Private Mergers and Acquisitions in Ireland: Overview

by Robert Maloney Derham, John Coary and Rob Barrett, *Matheson*

Country Q&A | Law stated as at 01-May-2024 | Ireland

Q&A guide to private mergers and acquisitions law in Ireland.

The Q&A gives a high-level overview of key issues including corporate entities and acquisition methods, preliminary agreements, due diligence, acquisition agreements and main documents, warranties and indemnities, acquisition financing, signing and closing, tax, employees, pensions, regulatory approvals, and environmental issues.

Corporate Entities

Ways to Acquire a Private Company

- Share Purchases and Asset Purchases
- Auctions
- Foreign Ownership Restrictions

Preliminary Agreements

Due Diligence

Consents and Approvals

Main Documents

Acquisition Agreements

Warranties and Indemnities

Signing and Closing

- Conditions Precedent
- Main Steps at Signing and Closing
- Signing
- Closing
- Execution of Documents
- Transferring Title to Shares
- Seller's Title and Liability

Governing Law and Arbitration

Consideration and Acquisition Financing

- Forms of Consideration
- Price Adjustments and Deferred Consideration
- Financial Assistance

Tax

© 2024 Thomson Reuters. All rights reserved.

Transfer Tax

Corporate Taxes

Asset Sale

Other Taxes

Employees

Information and Consultation

Transfer in a Business Sale and Other Protections

Pensions

Competition/Anti-Trust Issues

Substantive Test

Environment

Contributor Profiles

Robert Maloney Derham, Corporate M&A Partner

John Coary, Corporate M&A Partner

Rob Barrett, Corporate M&A Partner

Corporate Entities

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

Limited companies are the most common corporate vehicles used in private acquisitions in Ireland. In the majority of cases, the preferred corporate vehicle is a limited liability company (LTD), but occasionally a designated activity company (DAC) or a public limited company (PLC) will be used. The liability of shareholders in a private limited company is limited to any unpaid amount on their shares.

Ways to Acquire a Private Company

2. How are private acquisitions commonly structured and what factors apply to the choice of structure?

© 2024 Thomson Reuters. All rights reserved.

The vast majority of transactions are structured as share sales rather than asset sales. However, there has been an increase in the number of asset sales in the form of business carve-outs where certain large corporates seek to focus on their core business lines and sell off non-core assets. Asset purchases and business transfers can be more appropriate where a specific part of the target's business is being acquired and therefore needs to be carved out from the larger business.

The *Companies Act 2014* (Companies Act) allows for domestic mergers of Irish companies to be approved through a summary approval procedure or a shareholder special resolution confirmed by a court order. In practice, the merger regime under the Companies Act is primarily used as part of post-completion intra-group consolidation exercises rather than as a means for undertaking third-party arms-length acquisitions.

For an overview of cross-border acquisition structures, see *Acquisition Structures Toolkit (International)*.

Share Purchases and Asset Purchases

3. What are the main advantages and disadvantages of a share purchase (compared to an asset purchase)?

Transfer of Assets/Liabilities

In a share sale, the target company is acquired as a whole (including all of its subsidiaries), thereby removing uncertainty as to certain assets/liabilities not transferring at closing. The seller makes a clean break from the target company (subject to any earn-out/deferred consideration/rollover arrangement), as the buyer takes the target company with all historic liabilities. The buyer acquires all of the historic and current liabilities of the target company and cannot cherry-pick assets.

In an asset sale transaction, only those assets and liabilities that the buyer contracts to acquire are transferred and the buyer can cherry-pick the assets it wishes to acquire without inheriting the target company's liabilities.

Complexity of the Transaction

In a share sale, ensuring that all customer contracts are novated/assigned or that property assets are separately assigned is not a concern (but identification of change of control clauses remains important). All employees move with the target company, removing uncertainty as to changes in employees' status. A smaller number of consents/approvals are generally required, although change of control clauses in commercial contracts may be triggered.

Subject to certain statutory drag-along rights under the Companies Act or, where applicable, contractual drag-along rights in the target company's constitution or shareholders' agreement, if the buyer wishes to acquire 100% of the target company, all of the shareholders must agree to the transaction.

An asset sale generally produces more documentation than a share purchase, as title to certain assets which are transferring, such as real estate and intellectual property, require separate documentation to the asset purchase agreement. It is important to carefully describe and list the assets and liabilities that the buyer intends to buy in the asset purchase agreement, as there is a risk that if they are not described or listed correctly then the buyer will have no right to the assets/liabilities at closing.

© 2024 Thomson Reuters. All rights reserved.

Incorrect allocation of collected business debts post-completion, where some debts attach both to the part of the business that transfers and the part of the business that remains, can lead to reliance on "wrong-pockets" clauses in the asset purchase agreement and possible disagreement between the parties.

Consent from lenders may be required, and security release documents may need to be obtained if the asset sale is prohibited under the terms of any applicable financing arrangements and related security documents (although similar considerations can also apply to share purchases).

Tax Considerations

From a seller's tax perspective, a share sale is usually preferred so as to ensure only one tax charge arises. No value added tax (VAT) arises on the sale of shares (see *Question 29*).

There are accounting advantages to a share sale, including no clawback of tax depreciation, as the tax depreciable assets remain within the company that claimed the capital allowances.

From a buyer's perspective, stamp duty is ordinarily payable on the consideration paid for the shares transferred (or the market value, if higher). In contrast, a higher rate typically applies to asset purchases (which can be mitigated/exempted in certain cases).

Stamp duty on a share purchase is also more straightforward from an administrative perspective, with a flat rate typically applying on completion.

Other Factors

Employees of the transferor who are "wholly and mainly assigned" to the transferring assets are entitled to transfer to the transferee automatically as a matter of law under the *European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003* (SI 131/2003) (TUPE). Both the buyer and the target company must comply with information, consultation and other obligations under TUPE and related legislation (see *Question 31*).

Auctions

4. Are sales of companies by auction common? What is the typical procedure and what regulations (if any) apply?

In recent years, auction sales have gained popularity in Ireland. They remain common in particular where private equity investors seek to exit their investment. No specific regulatory restrictions apply. The process is relatively straightforward and typically involves the following steps:

- Issuance of an information memorandum to solicit interest.
- A first-phase financial due diligence and indicative bid process.

© 2024 Thomson Reuters. All rights reserved.

- A second-phase full due diligence review for qualifying bidders.
- Final binding bids and document negotiations (sometimes with multiple bidders).

It is essential that a robust non-disclosure agreement is entered into before commercially sensitive information is shared with potential bidders. Generally, a non-disclosure agreement is entered into with potential bidders before the information memorandum is shared.

While in the majority of cases the highest bidder is successful in an auction process, there is no requirement for the seller to accept the highest bid. Where mark-ups of the primary transaction documents are required as part of the bid process, the form of the mark-up can influence the determination of the successful bidder.

See also, *Practice Note, Auction Sales: Overview (International)*.

Foreign Ownership Restrictions

5. Are there any restrictions on acquisitions by foreign buyers?

While previously there were no specific restrictions on foreign buyers acquiring Irish private companies, this has recently changed following the coming into force of the Foreign Direct Investment (FDI) Regulation (*(EU) 2019/452*) on 11 October 2020.

The FDI Regulation applies to a broad range of foreign investments by non-EU countries into EU member states that are likely to affect "security or public order". An investment may be deemed likely to affect security or public order if it could potentially affect certain strategic interests such as:

- Critical infrastructure.
- Critical technologies.
- Supplies of critical inputs.
- Access to sensitive information, including personal data, or the ability to control such information.
- The freedom and pluralism of the media.

On 31 October 2023, Ireland enacted the *Screening of Third Country Transactions Act 2023* (commencing in Q2 2024), which implemented the FDI Regulation. The key points are that the new regime:

- Is suspensory (with criminal sanctions).
- Involves very low thresholds.
- Covers a wide variety of sectors.

© 2024 Thomson Reuters. All rights reserved.

- Must be considered in parallel with merger control rules.

Under the new legislation, a new mandatory notification to and screening procedure by the Minister for Enterprise, Trade and Employment is required for certain transactions that involve third-country or foreign-controlled undertakings (this includes both companies and individuals outside the EU, EEA and Switzerland) that are parties to a transaction if the following conditions are met:

- A third country undertaking or a connected person is a party to the transaction.
- The value of the transaction is at least EUR2 million.
- The transaction relates to or impacts:
  - critical infrastructure;
  - critical technologies or dual-use items;
  - critical inputs such as natural resources;
  - access to sensitive data; and/or
  - the freedom and plurality of the media.
- The transaction relates to an asset or undertaking in Ireland.

A "transaction" includes any transaction or proposed transaction where a change of control of an asset or the acquisition of all or part of an undertaking in Ireland is effected. The concept of "control" is the same as in the EU and Irish merger control regime and relates to "direct or indirect influence" over the activities of the undertaking, for example, voting rights or securities, ownership of assets of the undertaking or rights and contracts providing influence over the decisions of the undertaking.

Transactions for the acquisition of shares or voting rights only have to be notified where the above criteria are fulfilled and where the percentage of shares or voting rights held changes from:

- Less than 25% to more than 25%.
- Less than 50% to more than 50%.

It remains to be seen how this will be implemented in practice, but Ireland is expected to remain very friendly towards FDI.

For further information, see *Practice Note, Transactions and practices: EU Mergers & acquisitions: Legislation and notices – Foreign subsidies*.

Preliminary Agreements

© 2024 Thomson Reuters. All rights reserved.

6. What preliminary agreements are commonly made between the buyer and the seller before negotiating or executing the primary acquisition documents?

Letters of Intent

The main preliminary agreement is known interchangeably as either a "letter of intent", "memorandum of understanding", "heads of terms" or a "term sheet". Such documents are typically a summary of the key commercial and structural terms of a transaction and outline the proposed terms and conditions, including the:

- Transaction structure (share sale/asset sale).
- Conditions and timetable to completion.
- Framework of exclusivity and confidentiality.

While such documents evidence intent, they are not generally legally binding, except for certain provisions (such as confidentiality, exclusivity or, where required, non-solicitation). However, they do have a moral force and, once agreed, parties may find it difficult to deviate from commercial points later in the transaction.

Exclusivity Agreements

Also known as a "lock-out", "shut-out" or "no-shop" agreement, an exclusivity agreement is used to try to ensure that the seller in a prospective transaction negotiates solely with the prospective buyer and does not negotiate or solicit offers from any other parties for a defined period of time. This gives buyers assurance that they can incur costs when carrying out due diligence on the target company in the knowledge that they have exclusive negotiation rights and that the seller cannot use the buyer's offer to solicit other offers to outbid the buyer.

Non-Disclosure Agreements

Non-disclosure agreements are often one of the first agreements parties enter into at the beginning of a transaction. This is especially the case where one or more parties to the transaction will be sharing confidential information in relation to their business. One of the more negotiated points in a non-disclosure agreement is what information parties are allowed to disclose to their "affiliates" or "advisors" in order for them to carry out due diligence and what responsibility that party should have in the event the affiliate or advisor discloses confidential information that has been shared. Careful consideration should be given to who comes under the umbrella of a party's "affiliates".

Non-disclosure agreements are useful in that they discourage mishandling of confidential information. However, proving that there has been a disclosure of confidential information can be challenging. In addition, if such a breach has occurred, remedies such as damages or injunctions may be inadequate.

For further information, see *Practice Note, Key Documents for Acquiring a Private Company (Ireland).*

Due Diligence

© 2024 Thomson Reuters. All rights reserved.

7. How is due diligence typically carried out and what main areas does it usually cover?

Due diligence is generally carried out by the buyer's legal advisors. Typically, the buyer's lawyers share a due diligence questionnaire (DDQ) with the seller's lawyers. The DDQ will contain a list of questions for the sellers, which are usually categorised under a number of headings, such as:

- Share capital and corporate structure.
- Accounts.
- Financial arrangements.
- Key contracts.
- Tax.
- Intellectual property.
- Regulatory.
- Employment and pensions.
- Real estate.
- Data protection.
- Litigation and disputes.

The buyer's lawyers will also request a number of documents from the seller's lawyers. The requested documents are normally uploaded by the sellers to a virtual data room (VDR) to which the buyer, seller and their respective advisors have access.

The seller's lawyers will respond to the questions raised in the DDQ, following which the buyer's lawyers typically raise follow-up questions and/or request further documents be uploaded to the VDR.

Usually, several versions of the DDQ are circulated until all questions have been satisfactorily answered. At that stage, the buyer's lawyers draft a legal due diligence report addressed to the buyer outlining the issues identified during the due diligence exercise and advising as to how they can be dealt with. The buyer's lawyers typically have detailed instructions regarding the scope of the due diligence (and the materiality threshold to be applied), and the report will only address issues within this scope.

In recent years, areas such as data protection, and in particular GDPR compliance, have been given very high priority in the due diligence process, due to the potential for punitive penalties arising from breaches of the GDPR.

See also *Due Diligence in M&A Transactions and Joint Ventures Toolkit (International)*.

Consents and Approvals

© 2024 Thomson Reuters. All rights reserved.

8. What are the main consents and approvals typically required for an acquisition?

Corporate Approvals

There are restrictions on the transfer of shares in a private company under Irish law. The Companies Act prohibits private companies (other than a DAC, which is permitted to list debt only) from offering equities (debt or shares) to the general public or from listing their shares on any market, including regulated markets. In addition, the Companies Act limits the maximum number of members in a private limited company to 149.

The company's constitution may also contain restrictions on the transfer of shares. The most common restrictions are pre-emption rights and internal offer round provisions. The Companies Act incorporates default pre-emption rights into all company constitutions. However, this only applies to the issue of new shares and no default restrictions or internal offer round procedures apply to the transfer of existing shares.

Shareholder Approval

It is relatively common for shareholders in Irish private companies to enter into a shareholders' agreement, which will often contain provisions restricting the transfer of shares in the company.

There are also other procedural requirements that must be followed under Irish law in relation to the transfer of shares. These include a requirement that the company must receive evidence that the stamp duty due on the transfer of the shares has been discharged to register a transfer of shares in the company's register of members (except where certain exemptions apply). In addition, the directors of a company have a limited right to refuse to register the transfer of shares in a company. The default position under the Companies Act is that, unless the company's constitution provides otherwise, the directors' ability to refuse to register a transfer must be exercised within two months.

Contractual Consents

There is generally no obligation to seek a creditor's permission for the transfer of an asset. The most common exceptions to this are:

- **Contractual rights.** Consent is typically required where a creditor has a charge over the asset. Similarly, if the assets constitute a significant portion of a company's business, this may trigger a change of control provision in a contract, which may require consent to be obtained.
- **Insolvency.** A transfer can potentially be set aside if the transferring company is insolvent or a liquidator is appointed within, generally, six months or two years of the transfer. This typically arises in cases of unfair preference, fraudulent transfers and attempts to avoid a floating change.

Regulatory Approval

© 2024 Thomson Reuters. All rights reserved.

Both Irish and EU competition laws may impose restrictions on the transfer of shares where the transaction, if completed, could be deemed to restrict competition within a given market (see *Question 33*).

Ireland has also implemented the FDI Regulation by enacting the Screening of Third Country Transactions Act 2023, which imposes notification and screening requirements for foreign investments meeting certain thresholds from non-EU countries into Ireland (see *Question 5*).

For further information, see *Practice Note, Key Documents for Acquiring a Private Company (Ireland).*

Main Documents

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

The primary transaction documents in an acquisition include the following:

- Share or asset purchase agreement. The buyer typically prepares the first draft unless there is an auction sale, in which case the seller produces the first draft.
- Tax deed (in share sales only). The buyer typically prepares the first draft, unless there is an auction sale.
- Disclosure letter. The seller drafts this, with the buyer ensuring that sufficient detail on the disclosed matters is provided.
- Management/employee incentive agreements. These are common in private equity transactions, and the buyer typically prepares the initial drafts.
- Other transaction-specific key documents. These may include, among others:
  - transitional service agreements;
  - service agreements;
  - consultancy agreements;
  - licence agreements; and
  - intellectual property assignment agreements.

The buyer typically prepares the initial drafts of these types of documents.

A warranties and indemnities (W&I) insurance policy is now a regular and key transaction document. This is prepared by the insurer and reviewed by the buyer's counsel where a buyside W&I policy (the more usual policy type) is being used.

© 2024 Thomson Reuters. All rights reserved.

Acquisition Agreements

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

The substantive clauses in a share acquisition agreement include:

- Definitions section.
- Agreement for the sale and purchase of shares.
- Consideration.
- Conditions precedent to completion (if applicable).
- Interim provisions/material adverse change clause (if there is a gap between signing and completion).
- Completion mechanics.
- Warranties.
- Indemnities (if sought).
- Limitations on liability.
- Restrictive covenants (such as non-compete and non-solicitation clauses).
- Confidentiality.
- Miscellaneous clauses, such as:
  - notice provisions;
  - entire agreement;
  - announcements;
  - costs;
  - severability;
  - no assignment;
  - cumulative remedies;
  - waiver;
  - further assurance;
  - counterparts; and

© 2024 Thomson Reuters. All rights reserved.

  - governing law.

The main clauses in an asset acquisition agreement include:

- Definitions section.
- Agreement for sale and purchase of assets.
- Excluded assets and liabilities.
- Consideration (valuation of assets).
- Obligations at completion.
- Warranties.
- Indemnities (if sought).
- Limitations on liability.
- Restrictive covenants (such as non-compete and non-solicitation clauses).
- Transfer of employees (see *Question 31*).
- VAT.
- Confidentiality.
- Miscellaneous clauses, such as:
  - notice provisions;
  - entire agreement;
  - announcements;
  - costs;
  - severability;
  - no assignment;
  - cumulative remedies;
  - waiver;
  - further assurance;
  - counterparts; and
  - governing law.

© 2024 Thomson Reuters. All rights reserved.

Warranties and Indemnities

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

Seller warranties/indemnities in an acquisition agreement are intended to cover the entire business and typically include the following areas:

- Title and capacity.
- Company information.
- Related-party transactions or arrangements.
- Accounting information.
- Indebtedness.
- Solvency.
- Assets.
- Material contracts.
- Employees and pensions.
- Data protection.
- Intellectual property and information technology.
- Environmental.
- Properties.
- Insurance.
- Competition.
- Compliance with laws.
- Litigation.
- Tax.

In the Irish market, indemnities are typically only included where a specific risk has been identified as part of due diligence. This contrasts with certain other markets, such as the US market, where the default position is for warranties to be given on an indemnity basis.

© 2024 Thomson Reuters. All rights reserved.

12. What are the main limitations on warranties?

Limitations on Warranties

Warranty limitations are heavily negotiated in the context of a deal but typically include the following:

- Facts and information being disclosed against warranties in a disclosure letter.
- *A de minimis* amount whereby a buyer cannot bring a warranty claim unless it is above a certain financial threshold.
- A basket amount whereby any claim that meets the *de minimis* threshold is placed in a basket and the buyer cannot bring a warranty claim until the financial threshold of the basket is reached.
- An aggregate maximum liability cap. In smaller transactions this is often equal to the consideration the seller is receiving under the agreement, whereas in larger transactions this is typically a percentage of the overall consideration.
- Qualifications of the warranties by reference to the seller's knowledge, which can be in the form of a knowledge scrape of all warranties or on an individual warranty basis.
- Time limits for bringing a claim.
- Disregard of changes in legislation.
- Prevention of double recovery whereby a buyer cannot recover for a warranty breach both under the agreement and under an insurance policy.
- Restrictions on the conduct of third-party claims related to a warranty, where the seller may retain control over the claim, or the purchaser may be obliged to keep the seller updated or obtain seller consent before settling.

In general, the limitations on warranties are specific to the deal dynamic and the bargaining position of the parties.

The use of W&I insurance has become prevalent in Irish transactions as a means to limit the seller's liability under warranties. Depending on the level of cover acquired, the policy can be used to reduce the seller's liability to as low as EUR1. However, the seller typically retains risk for the title and capacity warranties, and full liability will apply if the seller has been found to have acted fraudulently or engaged in wilful misconduct or deceit.

The policy generally mirrors the warranties set out in the share purchase agreement, but the insurer may modify or carve out certain warranties. Coverage is generally broadest in property and energy transactions, with carve-outs being more prevalent in policies related to companies operating in regulated sectors. However, many of these limitations and carve-outs can be covered under the policy for an additional premium.

Qualifying Warranties by Disclosure

© 2024 Thomson Reuters. All rights reserved.

The seller may qualify warranties by reference to information disclosed to the buyer in a disclosure letter. This allows the seller to limit their liability by revealing any issues that contradict the warranties, preventing the buyer from being able to bring a warranty claim against the seller based on the matters disclosed.

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

Remedies

The principal remedies for a breach of warranty are:

- Damages for breach of contract (but there may be a cap on damages for warranty breaches in the warranty limitations).
- Rescission. This is a remedy that voids the contract and seeks to restore the parties to the position they were in before the contract was signed. Rescission cannot be claimed where the parties to the contract cannot be restored to their original position in relation to the rights and obligations created by the agreement. However, sellers typically resist the ability to have the contract rescinded for breach of warranty.

Time Limits for Claims Under Warranties

Time limits are heavily negotiated and deal-specific. 18 to 24 months is common for general warranty or indemnity claims, but this can vary and/or be longer for specific risks, such as environmental or data protection risks.

Longer warranty periods are typically applicable to warranties that are important to the business, while fundamental warranties relating to the ownership of the shares being sold typically have a limitation period of six years.

Time limits in respect of tax warranties, both in the share purchase agreement and in the tax deed of indemnity or covenant, are usually four years from the end of the audit cycle during which the transaction takes place or five years from the end of the accounting period current at the date of completion.

Signing and Closing

Conditions Precedent

14. What common conditions precedent are typically included in a private acquisition agreement?

© 2024 Thomson Reuters. All rights reserved.

The most common conditions precedent in share sale agreements are:

- Irish and/or EU competition clearance having been obtained. See *Question 33*.
- FDI clearance having been obtained. See *Question 5*.
- Obtaining change of control consents from key customers and/or suppliers, to ensure that key strategic contracts are preserved for the buyer.
- A requirement that specified permits, licences or consents are obtained to enable the buyer to complete the purchase and/or carry on the business.
- Where the company operates in a regulated sector, all necessary regulatory consents and waivers having been obtained.
- Shareholder consent, which may be required in certain circumstances, in particular where one of the parties is a listed company.
- Other transaction-specific conditions.

Main Steps at Signing and Closing

15. What are the main steps at signing and closing in a private share sale and asset sale? What main documents are commonly produced and executed?

Signing

It is now the norm rather than the exception that signings and closings occur virtually or remotely (as opposed to in-person), with the executed transaction documents being exchanged by email.

The principal documents produced at a signing meeting depend on whether the transaction is a share sale or an asset sale, but the main documents are as follows:

- Acquisition agreement.
- Disclosure letter.
- Board resolutions of the parties (where these are companies):
  - approving the transaction and the transaction documents; and
  - authorising a representative (usually a director) to sign the transaction documents on behalf of the company.

© 2024 Thomson Reuters. All rights reserved.

- Tax deed.
- Legal opinion (if a foreign party is involved).

Closing

The principal documents produced at a closing meeting depend on whether the transaction is a share sale or an asset sale, but the main documents are as follows:

- Share transfer forms.
- Share certificates/indemnity for lost share certificates.
- Closing board minutes for the buyer (where appropriate).
- Board minutes of the target company approving, among other things, the share transfer and updating the register of members following receipt of stamped share transfer forms.
- Resignation letters from resigning directors.
- Service agreements for key employees.
- Confirmation on transfer of consideration.
- Deed of release in respect of loans or other forms of security being paid off at closing.
- Escrow agreement (if part of the deal).

For an overview of the mechanics of signing and closing and key provisions of opinion letters in cross-border acquisitions, see *Signing, Closing, and Opinions Toolkit (International)*.

Execution of Documents

16. How are documents executed by companies in your jurisdiction? Are there specific formalities to execute certain types of documents?

A company's constitution should always be reviewed to determine whether any specific execution requirements apply. There are two general forms of contractual agreements under Irish law:

- A simple contract.
- A contract executed as a deed.

© 2024 Thomson Reuters. All rights reserved.

Any director, or any person authorised by the board to sign on behalf of the company, has the power to bind the company by signing a simple contract. If an individual other than a director is to sign a simple contract, board minutes, or a written resolution of the board, must be drafted to reflect their authority. Boards often delegate authority to sign to a non-director as either:

- A right to sign a specific and identified document.
- An ongoing right to sign a specific type of documents (for example, the Head of HR could be delegated authority to sign employment agreements on behalf of the company).

If an Irish company executes a document as a deed, additional execution requirements apply. The default requirement is that the company's seal be affixed and that two signatories countersign, in wet ink, the affixing of the seal. The signatories would typically be two directors, or one director and the company secretary or a person authorised by the directors in that respect. However, a company's constitution may provide that one signatory (a director, company secretary or person authorised by the directors) can countersign the affixing of the company's seal. Therefore, the company's constitution will need to be reviewed to determine how a document can be correctly executed.

In addition, if a company has appointed an individual as its attorney under a power of attorney, that individual can sign a deed, either in wet ink or electronically, in their capacity as the company's attorney, and this is binding on the company without any second signatory or the seal being affixed. This approach to the execution of deeds is increasingly common, particularly given the fact that this can avoid the need to obtain wet ink signatures and allow for a deed to be executed by way of electronic signature.

Documents may need to be executed as deeds, as opposed to simple agreements, for the following reasons:

- **No consideration.** If no consideration passes under a contract, it will not be binding unless executed as a deed.
- **Statute of limitations.** Documents are often executed as deeds where an extended limitation period is desirable, as the limitation period for deeds is 12 years as opposed to 6 years for most simple contracts.
- **Obligation to execute as a deed.** Certain documents, including documents transferring land, must be executed as a deed.

Valid execution of an agreement by a foreign company is dictated by the laws of the jurisdiction in which that foreign entity is incorporated. If a foreign company needs to execute an Irish deed, it must do so in accordance with the legal requirements of the jurisdiction in which it is incorporated. An affidavit, declaration, opinion or other form of confirmation may be required from a notary public or from a foreign legal practitioner citing the relevant applicable domestic law for valid execution of the deed/instrument and certifying that the deed/instrument was executed in accordance with the relevant law.

Transferring Title to Shares

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

The following formalities are generally required to transfer title to shares in a private limited company:

© 2024 Thomson Reuters. All rights reserved.

- Valid execution of a share transfer form (or other valid written instrument of transfer).
- Production by the transferors of their original share certificates or indemnities for lost share certificates.
- Payment of stamp duty (currently at a rate of 1% on share transfer) by a buyer on the consideration paid for the shares being transferred (or the market value, if higher).
- Board meeting of the target company to note the transfer and, on receipt of the stamped share transfer form, to:
  - update the register of members with the buyer's name; and
  - cancel the surrendered share certificate(s) and issue new share certificate(s) to the buyer.

Seller's Title and Liability

18. 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?

A buyer of shares has few statutory or common-law protections under Irish law regarding the nature of the assets and liabilities it is acquiring, and so the principle of caveat emptor (let the buyer beware) applies. A buyer generally includes a full suite of warranties and, where applicable, specific indemnities in the share purchase agreement relating to the business it is acquiring. Essentially, the seller will be expected to warrant that:

- It is selling full legal and beneficial title to the shares.
- It has all necessary authority to sell the shares (where the seller is a body corporate).
- The shares are being sold free from all encumbrances and together with all rights, attaching or accruing to the shares.

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

Seller

© 2024 Thomson Reuters. All rights reserved.

It is possible for a seller to be liable for pre-contractual misrepresentation or misleading statements. Whether a statement made by a seller or its authorised agent (acting within the scope of its authority) amounts to a misrepresentation is fact specific. A seller typically looks to exclude misrepresentation as a basis on which a claim can be brought by the buyer after completion.

Advisers

Advisors can also be liable under the tort of deceit for negligent misstatements, but, again, this is specific to the circumstances.

Governing Law and Arbitration

20. Can a share purchase agreement provide for a foreign governing law? Is an arbitration provision usually included in private M&A documents?

Choice of Law

It is possible for a share purchase agreement to provide for a foreign governing law, and a governing law clause can also be a hybrid of more than one jurisdiction. This is to be agreed between the parties.

Certain aspects to a share sale will be governed by Irish law regardless of the governing law clause, such as:

- The transfer of shares in an Irish company.
- Employee protections.
- Competition law issues.
- Data protection.
- Tax liabilities.

Arbitration

While not widely used, there has been a slight increase in the inclusion of clauses under which the parties agree that:

- Any disputes arising between them will be referred to arbitration.
- Neither party can pursue litigation until the arbitration process has been exhausted.

For further information, see Country Q&A, *Arbitration Procedures and Practice in Ireland: Overview*.

Consideration and Acquisition Financing

© 2024 Thomson Reuters. All rights reserved.

Forms of Consideration

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

Forms of Consideration

Cash consideration is the most common form of consideration used in Irish transactions. However, other forms of consideration are permissible. In order for a contract for the sale of shares to be enforceable under Irish law, the consideration must be sufficient and must not be past consideration. One typical form of consideration that has been more prevalent with the rise of private equity activity in Ireland is the use of share consideration. This is typically used in the context of management shareholders who sell certain of their shares in the target in consideration for the issuance of shares to them in the buyer's group.

Factors in Choice of Consideration

Depending on the transaction structure, consideration can often be structured to incorporate hold-backs or earn-outs to provide the buyer with protection against future warranty claims or deteriorating future performance.

Tax structuring can sometimes play a role in determining the form the consideration will take. However, this is typically more fundamental to determining the overall transaction structure.

Price Adjustments and Deferred Consideration

22. How is the price typically assessed and agreed? Is the price commonly adjusted?

The most common way of valuing a private company (known as an "earnings-based valuation") involves applying a particular multiple to the annual earnings (profits) of the business, with appropriate adjustments made for certain exceptional, non-recurring items that may distort the figures for the relevant year. The multiple to be applied is often established by reference to earnings multiples used on the acquisition of comparable publicly traded companies in the same sector.

An "asset-based valuation" is often more appropriate where the company derives most of its value from tangible assets, for example a property holding company.

Completion accounts consideration mechanisms tend to be more commonly used than locked box accounts. While it is less common in a locked-box mechanism the parties to agree certain carve-outs in respect of "permitted leakage", the concept of "unpermitted leakage" is not commonly used. Locked-box mechanisms offer many advantages to sellers, including:

© 2024 Thomson Reuters. All rights reserved.

- Certainty of price.
- Easier comparability of bids
- Less chance of post-closing or accounting-based disputes.

For an overview of certain key features of earn-outs, locked box pricing mechanisms, and purchase price retention arrangements to be considered in a cross-border private company acquisition, see *Earn-Out, Locked Box, and Retention Toolkit (International)*.

23. Do buyers typically pay the price in full on closing, or is deferred consideration common?

Payment of deferred consideration varies from sector to sector. However, in general, the use of deferred consideration, earn outs and escrow arrangements is increasing as the market rebalances following the impacts of COVID-19 and the related liquidity injection into the market.

Financial Assistance

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

Restrictions

There is a general prohibition on a company giving financial assistance in connection with the acquisition of its shares or shares in its holding company. This prohibition is relatively broad and encompasses direct and indirect financial assistance, whether by way of loan, guarantee, provision of security or other form of assistance. However, to constitute financial assistance for the purposes of the Companies Act, the assistance provided must have been given for the purpose of assisting with the acquisition of shares in the company or shares in its holding company. Where financial assistance concerns do arise, a careful analysis of the purpose behind the actions that give rise to these concerns should be undertaken.

Exemptions

While there is a general prohibition on financial assistance, the Companies Act also contains a whitewash procedure, referred to as the summary approval procedure (SAP), which can be used by a private company to authorise the provision of financial assistance in circumstances where the company would otherwise be prohibited from doing so.

Under the SAP, the following steps must be followed by the company before providing the financial assistance:

© 2024 Thomson Reuters. All rights reserved.

- **Members resolution.** The members of the company must approve the grant of the financial assistance through a special resolution (with 75% or more of the members present). This can be done either at a general meeting of the company or through a written resolution. The validity of the resolution lapses if the financial assistance is not given within 12 months of the resolution having been passed.
- **Directors' declaration.** A majority of the directors must make a declaration that the company will be able to meet its debts as they fall due over the next 12 months following the giving of the financial assistance. This declaration must be made no earlier than 30 days before the granting of the financial assistance and must reflect the reasonable opinion of the directors having made full enquiries into the affairs of the company.
- **Companies Registration Office filings.** A copy of the members special resolution and directors' declaration must be filed in the Companies Registration Office. The directors' declaration must be filed within 21 days of the financial assistance being commenced. If the declaration is not filed within this period it is not deemed to be valid and the entire SAP is invalidated. A court order is then required to validate the financial assistance.

Directors should consider carefully and diligently the giving of a declaration in connection with the SAP process as they could be deemed to be personally liable for the debts of the company if the company becomes insolvent within 12 months of the giving of the financial assistance and the declaration is found to have been given unreasonably.

Tax

Transfer Tax

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

Share Sale

Ordinarily, stamp duty is payable on the consideration paid for the transferred shares (or the market value, if higher). However, a higher rate can apply in certain circumstances where the shares derive the greater part of their value directly or indirectly from Irish land or buildings and certain other criteria are met.

Asset Sale

If stamp duty arises on an asset sale, the higher rate typically applies (on the consideration, or market value, if higher), assuming no residential property is being sold.

© 2024 Thomson Reuters. All rights reserved.

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 transfer tax liability?

Share Sale

Typically, in third-party transactions, it is preferable from a stamp duty perspective to acquire shares rather than assets, due to the lower rate generally applicable to a share sale. However, this depends on the assets in question, as certain stamp duty exemptions or mitigation techniques may be available in an asset sale. For example, there is a stamp duty exemption for the transfer of certain qualifying intellectual property and assets where legal title is capable of being transferred by physical delivery.

There is also an exemption from stamp duty for the transfer of shares and marketable securities admitted to the Enterprise Securities Market operated by the Irish Stock Exchange.

For both share and asset sales, stamp duty relief may be claimed where the transferor and the transferee are "associated" for stamp duty purposes (broadly, where there is a 90% association between the parties and certain other conditions are met). In addition, relief is also available for certain company reconstructions or amalgamations, subject to certain conditions being met. One key requirement for this relief is that the cash element of the consideration paid for the shares/assets must be limited to 10%. For share sales, there is an additional requirement that the buyer acquire 90% of the issued share capital of the target company.

Asset Sale

See above, *Share Sale*.

Corporate Taxes

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

Share Sale

Irish resident companies and individuals are generally subject to capital gains tax/corporation tax on chargeable gains (CGT) on gains arising on the disposal of both shares and capital assets.

Non-Irish resident companies or individuals disposing of shares/assets are only subject to CGT in Ireland to the extent that they are disposing of certain Irish "specified assets" or shares that derive the greater part of their value from such "specified assets". "Specified assets" include:

- Irish land or buildings.

© 2024 Thomson Reuters. All rights reserved.

- Irish minerals or any rights, interests or assets in relation to Irish mining or minerals or searching for minerals, and exploration or exploitation rights in a designated area.
- Irish-situated assets that are (or were at any time) used in or for the purpose of a trade carried on by the disposer through an Irish branch or agency.

Asset Sale

In an asset sale, an asset-by-asset analysis should be carried out to determine whether a sale of the asset is subject to CGT. See above, *Share Sale*.

Alternatively, the disposal of certain trading assets may be subject to corporation tax on any arising profit.

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 corporate tax liability?

Share Sale

In share sales where there is a corporate seller, no CGT is typically due on the transaction because either:

- For a non-Irish-resident seller, the shares fall outside the charge to CGT (as long as the assets do not constitute "specified assets" (see *Question 27*)).
- For an Irish-resident corporate seller, Ireland's "substantial shareholders' exemption" is potentially available.

Under Ireland's substantial shareholders' exemption, an exemption from CGT is available on the disposal by a parent company of shares in its subsidiary where certain conditions are met. Two of the main conditions are:

- A minimum of 5% of the target company must have been held for a period of 12 months prior to the sale.
- At the time of the disposal either:
    - the business of the target company consists wholly or mainly of the carrying on of a trade; or
    - the businesses of the seller, the target company and any other companies for which the seller is a parent company, and any other companies for which the target is a parent company, taken together, consist wholly or mainly of the carrying on of a trade.

Additional conditions/restrictions apply to the exemption. One notable restriction is that the exemption is not available on disposals of shares deriving the greater part of their value from Irish "specified assets".

Asset Sale

© 2024 Thomson Reuters. All rights reserved.

See *Question 27*.

Other Taxes

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

No VAT arises on the sale of shares, as a sale of shares is VAT exempt.

However, VAT can arise on an asset sale. The rate of VAT varies depending on the asset.

Transfer of business VAT relief may be available on the sale of business assets where certain conditions are met.

For an overview of key tax issues relating to the structure and tax costs after closing of a cross-border acquisition, see *Tax (Private Company Acquisitions) Toolkit (International)*.

Employees

Information and Consultation

30. 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) (TUPE) apply to asset transfers and transfers 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.

Where a transfer triggers the application of TUPE, both the transferring entity (transferor) and the entity to which the employees are transferring (transferee) must inform their respective employee representatives (or the employees directly, where it is not possible to elect representatives) of the following information no later than 30 days before the transfer is carried out where reasonably practicable and, in any event, in good time before the transfer:

© 2024 Thomson Reuters. All rights reserved.

- The date or proposed date of the transfer.
- Reasons for the transfer.
- Legal implications of the transfer for the employees, and a summary of any relevant economic or social implications of the transfer for them.
- Any measures envisaged in relation to the employees.
- The number of agency workers temporarily engaged in the undertaking concerned, the parts of the undertaking in which the agency workers work, and the type of work that the agency workers are engaged to do.

If the transferor or the transferee envisage any measures in relation to the employees, they must consult with their employee representatives, where reasonably practicable and no later than 30 days before the transfer, with a view to reaching agreement in relation to the measures. It is not necessary that agreement is reached on the relevant issues but there is a clear onus on both the transferor and the transferee to engage in meaningful consultation. In practice, even where measures are not envisaged, it is very common for the parties to a transaction to enter into dialogue with their respective staff groups once the necessary information is provided to them or their representatives.

Employees are only entitled to transfer under TUPE if they are wholly or mainly assigned to the transferred undertaking. If that is the case, the employees automatically transfer with the undertaking by operation of law unless an employee exercises their entitlement to object to the transfer of their employment. If an employee objects, the employee is deemed to have resigned from their employment. That means, in practice, that neither the transferor nor the transferee has any obligations to the employee, whether in respect of any redundancy payment or otherwise. An employer should ensure that an employee understands this before proceeding with an objection.

In addition, a transferee can request that the transferor notifies it of all rights and obligations arising from the transferring employment contracts that will transfer to the transferee on the date of transfer, so far as they are or should have been known to the transferor at the date of the transfer, albeit this arises under separate legislation. If the transferor fails to provide this information to the transferee, the transferee can rely on a statutory indemnity against the transferor for any liability arising in respect of a breach by the transferee of its obligations under TUPE resulting from the failure by the transferor to provide the information requested. This is an important indemnity for the transferee, as under Irish law, all liability (save for limited exceptions) under the employment contracts transfers to the transferee on the transfer date, which contrasts with the UK where there is joint and several liability between the transferor and transferee.

TUPE only applies to employees. As such, it is not uncommon for non-employees which may include consultants, contractors, secondees and agency workers to claim that they should transfer under TUPE on the basis that they should be deemed to be employees. It is therefore important for the parties to a TUPE transaction to consider the status of all non-employees involved in the undertaking or business concerned to determine if any such persons could have rights under TUPE.

Share Sale

No statutory information and consultation obligations arise on a share sale, unless 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 the *Information and Consultation Directive* (*2002/14/EC*) into Irish law). This mechanism is very rarely invoked in practice.

Parties should also check whether there are any collective agreements in place.

Employee consent is not required for a share sale.

© 2024 Thomson Reuters. All rights reserved.

See also *Employees (Private Company Acquisitions) Toolkit (International)*.

Transfer in a Business Sale and Other Protections

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

Transfer on a Business Sale

All eligible employees of the transferor who are properly assigned to the transferring business or undertaking automatically transfer to 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 (see *Question 32*)) 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. In addition, all liabilities arising from such contracts also transfer to the transferee.

Protections

Employee dismissals by the transferor or transferee as a result of the transfer are unlawful and prohibited under TUPE (see *Question 30*). Such dismissals are deemed to be automatically unfair, regardless of whether the individual is dismissed by the transferor or the transferee. However, a transfer-related dismissal is permitted if it is for economic, technical or organisational reasons that entail changes in the workforce. This arises where, for example, the transferee has a surplus of employees as a result of the transfer and needs to implement redundancies.

In addition, if a transfer involves a substantial change in working conditions to the detriment of the transferring employees, those employees can bring a quasi-constructive unfair dismissal claim against either party.

Other Protections

There is no additional statutory protection against dismissal in a share sale arrangement. Employees can seek to protect their rights using the general avenues of recourse, such as through:

- A claim for unfair dismissal.
- A breach of contract claim.
- An injunction seeking to restrain the dismissal.
- A discriminatory dismissal claim.
- An unfair dismissal claim under the Irish whistleblowing legislation.

See also *Employees (Private Company Acquisitions) Toolkit (International)*.

© 2024 Thomson Reuters. All rights reserved.

Pensions

32.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

There is currently no obligation for employers in Ireland to establish or operate a pension scheme for their employees.

In Ireland, about 40% of workers in the private sector have some sort of private pension coverage, although not all of these workers are members of private pension schemes established by their employer.

To benefit from preferential tax treatment, occupational pension schemes in Ireland are almost invariably established under a trust. Occupational pension schemes may be either:

- Defined benefit (the pension arrangement provides for a specified benefit at retirement).
- Defined contribution (the benefit at retirement is determined by the contributions paid by the employer and the employee and the return on those contributions).

A small number of schemes have features of both. In the past, defined benefit schemes were more popular but, in recent times, almost all new occupational pension schemes established in Ireland are defined contribution in nature.

If an employer does not offer access to an occupational pension scheme to its employees, or restricts access to its occupational pension scheme in certain ways, it must offer employees access to a personal retirement savings account (PRSA). A PRSA is a contract between the employee and a registered PRSA provider. Employers are not obliged to make a contribution to a PRSA in respect of employees but must facilitate employees who wish to set up and contribute to a PRSA.

The Irish government intends to extend the scope of pension coverage in Ireland by introducing an auto-enrolment pension arrangement, which they have announced is intended to be introduced in early 2025. The intention is that, when introduced, employees aged between 23 and 60 and earning at least EUR20,000 who are not already members of a pension arrangement will be automatically enrolled into a new scheme to be established by the state and administered by a newly established National Automatic Enrolment Retirement Savings Authority.

Employers would then be obliged to contribute a percentage of the employee's earnings to the scheme (capped at a salary of EUR80,000), with the employee contributing at the same rate and the government also contributing. The contributions that employers and employees are obliged to make will increase gradually over a ten-year period (starting at 1.5% of earnings and increasing eventually to 6%).

© 2024 Thomson Reuters. All rights reserved.

Employees will have the option to opt out or suspend membership of the new scheme in prescribed circumstances. Where they do so, they would be automatically re-enrolled periodically.

Pensions on a Business Transfer

TUPE safeguards employees' rights in the event of a transfer of a business (or part of a business) or change in service provision. However, Article 4(3) of TUPE provides that TUPE does not apply in relation to employees' rights to "old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes". These are generally the benefits that arise under occupational pension schemes established in Ireland. This is often referred to as the "pensions exception". However, by extension, rights to such benefits that are not provided under an occupational pension scheme or that are not "old-age, invalidity or survivors benefits" are not included in this exception and may transfer. The position as to what benefits may transfer in any particular case remains somewhat unclear and many questions remain unanswered. The continuing uncertainty around the transfer of benefits is usually addressed either through warranties or by the transferor agreeing to indemnify the transferee for any liability to provide pension benefits arising as a result of pension related benefits transferring by virtue of TUPE.

Although, there is generally no requirement for a transferee to honour existing pension rights or provide equivalent rights, on occasion, the parties to a transaction do agree in the business transfer agreement that the transferee will do so. This can occur for a variety of reasons, including that the transferor wishes to ensure that its employees will continue to enjoy certain benefits following the transfer.

Competition/Anti-Trust Issues

33. Do private acquisitions have to be notified to a competition law regulator in certain circumstances?

Notification and Regulatory Authorities

The Competition and Consumer Protection Commission (*CCPC*) enforces Irish and EU competition law in Ireland in line with the *Competition Act 2002*, as amended (Competition Act), including administering the Irish merger control regime.

Mergers, acquisitions (of shares and/or assets) and the creation of "full-function" joint ventures (that is, a joint venture that is intended to have an independent presence on the market on a lasting basis) are subject to mandatory notification to the Competition and Consumer Protection Commission (CCPC) before completion if either:

- The relevant turnover thresholds are met.
- They come within the definition of a "media merger", irrespective of the thresholds.

A transaction that must be notified to the CCPC is void if it is put into effect either before it has been notified to the CCPC or before clearance by the CCPC has been obtained. If notification is required, failure to notify before completion is a criminal offence for the undertakings involved, and it is a criminal offence for certain individuals who knowingly and wilfully fail to notify.

© 2024 Thomson Reuters. All rights reserved.

Subject to limited exceptions, a relevant transaction that is not notifiable to the European Commission under the Merger Regulation (*139/2004*) must be notified to the CCPC if, in the most recent financial year both:

- The aggregate turnover in Ireland of the undertakings involved (that is, the buyer groups and the target company (but not the seller) or the jointly controlling parent groups of a qualifying joint venture) is above EUR60 million.
- The individual turnover in Ireland of at least two of the undertakings involved is above EUR10 million.

The "turnover in Ireland" is the turnover that arises from the sale of goods and the provision of services to customers located in Ireland.

Even where the turnover thresholds set out above are not met, media mergers (mergers where at least two of the undertakings involved carry on a "media business") are notifiable to the CCPC (unless notifiable to the European Commission) and the Minister for Communications, Climate Action and Environment, 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 merger can be voluntarily notified by any of the undertakings involved. Voluntary notification precludes the CCPC from subsequently investigating the transaction as a suspected anti-competitive agreement or abuse of dominance, and so provides legal certainty. However, if the merger is voluntarily notified, it cannot be put into effect until the CCPC has approved it in advance.

Each undertaking involved in a merger must notify the CCPC of the merger. It is standard practice for parties to submit joint notifications to the CCPC. The notifying parties are typically the buyer(s) and the target company, or the jointly controlling parents of a joint venture.

Substantive Test

The substantive test for clearance applied by the CCPC is whether the merger would substantially lessen competition in the relevant markets for goods or services in Ireland.

For media mergers, two tests are applied:

- The CCPC applies the substantive test for clearance, as set out above.
- The Minister for Communications, Climate Action and Environment then applies a media plurality test to determine whether the merger would be contrary to the public interest in protecting the plurality of the media in Ireland.

Environment

© 2024 Thomson Reuters. All rights reserved.

34. 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?

Ireland does not have dedicated contaminated land legislation dealing with clean-up and other obligations (unlike other jurisdictions such as the UK). The clean-up of contaminated land in Ireland is dealt with under environmental and other licensing/permitting legislative regimes, or under waste, air or water pollution legislation. As a general principle, environmental liabilities can arise in connection with contaminated land where there is a risk (however minor) that the contamination could migrate off-site and cause damage to the environment.

Ireland has a range of more than 300 pieces of environmental legislation aimed at dealing with pollution and implementing the overarching "polluter pays" principle.

The identity of the "polluter" is generally defined by reference to the person who "causes" or "permits" pollution to occur or who "holds" waste on land. "Causing" or "permitting" pollution to occur can be quite broad in scope. A "polluter" can include the current or previous landowner or occupier and/or persons controlling or managing the entity that causes or permits the pollution.

The general approach taken by regulators to remediation requirements is to impose conditions to remediate the site on the grant of planning permission, so that the clean-up obligation arises when redeveloping the land is proposed. Alternatively, where appropriate, the Environmental Protection Agency (EPA) may direct the "holder" of waste to clean up the site under the *Waste Management Acts* 1996 to 2011. The EPA also has powers to carry out remediation works and then to recover the costs of doing so from the polluter.

Polluters can incur civil and/or criminal liability. If guilty of a criminal offence, fines can be imposed in addition to liability for clean-up costs and any compensation costs. These fines may be substantial, depending on the nature of the offence, and can be as much as EUR15 million. Civil liability under Irish environmental legislation can extend to all necessary clean-up steps, compensation costs and consequential/indirect losses.

In a share sale, the buyer will be liable for all historic environmental damage or breaches of environmental law for which the seller would have been liable (subject to any warranties or indemnities).

In an asset purchase, the liability for any environmental issues is limited to liabilities that relate specifically to the asset. The principle of caveat emptor (let the buyer beware) applies. As the new legal owner of the asset, the buyer takes control of any environmental issues and may therefore be vulnerable to enforcement action, including an obligation to clean up any contamination (subject to any warranties or indemnities). However, the EPA or other regulating authority can still pursue the previous owner for offences committed when they were the owner of the land.

It is possible to transfer or apportion civil environmental liabilities in commercial transactions through the use of indemnities and/or warranties. However, due to public policy considerations, it is generally not considered permissible to rely on indemnities to cover criminal sanctions. In addition, any contractual arrangements between parties cannot generally affect the position of or bind third parties, including regulators.

It may also be possible to put in place environmental insurance to reduce potential liability for clean-up costs.

Environmental liability can also extend to directors and other officers of the company (and in some instances its members), depending on the circumstances. Depending on whether there are applicable environmental licences in place, the contamination may also raise compliance issues, and the EPA (or other authority, depending on the licence(s)) may take enforcement action in respect of environmental pollution, such as groundwater contamination.

© 2024 Thomson Reuters. All rights reserved.

More than one party can be responsible for the clean-up of contaminated land. Parties can be jointly and severally liable.

For more information, see *Country Q&A, Environmental Law and Practice in Ireland: Overview*.

Contributor Profiles

Robert Maloney Derham, Corporate M&A Partner

Matheson
T +353 1 232 2013
F +353 1 232 3333
E *robert.maloneyderham@matheson.com*
W *www.matheson.com*

Professional qualifications. Solicitor, Ireland (admitted 2016); Solicitor, England and Wales (admitted 2017 - non-practising); Attorney, New York (2017)

Areas of practice. M&A; private equity; corporate reorganisations; equity fundraisings; general corporate advice.

Non-professional qualifications. BBL, University College Dublin; LL.M, The University of Chicago Law School

John Coary, Corporate M&A Partner

Matheson
T +353 1 232 2250
F +353 1 232 3333
E *john.coary@matheson.com*
W *www.matheson.com*

Professional qualifications. Solicitor, Ireland (admitted 2015)

Areas of practice. M&A; corporate reorganisations; private equity; equity investments; general corporate advice.

Non-professional qualifications. BCL, University College Dublin; LL.M, Kings College London

Rob Barrett, Corporate M&A Partner

Matheson
T +353 1 232 2352
F +353 1 232 3333
E *robert.barrett@matheson.com*

© 2024 Thomson Reuters. All rights reserved.

W *www.matheson.com*

Professional qualifications. Solicitor, Ireland (admitted 2012); Solicitor, England and Wales (admitted 2013 - non-practising)

Areas of practice. M&A; corporate reorganisations; private equity; equity investments; general corporate advice.

Non-professional qualifications. BCL, University College Dublin

END OF DOCUMENT

RESOURCE HISTORY

Law stated date updated following periodic maintenance.

This document has been reviewed by the author as part of its periodic maintenance to ensure it reflects the current law and market practice on 1 November.

Related Content

Topics

Cross-border - Acquisitions
Asset Acquisitions
Share Acquisitions - Private
Acquisitions - Auctions

Practice note: overview

Auction Sales: Overview (International) • Law stated as at 31-Jan-2021
Share purchases: overview • Maintained
Asset Acquisitions: Overview • Maintained

Country Q&A

Employment and Employee Benefits in Ireland: Overview • Law stated as at 01-Mar-2024
Tax on Corporate Transactions in Ireland: Overview • Law stated as at 01-Aug-2021

Toolkit

Signing, Closing, and Opinions Toolkit (International) • Law stated as at 01-Nov-2022
Employees (Private Company Acquisitions) Toolkit (International) • Law stated as at 01-Mar-2024

© 2024 Thomson Reuters. All rights reserved.