THE Mergers & Acquisitions Review

Eighth Edition

Editor
Mark Zerdin

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There is cause for optimism and caution in light of the past year’s events.

First, we can be tentatively optimistic about Europe. The possibility of a euro breakup appears to have faded, and European equities markets performed, on the whole, exceptionally well in 2013. Indeed, the euro/dollar basis swap has moved sufficiently to open up euro capital markets to borrowers wishing to swap proceeds to dollars; the World Bank sold its first euro benchmark bond for more than four years in November 2013, and non-European companies like Sinopec and Korea Natural Gas have issued large euro bonds in recent months. If the European economy continues to grow (and analysts are expecting growth to quicken), it is hoped that the prospect of crisis will continue to fade.

Second, though 2013 was a comparatively languid year for global M&A, the buoyancy of the credit and equity markets cannot be ignored. In terms of financing, the seeming willingness of banks to allow for looser borrower constraints, to underwrite jumbo facilities in small syndicates, and to offer flexible and fast bridge-financing for high-value acquisitions, presents a financing climate that should be particularly amenable to corporate M&A. It is also notable that continued political and economic instability did not impede the completion of some standout deals in 2013, including the Glencore/Xstrata tie-up and Vodafone’s disposal of its shareholding in Verizon Wireless. These deals show that market participants are able, for the right deal, to pull out all the stops. After a period of introspection and careful balance sheet management, corporates may be increasingly tempted to put cash to work through M&A.

There remains, however, cause for prudence. There is considerable uncertainty as to how markets will process the tapering of quantitative easing (QE) by the US Federal Reserve. The merest half-mention by Ben Bernanke, in May 2013, of a possible end to QE was enough to shake the markets, and to nearly double the 10-year US Treasury yield in a matter of months. Emerging markets are particularly sensitive to these shocks. The oncoming end of QE may already have been priced into the markets, but there is a possibility that its occurrence will cause further, severe market disruption. In addition, there are concerns around how the funding gap left by huge bank deleveraging will be
filled, and centrifugal pressures continue to trouble European legislators. Finally, there are broader concerns as to the depth of the global economic recovery as growth in the BRIC economies seems to slow. Optimism should, therefore, be tempered with caution.

I would like to thank the contributors for their support in producing the eighth edition of *The Mergers & Acquisitions Review*. I hope that the commentary in the following chapters will provide a richer understanding of the shape of the global markets, together with the challenges and opportunities facing market participants.

**Mark Zerdin**  
Slaughter and May  
London  
August 2014
Chapter 33

IRELAND

Éanna Mellett and Robert Dickson

I  OVERVIEW OF M&A ACTIVITY

2013 was a strong year for M&A activity in Ireland in terms of transaction values. Total deal values amounted to €38.59 billion as against €27.734 billion in 2012. The number of transactions of more than €120 million each in Ireland greatly increased in 2013 as against 2012 – 37 such deals were announced in 2013 as against 28 in 2012. Twelve such deals were announced in the fourth quarter of 2013, representing the busiest quarter in Ireland since the fourth quarter of 2006. However, taking all deal values and 2013 as a whole, 254 M&A and equity capital markets deals were announced, as against the 299 which were announced in 2012, representing a decline in mid-market and small deals in Ireland.

Ireland’s exit from its EU-IMF €85 billion bailout programme in December 2013 (without putting any credit line in place), its decreasing bond yields and economic growth generally demonstrate international investors’ desire to invest in Irish assets. Having said that, challenges continue to lie ahead for the Irish economy and it should also be noted that the strong deal values for 2013 are greatly enhanced by a small number of large-ticket M&A transactions.

II  GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

The main statutory framework in relation to mergers and acquisitions in Ireland is comprised of the Companies Acts 1963 to 2013 (the Companies Acts), which will soon be consolidated into a single Companies Act (further details of which are set out at
Section III below); the Irish Takeover Panel Act 1997, as amended (the Takeover Act); and takeover rules introduced pursuant to the Takeover Act, as amended in January 2014 (the Takeover Rules). Together with relevant provisions of contract law, the above legislation and rules form the primary legal basis for the sale and purchase of corporate entities. The Takeover Rules provide for the regulation of takeovers of Irish public companies (plcs) by the Irish Takeover Panel, which has been designated as the competent authority for the purposes of Directive 2004/25/EC on takeover bids.

The Irish merger control rules are contained in the Competition Act 2002, as amended. The rules do not generally apply to mergers in relation to which the European Commission has exclusive jurisdiction under the EU Merger Regulation.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

i Companies Bill

The Companies Bill 2012 (the Bill) has now completed its passage through the Dáil (the lower house of parliament) and is in the process of being considered and approved by the Seanad (the upper house of parliament). It is expected to become law in late 2014 or early 2015 and will consolidate, simplify and reform existing Irish company law.

The primary focus of simplification is the private company limited by shares (CLS) which is established as the new ‘model company’. Some of the distinguishing features of a CLS include:

a it may have just one director (currently Irish companies must have at least two directors);

b a multi-member CLS may dispense with the requirement to hold an annual general meeting; and

c it will be deemed to have ‘unlimited capacity’ (i.e., the ultra vires doctrine will cease to apply to it).

The Bill also simplifies certain aspects of merging Irish businesses and introduces new procedures that may be followed to implement mergers and divisions for the first time, the key provisions of which are:

Schemes of arrangement

The Bill streamlines the scheme process by enabling the directors of a company, as opposed to the High Court, to convene the appropriate shareholder or creditor meetings for approval of a scheme. This means that only one High Court application (as opposed to three under the current regime) would be necessary to implement a scheme. Under the Bill, the scheme would still need to be approved by a majority in number representing 75 per cent in value at the relevant shareholder or creditor meetings.

Reduction of share capital

In the context of merging Irish businesses, it may be desirable or necessary to reduce a company’s share capital. Currently, a capital reduction requires a shareholder resolution which is confirmed by court order. The Bill introduces a simplified process for companies
(other than plcs) to effect a capital reduction without court involvement known as the summary approval procedure (SAP). Removing court involvement will reduce the costs and time frame currently associated with a capital reduction. Using the SAP to implement a capital reduction will require: a declaration of solvency in respect of the company to be sworn by a majority of its directors; a report of a person who is qualified to be the company’s statutory auditor that would state whether, in that person’s opinion, the directors’ declaration is not unreasonable; and the approval of 75 per cent of the shareholders entitled to vote on the proposed transaction. The Bill also modifies the court process under the current law slightly by shifting the timing of the advertisement of the reduction and the date on which the reduction takes effect. The court process will remain relevant for plcs as such companies will not be able to avail of the SAP to effect a capital reduction.

Variation of capital on reorganisation
The Bill includes new provisions whereby a company may, for any purpose (with the result that its company capital is thereby reorganised) transfer or dispose of assets or liabilities or undertakings to a transferee company in exchange for securities in the transferee company being allotted to members of the company or its holding company (rather than the company itself). Under current legislation such a transaction could be regarded as a distribution which would require to be supported by distributable reserves. If such reserves are unavailable then the transaction constitutes a form of capital reduction. As with a capital reduction, such a variation will be capable of being implemented by using the SAP as outlined above (unless the relevant company is a plc) or by following the court process which is identical to the court process in respect of a capital reduction.

Mergers
Mergers are currently only available to plcs or to private limited companies in a cross-border situation. The Bill provides, for the first time under Irish law, for a merger to be effected between private companies incorporated in Ireland. By following a process similar to the cross-border merger process under the EC (cross-border mergers) Regulations 2008 (as amended), the Bill allows for all of the assets and liabilities of one or more transferor companies to be transferred to a successor company whereby the transferor companies are then dissolved without going into liquidation. In broad terms, the merger may take effect by each merging company passing special resolutions approving the merger and its confirmation by the court or by utilising the SAP referred to above. The ability to effect a merger by using the SAP is a significant development, as it will reduce both the time and the monetary cost of implementing a merger and therefore make it an accessible option when considering corporate restructuring possibilities.

Divisions
The Bill also provides for a private company to be split between two or more other private companies. As with a merger, none of the companies involved in the division may be a plc. Under the terms of the Bill, the effect of a division is that two or more companies acquire between them all the assets and liabilities of another company that is dissolved without going into liquidation. The division process is similar to the merger process set out in the Bill, however, the SAP may not be availed of. Common draft terms of division
and in certain cases a directors’ explanatory report and an expert’s report to shareholders must be provided. Each company involved in the division must pass special resolutions approving the division and the division must then also be confirmed by the High Court.

Mergers and divisions of public limited companies

Mergers and divisions involving plcs are dealt with separately in the Bill albeit the effect is the same, in that all assets and liabilities of a transferor company or companies are transferred to a transferee company or companies and the relevant transferor company is dissolved without going into liquidation. The Bill revokes the 1987 Regulations that set out the current regime for merging plcs. Accordingly, once the Bill is passed and enacted, the 1987 Regulations will no longer be relevant for implementing mergers involving plcs and the procedures set out in the Bill will need to be followed. The procedures in the Bill are very similar to those in respect of mergers and divisions of private companies. The key distinguishing feature of the merger process for a plc is that once again, a plc may not utilise the SAP and is obliged to seek the confirmation of the court to implement the merger. As with divisions of private companies, court involvement will also be necessary for divisions involving plcs under the Bill as currently drafted.

ii New Takeover Rules

The Irish Takeover Panel (the Panel) has published new Takeover Rules, which took effect on 6 January 2014. Transactions initiated prior to 6 January 2014 are governed by the Takeover Rules that existed prior to that date.

Some of the key changes to the Takeover Rules as a result of the January 2014 amendments – which are generally target-friendly – can be summarised as follows:

a there have been various modifications to ensure that the effect of public statements made by bidders and others is fully comprehensible to shareholders and the market;

b if there has been an announcement of a possible offer for a target but no announcement has been made of a firm intention to make an offer, the panel may (if so requested by the target) impose a time limit within which the bidder must clarify its intentions with either a firm offer announcement or the announcement of its intention not to make an offer. If the bidder states that it does not wish to make a firm offer, it may not make an offer for 12 months thereafter, except with the panel’s consent. This ‘put up or shut up’ regime only applies in circumstances where the bidder has been publicly named. The time limit for such a period is determined by reference to the circumstances – the equivalent UK Takeover Code rule impose an automatic period of 28 days;

c there are related rule changes that require a bidder who has announced that it does not intend to proceed with an offer, to refrain from any steps in relation to a possible offer for a 12-month period, including acquiring any securities in the target, making any statement as to the possibility of an offer, or taking steps that extend the knowledge of the possible offer beyond a restricted number of persons. Similar restrictions are now in place for offerors whose offer has been unsuccessful; and
the new Takeover Rules contain provisions confirming the extent to which an offeror will be bound by any information it includes in a possible offer announcement and require any such offeror to obtain the Panel’s consent prior to making a possible offer announcement, if the proposed announcement is to contain details of the terms of the offer. Essentially, in order to avoid complying with any such terms outlined in a possible offer announcement, the offeror would have to immediately withdraw incorrect information included. This restriction does not apply if the announcement outlines circumstances in which the terms included would fall away and those circumstances transpire.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Large-ticket M&A transactions in Ireland continued to typically involve international companies investing in and through Ireland. Multinational corporations continue, in certain circumstances, to regard Ireland as a useful strategic hub in their businesses. Perrigo’s €4.9 billion acquisition of Elan Corporation and the €6.5 billion acquisition of Ireland-based Warner Chilcott by US-based pharmaceutical company Actavis, were the largest examples of this phenomenon in 2013. Stabilisation of the eurozone and the cautiously positive outlook for Ireland’s economy have contributed to foreign investment in Ireland, while in some cases large multinationals have chosen to structure deals using an Irish holding company for strategic reasons. Ireland’s corporate tax regime is well documented as an advantage of investing in Ireland and continues to attract multinationals to the jurisdiction, but this is one of a number of factors attracting foreign investment, another being that highly specialised and attractive targets are perceived to be providing significant competitive advantage to their acquirers by way of an established footprint. In May 2014, Moody’s updated Ireland’s sovereign debt rating to Baa1, demonstrating the gradual increase in international confidence in Ireland’s economic position.

V SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND HOT INDUSTRIES

The key major deals in Ireland in 2013 were in the pharmaceutical, manufacturing and financial services sectors. The pharmaceutical, medical and biotech sector accounted for the vast majority of M&A value in Ireland for 2013, due largely to the Warner Chilcott and Elan deals. M&A activity by volume was spread more evenly through the sectors.

Financial services M&A has also been driven by interest from foreign strategic acquirers. The sale of Irish Life by the government to Great-West Lifeco for approximately €1.3 billion was a significant deal in that sector. The largest energy deal (€1.1 billion) was the selection of Centrica, Brookfield Renewable Power and iCON Infrastructure as preferred bidders for Bord Gáis Energy following a competitive sales process.

Deal values for specific sectors against one another tend to be greatly distorted by a small number of very large deals in particular sectors. However, it is possible to establish patterns over recent years in certain sectors. The leisure sector, for instance, while accounting for a very low proportion of all deal value in 2013, has seen total deal value steadily increase since 2009 and accounted for 13 per cent of M&A volume for
2013 – a large increase as against previous years. This has been largely driven by distressed hotel sales, including the €20 million sale of Fota Island Resort from the National Asset Management Agency to the China-based Kang family.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

Domestic funding for potential investors and purchasers of Irish companies and assets continues to be in short supply, particularly in specific sectors. Potential acquirers continue to have difficulty raising finance in Ireland in relation to targets whose business model is purely domestic – the difficulty of raising finance has therefore affected M&A in certain industries more than others and would tend to cause more difficulty in such sectors as retail and leisure, in which business models tend to be more domestically focused.

On that basis, M&A transactions involving foreign acquirers have tended to be financed by institutional investors with strong cash reserves; and by foreign conglomerates.

VII EMPLOYMENT LAW

There are a number of Irish employment and pensions updates that investors in and purchasers of Irish companies should be aware of.

With effect from 1 January 2014, the standard age at which the state pension becomes payable in Ireland has been raised from 65 to 66 in 2014 and will rise further to 67 and 68 in 2021 and 2028 respectively. It is thought that the increased retirement age in the workplace could have a bearing on the application of the unfair dismissals legislation in this regard.

The statutory funding standard for defined benefit pension schemes was reintroduced in 2012. With effect from 1 January 2016, defined benefit schemes are required to hold additional assets in the form of a risk reserve (in certain circumstances, schemes are required to hold a risk reserve from an earlier date). A risk reserve must be either funded or covered by a legally enforceable employer undertaking. The requirement to hold a risk reserve will put further pressure on defined benefit schemes in Ireland.

The Protection of Employees (Temporary Agency Work) Act 2012 gives effect to Directive 2008/104/EC on temporary agency work and for that purpose amends certain existing legislation. The purpose of the legislation is to ensure equal treatment in terms of basic working and employment conditions for temporary agency workers with comparable employees recruited to the same job.

The Protected Disclosures Bill 2013 was published in July of last year and it is envisaged that it will come into force later this year. The legislation is designed to protect whistle-blowing employees across all sectors. Under the current Bill, an employee will be protected from penalisation, or indeed threatened with penalisation when making a ‘protected disclosure’. An employee may bring a claim for unfair dismissal if they believe they have been dismissed by reason of the disclosure, and they can be awarded up to five years’ gross remuneration. Another significant aspect of the Bill is that it allows disclosures made prior to the enactment of the Bill to be protected.
Part 5 of The Central Bank (Supervision and Enforcement) Act 2013, also provides protection for whistle-blowers. More specifically it only deals with whistleblowing in respect of breaches of financial services legislation. However, what is different from this piece of legislation compared with the Protected Disclosures Bill 2013 is that an employer may be found guilty of a criminal offence if they penalise, or threaten to penalise, someone who has made a disclosure under this act. Both pieces of legislation provide for the anonymity of the whistle-blower.

Under the European Union (Parental Leave) Regulations 2013 an employee may, upon returning from parental leave, request a change to their working conditions such as their hours, for a set period. The employer is only obliged to consider the request made and is under no obligation to agree to it.

VIII TAX LAW

The most significant recent amendments regarding Irish tax law that are relevant to the M&A market have related to stamp duty. The rates of stamp duty on transfers of non-residential property (other than shares, which are charged at 1 per cent) were reduced to a flat rate of 2 per cent. Prior to this amendment, there had been a tiered rate of up to 6 per cent depending on the value of the assets being transferred. The 2 per cent rate is now applied without any de minimis limit, which contrasts with the previous position where a de minimis limit of €10,000 applied. The new rate will attach to any stampable transfer of property that is non-residential property – for example, goodwill and commercial property.

Recent finance acts have also introduced some further changes to the e-stamping system, which was introduced to replace the previous paper stamping system. A full ‘self-assessment’ regime for stamp duty has been introduced (this move to a self-assessment basis is similar to the regime in place for direct taxes). The main recent changes involved the abolition of the ‘adjudication’ process (thereby moving the stamp duty regime to a self-assessment regime) and the removal of the certification requirements on the face of instruments. Late filing penalties were amended and replaced by a surcharge (similar to the surcharge provisions in place for direct taxes). Furthermore, there has been a removal of the requirement for a company secretary or solicitor to swear a statutory declaration confirming that the tests for certain reliefs were met.

In the context of an asset acquisition, where certain intellectual property is being acquired, capital allowances can be claimed in respect of the expenditure incurred. The relief is available for a broad range of intangible assets (eg, patents, copyright, trademarks, know-how). Annual allowances are available based on the amount charged to a company’s profit and loss account or income statement for the accounting period in respect of the amortisation, or, alternatively, the company can opt for a fixed write-down period of 15 years at an annual rate of 7 per cent of qualifying expenditure, and 2 per cent in the final year. Recent finance acts have reduced the ‘clawback’ period in respect of the capital allowances claimed on such intangible assets. A clawback will now only occur where the asset ceases to be used in a trade within five years of acquisition. Previously this clawback period was 10 years (and prior to that had been 15 years).
Finally, legislation has been recently introduced to make Ireland a more attractive jurisdiction for multinational countries in the context of employee assignments both into and out of Ireland. A special assignee relief programme (SARP) was introduced to attract key people to Ireland to help expand established multinational and indigenous companies. Broadly, assignees are eligible for the relief where they have been employed by a foreign company for at least 12 months prior to arriving in Ireland, take up employment in Ireland with that company or an associated company for a minimum of 12 months, and have not been Irish-resident for the five tax years preceding the year of arrival. The effect of the relief will be to allow the assignee a tax deduction of up to 30 per cent of employment income liable to Irish tax in excess of €75,000 up to a maximum income of €500,000 and can be provided directly at source through payroll. The relief applies for the first five years of the employee’s residence in Ireland, subject to certain conditions. In addition, a ‘foreign earnings deduction’ was introduced to aid export companies seeking to expand into emerging markets from Ireland. The deduction applies where an individual spends 60 days or more in a year aiding Irish market development in certain countries. The countries initially covered were Brazil, Russia, India, China and South Africa (the BRICS countries), with additional emerging market African countries (Algeria, the Democratic Republic of the Congo, Egypt, Ghana, Kenya, Nigeria, Senegal and Tanzania) being added in subsequent legislation.

IX COMPETITION LAW

The Competition Act 2002, as amended (the Competition Act) governs the application of competition law at Irish level. Following publication of the long-awaited Competition and Consumer Protection Bill (Competition Bill) in March 2014, significant changes to the current merger control regime in Ireland are expected, assuming the Competition Bill is enacted by Parliament in its current form (scheduled for mid to late 2014). These include the following.

The Competition Bill provides for the merger of the existing Competition Authority and National Consumer Agency to create a new Competition and Consumer Protection Commission (CCPC).

The Competition Bill provides that where either one of the parties to a merger or acquisition has publicly announced an intention to make a public bid, or the parties can demonstrate a good faith intention to conclude an agreement, notification can now be made to the newly formed CCPC.

The CCPC’s decision-making deadlines are significantly extended. In general, the Competition Bill provides for a migration from a calendar month to working day review timeline. For example, instead of a Competition Authority Phase I deadline occurring within one calendar month of filing, the CCPC will have 30 working days to reach a decision. A similar change to Phase II timing is introduced (i.e., a deadline of 120 working days from filing). Additionally, the Competition Bill also provides for the introduction of a new ‘stop the clock’ provision for formal information requests in Phase II equivalent to that under Phase I.

The Competition Bill introduces new merger notification thresholds. These will remove the worldwide turnover threshold of €40 million and introduce a two-limb test
for notification. Parties will notify where the aggregate turnover in the state of the parties is not less than €50 million, and the turnover in the state of both parties is not less than €3 million.

The Competition Bill radically amends the current media merger regime. The Competition Bill introduces a revised jurisdictional test for media mergers and will transfer responsibility for the review of the media plurality issues from the Minister for Jobs (who is responsible for competition policy) to the Minister for Communications. In addition, the Competition Bill clarifies the substantive test for identifying a media plurality concern and introduces a new role for the Broadcasting Authority of Ireland in the preparation of a report on media plurality issues.

X OUTLOOK

An outlook of cautious optimism for M&A during the rest of 2014 and early 2015 is justified. However the positive deal value results of 2013 were strongly enhanced by a small number of large-ticket transactions, the likes of which may not be replicated on an annual basis. It remains challenging for potential acquirers to raise the requisite finance in the Irish markets for certain types of transactions, which may continue to restrict low and mid-market deal volumes, particularly in relation to targets with a domestic business model. A significant volume of potential M&A activity in 2014 is expected to come from larger banks’ non-core asset sales in 2014. Foreign investment is likely to continue to play a major role in Irish deal volume and value, as Ireland’s gradual recovery from recession should continue to be reflected in the improving M&A market.
Appendix 1

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