
THE MERGERS & ACQUISITIONS REVIEW

FIFTH EDITION

EDITOR
SIMON ROBINSON

LAW BUSINESS RESEARCH

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IRELAND

*Patrick Spicer**

I OVERVIEW OF RECENT M&A ACTIVITY

Following an extremely challenging year in 2009, with historically low levels of M&A activity, Ireland in 2010 showed a marked recovery despite issues remaining with financing and severe fiscal retrenchment. According to corporate deal activity reports and surveys, there were 197 deals involving Irish companies in 2010 with a total value of €10.3 billion. This compares with 134 deals and a total value of only €3.4 billion in 2009. Despite reduced certainty surrounding the stability of the banking sector and the anticipated outcome of stress tests, the market's response in the first quarter of 2011 was positive with 57 deals and €921.6 million aggregate value. This represented a rise in M&A activity in the first quarter for the first time in six years when compared to the first quarter of the previous year.¹

Buyers were predominantly trade players who took advantage of the scarcity of financial buyers and the low valuations of competitors to acquire strategic bolt-ons and consolidate their respective marketplaces.

The four largest deals of 2010 accounted for €7.1 billion – close to 70 per cent of total deal value. The largest of these transactions was AIB's disposal of its 70 per cent stake in Bank Zachodni WBK SA for €3.1 billion. Ardagh Glass Group plc acquired Impress Holdings for €1.7 billion, ESB acquired Northern Ireland's electricity networks from Viridian for €1.41 billion while Aryzta secured the acquisition of two US companies, Fresh Start Bakeries and Great Kitchens, for a combined €902 million.

Excluding these large deals, the underlying quarterly deal values in 2010 were €505 million, €787 million, €1,067 million and €1,167 million respectively. This shows a consistent level of improvement considering the €993 million and €988 million of

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1 Source of transactions statistics for 2010 and the first quarter of 2011: NCB Corporate Finance M&A Tracker Survey and Mergermarket.

deal value in quarters three and four of 2009, following the record low of €271 million recorded in quarter two of that year. In terms of volume, 2010 averaged 50 deals per quarter in contrast with 36 per quarter in 2009. The first quarter of 2011 accounted for a deal value of €921.6 million. This showed a fall from a somewhat inflated €2.58 billion (by ESB's €1.41 billion acquisition of NIE) in the last quarter of 2010 but represents a significant jump in quarter one deal value when compared to the previous year.

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 2009 ('the Companies Acts'), the Irish Takeover Panel Act 1997 ('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 merger control rules of the Republic of Ireland 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

The National Assets Management Agency Act 2009 was enacted as part of a strategy to stabilise and strengthen the Irish banking system. The Act established the National Assets Management Agency ('NAMA'), the purpose of which is to acquire, manage and realise performing and non-performing land and development loans (and associated loans) on the balance sheets of the five participating credit institutions. NAMA will purchase loans with a book value of €77 billion for approximately €54 billion. NAMA has extensive and far-reaching powers to acquire, manage and realise eligible bank assets and the underlying property and property-related assets upon which such loan assets are secured. Participating institutions are in the process of transferring loan assets to NAMA and the realisation of these assets should translate to an increase in deal volumes. However, this has not happened to any material extent as yet.

One of the purposes of NAMA is to free up credit for the banks and encourage lending. However, the memorandum of understanding entered into between the EU/IMF and the Irish government in December 2010 has bound the Irish government to deleverage the balance sheets of the banks by addressing their loans-to-deposits ratio and downsize the banking sector. As a result, the banks remain reluctant to provide credit.

Pillar A of the new Companies Bill was published in May 2011. As well as consolidating existing law in the area, the Bill will make important changes which 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 accounts 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 Act 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.

New Rules of the Superior Courts, which were effective from 9 June 2010, provide new procedures in respect of proceedings under the European Communities (Cross Border Mergers) Regulations 2008, the European Communities (Mergers and Divisions of Companies) Regulations 1987 and the European Communities (European Public Liability Company) Regulations 2007. The Rules contain the relevant forms including an application for a pre-merger certificate under the provisions of the Cross Border Mergers Regulations and an application for a pre-merger certificate in respect of the formation of a European Public Limited Liability Company by way of merger.

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. It will apply to existing directors and boards from 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;
- 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 commences 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 enters into force on 1 July 2011.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

An interesting dynamic of the current M&A landscape is the increase in international M&A activity. Disposals by Irish companies to foreign investors rose sharply from 40 deals in 2009 to 71 deals in 2010. Deal value was not disclosed in a large amount of these transactions but available deal value information shows a rise from €1.5 billion in 2009 to €4.66 billion.

Noteworthy transactions included Verint Systems' acquisition of Iontas for €11 million, Life Technologies' acquisition of Stokes Bio for €33 million, William Grant & Sons' acquisition of C&C Spirits division for €300 million and Singapore Technologies Telemedia's acquisition of Eircom. AIB sold its 70 per cent stake in Bank Zachodni WBK SA for €3.1 billion. 2010 also saw the first acquisition of an Irish company by a Chinese company, when ZJF acquired Firecomms, a manufacturer of transceivers for consumer plastic optical fibre.

Further evidence of this trend of international investment in Ireland is the recent report from the IDA, Ireland's inward investment promotion agency, which partners with foreign investors. The IDA reported that 60 per cent of corporation tax in Ireland last year was paid by IDA clients. It also reported that the number of companies investing in Ireland for the first time in 2010 was up 20 per cent on 2009 figures, despite foreign direct investment falling by 8 per cent globally. Among those were Warner Chilcott, LinkedIn and Webroot.

In relation to the Irish banks, reports suggest that Spanish banking giant, Banco Santander, has held talks with the Irish government in relation to acquiring parts of AIB's UK division. The British operations are expected to be stripped down into their structured credit and project finance portfolios, with a piecemeal disposal of the division's assets most likely. Meanwhile two American hedge funds have also expressed interest in Anglo Irish Bank's US loan book.

The M&A market also witnessed a number of Irish acquirers in international transactions in 2010. Deal volume rose from 56 deals completed in 2009 by Irish companies abroad to 71 with aggregate deal value rising from €1.12 billion to €5.49 billion. Again, a large amount of deals did not disclose their value. CRH led the way once more with 28 transactions in total. Principal deals of note include the aforementioned

acquisition of the US companies Fresh Start Bakeries and Great Kitchens by Aryzta, Ardagh Glass Group plc's acquisition of Impress Holdings BV and ESB's €1.41 billion acquisition of NIE.

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 is an increase in M&A activity in the financial sector.

The Irish government have continued to engage in extensive recapitalisation of both AIB and Bank of Ireland, funded from the National Pension Reserve Fund ('the NPRF'). A 91.2 per cent shareholding of AIB was acquired for €3.8 billion, while a share issue worth €1.04 billion gave the NPRF an additional 20.77 per cent stake in Bank of Ireland giving it a total 36.5 per cent stake. The Irish government also nationalised Irish Nationwide Building Society.

In further restructuring, AIB purchased Anglo Irish Bank's UK and Irish deposits for €3.5 billion and have also agreed to acquire EBS, with total assets of €20.1 billion, for an undisclosed fee, subject to approval from regulatory authorities and this is expected to complete on 1 July 2011.

Recapitalisation has also taken place by way of the sale of non-core assets to both domestic and foreign companies. For example, Fexco Limited has agreed to acquire Goodbody Stockbrokers from AIB for €24 million. State Street Global Advisors have acquired Bank of Ireland Asset Management Limited from Bank of Ireland for €57 million and Irish Life & Permanent have sold Irish Life International Ltd, their Irish-based life assurance company, for €26 million to Swedish based SEB TRygg Liv Holding AB. The government has also announced its intention to require Irish Life & Permanent to dispose of Irish Life Limited, which is understood to be worth €1-1.5 billion.

ii Distressed transactions

A key trend on the M&A front in 2010 was activity around distressed business and assets, with companies going into receivership seeking exit strategies through acquisitions, or property groups trying to divest viable trading businesses. Eason & Son acquired the airport stores of Hughes & Hughes in the first quarter of 2010 for an undisclosed amount. Italian company Pilgrim Sarl acquired McInerney Homes and McInerney Contracting for a combined €32 million. Other noteworthy transactions in this regard are energie group's acquisition of Jackie Skelly Fitness Clubs, UPC acquiring Broadworks Communications and Thrifty Car Rentals acquiring Irish Car Rentals.

iii Hot sectors

The most active sectors during 2010 were the IT and telecoms; building, construction and property; and industrial sectors with 32 transactions each. This represented something of a recovery for the construction and property sector, which had fallen from 67 deals in 2008 to only 18 in 2009. CRH completed 28 transactions alone in 2010, including the acquisition of a 48 per cent stake in Bauking AG for €126 million and selling its European insulation business to Kingspan for €120 million.

The IT and telecoms sector saw a rise from the seven deals of 2009 to 32 with STT's €47.6 million acquisition of Eircom and Spectrum Equity Investors' €64.7 million acquisition of Trintech Group. Biffa Waste Management's acquisition of Greenstar UK for €162 million was the standout transaction in the industrial sector.

The food and food services sector recorded 24 deals during 2010. In addition to Aryzta's acquisitions, they include Axereal's acquisition of the Greencore malt businesses for €116 million and the Capvest-led establishment of Valeo Foods Ltd through the merger of Batchelors and Origin Foods.

The 'Health and Pharmaceutical' sector was also active with 16 recorded transactions including Permira's €158 million acquisition of a majority stake in Creganna-Tactx Medical.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

In 2010, securing transactional finance or refinancing existing debt proved difficult with banks and other sources continuing to apply cautious lending practices. This meant companies had to look elsewhere for funding. 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. This means that banks should no longer have any reason to hoard capital. 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 free up credit.

However, with the banks attempting to deleverage their balance sheets, as mentioned above, by addressing their loan to deposit ratios and the banking sector itself contracting, raising bank financing remains difficult. Firms with strong balance sheets and a long track record can still expect to receive a bank's backing. Others need to be more creative and consider funding from venture capital or private-equity players. Anecdotal evidence suggests small to medium businesses are more willing than ever to give investors an equity stake in return for investment.

A string of Irish firms have proven it is possible to raise capital. Kerry-based IT firm Altobridge raised €8.5 million in a funding round led by Intel Capital, Bank of Ireland Seed and Early Stage Equity Funds led a €1.8 million investment in Dublin-based software protection speciality firm InishTech, and Irish aircraft-leasing group

Avolon secured a €326 million long-term debt facility from three US banks. In February 2011, Ardagh Glass raised €200 million by means of an oversubscribed bond issue. CRH (which has a very strong record in extracting value from acquisitions) has announced its intention to undertake a rights issue in expectation of further acquisition activities.

Large corporates are increasingly using their own balance sheets to fund transactions, with private equity houses, who need to deploy funds raised pre-credit crisis, having to commit more equity into transactions. Permira's €158 million acquisition of a majority stake in Creganna-Tactx Medical was funded entirely by equity.

VII EMPLOYMENT LAW

The Whistleblowers Protection Bill was introduced on 28 January 2010. The Bill aims to provide protection from civil liability to employees who make certain protected disclosures in relation to the affairs of their employers. Such disclosure must be made reasonably and in good faith, where an employee honestly believes some criminal act or broad misdemeanour has taken place, and where they report that to a number of sources. The Bill also attempts to ensure that employees who make such disclosures reasonably and in good faith, will not be penalised by their employers. This would include protection from dismissal.

The Bill details the persons to whom a protected disclosure may be made, including the Central Bank, the Irish Financial Services Regulatory Authority, the Data Protection Commissioner, the Environmental Protection Agency, the Garda Síochána, the Health and Safety Authority, the Standards in Public Office Commission, the Revenue Commissioners, and any other body that has regulatory, supervisory or investigative functions, in relation to the matter the subject of a protected disclosure.

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 from 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.

Amendments to the EU Capital Requirements Directive, commonly known as CRD III, will require credit institutions to adopt changed remuneration policies and practices with effect from 1 January 2011. This is part of a coordinated approach to impose controls on remuneration across the financial sector. The Central Bank are due to publish a Code on Remuneration Practices for Credit Institutions in line with the directive, which focuses on the principle of proportionality in relation to remuneration. Factors considered will be the size and value of the institution, internal organisation and the nature, scope and complexity of the business. Performance-related remuneration must be based on a combination of the assessment of the individual, of the relevant business unit and of the institution overall.

The Corporate Governance Code for Credit Institutions and Insurance firms, mentioned above, requires all institutions to ensure that their remuneration policies and practices do not promote excessive risk taking. Any 'Major Institution' (as yet undefined by the Central Bank) must establish a Remuneration Committee unless the institution is part of a wider group where such a committee already exists. However, the Central Bank retains discretion to require its establishment. While it does not apply to foreign incorporated subsidiaries of an Irish credit institution or insurance undertaking, the Central Bank has encouraged such institutions to adopt equivalent good governance practices.

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 multi-national corporations provide access to some form of share remuneration scheme for their employees, this will have a significant practical effect. Inland Revenue will have given a grace period on all penalties for late payment of such charges until late July 2011 in light of these difficulties.

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

In November 2009, the Irish Minister for Enterprise Trade and Employment ('the Minister') announced a public consultation on the operation and implementation of the Competition Act 2002 ('the Act'), which remains ongoing. In its submission in response to the consultation, the Competition Authority proposed a number of amendments that, if adopted, would bring Irish merger control procedures more into line with the EU Merger Regulation. The Irish government has also announced that it plans to merge the Competition Authority and the National Consumer Agency.

Under the NAMA Act 2009, NAMA's activities with respect to the acquisition of bank assets are exempt from the Competition Act 2002. However, NAMA's conduct post-acquisition of assets still falls within the remit of the Act. The Competition Authority has undertaken to monitor NAMA's conformity with the Act after the transfer of assets.

In February 2010, under the EU State Aid rules, the European Commission approved the NAMA scheme as a measure to 'remedy a serious disturbance in the economy of a Member State'. However, in light of the potential effects of the NAMA scheme on European competition law, the European Commission required and obtained a commitment by the Irish authorities to 'report on a yearly basis to both the Commission and the Irish national competition authorities' on the use of NAMA's post-acquisition powers. This is due to happen later in 2011. The Commission noted that this requirement 'will allow the Commission and the Irish competition authorities to take any action they consider adequate if they deem that NAMA's use of its powers has resulted in competition distortions'.²

Certain provisions of the NAMA Act 2009 expressly refer to the Competition Act 2002 providing that NAMA must report information to the Competition Authority where it suspects that a participating institution has contravened competition law. The Minister for Finance may not approve any restructuring or business plan for a participating institution where that plan does not comply with Irish or European competition law.

Two full Phase II investigations were initiated in 2010 where, following a preliminary investigation, it was inconclusive as to whether the transaction would not substantially lessen competition. The *Greenstar/Veolia (Ireland)* merger transaction was referred to the Competition Authority but was cleared without conditions nine weeks into the Competition Authority's Phase II review. The acquisition of 50 per cent of the

2 European Commission decision on the Establishment of a National Asset Management Agency: Asset relief scheme for banks in Ireland.

share of R&H Hall from Origin Enterprises plc by W&R Barnett Limited was also the subject of a Phase II investigation in 2010 but this transaction was cleared in 2011.

The Competition Authority decided, in January 2011, to carry out a full Phase II review in relation to the proposed transaction whereby Stena AB, through its subsidiary Stena Line UK Limited, would acquire certain assets from DFDS A/S but later approved the transaction.

Following the parties' successful appeal to the Irish High Court against the Competition Authority's 2008 decision to prohibit the *Kerry/Breeo* merger, the Competition Authority's subsequent appeal to the Supreme Court remains pending at the time of writing.

X OUTLOOK

The pace of economic contraction slowed in 2010. GDP declined 1 per cent in 2010 with a fall of GNP of 2.1 per cent. Most recent economic indicators predict a rise of 2 per cent and 0.5 per cent respectively in 2011, with exports driving the recovery.³

As a result of current positive sentiment, we should see an M&A market in 2011 consistent with that of 2010. Strong competition between the private equity and strategic groups is anticipated to increase M&A activity in the mid-market. Consolidation in the financial services sector is expected to further drive activity in 2011. It is likely that there will be more transactions in the sectors where valuations of assets are based on prospects of creating value in the future, such as technology and renewables, with trade sale remaining the most likely form of exit for Irish companies.

3 Recent economic indicators consulted include Economic and Social Research Institute (ESRI) 'Quarterly Economic Commentary – Spring 2011 (Durkan, O'Sullivan – Research Bulletin 6 May 2011)'.

Appendix 1

ABOUT THE AUTHORS

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Patrick Spicer is a partner and head of the corporate and commercial department specialising in public and private M&A and private equity. Having graduated with first-class honours (LLB, 1993) from Trinity College Dublin, Patrick joined Matheson Ormsby Prentice in 1995 as a trainee, qualified as a solicitor in 1997, and in 2002 was made partner. Recent transactions include advising William Grant on the €300 million acquisition of shares and assets of the C&C Group's spirits and liqueur business; advising BC Partners Limited on their €585 million acquisition of Spotless Group SAS from AXA Private Equity, European Capital Limited and the Gualandi family; and advising Syncreon Holdings plc on its \$300 million high-yield bond issue. Patrick is a member of the Law Society of Ireland, and speaks English and French.

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