The Mergers & Acquisitions Review

Sixth Edition

Editor
Simon Robinson

Law Business Research

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EDITOR'S PREFACE

Deal-making has remained on the agenda in the past year, although the first half of 2011 showed a stronger performance than the second half, which saw a significant fall in transactional activity. In the wake of continuing economic uncertainty, opportunities for acquisitions remain limited to companies and institutions on a stable financial footing. At the same time, corporates are beginning to focus on their core business and looking for ways to return value. Valuations remain favourably low for purchasers, and the prospect of striking a bargain makes cross-border M&A attractive for those who can afford it. While access to the loan market has remained difficult, cash-rich corporations have begun to swing the balance in their favour. Shareholder participation and a desire for control and accountability are on the rise, and an atmosphere of increased regulation, reform and austerity is building. We remain in a state of geopolitical flux, and these factors continue to complicate the global economic scenario. The period of widespread unrest in the Middle East and North Africa seems to be reaching a settled conclusion, although the situation in Syria (and possibly Mali and Sudan) is still volatile. A number of countries have seen fresh elections and a transition of leadership, including France and Russia, and a change of leadership in China is expected following the 18th National People's Congress this autumn, when the US presidential elections will also take place. The sovereign debt crisis and the ongoing uncertainty over the fate of the eurozone are further contributing to the lack of confidence in the markets.

All is not doom and gloom, however, and whereas the global picture remains difficult, there are signs of hope. The emerging markets have shown a persistent growth in outbound investment, spurred on by a desire to build a more prominent global presence and for the purpose of accessing new markets. European targets remain of interest to both US and Middle and Far-Eastern buyers. Inbound investment from the emerging markets into both Africa and Australia is on the rise, and this has strengthened activity in the energy, mining and utilities sector. The technology, media and telecoms sector has also shown signs of promise with some high-profile deals, and must be watched with interest in the coming year. There is hope that, as political and economic factors stabilise, M&A activity will once more gather pace and momentum, and enter a new era of resurgence. We shall see.

Once again, I would like to thank the contributors for their continued support in producing this book. As you read the following chapters, one hopes the spectre of the years past will provide a basis for understanding, and the prospect of years to come will bring hope and optimism.

Simon Robinson
Slaughter and May
London
August 2012

Chapter 30

IRELAND

Fergus Bolster[1]

I OVERVIEW OF M&A ACTIVITY

2011 was a relatively good year for mergers and acquisitions in that the recovery shown in 2010 was maintained and the market remained ahead of the historically low levels of activity in 2009. According to corporate deal activity reports and surveys, there were 212 deals involving Irish companies in 2011 with a total value of €9.2 billion. This compares with 197 deals and a total value of €10.3 billion in 2010. Despite the ongoing European sovereign debt crisis and the uncertain outlook for the Irish economy, M&A activity in the first quarter of 2012 continued in a positive manner with 51 deals representing a total value of €792 million; in terms of deal volume, this remains in line with the quarterly average for 2010 and 2011.[2]

As in 2010, buyers were predominantly trade players. The building and construction, financial services, food/food services and technology sectors saw the most activity although, in the building and construction sector, most of this activity consisted of foreign acquisitions undertaken by CRH plc. In total, foreign acquisitions by Irish companies represented 43 per cent of deal volume in 2011. In addition to CRH plc, other Irish public companies were also active, including DCC plc, Kerry Group plc, Glanbia plc and Origin Enterprises plc.

1 Fergus Bolster is a partner at Matheson Ormsby Prentice.

2 Source of transactions statistics for 2011 and the first quarter of 2012: NCB Corporate Finance M&A Tracker Survey Quarterly Updates.

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 2012 ('the Companies Acts'), the Irish Takeover Panel Act 1997, as amended ('the Takeover Act') and takeover rules introduced pursuant to the Takeover Act ('the Takeover Rules'), which together with relevant provisions of contract law, form the primary legal basis for the sale and purchase of corporate entities. The Takeover Rules provide for regulation of takeovers of Irish public companies 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

Pillar A of the new Companies Bill was published in May 2011. As well as consolidating existing law in the area, the Bill proposes important changes that will make it easier and cheaper to start and run a company. The legislation published on 30 May 2011 contains all provisions relevant to the private company limited by shares ('CLS'), which account for over 90 per cent of companies in Ireland. This company type will now be put at the centre of Irish company law, and important reforms will be made to the way this company type operates:

a a CLS will be allowed to have only one director;

b a CLS will only be required to have one document in its company constitution, and the Bill provides for a default document to apply in all cases except where the company changes this;

c a CLS will have the same legal capacity as a natural person, reducing the necessity to prepare long company constitutions, and reducing legal disputes caused by the ultra vires doctrine; and

d a CLS will no longer be required to have a 'physical' AGM every year – it will be possible to do this by correspondence.

Other changes include an exhaustive listing of the duties of directors, previously contained in case law, and of all criminal offences under company law.

The Central Bank of Ireland has published a Corporate Governance Code for Credit Institutions and Insurance Firms. The Code sets out minimum statutory requirements for banks and insurance companies in respect of the governance of their institutions. The Code includes provisions on the membership of the board of directors, the role and responsibilities of the chairman and other directors and the operation of various board committees and has applied since 1 January 2011.

Among the requirements of the Code are:

a boards must have a minimum of seven directors in major institutions and a minimum of five in all others;

b limits on the number of directorships that directors may hold in financial and non-financial companies to ensure they can comply with the expected demands of board membership of a credit institution or insurance company;

c the prohibition on an individual who has been a CEO, director or senior manager during the previous five years from becoming chairman of that institution; and

d a requirement that board membership is reviewed at a minimum every three years.

The Minister for Enterprise Trade and Innovation has made Regulations to give effect to Directive 2009/49/EC amending Directives 78/660/EEC and 83/349/EEC as regards certain disclosure requirements for medium-sized companies and the obligation to draw up consolidated accounts. The new regulations apply to the preparation of annual accounts in the case of a company or undertaking the financial year of which commenced on or after 1 January 2011. The regulations provide that parent undertakings that only have non-material subsidiaries are to be exempted from the requirement at Article 1(1) of Directive 83/349/EEC requiring the drawing up of consolidated accounts and a consolidated annual report.

A new Directive 2011/35/EU updates and codifies provisions contained in earlier Directives regarding the merger of public limited liability companies. The new directive repeals and replaces Directive 78/855/EEC and includes revised provisions regarding disclosure requirements and safeguards to be afforded to members and third parties. The provisions of the directive cover merger by acquisition; merger by formation of a new company and acquisition of one company by another, which holds 90 per cent or more of its shares. The directive entered into force on 1 July 2011.

The Irish Takeover Panel published two consultation papers in July 2011 and a further consultation paper in February 2012 proposing a number of changes to the Takeover Rules. The proposed changes include:

a permitting bidders and targets to incorporate certain information into relevant documents by reference, including by reference to information on a website;

b obliging each bidder and target to make available on their respective websites, all information, with certain limited exceptions, published by it in relation to an offer;

c making certain amendments to the list of documents required to be put on display by a bidder and a target and requiring that all such documents be published on a website as well as being displayed in hard copy format;

d amending and clarifying how the 'put up or shut up' mechanism operates;

e extending the Rule 35 restrictions that apply to a bidder whose offer has lapsed or been withdrawn;

f amending and clarifying the position with regard to the use of pre-conditions in offers and the circumstances in which they can be invoked;

g introducing a new rule setting out the circumstances in which joint interviews and debates will be permitted;

h introducing a new rule imposing specific responsibilities on advisers to bidders and targets;

i amending the rule that currently requires takeover offers in certain instances to be made in cash to provide for circumstances in which a bidder will be required to structure its offer as a securities exchange;

j providing clarity on the circumstances in which the Irish Takeover Panel will require arrangements to be entered into between a bidder and target management in the context of a takeover to be approved in advance by target shareholders; and

k amending the rule which requires a target to ensure equality of information between competing bidders by allowing the target to impose conditions (e.g., confidentiality and hold harmless undertakings) on bidders in connection with information disclosed to them.

The consultation period for each has ended. If the changes proposed in the three consultation papers are implemented they will represent the most significant overhaul of the Irish Takeover Rules since their first introduction.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

In 2011, there were 71 disposals by Irish companies to foreign acquirers, the same number as was recorded in 2010. Of these, 17 were trade sales to UK buyers, 21 were trade sales to US buyers, 19 were trade sales to other foreign buyers and the remaining 14 deals were trade sales and buyouts of Irish-owned foreign companies.[3]

Noteworthy deals included the €1.1 billion acquisition of a 35 per cent stake in the Bank of Ireland by a group of investors including Fairfax Financial Holdings Limited, WL Ross & Co, Fidelity Investments and Kennedy Wilson, the €669 million acquisition of Elan Drug Technologies by Alkermes Inc, the €200 million acquisition of Quinn Insurance Limited by a Liberty Mutual/IBRC joint venture, the €180 million acquisition by BAE Systems plc of Norkom and the €150 million acquisition by IBM of software company Curam.

The M&A market also witnessed a number of Irish acquirers involved in international transactions. In total, foreign acquisitions by Irish companies represented 43 per cent of deal volume in 2011, comprising 92 transactions, up from 71 in 2010. CRH plc led the way, with 44 acquisition and investment transactions, principally in North America and Europe, totalling approximately €600 million, the largest being the €100 million acquisition of the VVM Group in Belgium. Other foreign acquisitions of note included the €171 million acquisition by Kerry Group plc of the US based Cargill Inc-Flavor Systems, the €129 million acquisition by Greencore plc of the UK-based Uniq and Glanbia plc's acquisition of Bio-Engineering Supplement & Nutrition Inc in the United States for €107 million.[4]

3 NCB Corporate Finance M&A Tracker Survey Quarterly Updates (2011).

4 Id. and Mergermarket.

V SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND HOT INDUSTRIES

i M&A in the financial sector

The EU/IMF memorandum of understanding has committed the Irish government to a comprehensive reorganisation and downsizing of the banking system, the deleveraging of banks' balance sheets and further recapitalisation of the banks. The Central Bank's Prudential Liquidity Assessment Plan 2011 has set ambitious target loan-to-deposit ratios for 2013, identified non-core assets and set adjustment paths to these targets. The result of these developments has been an increase in M&A activity in the financial sector.

The Irish government continued to make investments, including a €2.3 billion investment in Irish Life and Permanent while a group of investors including Fairfax Financial Holdings Limited, WL Ross & Co, Fidelity Investments and Kennedy Wilson acquired a €1.1 billion stake in the Bank of Ireland. The main banks also made a number of significant divestments. AIB completed the sale of Goodbody Stockbrokers to Fexco, the sale of its international financial services business to the Capita Group plc and the sale of its investment management division to Prescient Holdings, while Bank of Ireland sold Bank of Ireland Securities Services to Northern Trust for €60 million and sold its UK-based Burdale business to Wells Fargo for €690 million.

The €200 million acquisition of Quinn Insurance Limited by a Liberty Mutual/IBRC joint venture was also noteworthy in this sector.

ii Distressed transactions

The 2010 trend of M&A involving distressed business and assets continued in 2011. Zapa Technologies was bought out of liquidation by a group of investors, SuperQuinn was acquired by the Musgrave Group and A-Wear was bought by Hilco UK limited.

iii Sale of state assets

The EU/IMF memorandum of understanding has committed the Irish government to raise up to €3 billion from the sale of state assets. To this end, the government established a specific unit within the National Treasure Management Agency (NAMA), called New Era, to oversee its proposed disposal programme. Assets listed in the disposal programme include Bord Gáis Éireann's energy business and some of the Electricity Supply Board's non-strategic power generation capacity.

iv Hot sectors

The most active sectors during 2011 were the building and construction, financial services, food and food services, and technology sectors, although, as mentioned above, in the building and construction sector, most of the activity consisted of foreign acquisitions undertaken by CRH plc.

The food and food service sector saw activity in terms of both domestic consolidation and overseas acquisitions, with Kerry Group plc, Greencore plc and Glanbia plc leading the way in the latter category.

M&A in the technology sector, in particular IT and telecoms, performed strongly. This sector has historically been a steady contributor to M&A activity, with trade sales to

US and UK buyers being the most common exit path for many Irish entrepreneurs and investors. The standout deals included the €180 million acquisition by BAE Systems plc of Norkom, the €150 million acquisition by IBM of software company Curam and the €100 million acquisition by Telecity Group plc of Data Electronics.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

In 2011, securing transactional finance from Irish banks or refinancing existing debt remained difficult with Irish banks and other sources applying cautious lending practices as they continued to deleverage their balance sheets. As a consequence, the M&A market is characterised by foreign and large Irish corporate trade buyers, neither of which are reliant on local sources of financing for transactions. Private equity played a limited role in 2011.

While the bank stress tests of March 2011 were awaited nervously, the market's verdict appears to be that the stress tests were in fact credible. Of the €24 billion of capital to be injected, €5.3 billion is considered to be a highly conservative capital buffer and €13.2 billion covers losses on the sale of non-core loans rather than further losses on core assets. The comprehensive bank restructuring plan, announced at the end of March 2011, seems to have further bolstered confidence in the banking sector. This, when coupled with the removal of performing and non-performing loans from the balance sheets of the five NAMA participating lending institutions, should, it is hoped, free up some credit for increased domestic M&A activity.

VII EMPLOYMENT LAW

The National Pension Framework was published in March 2010 and recommends a number of changes to Irish law over a five-year period, in particular the increase of the national pension age in the state. It is proposed that the standard age be raised from 65 to 66 in 2014 and further to 67 and 68 in 2021 and 2028 respectively. The proposed increased retirement age in the workplace will have a bearing on the application of the Unfair Dismissals legislation in this regard. The Framework also envisages the introduction of a new auto-enrolment pension for all employees over 22. Therefore, by 2014, membership of such schemes may be mandatory. There is no definitive timescale for the implementation of the Framework as of yet, but employers should be mindful of potential changes to pensions law in Ireland.

The Protection Of Employees (Temporary Agency Work) Act 2012 has been signed into law with most of the provisions of the Act being deemed to have come into effect on 5 December 2011 and the remaining provisions having come into effect on 17 May 2012. The Act 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.

VIII TAX LAW

The Finance Act 2011 was enacted in February 2011. The Act has the difficult task of balancing Ireland's desire to become increasingly competitive and tax efficient, while also improving the level of exchequer receipts. This Act implements many of the obligations under the EU/IMF bailout deal of 2010 with regards the restructuring of public finances. As such, Ireland remains an extremely attractive location for headquarter and holding companies, but smaller tax reliefs are being discontinued in pursuit of increased revenue.

The discontinuation of the commonly availed of relief on interest paid by companies, in respect of intra-group borrowings to acquire certain assets from either a connected company, or another group company, is of particular importance to holding companies financing the movement of assets between their subordinate group companies. This measure was the subject of intense lobbying to reduce relief for large multi-nationals, which would then be used to justify a maintaining of the low corporate tax rate and tax neutral funds industry. The amendment does not include some assets, namely any borrowings made to purchase the trading stock of group company. Similarly, should a connected company be paid interest for a loan given to the borrowing company, where the loan was used to purchase certain assets from that connected company, the tax charge on income will be restricted. Revenue have since qualified that any asset, which explicitly falls into the category of stock in trade in the borrowing company will be exempted from a charge on income.

The Finance Act 2011 brings share remuneration for employees within the withholding regime for employee income tax, which in Ireland is withheld by the employer on payment. As such there is a corresponding withholding obligation for the new universal levy known as the Universal Social Charge and social insurance. If shares are appropriated under a profit-sharing scheme, any charges will apply at the market value of those shares. There is also a general discontinuation of exempting some share option schemes from a charge. Finally, there is no relief for any amount spent on the purchase of new shares by employees. As most multinational corporations provide access to some form of share remuneration scheme for their employees, this will have a significant practical effect.

The Act also provides for an extension of the three-year corporation tax relief for start-up companies who commenced trading in 2011, modifying the existing relief so that the value of the relief will be linked to the amount of Employers' PRSI paid by a company in an accounting period, taking account of the Employer Job (PRSI) Incentive Scheme, subject to a maximum of €5,000 per employee and an overall limit of €40,000. If the amount of qualifying Employers' PRSI paid by a company in an accounting period is lower than the reduction in corporation tax otherwise applicable, relief will be based on this lower amount.

IX COMPETITION LAW

The Competition (Amendment) Act 2012 (which had been introduced as a Bill in 2011) was signed into law on 20 June 2012 but requires the making of the necessary commencement orders by the Minister for Jobs, Enterprise and Innovation.

The main purpose of the new legislation is to strengthen competition law enforcement and provide for new and increased sanctions and penalties.

The Act includes provisions to distinguish between private enforcement and public enforcement of civil actions with regard to competition law and provides for separate public enforcement provisions to be taken by the Competition Authority.

The Act amends Section 160 of the Companies Act 1990. This will allow a court either on its own motion or on foot of an application to it from either the Competition Authority or the Commission for Communications Regulation to order that a person shall not be appointed as a company director as a result of an infringement of offences under the Competition Act 2002 – other than indictable offences that already result in automatic disqualification. The Act also aligns certain fines with the classifications contained in the Fines Act 2010.

X OUTLOOK

In general economic terms, GDP increased by 1.4 per cent in constant prices between 2010 and 2011 while, on the other hand, GNP fell by 2.5 per cent over the same period. Industry and software were the main contributors to growth in 2011, with the software and communications sector increasing by 12.3 per cent in constant prices while industry (excluding building and construction) increased by 3.1 per cent.[5] Most recent economic indicators predict that the Irish economy will grow by 0.6 per cent in GDP terms but will remain unchanged when measured by GNP in 2012, with the external environment again likely to be the principal factor determining growth in the Irish economy in 2012.[6] In this regard, much will depend on the EU approach to finding a solution to the sovereign debt crisis in the eurozone and the introduction of fiscal stimulus initiatives.

Subject to eurozone concerns, we expect to see an M&A market in 2012 consistent with that of 2011, with foreign and large Irish trade buyers continuing to drive activity. In terms of sectors, the ongoing restructuring of the Irish banks should continue to contribute to deal activity in this area. Likewise, we expect that the technology sectors will continue to attract the attention of overseas buyers, while a certain amount of distressed deal activity will continue. Notwithstanding the announced proposed disposal of certain state assets, it is not expected that any significant transactions of this nature will complete in 2012.

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5 Central Statistics Office National Income and Expenditure Annual Results for 2011.

6 Economic and Social Research Institute (ESRI) Quarterly Economic Commentary – Summer 2012.

Appendix 1

ABOUT THE AUTHORS

FERGUS BOLSTER

Matheson Ormsby Prentice

Fergus Bolster is a partner in the firm's corporate department, where he focuses primarily on mergers and acquisitions, securities law and corporate governance matters. Having graduated from University College Cork (1995), he worked for a period in the Irish Department of Foreign Affairs before qualifying as a solicitor in 1999. Mr Bolster joined Matheson Ormsby Prentice in 2002 and was made partner in 2007.

Mr Bolster advises on mergers, acquisitions, disposals, joint ventures, restructurings and capital-raising transactions. He has represented public and private companies, institutional investors and financial intermediaries engaged in variety of industries and sectors. He also has extensive experience advising on takeovers of publicly quoted companies subject to the Irish Takeover Rules and on matters of Irish securities law generally.

He also advises corporate clients on a broad range of governance and business-related matters, including directors' duties and responsibilities, disclosure obligations and compliance matters. This advice is often provided to boards and individual directors in crisis situations where the satisfaction of their fiduciary duties is subject to particular scrutiny.

His recent transactions include advising Cemex España, a member of the Cemex Group (BMV (Mexico): NYSE), on its recommended public acquisition of Readymix plc (ISE), advising Realm Energy International Corporation (TSX Venture Exchange) on its recommended public merger with San Leon Energy plc (AIM) and advising Payzone plc (AIM) and its key management on the terms of a debt and capital restructuring involving its existing RBS-led banking syndicate and Duke Street. Mr Bolster is a member of the Law Society of Ireland, and speaks English.

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