to six years of their initial investment. This period can be shorter, depending on the market.

PE sellers by way of IPO have not been a feature of the Irish market in recent years and almost all exits have been implemented by way of sale process. As such, there is no established market practice or pattern as regards the pursuit of dual-track or triple-track processes.

It is not common in the Irish market for a PE fund to reinvest beyond the life of its initial investment.

Whole and partial continuation funds are still relatively new to the Irish market but it is anticipated that these may become a feature of the market over the coming years.

10.2 Drag and Tag Rights

Drag rights are typical in equity arrangements in Ireland; however, they are rarely utilised. Typically, a buyer will not want to complete a sale using a drag-along. A PE fund will be afforded rights to enable it to force any minority shareholders to sell their shares if the PE fund wishes to sell their stake; however, it would not be typical for a PE shareholder to be the subject of a drag-along.

The equity threshold required to enforce a drag-along varies from transaction to transaction and is linked to the shareholder base but is usually set at the percentage of the shares held by the investors, always including the PE shareholders.

Tag rights are also common in Ireland and, in the event that the PE shareholder wishes to sell its shares, the other minority shareholders also have the opportunity to sell their shares on the same terms.

There is no typical threshold needed to enforce these rights – it will depend on the equity structure of the company in question.

10.3 IPO

The length of any lock-up period imposed on a PE seller on an IPO exit will be determined by regulation and the market practice applicable to the chosen listing venue and may be negotiated, but would customarily be for a period of at least six months from listing.

Following expiration of the lock-up period, PE sellers will sometimes agree with the issuer and underwriters of the IPO to continue to be subject to "orderly market" limitations on the timing, volume and manner of the disposal of their shares. An orderly market arrangement may continue for a further period equal in duration to the lock-up period.

As mentioned in **10.1 Types of Exit**, PE sellers by way of IPO have not been a feature of the Irish market in recent years and almost all exits have been implemented by way of sale process.

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