ACC Association of Corporate Counsel

Private mergers and acquisitions in Ireland: overview

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CORPORATE ENTITIES AND ACQUISITION METHODS

1. What are the main corporate entities commonly involved in private acquisitions?

The main corporate entities involved in private acquisitions are limited companies, either private companies limited by shares or a public limited company. The liability of the shareholders in a limited company is limited to the amount, if any, unpaid on their shares. A private company cannot offer its shares for sale to the general public.

2. Are there any restrictions under corporate law on the transfer of shares in a private company? Are there any restrictions on acquisitions by foreign buyers?

Restrictions on share transfer

While shares in private limited companies are transferable, a private limited company is required under the Companies Act 2014 (Companies Act) to restrict the transfer of shares. The number of members in a private limited company is restricted to 149. Restrictions on share transfers may be prescribed by the company's constitution or articles of association. If there is a separate shareholders' agreement in place, this may also contain restrictions. A transfer of the legal title to shares is not complete until registered in the company's share register, which cannot be completed until a stamp duty filing has been completed (unless the value of the transfer is less than EUR1,000, in which case the transfer is exempt from the filing requirement). The transferee may have certain equitable rights to the shares pending registration in the company's share register but a share transfer is not complete and the transferee will not have full legal title until the transferee is registered as a member.

The directors are usually granted the ability under the constitution or articles of association to decline to register the transfer of a share to a person whom they do not approve. However, the directors are required to exercise this discretion bona fide and for the benefit of the company as a whole. There is the ability under the Companies Act for an aggrieved person to challenge a refusal to register by seeking rectification of the company's register of members, where the name of the transferee is not entered in the register of members without sufficient cause. In addition to the ability of the directors to decline the registration of share transfers, pre-emption rights or rights of first refusal are often provided for in the constitution or articles of association.

Foreign ownership restrictions

Acquisitions by foreign buyers are generally unrestricted. However, as a result of Article 215 of the Treaty on the Functioning of the European Union and Regulation 881/2002 (as amended), certain measures are in place that restrict trade between Ireland and a list of restricted countries.

3. What are the most common ways to acquire a private company? What are the main advantages and disadvantages of a share purchase (as opposed to an asset purchase)?

The most common acquisition method is by share purchase.

Share purchases: advantages and disadvantages

The main advantages of a share purchase (disadvantages of an asset purchase) are:

- All assets of the target company, and its subsidiaries, are relatively easily acquired (compared to the mechanics of an asset sale).
- Generally, 1% stamp duty is payable on the value of the shares (compared with higher rates generally on an asset purchase). (*See Question 25.*)
- No value added tax (VAT) is payable on the purchase of shares.
- All employees are acquired and no change in status of the employees.
- No need to assign or novate contracts, though contracts will need to be reviewed to identify any change of control provisions that require the consent of a third party.
- Fewer consents and approvals are likely to be required in a share purchase.
- Non-competition and non-solicitation clauses are generally considered justifiable where both tangible assets and intangible assets, such as goodwill and know-how developed by the seller, are transferred to the buyer.
- Irish company law now permits "merger accounting" as per the Companies Act.
- Sellers prefer a share sale because it is generally more tax efficient for sellers.

The main disadvantages of a share purchase are:

- A buyer cannot pick and choose assets and liabilities.
- Risk, albeit limited, of inheriting liabilities, particularly those where the corporate veil may be pierced (for example, environmental).
- Post-completion integration may be more difficult (for example, having to merge an existing business with an acquired subsidiary's business).
- Change of control clauses may be triggered.

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Asset purchases: advantages and disadvantages

The main advantages of an asset purchase are:

- A buyer can pick and choose the assets and can mainly leave the liabilities behind.
- Only employees attaching to the chosen assets will transfer.
- Generally, the primary asset sale documentation is more straightforward than the primary share sale documentation.

The main disadvantages of an asset purchase (advantages of a share sale) are:

- In an asset sale, only the assets and liabilities the buyer agrees to buy and which are identified in the asset purchase agreement will be acquired. Particular care must be taken to identify and define those assets and liabilities in the asset purchase agreement.
- Title to some assets will pass on completion pursuant to the asset purchase agreement. However, further formalities and documents are probably required to transfer legal title to other assets, for example real estate or intellectual property.
- Allocation of collected business debts post-completion.
- If the asset sale breaches borrowing covenants or the terms of security taken over the acquired assets, consent of lenders may be required and security release documents may need to be obtained.
- A straightforward asset purchase, limited to the transfer of physical assets or to exclusive commercial property rights without goodwill, will mean no business or undertaking is being transferred. Non-compete and/or non-solicitation provisions cannot be imposed on the seller if there is no transfer of an undertaking or business.
- Control of a pension scheme does not automatically pass.
- Higher stamp duty and VAT may apply.

Mergers under the Companies Act 2014

The Companies Act introduced new statutory methods for the merger of Irish companies. The Companies Act provides for such domestic mergers to be effected by means of a summary approval procedure (SAP) or by way of a special resolution which is confirmed by a court order. The Companies Act sets out three ways in which a merger can take place:

- By acquisition.
- By absorption.
- By the formation of a new company.

For a merger to take place under the Companies Act, none of the merging companies can be a public limited company, and at least one of the merging companies must be a private company limited by shares in Ireland. The main advantages of a statutory merger are:

- The assets and liabilities of the merging company transfer automatically to the successor company upon approval.
- The transferor is dissolved without having to be wound up.
- Mergers in this manner cannot trigger change of control clauses in contracts.
- Court approval is not required where the SAP can be used.
- Where the SAP is used creditors do not have a right to be heard.

The main disadvantages of a statutory merger are:

- There are more technical procedural requirements than a share purchase or an asset sale which may impact on timing.
- The statutory merger process cannot be used for partial transfers.
- There must be at least one Irish company limited by shares involved.
- The transfer of contracts is not governed by Irish law and assets with a non-Irish situs may be subject to additional requirements imposed by local law.
- If the merging entity is a public limited company, or unanimous shareholder approval is not possible, a court process will be required.
- If using the SAP, there may be potential unlimited liability for the directors.

4. Are sales of companies by auction common? Briefly outline the procedure and regulations that apply.

Auction sales are common but certain buyers may refuse to participate in auctions, so it depends on the potential buyer community. No particular regulations apply to auction sales for private companies. The procedure is not particularly unusual, and often involves:

- An information memorandum to solicit interest.
- A first phase indicative bid process.
- A second phase full data room for those who qualify from phase one.
- Final binding bids and document negotiations (sometimes with multiple bidders).

Usually a seller will make clear in the information memorandum that it is not obliged to accept the highest bid, nor to consider all offers tendered, and will generally reserve its discretion to vary the auction procedures.

PRELIMINARY AGREEMENTS

5. What preliminary agreements are commonly made between the buyer and the seller before contract?

Letters of intent

The main preliminary agreement is a letter of intent, sometimes called a memorandum of understanding, heads of terms or termsheet.

Letters of intent are normally entered into by a seller and buyer immediately after the key commercial terms of the deal have been agreed. They set out the proposed terms and conditions of the transaction and usually set out the high-level agreement between the parties on issues such as:

- The shares/assets to be acquired.
- The consideration payable.
- Any conditions to completion, timetable and process.
- Responsibility for drafting agreements, due diligence, warranty cover, confidentiality and exclusivity.

As a rule, letters of intent are not legally binding, although the provisions relating to confidentiality, exclusivity/lock-out, costs and governing law are agreed to be legally binding. However, letters of intent are often considered morally binding by the parties. As such, a buyer or seller can find it difficult, at a later stage in the transaction, to materially vary the deal terms from those set out in the letter of intent. In general terms, there is no duty in Ireland to act in good faith when it comes to concluding a letter of intent.

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Exclusivity agreements

Exclusivity (or lock-out or shut-out) agreements normally provide that a seller will not negotiate with, or solicit offers from, any other parties other than one prospective buyer for a fixed period of time. This commitment from a seller will give a potential buyer comfort that they can incur substantial due diligence and other costs, in the knowledge that they have exclusive negotiation rights. The exclusivity arrangement can also prevent a seller from using the potential buyer's offer as leverage to encourage further offers.

Non-disclosure agreements

These are usually entered into at the beginning of a transaction, when one party wishes to begin disclosing confidential information (including personal data) in the context of a stated business purpose.

While it is advisable to enter into a confidentiality agreement if confidential information is to be disclosed, there can be difficulties in enforcing them and with proving that a breach has occurred.

There may be restrictions on the disclosure of certain information. For example, such information may already be the subject of a confidentiality obligation, or if information passing between entities constitutes personal information, it will be protected under applicable data protection laws.

Damages and/or an injunction are the remedies for breach of a non-disclosure agreement. An injunction may be an inadequate remedy because the loss may have been suffered by the time an injunction has been obtained.

ASSET SALES

6. Are any assets or liabilities automatically transferred in an asset sale that cannot be excluded from the purchase?

Only the assets and liabilities the buyer agrees to purchase, and which are identified in the asset purchase agreement, will be acquired. Any employees attaching to the acquired assets will transfer and the buyer will be obliged to comply with transfer of employment law requirements (*see Question 31*).

7. Do creditors have to be notified or their consent obtained to the transfer in an asset sale?

The general rule is that unless the transferor has solvency issues (or there is a contractual obligation to do so, for example, a loan agreement), creditors do not have to be notified or their consent obtained in an asset sale. Liabilities remain with the seller unless otherwise agreed between the parties.

However, if a buyer is assuming a transferor's liability relating to a creditor such as a bank facility, consent of the creditor is likely to be required.

SHARE SALES

8. What common conditions precedent are typically included in a share sale agreement?

Conditions precedent may include:

- Competition and Consumer Protection Commission (anti-trust) approval.
- All necessary consents (industry specific or regulatory) and waivers in respect of the shares are obtained.
- All material permits, licences and consents to enable the buyer to complete the purchase.
- Transaction specific conditions, for example bank consent and material third party contract consent.

There are normally three classes of condition:

- Those largely outside the control of the seller.
- Those the seller is obliged to satisfy.
- Those which a buyer has to satisfy.

Generally, a target date for completion of these will be identified by the parties, at which point the parties can complete the acquisition or the conditions (in bullet points two and three above) can be waived. If the conditions are not satisfied (or waived), the other party has the option to terminate. Depending on how the share sale agreement is drafted, the relevant party is generally required to use reasonable endeavours to fulfil these conditions.

SELLER'S TITLE AND LIABILITY

9. Are there any terms implied by law as to the seller's title to the shares in a share sale? Is any specific wording necessary and do buyers normally impose a higher standard than is implied by law?

The general principle of caveat emptor (let the buyer beware) applies, so careful drafting of the sale agreement is necessary to ensure title passes to a buyer. To acquire full title to the shares, a buyer should provide in the documents that the shares are sold free from all encumbrances and together with all rights attaching or accruing to the shares. This is normally also warranted by the seller.

The document should also be drafted to ensure that the seller procures the valid transfer of full title to the seller on completion (that is, procure that the name of the purchaser is entered on the register of members of the seller on completion, provision of share certificates in the purchasers name and so on).

10. Can a seller and its advisers be liable for pre-contractual misrepresentation, misleading statements or similar matters?

In short, it is possible for a seller to be liable for pre-contractual misrepresentation or misleading statements. The sale contract may provide otherwise and if there is an issue, a debate may arise as to whether the seller has defrauded (rather than mis-represented matters to) the buyer.

Advisers could similarly be liable for negligent misstatements, as well as under the tort of deceit, but it would very much depend on the circumstances.

MAIN DOCUMENTS

11. What are the main documents in an acquisition and who generally prepares the first draft?

The main documents in an acquisition are:

- Share purchase agreement/asset purchase agreement, usually prepared by the buyer (unless there is an auction sale).
- Disclosure letter. This is drafted by the sellers.
- Tax deed. This is usually drafted by the buyer, for share sales only.

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- Any relevant documents of transfer (for example, intellectual property, real property, shares and so on).
- Any other key agreements, such as service agreements, which are usually drafted by the buyer.

ACQUISITION AGREEMENTS

12. What are the main substantive clauses in an acquisition agreement?

The main clauses in a share acquisition agreement are:

- Definitions.
- Agreement for the sale and purchase of shares.
- Consideration.
- Conditions precedent to completion.
- Obligations at completion.
- Warranties.
- Limitations on warranties.
- Indemnities (if relevant).
- Restrictions on sellers, for example non-compete clause.
- Tax covenant (if not contained in a separate tax deed).
- Miscellaneous clauses, such as announcements, confidentiality, costs, severability, no assignment, whole agreement, survival, cumulative remedies, waiver, further assurance, notices, counterparts, jurisdiction and governing law.

The main clauses in an asset acquisition agreement are:

- Definitions.
- Agreement for sale and purchase of assets.
- Consideration (valuation of assets).
- Obligations at completion.
- Warranties.
- Limitations on warranties.
- Indemnity.
- Restrictions on sellers, for example non-compete.
- Employees.
- VAT.
- Miscellaneous clauses, such as announcements, confidentiality, costs, severability, no assignment, whole agreement, survival, cumulative remedies, waiver, further assurance, notices, counterparts, jurisdiction and governing law.

13. Can a share purchase agreement provide for a foreign governing law? If so, are there any provisions of national law that would still automatically apply?

While it would be possible for a share purchase agreement to provide for a foreign governing law if agreed between the parties, a transaction being negotiated in Ireland relating predominantly to an Irish company is usually governed by Irish law.

Regardless of the chosen governing law under the contract, certain provisions of Irish law continue to apply automatically, for example relating to the actual transfer of the shares, tax liabilities, employee protection and competition/anti-trust issues (where relevant).

WARRANTIES AND INDEMNITIES

14. Are seller warranties/indemnities typically included in acquisition agreements and what main areas do they cover?

Acquisition agreements generally contain warranty protection from the sellers, including relating to:

- Capacity and title.
- Company information.
- Financial information.
- Key contracts.
- Employees and pensions.
- Assets.
- Tax.
- Litigation.
- Environmental.
- Legal compliance.
- Insurance.
- Intellectual property.
- Data protection.
- Property.
- Business warranties.

Tax cover is normally given on an indemnity basis.

15. What are the main limitations on warranties?

Limitations on warranties

The limitations on warranties depend on the circumstances but sometimes include:

- Time limits for bringing a claim.
- Aggregate minimum claim (a buyer is normally prevented from bringing a claim for small or immaterial matters).
- Aggregate maximum liability (there is often a cap on total recovery under warranty claims).
- Warranties qualified by the buyer's knowledge. This is often negotiated, depending on the circumstances.
- Prevention of double recovery under warranties, indemnities and insurance policies.
- Conduct of claims, where a seller attempts to maintain control of or input into a warranty related third party claim.

Other limitations on warranties are sometimes considered, and depend on the circumstances and bargaining position or approach to risk taken by the buyer or the seller.

Qualifying warranties by disclosure

A standard and most commonly accepted limitation is that no warranty claim can be made to the extent the matter was disclosed in the disclosure letter. There can be debate on the level of disclosure required. The share purchase agreement will often set out what is meant by proper and fair disclosure by the sellers.

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16. What are the remedies for breach of a warranty? What are the time limits for bringing claims under warranties?

Remedies

The main remedies are:

- Damages for breach of contract (and possible claims for misrepresentation).
- Rescission. Sometimes the right of rescission for breach of warranty is limited to the period between signing and completion, and is not available after completion.

Time limits for claims under warranties

The period of time in which a warranty claim can be made is usually subject to heavy negotiation. 18 months to two years is about normal for general claims but it can be longer or shorter.

A longer warranty period may be negotiated for key warranties (for example, in relation to IP ownership for a technology business). Other warranties may not be subject to any time limitation, for example title to the shares.

A four to five year period usually applies for claims under the tax covenants or tax deed. This tax limitation period is usually aligned to the time limit for the Irish tax authority (the Revenue Commissioners) to make assessments, which is four years starting at the end of the chargeable period in which the return is delivered.

CONSIDERATION AND ACQUISITION FINANCING

17. What forms of consideration are commonly offered in a share sale?

More often than not cash is paid for the shares, though any asset can be accepted including debt or shares in other companies. There are different methods of how consideration can be paid, such as earn-outs or holdbacks. Tax is sometimes a driver for consideration other than cash, although the commercial terms normally dictate whether it should be cash or non-cash consideration.

18. If a buyer listed in your jurisdiction raises cash to fund an acquisition by an issue of shares, how is the issue typically structured? What consents and regulatory approvals are likely to be required?

Structure

If a buyer is listed in Ireland then finance can be raised either through a rights issue, a placing or by bank debt. The method used will depend on the amount of cash that is required.

Consents and approvals

In order to approve the issue of shares, it may be necessary to convene a shareholders extraordinary general meeting (EGM) and perhaps to approve the transaction itself. Whether a shareholder EGM is required will depend on the relevant listing rules (for example, Rules of the Irish Stock Exchange, NASDAQ or AIM Rules), and also on whether the Irish listed company has existing authority to issue shares from its last annual general meeting. Pre-emption rights do not apply in a share-for-share exchange.

Requirements for a prospectus

A prospectus is subject to prior approval by the Central Bank of Ireland. There are certain exemptions from the requirement to produce a prospectus, which include an offer of securities:

- Solely to qualified investors.
- Addressed to fewer than 150 natural or legal persons, other than qualified investors.
- Addressed to investors who acquire securities for a total consideration of at least EUR100,000 per investor, for each separate offer.
- Whose denomination per unit amounts to at least EUR100,000.
- With a total consideration in the EU less than EUR100,000, calculated over a 12-month period.

If a listed company is approaching all its shareholders for a rights issue, more often than not a prospectus will be required, and this will be regulated by the Central Bank of Ireland.

19. Can a company give financial assistance to a potential buyer of shares in that company?

Restrictions

A private limited company can only give financial assistance if certain provisions of the Companies Act are complied with. There is a general prohibition under Irish company law on the giving of financial assistance (whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise) by a company for the purpose of an acquisition for shares made or to be made by any person in the company or in its holding company.

Exemptions

Under Irish company law, there is a generalised validation procedure for private limited liability companies, the Summary Approval Procedure (SAP), which if followed, means that the prohibition against giving financial assistance does not apply.

The SAP involves:

- The directors (or a majority of them) provide a declaration of solvency in writing at a meeting of the directors held no earlier than 30 days before the meeting of the members to approve the financial assistance. This declaration sets out certain information in relation to the assistance, and states that the directors swearing the declaration have made a full inquiry into the affairs of the company and have formed the opinion that the company will be able to pay its debts in full as they become due following this assistance.
- The members of the company giving the assistance must pass a special resolution at an EGM authorising the giving of the assistance (no more than 12 months before the assistance is given).
- A copy of the special resolution must be filed with the Registrar of Companies (CRO) within 15 days of it being passed and the directors' declaration must be filed with the CRO within 21 days of the financial assistance being commenced.

The SAP procedure is not available to a public limited company with some exceptions, for instance in cases of members voluntary winding up.

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SIGNING AND CLOSING

20. What documents are commonly produced and executed at signing and closing meetings in a private company share sale?

Signing

The main documents at signing are the:

- Acquisition agreement.
- Disclosure letter.
- Board resolutions of the parties approving the transaction and authorising entry into the transaction.
- Legal opinion, where there is a foreign party.
- Power of attorney, if any document is being executed by an attorney.
- Tax deed.

Closing

The main documents at closing are the:

- Stock transfer forms (the actual document under which title to the shares transfers).
- Share certificates in respect of shares being transferred, or indemnity for lost share certificates.
- Confirmation on transfer of consideration.
- Closing board minutes for the buyer.
- Board minutes for the target approving the acquisition, and entry of new shareholders into the register of members.
- Resignation letters for outgoing directors.
- Service agreements being entered into with key employees.
- Deed of release in respect of any loans or security.
- Escrow agreement (if relevant).

21. Do different types of document have different legal formalities? What are the formalities for the execution of documents by companies incorporated in your jurisdiction?

In general, a contract (as opposed to a deed) should be signed in the way authorised by the company and in compliance with the constitution or articles of association. The process tends to be less formal than some other jurisdictions, but does require analysis of the articles of association, the drafting of approval board minutes and sometimes a power of attorney.

There is a distinction under Irish law between a simple contract and a deed. In most cases the limitation period for actions brought under deeds is 12 years from the cause of action, compared to a six-year limitation period from the cause of action for contracts under hand (that is, not sealed). Deeds are enforceable despite any lack of consideration.

Deeds require additional execution requirements. For an Irish company, the company seal must be affixed to the deed. Use of the company seal is governed by a company's constitution or the Companies Act. Two signatories are usually required to countersign a document to which the company seal is affixed. The signatories required are usually two directors, or one director and the company secretary or a person authorised by the directors in that respect.

22. What are the formalities for the execution of documents by foreign companies?

A foreign company must execute documents in the manner permitted by the laws of its country of incorporation.

For a foreign body corporate, a deed under Irish law is executed in accordance with the legal requirements governing execution of the document by that body corporate in the jurisdiction where it is incorporated.

Where a deed is executed by a foreign company a statement, opinion, affidavit or declaration from a foreign legal practitioner from the relevant jurisdiction, which cites the applicable domestic law for the valid execution of the deed/instrument and certifying that the deed/instrument was executed in accordance with the relevant law may be required.

23. Are digital signatures binding and enforceable as evidence of execution?

Digital signatures are binding and enforceable as evidence of execution. The Electronic Commerce Act 2000 permits the use of digital signatures for execution. Regulation (EU) 910/2014 on electronic identification and trust services for electronic transactions in the internal market (Electronic Identification Regulation) came into effect in 2016. It aims to provide a harmonised regulatory environment to enable secure electronic interactions between individuals and businesses across the EU. Under the Electronic Identification Regulation, an e-signature must not be denied legal effect on the grounds that it is in electronic form. The Electronic Identification Regulation introduced three types of online signature (simple e-signatures, advanced e-signatures and qualified e-signatures). Qualified e-signatures are the highest ranking digital signature and were given the same legal effect as a handwritten signature by the Electronic Identification Regulation.

24. What formalities are required to transfer title to shares in a private limited company?

Legal title to shares is generally transferred by:

- Execution of a written instrument of transfer (stock transfer form).
- Production of original share certificates, or indemnity for lost share certificates.
- Payment of 1% stamp duty by the buyer (to the extent applicable).
- A board meeting of the target company to approve the transfer and registration of the buyer's name on the company's register of members.
- Issue of a new share certificate.

In general terms, beneficial or equitable title to the shares can be transferred without the above formalities, but may be subject to other restrictions (for example, contractual pre-emption rights and stamp duty will still apply).

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TAX

25. What transfer taxes are payable on a share sale and an asset sale? What are the applicable rates?

The sale of shares is generally subject to stamp duty at a rate of 1% of the consideration for the shares (or the market value of the shares, if higher). The sale of shares which derive the greater part of their value directly or indirectly from Irish real estate is subject to stamp duty at the rate of 6% of the consideration for the shares (or the market value of the shares, if higher). There is an exemption from stamp duty in relation to the transfer of shares and marketable securities of companies listed on the Enterprise Securities Market of the Irish Stock Exchange. The stampable instrument is the stock transfer form.

In an asset sale, stamp duty arises on instruments for the sale of Irish situated assets at various rates, depending on the asset. Following the 2018 Irish Budget, non-residential property (being any property other than residential property, stocks or marketable securities or insurance policies) is subject to stamp duty at the rate of 6% of the consideration given for the property (or the market value, if higher).

26. What are the main transfer tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate tax liability?

Generally, from a stamp duty perspective it is preferable to acquire shares rather than assets, due to the lower rate of 1% generally applicable to a share sale. However, this depends on the assets in question and their location.

In an acquisition of shares in an Irish company, certain techniques are often used to minimise the stamp duty arising. For example, it may be possible to carry out a transfer of the ownership of the target through a court approved scheme of arrangement, involving cancellation of the issued share capital of the target rather than the sale of its shares. No stamp duty arises where the shares are cancelled as part of such a scheme of arrangement. However, a court is unlikely to approve such a scheme of arrangement if the purpose is solely to avoid stamp duty.

In addition, relief from stamp duty is available for certain company reconstructions or amalgamations. Where the acquiring entity acquires all the share capital of the target in exchange for the issue of shares in the acquiring entity, the transfer may qualify for relief from stamp duty.

Relief is also available from stamp duty for transfers of shares and assets between associated companies. These are companies in a 90% beneficial relationship where a number of conditions are satisfied.

27. What corporate taxes are payable on a share sale and an asset sale? What are the applicable rates?

Subject to exemptions (*see Question 28*), an Irish resident (individual or a company) is generally subject to capital gains tax (CGT) at 33% on any gain realised from the disposal of shares and worldwide assets.

A non-resident (individual or a company) is generally only subject to CGT at 33% on a gain from the disposal of the following assets or shares that derive their value or a greater part of their value from such assets:

- Land or buildings in Ireland.
- Irish minerals or any rights, interests or assets in relation to mining or minerals or searching for minerals.
- Exploration or exploitation rights in a designated area.

In addition, a non-resident is also subject to CGT on gains from the disposal of assets situated in Ireland which are used in, or for the purpose of, a trade carried on by that non-resident through a branch or agency in Ireland.

28. What are the main corporate tax exemptions and reliefs in a share sale and an asset sale? Are there any common ways used to mitigate tax liability?

There is an exemption from capital gains tax (CGT) on a disposal by a parent company of shares in its subsidiary, where certain conditions are met. The parent company must, for a continuous period of 12 months ending within the two-year period before the disposal, have done all the following:

- Directly or indirectly held at least 5% of the subsidiary's ordinary share capital.
- Been beneficially entitled to at least 5% of the profits available for distribution to equity holders of the subsidiary.
- Been beneficially entitled on a winding-up to at least 5% of the assets of the subsidiary available for distribution to equity holders.

In addition, the subsidiary must be tax resident in an EU member state (including Ireland) or a country with which Ireland has signed a double tax treaty, and it must be carrying on a trade or be part of a trading group. However, there are a number of restrictions to the relief, for example it is not available on certain disposals such as the disposal of shares deriving the greater part of their value from Irish land or mineral rights.

A relief from CGT is also available for gains on a transfer of shares or assets between two companies in a 75% group relationship.

Further, a relief from CGT is available for individuals on gains from the disposal of certain business assets where a number of conditions are satisfied. This relief is known as retirement relief and applies to individuals aged 55 years and over.

29. Are other taxes potentially payable on a share sale and an asset sale?

A sale of shares is exempt from value added tax (VAT).

However, VAT is potentially payable on the sale of assets. Normally, VAT is chargeable at:

- 23% on the transfer of most movable assets and transfers of intangible assets in Ireland.
- 13.5% on the transfer of Irish immovable property (where applicable).

A relief is available on the transfer of business assets where a number of conditions are satisfied. The relief is generally available where the entire business or part of a business is transferred, and where the transferred assets constitute an undertaking or part of an undertaking capable of being operated on an independent basis.

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30. Are companies in the same group able to surrender losses to each other for tax purposes? For example, can interest expenses incurred by a bid vehicle incorporated in your country be set off against profits of the target before tax?

Group relief for the surrender of trading losses and other amounts eligible for relief from corporation tax (such as interest expenses) is available for companies in a 75% group relationship.

A group for this purpose can be composed of:

- Irish resident companies.
- Companies resident in other EU member states, in the European Economic Area (EEA), or in a jurisdiction with which Ireland has concluded a double tax treaty.
- Companies that have their principal class of shares substantially and regularly traded on a recognised stock exchange.

Current year losses in one group company can be surrendered and used by the recipient group company on a current year basis. Trading losses of a group company for corporation tax purposes can be surrendered to another group company that is subject to corporation tax, and can be used to reduce the recipient company's profits on a value basis.

A similar form of loss surrender applies to a company owned by a consortium, which is up to five companies owning at least 75% of the surrendering company, with each owning at least 5%. Losses incurred by the company can be surrendered up to the consortium companies.

EMPLOYEES

31. Are there obligations to inform or consult employees or their representatives or obtain employee consent to a share sale or asset sale?

Asset sale

The European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (as amended) (commonly known as TUPE) apply to an asset transfer, and any transfer of an undertaking, business or part of an undertaking or business from one employer to another as a result of a legal transfer or merger.

When TUPE applies, both the transferee and transferor must inform their respective employee representatives affected by the transfer of the following information, where reasonably practicable no later than 30 days before the transfer is carried out and in any event in good time before the transfer:

- Date or proposed date of the transfer.
- The reasons for the transfer.
- The legal implications of the transfer for the employees.
- A summary of any relevant economic or social implications of the transfer for them.
- Any measures envisaged in relation to the employee.
- The number of agency workers temporarily engaged in the undertaking concerned.
- Those parts of the undertaking in which those agency workers are, for the time being, working.
- The type of work that those agency workers are engaged to do.

Where the transferor or the transferee envisage any measures in relation to the employees, they must consult with the affected employee representatives, where reasonably practicable, no later than 30 days before the transfer is carried out with a view to reaching agreement.

The obligation to consult lies on both the transferor and the transferee. In practice, however, the transferor usually assumes a more proactive role in the consultation process. For example, where there are measures envisaged following the transfer (such as potential redundancies), it would be usual for the transferor to notify and consult the transferring employees, and then for the transferee to consult with the affected employees before the transfer.

Employee consent to the transfer is not required. An employee that is wholly or mainly assigned to the business being transferred has the right to transfer with the business by operation of law but is not obliged to transfer. Where an employee refuses to transfer, the position is that this refusal does not defeat the operation of the transfer and the objecting employee's employment is deemed to transfer to the transferee. However, the employee is deemed to have resigned from the employment of the transferee.

Failure to comply with these obligations could result in a referral to the Workplace Relations Commission, who can award compensation up to a maximum of four weeks remuneration to each employee in the case of a contravention of the information and consultation provisions, and two years remuneration in the case of a contravention of any other provision of the Regulations. In addition, failure to consult could result in problematic industrial relations issues.

In addition (*section 21, Employees (Provision of Information and Consultation) Act 2006*):

- The transferor must notify the transferee of all rights and obligations arising from the employment contract on the date of transfer which will transfer to the transferee, so far as they are or should have been known to the transferor at the time of the transfer.
- A failure by the transferor to notify the transferee of any such right or obligation does not relieve the transferee of the obligation to take on that right or obligation.

If the transferor fails to provide information or documents to the transferee, the transferor may have to indemnify the transferee in respect of any amount of compensation payable by the transferee to an employee, relating to a complaint regarding a breach of his rights under TUPE.

A seller, as a data controller, must ensure that the disclosure of employees' personal data to prospective buyers during the due diligence process complies with the applicable data protection laws. While those laws do not require the seller to inform employees about the specific transaction at hand, the seller must inform employees that their personal data may be disclosed to a prospective buyer of any of the company's assets or business. This information can be provided to employees in advance of any transaction via a provision in the seller's privacy policy for their employees.

Share sale

No statutory information and consultation obligations arise on a share sale, unless the employees have requested the employer to establish information and consultation arrangements for the business, under the Employees (Provision of Information and Consultation) Act 2006 (which transposed Directive 2002/14/EC on informing and consulting employees (Information and Consultation Directive) into Irish law).

Also, the parties should check whether there are collective agreements that provide for such a consultation process. Additionally, it is advisable to consider whether this could cause

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any industrial relations issues, despite the absence of an agreement.

Employee consent is not required for a share sale.

32. What protection do employees have against dismissal in the context of a share or asset sale? Are employees automatically transferred to the buyer in a business sale?

Business sale

The general position is that employees automatically transfer on a business/asset sale.

Dismissals by the transferor or the transferee in connection with a transfer are prohibited under TUPE and automatically unfair, regardless of whether the individual is dismissed before or after the transfer.

However, a transfer related dismissal is permitted if it is for economic, technical or organisational reasons that involve changes in the workforce (ETO defence). The ETO defence is only available to the transferee and not to the transferor. Certain conditions must be satisfied to successfully rely on the ETO defence.

On the sale of a business, by asset or share sale, service agreements should be reviewed carefully, to see whether a change of control provision could trigger obligations, including a severance payment.

Share sale

Employees do not have additional protection against dismissal in a share sale. It is considered unnecessary, as only the identity of the shareholders changes and not the employer. If dismissals are made, the usual protection against dismissal applies, including:

- Claim for unfair dismissal. Generally, employees with more than 12 months' service are protected from being unfairly dismissed under the Unfair Dismissals Acts 1977 to 2015. A dismissal is deemed to be automatically unfair unless it is for a fair reason (as provided for under the Acts) and fair procedures are followed in terminating the employee's employment.
- Breach of contract.
- Injunction seeking to restrain the dismissal.
- Equality proceedings, if the dismissal is related to discrimination.

Transfer on a business sale

Employees assigned to the transferring business automatically transfer to the buyer (the transferee) in a business sale. All employment rights (except rights to old age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes) and obligations transfer to the transferee. Employment contracts in place immediately before the transfer have effect as if originally made between the employees and the transferee.

TUPE only applies to employees. The following workers fall outside its scope:

- Consultants.
- Independent contractors.
- Temporary secondees.
- Agency workers, however, this is not absolute. TUPE may apply to agency workers in certain circumstances, for example where agency workers are deemed to be an employee of the transferor or their wages are paid by the transferor.
- Employees engaged on a sea-going vessel.

PENSIONS

33. Do employees commonly participate in private pension schemes established by their employer? If an employee is transferred as part of a business acquisition, is the transferee obliged to honour existing pension rights or provide equivalent rights?

Private pension schemes

Generally, participation in private funded pension schemes in Ireland is quite low. Current data indicates that only around 40% of private sector workers, and around 22% of those working part-time, have a pension.

Private occupational pension schemes can be established by employers as defined benefit schemes or defined contribution schemes. To be approved by the Revenue Commissioners, they must be established under irrevocable trusts. Employers are increasingly opting for defined contribution schemes. There are now more employees in defined contribution schemes than defined benefit schemes. Overall rates of membership of both defined benefit and defined contribution schemes have declined in recent years.

There is currently no provision in law for auto-enrolment in a private occupational pension scheme. The government intends to legislate for auto-enrolment and has targeted a commencement date of 2022. Under the proposed system, employers are expected to be required to enrol qualifying employees in a pension arrangement into which both the employer and employee will contribute. It is also expected employees will have the right to opt-out and that contributions will need to meet certain minimum requirements.

Currently, if an employer does not provide an occupational pension scheme, where eligibility for the scheme is limited or where the waiting period for entry exceeds six months, the employer must provide access to a personal retirement savings account (PRSA), a type of personal pension arrangement. However, there is currently no obligation on an employer to pay contributions into that PRSA.

Subject to limits set by the Revenue Commissioners, employer and employee contributions to occupational pension schemes approved by the Revenue Commissioners and PRSAs are tax deductible.

Pensions on a business transfer

The rights of employees on the transfer of a business are protected by the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (Transfer Regulations).

There is no obligation to honour rights categorised as old age, invalidity or survivors benefits provided under an occupational pension scheme (Transfer Regulations). In general, most occupational pension scheme rights would constitute such benefits. However, the Transfer Regulations do oblige a transferee to honour existing pension rights and/or provide equivalent rights where the rights fall into any of the following categories:

- Right to contributions to a PRSA.
- Pension/old age, invalidity or survivors' benefits provided as a matter of contract (this may be instead of or in parallel with rights under an occupational pension scheme).
- Rights under a supplementary pension scheme which is not an occupational pension scheme under the Pensions Act, as amended (in our experience, such schemes are rare).

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- Rights under an occupational pension scheme that do not constitute old age, invalidity or survivors benefits. These are rights identified subsequent to the decision of the Court of Justice of the European Union in the *Beckmann* and *Martin* cases, but they have not yet been considered by an Irish court in an Irish context. In our experience, these rights are unusual but may arise in the context of a bridging pension or early retirement rights.

In addition, the parties can agree in the business transfer agreement that the transferee will provide equivalent pension rights or honour existing rights.

Under the Pensions Act, an employee who is entitled to a preserved benefit from the occupational pension scheme of their pre-transfer employer is entitled to have the trustees of that scheme make a transfer payment of their preserved benefit to another pension arrangement within three months of leaving service.

COMPETITION/ANTI-TRUST ISSUES

34. Outline the regulatory competition law framework that can apply to private acquisitions.

Triggering events/thresholds

Mergers, acquisitions (of shares and/or assets) and the creation of certain joint ventures (that is, an autonomous economic entity or "full-function joint venture" created on a lasting basis) must be notified to the Competition and Consumer Protection Commission (CCPC) where the relevant thresholds are met or irrespective of such thresholds if they are certain types of media merger. If a transaction that is required to be notified to the CCPC is put into effect either before it has been notified to the CCPC or before clearance by the CCPC has been obtained, it is void. Failure to notify where a notification is required is a criminal offence for the undertakings involved and it is a criminal offence for certain individuals who knowingly and wilfully fail to notify.

A relevant transaction must be notified to the CCPC if, in the most recent financial year:

- The aggregate turnover in Ireland of the undertakings involved (that is, the purchaser groups and the target (but not the vendor) or the jointly controlling parent groups of a qualifying JV) is at least EUR50 million.
- The turnover in Ireland of each of two or more of the undertakings involved is at least EUR3 million.
- Turnover in Ireland is that generated by the undertakings involved from the sale of goods and the provision of services to customers in Ireland.
- Even where the relevant thresholds set out above are not met, a merger may be voluntarily notified by any of the undertakings involved. Voluntary notification protects the merger because if the CCPC approves the merger, it cannot subsequently investigate the transaction as a suspected anti-competitive agreement or abuse of dominance. However, if the merger is voluntarily notified, it cannot be put into effect until the CCPC has approved it in advance.
- Media mergers (that is, mergers where at least two of the undertakings involved carry on a media business and at least one of which is in Ireland) are also notifiable to the CCPC (provided they are not notifiable to the European Commission under the EU merger control rules) irrespective of the above thresholds, if at least one of the undertakings involved either:
- Has a physical presence in, and makes sales to, customers in Ireland,
- Has made sales in Ireland of at least EUR2 million in the most recent financial year.
- A notification of such a media merger must also be made to the Minister for Communications, Climate Action and Environment (the Minister) even if the transaction is otherwise notifiable to the European Commission (Commission) under the EU merger control rules. Notification cannot be made to the Minister until the CCPC or Commission has approved the media merger on competition grounds.

Notification and regulatory authorities

Each undertaking involved in a merger is obliged to notify the CCPC of the merger. This can be done jointly with one notification (usual) or separately (very rare). The notifying parties are normally the buyer(s) and the target, or the jointly controlling parents of a joint venture.

The main merger control legislative provisions are set out in Part 3 and Part 3A of the Competition Act 2002 (Competition Act).

The CCPC enforces Irish and EU competition law in Ireland. Media mergers are assessed by the CCPC and the Minister. If a media merger is deemed to require a more detailed assessment after its initial examination, then the Broadcasting Authority of Ireland also plays a role and other advisory bodies potentially do too.

The National Asset Management Agency Act 2009 and Credit Institutions (Resolution) Act 2011 exempt certain credit institution mergers from Irish merger control obligations under the Competition Act (but there is no exemption for notification where the Commission must be notified under the EU merger control rules).

Substantive test

The test applied by the CCPC is whether the result of the merger would be to substantially lessen competition (SLC) in markets for goods or services in Ireland.

For media mergers, two tests are applied. The substantive test for clearance applied by the CCPC is the SLC and the Minister applies a media plurality test to determine whether the merger would be contrary to the public interest in protecting plurality of the media in Ireland.

ENVIRONMENT

35. Who is liable for clean-up of contaminated land? In what circumstances can a buyer inherit and a seller retain liability in an asset sale and a share sale?

In Ireland, regulatory liability (both for clean-up and criminal offences for breach of regulation) and civil liability for contamination lie principally with the person who is currently in direct control. This is the entity/person responsible for the management (and control) of the property on which the contamination exists, whether or not they are the polluter. The entity/person who caused or permitted the contamination may also be held responsible. It is not unusual for several parties to be partially responsible.

Ireland does not have specific legislation dealing with contaminated land. The authorities rely primarily on waste and water pollution legislation to enforce regulatory compliance. In relation to waste, the principal legislation is the Waste Management Act 1996, as amended. The Waste Management Act makes it an offence to hold, transport, recover or dispose of waste in a manner that causes or is likely to cause environmental pollution. The penalties for such offences vary. Offences are punishable by imprisonment and/or a fine, and the directors and officers of companies face potential liability. The adverse PR effects of a prosecution may be of more concern than the fine. In addition, the enforcing authority can serve a notice to order remedial clean-up measures are carried out and can suspend activity in the meantime. Environmental pollution is widely defined by reference

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to the impact waste has on human health or the environment generally.

The occupant of land on which contamination is present is deemed to be the holder of waste and is therefore subject to the Waste Management Act. It is not necessary to show that the occupier knowingly caused or permitted the pollution to occur. A landowner is presumed to have consented to the depositing of the waste on their land, unless they can prove otherwise.

The enforcing authority will generally first pursue the current owner/occupier of the land on which the waste is situated. The extent of an owner's liability, if it is held to be a polluter or otherwise holding waste, may depend on the existence and availability to the enforcing authority of other potentially responsible parties.

Depending on the circumstances generally, a former owner, tenant or occupier (including a seller) should not normally be liable simply due to a previous interest in a property. They will only be liable for matters arising from their acts or omissions during occupation, that is, if they are polluters or permitters, or because they have assumed such liability contractually or under a lease.

In terms of civil liability, if liability arises under tort, the person liable is whoever committed the tortious act. If a person continues a tort first committed by another (for example, through permitting a nuisance to continue) they will be jointly and severally liable with the first person who committed the tort.

The principle of caveat emptor applies, so a buyer will have to make its own enquiries relating to contaminated land issues associated with an asset. The starting point is that a buyer of assets (as opposed to shares) will inherit liability for environmental issues. In a share sale scenario, buyers will step into the shoes of the vendor. Therefore, they may be responsible not only for the contamination of, or pollution arising from, currently owned or occupied land/facilities, but also for historic environment liabilities. They will be exposed to the same environmental enforcement actions as the vendor would have been. Environmental due diligence should be carried out to assess the environmental risk. Typically, a buyer will try to pass on liability for clean-up of contaminated land to the seller through seller warranties or an indemnity, but the buyer remains primarily responsible. The buyer will become the legal owner in "control" of the environmental issue and will therefore be vulnerable to enforcement action.

A seller can indemnify a buyer in relation to any civil liability (including the costs of clean up) it would otherwise have for contamination. However, as a matter of public policy, it is not possible to indemnify against criminal liability.

A buyer of shares in a limited company is not immune from environmental law breaches due to the limited liability status of the target. In addition, company directors, officers, managers and/or secretaries can be personally liable, where it is proved that an offence was committed with their consent, connivance or approval, or where the offence was facilitated by neglect on their part.

ONLINE RESOURCES

Irish Statute Book

W *www.irishstatutebook.ie*

Description. Contains acts of the *Oireachtas* (parliament), statutory instruments and the legislation directory, for the period 1922 to 2014.

Companies Registration Office

W *www.cro.ie*

Description. Contains information relevant to the incorporation and registration of companies and filing obligations.

Irish Tax and Customs

W *www.revenue.ie*

Description. Contains information relating to the assessment and collection of taxes and duties.

The Competition and Consumer Protection Commission

W *www.tca.ie*

Description. Contains information relating to the Competition and Consumer Protection Commission, including relevant legislation and recent decisions, speeches and news.

Data Protection Commissioner

W *www.dataprotection.ie*

Description. Contains information on individuals' rights and on organisations' responsibilities in relation to data protection information.

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