The Private Equity Review

Fifth Edition

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EDITOR'S PREFACE

The fifth edition of *The Private Equity Review* comes on the heels of a solid but at times uneven 2015 for private equity. Deal activity and fundraising were strong in North America, Europe and Asia, but the year ended with uncertainty in the face of declining growth in China, Brazil and other developing and emerging markets, increased volatility in commodity, stock, currency and other financial markets, and deflation concerns in developed countries. Nevertheless, we expect private equity will continue to play an important role in global financial markets, not only in North America and western Europe, but also in developing and emerging markets in Asia, South America, the Middle East and Africa. As large global private equity powerhouses extend their reach into new markets, home-grown private equity firms, many of whose principals learned the business working for those industry leaders, have sprung up in many jurisdictions to compete using their local know-how.

As the industry continues to become more geographically diverse, private equity professionals need guidance from local practitioners about how to raise money and close deals in multiple jurisdictions. This review has been prepared with this need in mind. It contains contributions from leading private equity practitioners in 29 different countries, with observations and advice on private equity deal-making and fundraising in their respective jurisdictions.

As private equity has grown, it has also faced increasing regulatory scrutiny throughout the world. Adding to this complexity, regulation of private equity is not uniform from country to country. As a result, the following chapters also include a brief discussion of these various regulatory regimes.

While no one can predict exactly how private equity will fare in 2016, it can confidently be said that it will continue to play an important role in the global economy. Private equity by its very nature continually seeks out new, profitable investment opportunities, so its further expansion into growing emerging markets is also inevitable. It remains to be seen how local markets and policymakers respond.

I want to thank everyone who contributed their time and labour to making this fifth edition of *The Private Equity Review* possible. Each of them is a leader in his or her respective market, so I appreciate that they have used their valuable and scarce time to share their expertise.

Stephen L Ritchie
Kirkland & Ellis LLP
Chicago, Illinois
March 2016

Chapter 11

IRELAND

David Widger[1]

I OVERVIEW

i Deal activity

Overall mergers and acquisitions in 2015 increased 12 per cent in volume (from 212 to 239 deals) from 2014 and in value by 163 per cent (from €11.4 billion to €30 billion). There was a steady increase in 2015 in the volume of deals recorded, and this increased M&A activity is expected to continue through 2016. The significant increase in deal value is mainly due to three large transactions, namely CRH's €6.5 billion acquisition of certain assets of Holcim Ltd and Lafarge SA, Bohai Leasing's €6.5 billion acquisition of Avolon Holdings Limited and Paddy Power and Betfair Group's €3.8 billion merger. The increase in both deal volume and value shows the continued strong recovery in merger and acquisition activity involving Irish companies. Domestic-driven M&A activity also increased over the past 12 months and this is expected to continue to grow in 2016.

Seventy-eight merger notifications were made to the Irish Competition & Consumer Protection Commission (CCPC) in 2015, representing an increase of approximately 90 per cent from 41 in 2014 and 110 per cent on a three-year 2012–2014 average (37). There are two main reasons for the rise in 2015. Increased confidence and activity in the economy was one factor, but legislative changes that introduced new thresholds at which deals must be notified for review also contributed to the increase. The most notifications were made in the food sector and the health and pharma sector, with nine mergers each in 2015. Private equity firms were party to 24 merger notifications made in 2015, representing 31 per cent of the total number of notifications made, compared with an average annual total of 27.9 per cent during the period from 2010 to 2014.

1 David Widger is a partner at A&L Goodbody.

The volume of private equity deals increased from 40 deals in 2014 to 49 deals in 2015, which continues the positive upwards shift following two years of unchanged figures for 2012 and 2011. Deal value (in respect of disclosed consideration for private equity transactions) escalated by 37 per cent from €7.674 billion in 2014 to €10.549 billion in 2015. This growth reflects the recent increase in economic activity in Ireland. To place this in context, the value of private equity buyouts increased from €448 million in 2012 to approximately €1.753 billion in 2015, while the value of private equity exits increased from €40 million in 2012 to approximately €8.263 billion in 2015.

There were 13 private equity exits during 2015. This is broadly on par with 12 exits in 2014, but remains a marked decrease from the 42 exits that occurred in 2011.

There have also been a significant number of new sponsors entering the Irish market in recent years due to reduced asset valuations and the lack of domestic operators with access to acquisition finance. Foreign private equity sponsors in 2015 included entities from the United States, Canada, Norway, the United Kingdom, Germany and Japan.

ii Operation of the market

As is the case in the UK, in Ireland the management of an investee company is normally incentivised to maximise returns for the private equity investor on a successful exit by allowing such management to take an equity stake in the investee company.

Usual equity incentive arrangements used in Ireland consist of the following:

a Shares: normally, non-preference shares in the investee company are subscribed for, for a nominal amount, by the managers who are to be incentivised; those shares then achieve capital appreciation on a successful exit by the private equity investor.

b Ratchet mechanisms: under a ratchet mechanism, continuing key shareholders and management may be given increased or decreased share rights (as the case may be) in the investee company (ratcheted up or ratcheted down) according to an agreed performance formula or with reference to exit valuations achieved by the private equity investor.

c Share options: the relevant investee company (under terms prescribed by the private equity investor) grants options to subscribe for shares in the capital of the investee company. Such options would normally have a vesting period before they can be exercised, thereby ensuring that the option holders are incentivised to drive the investee company's performance for the required private equity investment period. The options would also normally be subject to good-leaver or bad-leaver provisions.

In addition to equity incentives, it is common for private equity investors to agree non-equity (such as cash) bonus arrangements with key management or employees – again linked to the investee company's target performance. It is important to structure such bonus payments to Irish residents in a manner that minimises the amount of income tax payable.

In a similar manner to the UK, the Irish sale process for an investment by a private equity investor in an Irish non-listed company is largely driven by commercial considerations, and can be a protracted process.

Ireland operates a merger control system, whereby certain mergers and acquisitions must first be approved by the CCPC (or indeed approved at EU level in certain circumstances) if they result in prescribed turnover thresholds being reached, or relate to particular industry sectors.

The challenges that the Irish economy faced from 2007 right up until relatively recently, including obtaining funding from risk-averse local banks, led to an increase in the amount of time it typically took to get deals done. Completing due diligence and getting funding in place became more drawn out than was the case before 2007, caused in part by an increasingly risk-averse appetite for investment. The pick up in the domestic M&A market through 2014, which continued in 2015, has seen a return to a more normally functioning, efficient M&A market.

The main documents used in a private equity investment are normally as follows:

a a sale agreement (between the private equity investment vehicle and the relevant selling shareholders where a shareholder is exiting the investee company) or, more usually, a subscription and shareholders' agreement (between the private equity purchase vehicle and the continuing shareholders and other key management);

b a loan note instrument if the private equity investor is also subscribing for loan notes in the investee company. Private equity investors investing in Irish investee companies commonly invest through a combination of equity (in the form of ordinary and preference shares) and loan notes;

c the investee company's articles of association, which set out the rights attaching to the various classes of shares in the capital of the investee company, including the private equity investor's equity; these normally include, *inter alia*, dividend rights, liquidation preference rights, anti-dilution rights, drag-along rights, and tag-along rights;

d any employment or service agreements for the senior management of the investee company;

e the tax deed from the shareholders or investee company, in favour of the private equity purchase vehicle providing an indemnity in respect of pre-investment tax liabilities of the investee company;

f share option arrangements; and

g any finance documentation where the private equity investor is raising bank debt to finance investment.

II LEGAL FRAMEWORK

i Acquisition of control and minority interests

A private equity sponsor will have two distinct layers of structure and documentation in place to control private equity investments in investee companies.

The first layer details the structure to be used by the private equity sponsor to raise, hold, manage, invest and distribute the private equity funding and the proceeds of

investment, as between the private equity sponsor and the private equity investors who invest in its fund. Most Irish private equity funds are established as unregulated limited partnerships under the Irish Limited Partnership Act 1907.

The second structure layer sets out how the private equity structure established and controlled by the private equity sponsor (as stated, normally a limited partnership – the private equity investor) actually invests the private equity funds raised by the limited partnership in target investee companies, and how the private equity investor manages, controls and eventually realises those investments.

Establishment of private equity sponsors' control over the private equity fund structure

Fund structures used by private equity sponsors in Ireland to raise, hold and make investments in target investee companies can be unregulated limited partnerships, regulated funds or investment limited partnerships, general partnerships and special purpose vehicles (being either Irish private limited liability companies, or public limited liability companies, under the Irish Companies Act, 2014 (Irish Companies Act)). As already stated, most Irish private equity funds are established as limited partnerships, which are governed by a partnership agreement.

Limited partnerships

Every limited partnership must consist of at least one general partner (GP) and at least one limited partner (LP), and must not contain more than 20 partners (or 50 where the limited partnership 'is formed for the purpose of the provision of investment and loan finance and ancillary facilities and services to persons engaged in industrial or commercial activities').

The private equity sponsor controls the GP and, either through the GP or a separate management company, manages the investment activities of the limited partnership. If there is to be a separate management company, that management company contracts directly with the partnership to provide that service.

The GP has unlimited liability with regard to third parties. For this reason, many private equity sponsors use a limited liability vehicle to act as GP.

Normally, private equity investors who wish to invest through the private equity sponsor structure will be LPs in the limited partnership.

A limited partnership is not, and does not create, a separate legal entity; they have become popular in tax-driven financings and structures because they are tax-transparent.

A body corporate may be an LP or a GP, but a partnership in itself cannot be an LP or a GP in a limited partnership. Limited partnerships therefore allow persons and entities to be involved in a partnership purely as investors, and without the risk of unlimited liability to creditors.

As noted above, a private equity fund structured as a limited partnership is governed by the terms of the partnership agreement establishing it. The private equity sponsor will normally ensure that the limited partnership agreement contains provisions adequately compensating the private equity sponsor, as GP or manager, for its efforts, and granting it sufficient power to manage the limited partnership's activities and investments in the manner it deems necessary to maximise returns. The limited partnership agreement will also set out the term of the life of the partnership.

Regulated funds or investment limited partnerships

These are rarely used by private equity sponsors as they are regulated by the Central Bank of Ireland (Irish Central Bank) and are subject to certain restrictions, including investment and borrowing limits (although in the case of funds targeted at professional investors, institutions and high-net-worth individuals, derogations are available from many of the restrictions), requirements as to the suitability of the private equity sponsor, and the fact that independent custodians and administrators must be appointed.

Irish limited liability companies

Irish limited liability companies established under the Irish Companies Act are occasionally used to avail of the benefit of limited liability, as the liability of each member, including the private equity sponsor, is (absent fraud, etc.) limited to the amount of issued share capital subscribed for by each such member in that company. Limited partnerships tend to be used more than Irish companies as fund structures because of tax and company law issues arising on extracting value from Irish companies, and because of the account-filing obligations that arise.

While unlimited liability companies do exist under the Irish Companies Act, they tend to be only rarely used as private equity fund vehicles.

The private equity sponsor, when utilising an Irish company as a private equity fund vehicle, would establish control over the relevant company through a comprehensive subscription and shareholders' agreement, setting out the terms upon which the private equity sponsor and each private equity investor will invest in the company (through equity and debt), and their respective information, control and liquidation preference rights on dissolution of the company.

Each Irish company must have a minimum of one EEA-resident director (or alternatively arrange for an insurance bond to be put in place). In practice, at least two Irish-resident directors are usually appointed to ensure Irish tax residency for the relevant company by placing central management and control in Ireland. The test for central management and control is not defined in Irish legislation, and the meaning of central management and control is based on a body of case law.

Irish general partnerships

An Irish general partnership is one in which all of the partners (including the investors) have joint and several liability for the debts and obligations of the partnership to third parties. Again, an Irish general partnership is not, and does not create, a separate legal entity, and is also tax-transparent.

Irish limited partnerships, where the LPs have limited liability, are therefore normally preferred over general partnerships as 'partnership' fund structures.

The manner in which an Irish general partnership fund is structured, controlled, and can make, realise and distribute the proceeds of investments (including, for example, provisions dealing with investment term and policy) is also prescribed by the terms of the partnership agreement under which it is established.

Establishment of private equity sponsors' control over investments

The principal way in which the private equity investor will exercise control over each relevant investee is through the subscription and shareholders' agreement.

The extent of the private equity investor's control over an investee is a matter of commercial agreement between the parties (which include the private equity investor on one side, and the investee company, its other shareholders and relevant management on the other). A well-structured investment agreement would normally provide the private equity investor with:

a leverage of warranties, indemnities or non-compete covenants;
b board representation and quorum rights;
c information and reporting rights;
d veto rights;
e step-in rights;
f preferred equity share rights;
g pre-emption rights; and
h transfer restrictions.

Key structuring considerations for sponsors domiciled outside the jurisdiction

Any foreign private equity sponsor wishing to operate or establish a private equity fund in Ireland will require specific local and Irish tax advice on such structuring.

Foreign persons and entities are entitled to hold shares in Irish companies. As previously noted, each Irish company must have a minimum of one EEA-resident director (or alternatively arrange for an insurance bond to be put in place), and if the Irish company is to be Irish tax-resident, in practice at least two Irish-resident directors are usually appointed.

The Irish Companies Registration Office will need to be satisfied that the limited partnership is carrying on business in Ireland before it will accept its registration, or the registration of a related business name for the partnership. Logistically, the foreign GP will have to be able to show that it is running the limited partnership business in Ireland, and this may involve it having an office and personnel in Ireland for that purpose.

If a foreign private equity sponsor wishes to establish an Irish limited partnership, and to act as the GP of that limited partnership, it is usual for that foreign GP to register as having established a 'branch' in Ireland.

Foreign companies with a branch in Ireland are required to file a balance sheet, profit and loss account, directors' report and auditor's report with the Companies Registration Office in Ireland, and if the company is a holding company, group accounts should be furnished.

ii Fiduciary duties and liabilities

The private equity sponsor must first understand what, if any, fiduciary duties it owes private equity investors investing through the private equity fund it has established in Ireland, and second understand the fiduciary duties that fund itself owes other shareholders in the portfolio investee companies the private equity investor invests in.

No fiduciary duties as such exist between shareholders under Irish law – unlike directors, who are obliged not to act in breach of their fiduciary duties to the company of which they are a director. Further, as a general principle, shareholders may also vote as they please; the right to vote being a personal right of the shareholders, they are generally free to act in their own interests and to exercise their own judgement as to how they vote.

Private equity sponsors' representatives on a portfolio investee company's board (nominee directors) owe the same duties to the relevant investee company as any other director. Nominee directors should bear in mind that they, like all directors, are subject to the obligations contained in the Irish Companies Act, and elsewhere in respect of listed and regulated entities, with regard to directors and disclosure of conflicts of interest.

Nominee directors also owe fiduciary duties to creditors, where a company is insolvent or in a 'zone of insolvency'; and employees and shareholders, to the extent the Irish courts now view the interests of a company's employees and shareholders as interests of the company itself.

The Irish Companies Act, which commenced on 1 June 2015, consolidated and introduced certain reforms to pre-existing Irish company legislation, including the codification of directors' fiduciary duties and directors' liability to account to the company for gains made and to indemnify the company for losses caused as a result of their breach of duty.

There are numerous situations where a company director can face personal liability other than for breach of his or her fiduciary duties as a director, and can also face heavy fines and sometimes imprisonment for breaches of the requirements of various statutes such as those relating to company, environmental, and health and safety law. Shadow directors are also included in the definition of 'director' for many offences.

In the context of insolvency, directors may also face liability where they make an inaccurate declaration required to allow a private company to give financial assistance for the purchase of its own shares (an act ordinarily prohibited under the Irish Companies Act), engage in 'fraudulent' or 'reckless' trading, misapply company assets, make an incorrect declaration of solvency in the context of a voluntary liquidation or buy shares in a company's holding company in certain circumstances.

On insolvency of a company, a director may also face 'restriction' or 'disqualification' for up to five years or such other period as the courts think fit.

Under the Limited Partnership Act 1907, the GP of a limited partnership is akin to a member of an ordinary partnership, and is liable for all debts and obligations of the partnership. The GP (or manager) controls the business of the partnership and so is involved in its day-to-day management. To this effect, the GP is authorised to bind the partnership in relation to partnership business, and to negotiate and execute documents, and he or she is also liable, without limitation, for the debts of the partnership.

Irish law continues to support the fundamental principle that a company possesses a separate legal identity from its shareholders. A private equity investor shareholder, no matter how great the extent of its shareholding or of the control exercised by it over the board of directors in an investee company, cannot normally be made liable for the debts of that investee company.

In very exceptional circumstances, usually involving some level of wrongdoing and where justice requires it, a court will set aside this principle and 'pierce the corporate veil'. The essential question in any case involving a piercing of the corporate veil is whether the purpose for which the distinction between the private equity investor shareholder and the investee company exists is real or merely represents a diversion of liability away from the party upon whom it more correctly rests. It would, however, be highly unlikely for a court to pierce the corporate veil and attribute the liability of an investee company to its private equity investor shareholder.

Apart from the common law carveouts where Irish courts are willing to pierce the corporate veil, there is also statutory provision under Irish law for the imposition of 'related company' liability on two separate Irish companies. Section 599 of the Irish Companies Act allows a court to make an order requiring one company to contribute to the debts and liabilities of another insolvent 'related' company[2] in circumstances where the court considers it just and equitable to make such an order.

In reality, it is difficult to foresee in the event of a claim against any investee company how the relevant private equity investor would be held responsible for the resulting liabilities of the investee company.

In terms of raising finance to invest in investee companies, the use of a limited partnership structure, as opposed to a limited liability corporate structure, typically has no material adverse consequences or implications for lenders to that structure, nor does it affect the ability of the borrower (i.e., the limited partnership) to repay its financial obligations to a lender under the relevant facility agreement, to create security in favour of the lender, or to carry out and perform its obligations under the project documents.

From a lender's point of view, any differences between lending to a limited partnership and to a limited liability company are more of a structural nature than anything else.

The enforcement remedies available to lenders in respect of a limited partnership will be as set out in the relevant debenture, which normally include either appointing a receiver to the assets of the partnership, or the lender enforcing their security as mortgagees in possession.

Where a receiver might be appointed to the partnership, the receiver would look to the assets of the partnership, which would mean looking to the assets held by the GP on the limited partnership's behalf. It is important to remember that the liability (in the context of the partnership) of the GP is unlimited (for this reason, as mentioned above, a lot of private equity sponsors utilise a limited liability company to act as GP), and so lenders are entitled to seek recovery against the GP for everything. Nevertheless, if there were to be a shortfall, as well as having recourse to the GP, the receiver would be entitled to look to the capital contribution made by the limited partners; the liability of each LP is limited to its capital contribution.

2 A company is deemed to be 'related' to another company:

a where it is its holding company or subsidiary;

b where it or its other group companies own more than 50 per cent of the share capital;

c where its own members own more than 50 per cent of the share capital;

d where it is entitled to exercise or control the exercise of more than 50 per cent of the voting power at any general meeting of the company;

e where there is another company to which both companies are related; or

f where the businesses of the companies have been carried on in such a way that the separate business of each company is not readily identifiable. (This last proviso does not however affect the general principle that group companies are recognised to be separate legal entities even where they are interrelated and interact on a day-to-day basis. For Section 140 to be invoked, something beyond normal group trading is required.)

Normally a private equity investor investing in an investee company will have agreed and incorporated exit rights into the investment agreement signed with the other shareholders of the investee company. Such rights normally allow the private equity investor to instigate, or compel, a process that will lead to a sale or initial public offering (IPO) of the entire issued share capital of the investee company after a certain period of time following its investment (frequently, four to six years).

An exit by a private equity investor from a portfolio investee company will be determined by the financial circumstances of the relevant investee company, and the prevailing economic conditions affecting the market in which it operates or the financial markets generally.

Where the investment in an investee company has been successful, the most common forms of exit currently are either trade sales, or secondary sales to other venture capital or private equity funds. Although IPOs have, in the past, tended to achieve higher exit values for investors, they are not common at present in Ireland.

Where the investment has not been successful, the most common forms of exit are either the sale of the investee company to another investor or to the investee company's management, or the liquidation of the investee company. Sale is normally more attractive to a private equity investor, as it allows it to recover some of its investment while avoiding the exposures and complexities involved in an insolvent liquidation.

III YEAR IN REVIEW

i Recent deal activity

As already noted, 2015 marked a further upswing for private equity in Ireland as the improved conditions in 2014 which saw funding difficulties lessened and the market pick up strengthened in 2015. Based on figures available from Mergermarket (in respect of disclosed consideration for private equity transactions), the aggregate private equity deal value (comprising both buyouts and exits) in Ireland in 2015 surpassed 2014 figures by 177 per cent to €21.09 billion, comprising 49 transactions (a remarkable rise when compared with €7.59 billion representing the 31 transactions in 2014 and €448 million representing the 18 transactions in 2012).

2015 showed an increase in large, keynote transactions in Ireland, such as the €6.5 billion acquisition of Avolon Holdings Limited by Bohai Leasing Limited, the €1.4 billion acquisition of Aer Lingus by International Consolidated Airlines Group, SA and the €911 million acquisition of the Jurys Inns Group Limited by Lone Star Funds. Acquisitions by US acquirers such as Cerberus, Lone Star, Davidson Kempner and Avenue Capital of loan portfolios from financial institutions such as RBS/Ulster Bank, Bank of Scotland, KBC and the National Asset Management Agency (Ireland's 'bad bank') also contributed to M&A activity generally.

During 2015, a particular feature of the Irish M&A market was the significant bolt-on acquisitions made by previously migrated companies using their Irish platforms. Companies that have moved to Ireland are using that platform to drive M&A growth. For example Actavis (now Allergan plc) since its 2013 inversion into Ireland by way of an US$8.5 billion acquisition of Warner Chilcott, has completed an US$18 billion acquisition of Forest Labs, a US$66 billion acquisition of Allergan and several smaller

deals. The stand-out deal of 2015, was Pfizer Inc's proposed US$160 billion merger with Allergan plc, which was announced in November 2015. This deal, the largest global deal announced in 2015, would, if completed, create the world's largest pharmaceutical company with its corporate headquarters in Ireland.

Others who have been active throughout the year include Endo, which completed an US$8 billion acquisition of Par Pharmaceuticals and a US$2.6 billion acquisition of Auxilium and Perrigo, which completed the €4 billion acquisition of Omega Pharma and several smaller deals. Horizon Pharma, XL and Mallinckrodt have also all been on the acquisition trail in the last year.

ii Financing

Private equity transactions are usually structured with a combination of debt and equity, the proportions of each being driven by market conditions and the relative cost and availability of debt. Recent transactions tend to have much lower debt multiples than would have been the case in the past. Where private equity investors can raise debt, that debt now tends to be funded by a number of different banks as the banks are increasingly conscious of the need to minimise risk exposure.

As business confidence has returned to the Irish market, we have begun to see more Irish companies tapping the equity capital markets both in Ireland and overseas such as Cairn Homes, Malin Corporation, Hibernia REIT, Dalata, Prothena Corporation and Presbia. In the leisure sector, Cairn Homes floated on the London Stock Exchange in March 2015. Cairn raised circa €400 million from investors in Ireland, the United States, the United Kingdom and several other jurisdictions. Cairn's IPO was the first Irish house builder to float on the stock exchange since 1997. Other IPO deals included petrol forecourt retailer, Applegreen's IPO on the Irish Stock Exchange and London Stock Exchange. Ophthalmic device company Presbia also launched an IPO on the NASDAQ.

Funding debt is generally a mixture of senior facility, mezzanine, working capital or other revolving facilities, and some asset finance, if appropriate. There also appears to be an increasing number of private equity financings, which include high-yield instruments that are convertible into equity in the event of any default on the part of the promoters seeking the private equity co-investment.

Irish private equity funds typically receive funds from a variety of financial institutions, pension funds, government agencies, quasi-state bodies, overseas development funds with a particular geopolitical interest in Ireland, corporate investors and private high net worth individuals. Foreign sponsors and government-funded private equity funds have played an increasingly important role in Irish private equity transactions, as funding from financial institutions (and in particular Irish financial institutions) decreased dramatically as a result of the financial crisis and such funding has only recently begun to recover towards previous levels again.

Most private equity funds established in Ireland continue to have a term of 10 years, with the possibility of extending that term to allow a greater period for liquidating the fund's interests in all portfolio investee companies. Typically, funds have an initial investment period of three to five years to source and invest in new companies.

Following this initial investment period, the terms of the fund generally restrict its purpose to managing and making follow-on investments in existing portfolio investee companies.

Generally, private equity funds look for returns of between 30 and 40 per cent per annum by way of capital gain.

As noted above, most private equity funds operating in Ireland invest in investee companies by subscribing for preferred equity in the capital of the investee company. Occasionally they take a mix of equity and debt, in the form of loan notes of the investee company (which may also be convertible into equity). The preferred equity rights generally include a combination of liquidation preference rights, veto rights over prescribed actions by the investee company and its management, and anti-dilution protections.

Preference shares are also generally convertible into ordinary shares at the discretion of the private equity investor, and automatically convert on the occurrence of certain agreed exit events, for example, an IPO at a pre-agreed minimum valuation of the investee company.

In certain circumstances (e.g., where the investee company requires short-term bridging finance), private equity funds may also lend money, either by way of a straight loan or convertible security, to investee companies.

iii Key terms of recent control transactions

Aer Lingus plc

International Consolidated Airlines Group, SA, a UK listed and based airline company, has acquired the Irish flag carrier Aer Lingus in a €1.4 billion deal.

Topaz Energy Group Limited

Denis O'Brien sold his stake in his Topaz network of more than 460 filling stations to listed Canadian retailer Alimentation Couche-Tard for an undisclosed consideration figure reputed to be about €450 million, having acquired the business in 2013 and made significant investments in, and bolt-on acquisitions to, the business in the interim.

Eirgen Pharma Limited

OPKO Health, Inc, a multinational biopharmaceutical and diagnostics company listed on the NYSE, has acquired EirGen Pharma Ltd, a growing, specialty pharmaceutical company focused on the development and commercial supply of pharmaceutical products for sale around the world, for an estimated consideration of US$135 million.

Celtrak Limited

Celtrak, an Ireland-based company that provides customised and integrated vehicle tracking and fleet management solutions, has been acquired for an undisclosed sum by Thermo King, the US-based manufacturer of transport temperature control systems.

AMCS Group
Insight Venture Partners and the state-backed Ireland Strategic Investment Fund, has acquired a stake in AMCS Group, an Irish-based company engaged in designing, developing, implementing and supporting integrated environmental software and solutions, for US$50 million.

iv Exits

As already stated, recent financial challenges have eased slightly, leading to higher deal valuations in 2015 and an increase in the number of recent private equity exits in Ireland. The average value of private equity exits in 2015 (based on publically disclosed deal value) was approximately €1.032 billion. Where exits are occurring, they are being driven either by a need on the part of the private equity sponsor and its co-investors to deleverage, or are taking place in Ireland's buoyant technology sector. Recent notable exits include the following:

Avolon Holdings Limited
Bohai Leasing Company Limited, the China-based and listed specialised finance lease company, acquired Avolon Holdings Limited, the Irish headquartered, US-listed aircraft leasing and lease management company. The shareholders of Avolon included affiliates of CVC Capital, Cinven, Oak Hill Capital and GIC. Avolon, as a wholly owned subsidiary of Bohai, will be the core aircraft leasing brand for Bohai and its parent, HNA Group, and assumes management of Hong Kong Aviation Capital, another Bohai subsidiary.

Jurys Inns Group
Lone Star Funds, the US-based private equity firm, agreed to acquire Jurys Inns Group Limited, the Irish-based owner and operator of a hotel chain, from a consortium of private equity firms including Oman Investment Fund, Mount Kellett Capital Management, Ulster Bank, Westmont Hospitality Group and Avestus Capital Partners. The total purchase price for the acquisition was approximately €911 million. The acquisition completed on 16 March 2015.

IV REGULATORY DEVELOPMENTS

The basic framework of Irish funds law and regulation applies equally to private equity funds and other funds.

The Irish Central Bank regulates those conducting private equity activities in Ireland, that is, generally the managers and advisers and not the fund itself. Depending on the fund's structure, other rules and regulations may apply.

For instance, alternative investment funds (AIFs) are now subject to the EU Alternative Investment Funds Managers Directive, which is given effect in Ireland by the European Union (Alternative Investment Fund Managers) Regulations 2013 (AIFMD). AIFMD applies to AIFs that acquire control of EU-based listed or non-listed companies and imposes asset-stripping restrictions and disclosure obligations on AIF managers. The asset-stripping restrictions require AIF managers to use their best efforts to prevent, for a period of 24 months following the acquisition, any reduction in capital, any share

redemption, any distribution or share buy-back in circumstances where the net assets of the company fall below its issued share capital and non-distributable reserves, and any distribution to shareholders greater than available profits. The disclosure obligations require managers of AIFs having a shareholding in a non-listed EU company to inform the company's local regulator of certain reductions in its shareholding, and to provide certain information to the company, other shareholders and the local regulator in the event that the AIF acquires control of the company. The restrictions imposed by AIFMD do not apply to small and medium-sized enterprises, or to special purpose real estate companies.

Typically, where the private equity fund is structured as an unregulated limited partnership, no licences are required unless the fund is providing certain regulated investment services.

A private equity sponsor providing regulated services in Ireland must be appropriately authorised by the Irish Central Bank or by a competent authority in another EEA Member State. If authorised in another EEA Member State, the entity must passport that authorisation into Ireland. Certain exemptions do, however, apply to the requirement to be authorised.

In the context of private equity transactions, regulated services would include the provision of investment advice, the reception and transmission of orders and the execution of orders in financial instruments.

If an authorisation were required in Ireland, it would be necessary for the private equity sponsor providing the regulated services to submit an application form with supporting documentation (including a business plan) to the Irish Central Bank. Directors and senior managers of the relevant fund would also be subject to the Irish Central Bank's 'Fitness and Probity' regime.

In certain circumstances, where facilities for participation by the public in an offering are provided, Irish Central Bank approval for the offering will also be required.

If the fund is structured as a regulated investment fund or a regulated investment limited partnership, approvals and authorisations must be obtained from the Irish Central Bank.

It is possible to set up regulated investment funds engaging in private equity investments; these are structured as unit trusts or investment companies. It is also possible to set up regulated investment limited partnerships.

It is also necessary for any partnership that has a place of business in Ireland, and carries on business under a name that does not consist of the true surnames of all partners who are individuals and the corporate names of all partners that are bodies corporate without any addition, to register the use of the name (by all of the partners) under which it carries on business with the Irish Companies Registration Office.

V OUTLOOK

Private equity activity appears to be bouncing back to pre-crisis levels, with 2015 showing a consistent improvement from 2014 in terms of disclosed deal value and volume. The

steady Irish economic recovery has created a far more attractive investment environment than we have seen in recent years and positive sentiment is supported by increasingly positive statistics.

One evolving feature is the increase in secondary sales by the purchasers of Irish businesses and assets via distressed debt sales during or immediately following the economic crisis. Many of these purchasers were private equity and hedge funds (a significant proportion of which are US-based) and a number have already sold on the acquired debt books or may look to do so during 2016.

The recovery of Ireland's TMT, agri-food, pharmaceutical, and medical and biotech sectors, present significant potential opportunities for private equity in the future. There is strong domestic and international interest in these assets, and any ensuing sales processes are likely to attract a multitude of interested suitors.

It appears that the macroeconomic challenges and related financing difficulties that Ireland faced over the last number of years have eased significantly in the last two years, which should see a continued increase or stabilisation in deal flows and deal values. If markets continue to stabilise in 2016, increasing opportunities are available for companies that can access private equity funding to grow their business through real value-for-money acquisitions.

There is an increasing perception of Ireland as a place where private equity investors can obtain a good deal of value for their investments, and this continued convergence of buyer and seller expectations as regards company valuations should facilitate a continuing flow of private equity transactions in Ireland in 2016.

Although bank funding has increased over the past year and is expected to continue to increase in 2016, international private equity providers are also expected to play an important role in Irish M&A activity in 2016 as they actively seek to take advantage of Irish value opportunities. As mentioned above, it is expected that the purchasers of Irish businesses and assets via distressed debt sales during or immediately following the economic crisis, being mainly private equity and hedge funds (a significant proportion of which are US based), will increase the level of secondary disposals of such debt or assets.

The mid-market sector is also expected to see increased activity and a return of domestic buyers, sometimes funded by private equity rather than traditional bank debt.

For 2016, transactions will likely be structured with a combination of bank-leveraged debt and funding from private equity providers who will lead other forms of funding such as mezzanine finance, asset finance and vendor loan notes.

The sectors that have seen the most activity in the past three years – financial services, agri-food, TMT and pharmaceutical and life sciences – are likely to continue to do so in 2016.

Appendix 1

ABOUT THE AUTHORS

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David Widger is a partner and head of A&L Goodbody's corporate department. His key areas of expertise include mergers and acquisitions, corporate finance, private equity, venture capital, corporate restructurings, and capital markets and securities law. Mr Widger's practice involves advising a wide range of Irish and international public and private corporations, institutions and private equity funds on all legal aspects of their corporate affairs.

He is consistently recognised by clients and peers in leading international publications for his knowledge of the law and expertise in dealing with complex issues, including *Chambers Global*, *Chambers Europe*, *The Legal 500*, *Best Lawyers*, *IFLR1000*, *PLC Which Lawyer?* and *Who's Who Legal*.

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