



MERGERS AND ACQUISITIONS

ƒY`UbX

Taxation of Cross-Border
Mergers and Acquisitions

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Introduction

Irish tax provisions on mergers and acquisitions (M&A) have been evolving gradually in recent years and there have been no fundamental changes since the introduction of the capital gains tax participation exemption in 2004. There have, however been some important amendments and enhancements to the relevant provisions, most notably in relation to the tax implications of the acquisition of intellectual property.

The chapter proceeds by addressing three fundamental decisions facing a prospective purchaser:

- What should be acquired: the target's shares or its assets?
- What will be the acquisition vehicle?
- How should the acquisition vehicle be financed?

Tax is only one of the areas to be considered in structuring a transaction. Other areas, such as company law and accounting issues that are outside the scope of this book will also be relevant when determining the optimum structure.

Recent Developments

The most significant recent Irish development is the introduction in 2009 of tax relieving provisions relating to the acquisition of intangible assets. Whilst traditionally the majority of M&A transactions have tended to be structured as share purchases for the reasons outlined below, the introduction of these new provisions requires the structuring of acquisitions involving substantial components of intellectual property to be carefully reconsidered.

Irish companies are now entitled to claim a tax write-off for the capital cost of acquiring or developing qualifying intangible assets for the purposes of their trade. Where such qualifying intangible assets are amortized or depreciated for accounting purposes, the tax write-off will be available in line with the accounting write off.

Alternatively, if the qualifying intangible asset is not amortized or depreciated for accounting purposes, or indeed has a very long life, a company can elect to take the tax write-off over a 15 year period. Here a rate of 7

percent will apply for years 1 to 14 and 2 percent will apply for year 15.

The definition of qualifying intangible assets is broad and encompasses patents, design rights, brands, trademarks, domain names, and certain know-how. Goodwill also qualifies to the extent that it is directly attributable to qualifying intellectual property.

Certain restrictions and anti-avoidance measures apply to the relieving provisions. The principal restriction is that relief for capital allowances and certain interest costs is restricted to 80 percent of the annual income arising from the exploitation of the intellectual property. Unused allowances or interest can be carried forward to future accounting periods.

Asset Purchase or Share Purchase

The following sections provide some insight into the issues that need to be considered, when a purchase of either assets or shares is contemplated and the possible concerns of the seller. Readers are reminded that a list of the advantages and disadvantages of both alternatives is provided at the end of this chapter.

Purchase of Assets

A purchase of assets will usually result in an increase in the base cost of those assets for both capital gains tax and capital allowance purposes, and it may enable the purchaser to use the new intellectual property amortization rules discussed above. However, a sale of assets (as opposed to shares) may trigger a claw-back of capital allowances on plant and on industrial buildings, although this can be avoided in some instances. Higher stamp duty costs are also likely to arise for the purchaser.

Purchasers may be reluctant to acquire shares, as opposed to acquiring assets and a business, from the company, because of the exposure they would assume to the existing liabilities of the company, not all of which may be certain and known.

A shareholder may have a different base cost for his/her shares than the company has with respect to its trade and undertaking. This may influence a decision on the part of a seller as to whether he/she would wish to sell shares or have the company sell the business assets.

However, where a company sells a business, the shareholders may attract a second charge to capital gains tax, or charges to income tax, if they attempt to extract the sales proceeds from the company. For that reason the sale of shares directly may be more attractive to a seller, rather than the sale of the company's assets.

Purchase Price

For tax purposes, it will be necessary to apportion the total consideration among the assets acquired. It is generally advisable for the purchase agreement to specify the allocation. This will normally be acceptable for tax purposes provided it is commercially justifiable.

When a business is purchased for a single price that is not allocated by the purchase agreement to the individual assets, there are no statutory rules for the allocation. It is necessary to agree the apportionment of the price over the assets with the revenue commissioners – this would normally be done by reference to the assets' respective market values. The revenue commissioners have the power to apportion the sales proceeds of a building that has attracted capital allowances between that part relating to the expenditure that attracted the allowances and that part relating to expenditure that did not attract allowances, but this would not normally affect to any significant extent the apportionment of price between goodwill and other assets.

It should be noted that if consideration in excess of EUR 500,000 is paid for certain assets, including Irish real estate and goodwill, the vendor should provide a tax clearance certificate prior to the payment of the consideration. If this certificate is not provided, the purchaser is obliged to withhold 15 percent of the consideration to be paid.

Goodwill

Goodwill paid for a business as a going concern is neither deductible nor capable of being depreciated or amortized for Irish tax purposes unless the goodwill is directly attributable to qualifying intellectual property as discussed in the Recent Developments section earlier in the chapter. For this reason, where the purchase price for a business (as opposed to shares) contains an element of goodwill, it is common practice for the purchaser to seek to have the purchase agreement arranged so that the price is payable for the acquisition of tangible assets and qualifying intellectual property, thus reducing or eliminating the element of purchase price assignable to undeductible goodwill. The revenue commissioners would not normally challenge this where

the agreed prices assigned to the various assets are reasonable.

While the allocation of the purchase price for a business primarily to assets other than goodwill may be to the advantage of the purchaser, such allocation can have disadvantages for the seller. It may lead to a claw-back (called a balancing charge) of capital allowances given previously, where a higher price is paid for plant and machinery or industrial buildings; it may have income tax implications where it is allocated to trading stock; it may also have capital gains tax implications. The purchaser would also have to consider the stamp duty implications, stamp duty being payable (where due) by the purchaser rather than the seller. In many instances, the seller may have a zero or very low base cost for capital gains tax purposes for goodwill and, therefore, the minimization of the amount of the consideration referable to goodwill may, to that extent, also be in the interests of the seller.

Depreciation

Depreciation for tax purposes (known as capital allowances) is available as a deduction with respect to plant and machinery in use for the purpose of a trade or profession or for the purpose of leasing, and for industrial buildings and (for a limited period) for commercial buildings situated in certain areas that have been specially designated for urban renewal. Certain new rental dwellings also attract capital allowances for a limited period. With certain minor exceptions, capital allowances on plant and machinery are calculated on a straight-line basis at a rate of 12.5 percent per year. Industrial buildings are subject to a straight-line rate of 4 percent.

The new provisions relating to the tax deductibility of the depreciation of qualifying intangible assets discussed in the Recent Developments section earlier has dealt with an anomaly gap which had previously existed whereby the depreciation of such assets could not in most instances be deductible for tax purposes.

For a license fee payment to be deductible, it is generally necessary that the payment be wholly and exclusively incurred for the purpose of a trade and be of a revenue nature. A prepayment of an annual fee is deductible in the period to which the annual fee relates. Capital payments with respect to the acquisition of software rights by a trading company can be amortized at the rate of 12.5 percent per year for eight years.

Tax Attributes

Tax losses are not transferred on an asset acquisition. They remain with the vendor company.

Value-Added Tax (VAT)

In common with other Member States of the European Union (EU), Ireland operates a system of VAT based on the European VAT directives (principally the sixth and eighth directives). The standard rate of VAT is currently 21.5 percent; however, there is a lower 13.5 percent that applies in certain circumstances.

The sale of a business by one taxable person to another taxable person is not a transaction to which VAT applies. When the purchaser will be a taxable person as a result of carrying on the business being sold, the revenue commissioners generally accept that the purchaser is a taxable person at the time of the sale.

Transfer Taxes

Stamp duty is chargeable on documents that transfer ownership of property, when the document is executed in Ireland or when a document relates to property in Ireland or things to be done in Ireland. There are extensive exemptions from stamp duty, particularly in relation to documents used in the financial services industry.

Many assets may be transferred without the use of a document (that is, transfer by delivery of plant and machinery). Interests in land may be transferred only by use of a document, and failure to stamp that document can have serious implications for title to the land. The company secretary cannot act on share transfer documents relating to shares in Irish companies unless they are stamped. Where shares in a company are issued in return for consideration other than cash, a return must be made to the companies office, and this return attracts stamp duty even if the underlying assets to which the return relates have been transferred by delivery rather than by means of a written document.

Rates of stamp duty are progressive and (for assets that are not residential property or marketable securities) are at the rate of 6 percent where the consideration exceeds EUR 80,000. The normal rate of stamp duty with respect to transfers of Irish shares and marketable securities is one percent. The transfer of non-Irish shares and securities is normally exempt.

There is a relief from stamp duty (subject to conditions) in respect of transactions within a 90-percent worldwide group.

Purchase of Shares

The purchase of a target company's shares does not result in an increase in the base cost of the company's assets and there is no deduction for the difference between underlying net asset values and consideration.

A sale of shares by a company may be exempt from Irish capital gains tax provided the conditions contained within the holding company participation exemption (mentioned above) are satisfied. Thus, the availability of this exemption may influence a decision by the shareholder on whether to sell shares or assets as well as the level at which any sale is made; that is, whether a sale is made by the shareholder directly or by a holding company owned by the shareholder.

In addition, provided it is not part of a tax avoidance arrangement, an exchange of shares for other shares will not usually give rise to capital gains tax, the charge being deferred until the newly acquired shares are disposed of. For this treatment to apply, it is necessary that the company issuing the shares has control of the target company or acquires control of the target company as a result of the exchange. Alternatively, the shares should be issued as a result of a general offer made to members of the other company or any class of members, and the offer should be made in the first instance on such conditions that, if satisfied, the acquiring company would have control of the target company. This relief may make it attractive to shareholders in a target company to accept a share offer rather than a cash offer for their shares. The standard rate of capital gains tax in Ireland was increased to 25 percent in 2009.

Tax Indemnities and Warranties

In the case of negotiated acquisitions, it is usual for the purchaser to request and the seller to provide indemnities and warranties as to any undisclosed taxation liabilities of the target company. The extent of such indemnities or warranties is a matter for negotiation.

Tax Losses

Carried-forward Irish tax losses generated by the target company will, in principle, transfer along with the company. However, losses arising prior to a change in ownership may no longer be available for carry-forward against subsequent profits, when:

- within any period of three years there is both a change in the ownership of a trading company and a major change in the nature or conduct of the company's trade; and

- at any time after the level of activity in a company's trade has become small or negligible, and before any considerable revival of the trade, there is a change in the ownership of the company (this is an anti-avoidance measure designed to prevent dealings in companies with trading losses).

Capital losses that accrue to a company prior to its acquisition cannot be used to relieve gains on pre-acquisition assets of the acquiring group. Unrealized losses on pre-acquisition assets of a target company are similarly ring-fenced.

Crystallization of Tax Charges

The purchaser should satisfy itself that it is aware of all intra-group transfers of assets within ten years prior to the transaction, because the sale of the target company could trigger a de-grouping capital gains tax exit charge. It is usual for the purchaser to obtain an appropriate indemnity from the seller.

Pre-Sale Dividend

In certain circumstances, the seller may prefer to realize part of the value of its investment as income by means of a pre-sale dividend. The rationale here is that the dividend may be subject to no or only a low effective rate of Irish tax, but it reduces the proceeds of sale and thus the taxable capital gain on sale, which may be subject to a higher rate of tax. The position is not straightforward, however, and each case must be examined on the basis of its own facts.

Transfer Taxes

Stamp duty is payable on transfers of shares in Irish companies. The normal rate of stamp duty with respect to shares is 1 percent. As previously mentioned, relief is available (subject to numerous conditions) on such stamp duty in the case of share-for-share swaps and shares-for-undertaking swaps and also in respect of intra-group transactions.

Tax Clearances

It is not possible to obtain a full clearance from the revenue commissioners regarding the present and potential tax liabilities of a target company. The target company's tax advisers will usually be able to obtain a statement of the company's tax liabilities as known at that point in time from the revenue commissioners, but such a statement does not prevent the revenue commissioners from reviewing those liabilities and subsequently increasing them.

If the value of shares is mainly derived from Irish real estate, the vendor is obliged to furnish a capital gains tax clearance certificate to the purchaser prior to the payment of consideration. If this tax clearance certificate is not provided, the purchaser is obliged to withhold 15 percent of the consideration.

Choice of Acquisition Vehicle

The following vehicles may be used to acquire the shares or undertaking of the target company.

Local Holding Company

An Irish holding company might be used if it is desired to obtain a tax deduction for interest on acquisition finance in Ireland or otherwise to integrate the target into an Irish operating group.

Ireland also has favorable attributes as a holding company regime. The regime has two limbs: the first is an exemption from capital gains tax in connection with gains arising on the disposal of certain shares. The second is a form of onshore pooling, which, although not an exemption from corporate tax on dividends received from foreign subsidiaries, serves to reduce substantially (or in many cases eliminate) the Irish taxation attributable to foreign dividends. Both limbs significantly enhance Ireland as an attractive location for corporate entities (particularly as a European headquarters location).

The capital gains tax exemption exempts gains arising on the disposal of certain shares accruing to an Irish holding company from Irish capital gains tax. The corollary to this relief is that capital losses arising on such shares are not deductible against other capital gains accruing to that company.

The conditions applying to the holding company are:

- it must hold the shares in the investment and meet the conditions discussed below within an uninterrupted period of not less than 12 months;
- the investor company must hold not less than 5 percent of the investee company's equity share capital;
- at the time of disposal, the business of the investee company must consist wholly or mainly of carrying on a trade or trades, or it must be part of a trading group whose business consists wholly or mainly of the carrying on of a trade or trades;
- the investee must be an EU or tax treaty resident at the time of disposal; and

- the investee must not derive the greater part of its value from Irish real estate.

The second limb of the participation exemption deals with onshore pooling of dividends. This concerns the taxation of dividends received by a holding company from its offshore investees. In general, foreign dividends received by a holding company from trading subsidiaries in EU countries or countries with which Ireland has a double tax treaty are chargeable to tax at a rate of 12.5 percent. Otherwise, the dividends might be taxable at a rate of 25 percent.

The onshore pooling regime allows an Irish company to aggregate all the credits on foreign dividends received for set-off against the Irish tax arising on these dividends. Any excess of tax credits can be carried forward for use in future tax years. The relief is effectively only available for an investment that qualifies for the capital gains tax exemption.

Foreign Parent Company

The foreign purchaser may choose to make the acquisition itself, perhaps to shelter its own taxable profits with the financing costs. This will not necessarily cause any Irish tax problems as Ireland does not tax the gains of non-residents disposing of Irish share investments unless the shares derive greater than 50 percent of their value from Irish real estate-related assets.

Dividends and other distributions from Irish resident companies are subject to dividend withholding tax (WHT). The rate is the standard rate of income tax (currently 20 percent). There are numerous exemptions from dividend WHT, generally dependent on making suitable written declarations to the paying company. Exemptions are available in relation to dividends paid to Irish resident companies, to companies resident in the EU or treaty states, to companies ultimately controlled from the EU or treaty states, and to certain quoted companies.

Non-Resident Intermediate Holding Company

The analysis in the Foreign Parent section earlier applies. The payment of dividends to intermediate holding companies that are resident in tax haven jurisdictions can give rise to WHT. However, depending on the residence of the ultimate parent company, it may be possible to take advantage of exemptions from dividend WHT.

Local Branch

A branch of a non-resident company may qualify for the 12.5-percent rate of corporation tax (applicable to

trading income). There are no Irish capital gains tax advantages in using a branch structure rather than a resident company structure, as the sale of branch assets will be subject to Irish capital gains tax, whereas the sale of shares in an Irish company by a non-resident will only be subject to Irish capital gains tax if the value of the shares is mainly derived from Irish real estate-type assets.

Some forms of tax relief are dependent on the use of an EU-based company or a company with which Ireland has a double tax treaty. The acquisition of an undertaking through the branch of a foreign company offers certain advantages:

- Dividend WHT will not arise on the repatriation of branch earnings abroad. This is not a major advantage when the holding company is resident in a treaty state or is controlled from a treaty state, as exemptions may be available.
- The repatriation of profits abroad other than by way of dividends may be important in the context of controlled foreign company (CFC) legislation in the investor's home country (such as U.S. Subpart F rules). A Netherlands-resident company with an Irish branch is frequently used to avoid such problems.

Joint Ventures

Joint ventures can be either corporate (with the joint venture partners holding shares in an Irish company) or incorporated (usually an Irish partnership). In practice, there may be non-tax reasons that lead a purchaser to prefer using a corporate joint venture, although factors such as seeking to obtain Irish tax deductions for acquisition finance or the differing tax attributes of investors (such as individuals v. corporates) might mean a corporate joint venture is substantially more favorable from a tax perspective.

There are consortium loss provisions that allow the surrender of losses to Irish corporate joint venture investors in certain cases where they might not have the 75-percent majority shareholding required to meet the normal tax loss group relief conditions.

Choice of Acquisition Funding

Where the financing of the takeover requires loans, the structure used for the takeover may be influenced by the need to obtain tax relief (whether in Ireland or elsewhere, or both) for interest on those loans. Ireland does not have specific thin-capitalization rules (see Deductibility of Interest section later in the chapter).

Debt

Interest is deductible for Irish corporation tax purposes, if:

- it is incurred wholly or exclusively for the purposes of a trade;
- it is incurred on loans used to acquire, improve, or maintain a rental property (in which case it is deductible only against the rental income); and
- it is annual interest paid on loans used to acquire a shareholding in an Irish rental income company, a trading company, or the holding company of such companies, or in lending money to such companies, provided the company controls more than 5 percent of the target company and has a common director.

Interest is deductible on an accrual basis in relation to the first two conditions earlier, but only when paid in relation to the third.

Deductibility of Interest

Ireland does not have thin-capitalization rules per se. However, certain aspects of the legislation treating interest as distributions (see earlier) have a similar effect in that interest on convertible loans (among others) may be regarded as a distribution.

The rules for the deductibility of interest are explained earlier. Annual interest paid after deduction of tax (or paid gross with the revenue commissioners' consent when a double-taxation agreement so provides) is deductible for corporation tax purposes when the loan was used to acquire shares in or advance moneys to a trading or Irish rental income company or a holding company of such companies in which the investing company has a greater than 5 percent interest and a common director. Such interest deductions may create a loss that can be surrendered for relief to other members of a group, as explained earlier.

When interest is at a rate that is more than a reasonable rate of return on the loan in question, it may be regarded as a distribution and not as interest. No other transfer pricing rules are specifically applicable to interest.

Withholding Tax on Debt and Methods to Reduce or Eliminate

Ireland imposes an interest WHT only on Irish source annual interest (that is, interest on a loan that can be outstanding for more than one year). Such interest must be paid after deduction of tax if paid by a company

resident in the state or paid by any Irish resident person to a non-resident person.

There are exceptions with respect to:

- interest paid by and received by banks carrying on a bona fide banking business in the state;
- interest paid to or by a qualifying securitization vehicle;
- when the revenue commissioners approve making the payment gross; and
- interest paid by a company in the ordinary course of a trade or business to a company resident in a treaty state or in the EU.

Interest WHT does not apply to interest that is treated as a distribution, as explained above. The rate of WHT on interest is the standard rate of income tax (currently 20 percent). A double taxation agreement may eliminate the obligation to deduct tax or reduce the rate at which it is deductible, but payment should be made gross, or at a reduced rate only with the prior consent of the revenue commissioners. When that consent is not given, the recipient may have to seek a tax refund (where applicable).

Checklist for Debt Funding

- Ireland has no thin-capitalization rules and currently no formal transfer pricing provisions.
- Since many Irish companies pay tax at a rate of 12.5 percent, it will sometimes be the case that it is more beneficial to obtain tax relief for the loans in another jurisdiction, where the acquiring company also has taxable income, than it is to obtain such relief in Ireland. It is difficult, however, to generalize in this area.
- The tax deductibility of certain types of acquisition finance is only available on a paid basis as opposed to an accruals basis and it can only be used to offset Irish group profits in the year of payment.
- Subject to double tax treaties, WHT of 20 percent might apply on interest payments to entities outside the EU.

Equity

A purchaser may use equity to fund its acquisition, possibly by issuing shares to the seller in satisfaction of the consideration or by raising funds through some form of placing. Further, the purchaser may wish to capitalize

the target post-acquisition. Ireland has no capital duty on the issue of shares.

However, as Ireland has no thin-capitalization rules, the choice of equity as part of the funding does not tend to be driven by the purchaser's Irish tax considerations. If vendor finance is being provided this will often be in the form of equity to enable the vendor to defer paying capital gains tax.

A key drawback of equity funding is that it offers less flexibility than debt should the parent subsequently wish to recover the funds it has injected. An Irish incorporated company may buy back its own shares and cancel them, or, to a limited extent, hold them as treasury shares. It may convert ordinary share capital into redeemable share capital and may redeem such share capital. Such buy-backs and redemptions of shares must generally be done out of distributable profits. Under existing tax legislation, to the extent that shares are bought back or redeemed for an amount in excess of their issue price by an unquoted company, the excess is treated as a distribution.

There is an exception with respect to the buy-back or redemption of shares in trading companies or holding companies of trading companies (in certain circumstances only, and usually limited to minority shareholdings), which are treated as being subject to capital gains tax rules rather than distribution rules. In some cases it may be more tax-efficient for a seller to have his/her shares redeemed or bought back by the company in a manner that subjects the transaction to income tax, rather than to dispose of the same shares in a manner that attracts capital gains tax. Similarly, a dividend from a company prior to sale can be a tax-efficient method of extracting funds in some instances, although there is anti-avoidance legislation in this area. Where a company borrows money to fund a buy-back of its shares or to fund redemption of its shares, interest on such loans may not be deductible, depending on the circumstances.

The payment of an intra-group dividend between Irish-resident companies will usually not have tax implications, in that the dividend will be received free of tax in the hands of the recipient company.

It may be possible for overseas shareholders in Irish companies to receive dividends free of tax in their home country (and free of tax in Ireland), either under the domestic law of the shareholder's country (participation privilege-type exemptions) or under the provisions of a double taxation agreement (DTA) with Ireland.

Hybrids

The distinction between debt and share capital for tax purposes is based on the legal distinction involved. Only share capital that is in accordance with Company Law is share capital for tax purposes. Only a dividend that is a dividend for the purposes of company law is a dividend for tax purposes. However, interest on debt instruments may be treated as a distribution (that is, akin to a dividend) in certain circumstances.

Interest is a distribution when it is paid with respect to a security:

- That is convertible into shares, provided the security is not quoted on a recognized stock exchange nor issued on terms comparable with those so quoted.
- The interest on which is dependent on the result of a company's business to any extent.
- That is connected with shares in the company where, in consequence of the nature of the rights attaching to the securities or shares, it is necessary or advantageous for a person to hold a proportionate holding of each. (The circumstances in which such interest is treated as a distribution are widely stated where the interest is paid to a non-resident, but are restrictively stated where the interest is paid to an Irish resident company or to a company trading in Ireland through a branch or agency.)
- When the interest is more than a reasonable rate of return, to the extent that it gives more than such a reasonable rate of return.
- That is issued by the company and held by a company resident outside the state.
- When the company that issued the security is a 75-percent subsidiary of the other company.
- When both companies are 75-percent subsidiaries of a third company that is not resident in the state.

The treatment of interest paid to a non-resident associate as a distribution for that reason solely does not apply where the recipient is a resident of the EU or treaty state and the interest is paid for the purposes of a trade.

When interest is payable in the ordinary course of a trade to a 75 percent non-resident affiliate company located in a non-treaty jurisdiction, the Irish company

can choose whether the payment should be treated as interest or as a distribution.

When the interest is payable to a company that is subject to corporation tax in Ireland, in the case of:

- convertible securities;
- securities whose interest varies with the company's results; and
- securities connected with shares in the company.

It is treated as a distribution only if certain additional conditions are met, which in practice make the provision non-applicable in most such situations.

Share options are not treated as share capital for tax purposes. Options are subject to capital gains tax treatment, other than in the hands of a dealer in shares or a financial institution. When they are exercised, the grant and acquisition of the option will generally merge with the acquisition and disposal of the asset over which the option existed, other than in the hands of a share dealer or financial institution. There are special rules relating to share options granted in the context of an office or employment. Employment-related share options are broadly treated within income tax rather than capital gains tax. Options under an approved share option scheme are treated within the capital gains tax regime.

Discounted Securities

The tax treatment of securities issued at a discount to third parties might follow the accounting treatment with the result that the issuer should be able to obtain a tax deduction for the discount accruing over the life of the security. However, there are some uncertainties surrounding the tax treatment of discount so it is always advisable to get specific advice if contemplating the use of discounted securities.

Deferred Settlement

Interest is not imputed where the consideration for the disposal of shares is left outstanding or takes the form of debentures, and when no interest is payable or a rate of interest lower than market value is payable on the debentures or outstanding consideration. Interest would be deemed to arise only when the purchase agreement specified a purchase price and the total consideration finally payable was a greater sum.

In most instances the date of disposal of an asset for capital gains tax purposes is the date on which the contract for the disposal of the shares becomes unconditional. For that reason, liability to capital gains

tax can arise at a date in advance of the date of receipt of consideration. Although it is possible to defer payment of the capital gains tax, interest may arise. In certain circumstances, deferred consideration may be regarded as an asset in itself, constituting (at its discounted open market value at the date of the disposal) the consideration for the disposal. The final receipt of the consideration may then involve a disposal of the deemed asset consisting of the right to receive the consideration.

Other Considerations

Concerns of the Seller

The principal concerns of a seller of a business or of assets are likely to be lowering:

- capital gains tax exposure; and
- claw-back of capital allowances on assets being disposed of.

Particular concerns that a seller may have in connection with a sale of shares are:

- A sale of shares may be preferable to a sale of an undertaking in that the gain may be exempt under the holding company regime mentioned earlier.
- If not exempt under the holding company regime, only one charge to capital gains tax potentially arises before the seller has direct possession of the sales proceeds. When an undertaking owned by a company is sold, as opposed to a sale of shares, capital gains tax may arise both on the sale of the undertaking and subsequently on the disposal of shares in the company when the shareholder attempts to realize the cash proceeds.
- The capital gains tax base cost of shares in a company may not be the same as the base cost of the company's undertaking and assets.
- The availability of capital gains tax losses for offset against taxable gains arising on the disposal may differ, as between the shareholder and the company. The availability of losses to one, but not the other (arising out of previous transactions) might dictate a preference for the sale of the shares or the undertaking as the case may be.
- Capital gains tax liabilities on a disposal of shares or an undertaking may generally be deferred if the consideration consists of other shares (subject to conditions).

- The seller will usually try to avoid a claw-back of capital allowances on the disposal of assets.
- A claw-back of inheritance tax or gift tax relief on shares in the company may occur if those shares are disposed of within six years of the date of a gift or inheritance.
- Non-Irish resident sellers of shares will only be subject to Irish capital gains tax on the sale of the shares if the shares derive the greater part of their value from Irish real estate-type assets. Consequently, the earlier concerns might not be relevant for non-Irish sellers.

Stamp duty will not normally be a concern of the seller other than in the context of an arrangement to avoid capital gains tax or the claw-back of capital allowances. The effect of a change in ownership on trading losses carried forward from previous periods will not normally concern the seller, although it may be of concern to the purchaser. Recognition of deferred capital gains tax on a company leaving a group, when the company owns assets obtained from other group companies on which capital gains tax was deferred at the time of transfer, will not concern the seller, but may concern the purchaser.

When the seller has been entitled to relief of interest on loans to finance his/her shareholdings, such interest relief would be lost in whole or in part on the sale of the shares. The relief is unlikely to be lost in the event of the sale of the undertaking rather than the shares.

Company Law and Accounting

A merger usually involves the formation of a new holding company to acquire the shares of the parties to the merger. The merger generally is achieved by issuing shares in the new company to shareholders of the merging companies, who swap their shares in those companies for shares in the new company. The new company may (but need not) have the old companies wound up and their assets distributed to the new company once the liabilities have been discharged or the creditors have agreed to the new company assuming the liabilities.

A takeover may be achieved by the bidder offering cash, shares, loan notes, or a mixture of all three in exchange for either the shares of the target company or its undertaking (broadly speaking, its business) or assets.

An amalgamation, such as a share-for-share exchange or share-for-undertaking exchange, is possible without the need to obtain court approval. In the case of a share-

for-undertaking exchange, where the shares issued by the acquirer are received directly by the shareholders in the target company, the target company must have sufficient distributable reserves to effect the transaction, and the transaction must not involve a reduction in the company's share capital. However, when a compromise arrangement is proposed between a company and its creditors, an application to the court is necessary (section 203 CA 1963) in connection with a proposed reconstruction of a company, or an amalgamation of two or more companies. The court may, by order under section 203, either sanction the reconstruction or amalgamation, or make provisions for any matters it deems suitable.

A proposed merger or takeover may require notification to the competition authority in writing within one month of a public offer that can actually be accepted. The relevant financial thresholds for mergers or acquisitions of this nature, of which the authority must be notified, are as follows in the most recent financial year:

- the worldwide turnover of each of two or more of the undertakings involved in the merger or acquisition is not less than EUR 40 million;
- each of two or more of the undertakings involved carried on business in any part of the island of Ireland; and
- the turnover in the state of any of the undertakings involved in the merger or acquisition is not less than EUR 40 million.

The competition authority will determine whether, in its opinion, the result of the transaction would be substantially to lessen competition in Ireland.

Company law and accounting standards predominantly determine the accounting treatment of a business combination. In general, most combinations are accounted for as acquisitions and merger accounting is only applied in limited circumstances. Merger accounting is not allowed under IFRS; all business combinations must be accounted for as acquisitions. The relevant Irish accounting standards and company law restrict merger accounting to a very small number of genuine mergers and group reorganizations.

One of the main practical distinctions between acquisition accounting and merger accounting is that acquisition accounting may give rise to goodwill. The net assets acquired are brought onto the consolidated balance sheet at their fair values, and goodwill arises to the extent that the consideration given exceeds the

aggregate of these values. Under Irish GAAP the goodwill is then amortized through the profit and loss account over its useful economic life. Acquisition accounting principles also apply to purchases of trade and assets with any goodwill and fair value adjustments appearing on the acquirer's own balance sheet. In merger accounting, goodwill does not arise, as the acquirer and the seller are treated as though they had operated in combination since incorporation; adjustments are made to the value of the acquired net assets only to the extent that this is necessary to bring accounting policies into line.

Another important feature of Irish company law concerns the ability to pay dividends. Distributions of profit may be made only out of a company's distributable reserves. For groups, this means the reserves which are retained by the holding company (or its subsidiaries) rather than those of the group at the consolidated level. Regardless of whether acquisition or merger accounting is adopted in the group accounts, the ability to distribute the pre-acquisition profits of the acquiring company may be restricted.

Finally, a common issue on transaction structuring is the provisions concerning financial assistance. Broadly, these say that it is illegal for a public company (or one of its private subsidiaries) to give financial assistance, directly or indirectly, for the purpose of the acquisitions of that company's shares. Similar provisions apply to acquisitions of private companies unless a whitewash procedure is carried out, which requires the directors to make statutory declarations as to the solvency of the company.

Group Relief/Consolidation

Tax relief exists for groups of companies. A group is defined differently for the purposes of the various types of tax relief involved.

An EU-resident company and its EU-resident 75-percent (or greater) owned subsidiaries can form a group for the purposes of surrendering losses between group members. This means the Irish losses arising from trading (principally) in one company may be surrendered to another group member to offset Irish trading income arising in the same year and the previous year. There are share-of-profits and share-of-assets tests to be met when determining whether one company is a 75-percent subsidiary of another.

Losses may also be surrendered by a company to members of a consortium owning the company. This form of relief is available where five or fewer EU-resident companies control 75 percent of the ordinary

share capital of the surrendering company and all of the shareholders are companies. Other forms of loss relief for trading losses are available to reduce tax on non-trading income and on capital gains on a group basis. Trading losses are relieved on a value basis against non-trading income of group companies, in a similar manner to that described above.

Following the European Court of Justice (ECJ) judgment in the Marks and Spencer case, an Irish-resident company can now claim group relief from a surrendering company which is resident in an EU Member State or resident in an EEA Member State with which Ireland has a double taxation agreement. The surrendering company must be a direct or indirect 75-percent subsidiary of the claimant company. Group relief cannot be claimed by an Irish resident company in respect of losses of a foreign subsidiary which are available for offset against profits in another jurisdiction or which can be used at any time by way of offset against profits in the country where the losses arise.

Transfer Pricing

Ireland does not currently have specific transfer pricing provisions.

Dual Residency

Residence in Ireland for tax purposes can be based on either the registration of the company in Ireland or the location in Ireland of the central management and control of a company registered elsewhere. When an Irish-registered company is treated under a DTA as resident in another state, it will not be treated as resident in Ireland under Irish domestic law. An Irish incorporated company will not be treated as resident in Ireland merely by virtue of incorporation in Ireland, if it carries on a trade in Ireland (or is related to a company that does) and either is:

- ultimately controlled by persons resident in the EU or in a DTA territory and not controlled from Ireland; or
- part of a group quoted in the EU or in a DTA territory.

Residence in Ireland for tax purposes is also based on the location in Ireland of central management and control of the company's affairs. It is thus possible for a company that is managed and controlled in Ireland, but registered in another jurisdiction to be dual-resident if the other jurisdiction in which it is registered is one that recognizes residency on the basis of place of registration. A company may also be dual-resident if the company is Irish incorporated, but centrally managed

and controlled in a jurisdiction that treats the company as being resident in that jurisdiction (subject to the exception noted earlier regarding residence under a tax treaty). There are no particular advantages from the viewpoint of Irish taxation in having dual residency.

Foreign Investments of a Local Target Company

Where the Irish target company holds overseas investments it will (when resident in Ireland) be liable to tax in Ireland on income from such investments and on gains on the disposal of those investments unless exemption is available under the holding company regime.

Comparison of Asset and Share Purchases

Advantages of Asset Purchases

- The purchase price (or a proportion not including goodwill) can be depreciated or amortized for tax purposes.
- A step-up in the cost base for capital gains tax purposes is obtained.
- A deduction is gained for trading stock purchased.
- No previous liabilities of the company are inherited.
- No acquisition of a tax liability on retained earnings.
- It is possible to acquire only part of a business.
- Greater flexibility in funding options.
- Profitable operations can be absorbed by loss companies in the acquirer's group, thereby effectively gaining the ability to use the losses.

Disadvantages of Asset Purchases

- Possible need to renegotiate supply, employment, and technology agreements, and change stationery and software, among others.
- A higher capital outlay is usually involved (unless the debts of the business are also assumed).
- Higher stamp duty.
- Accounting profits may be affected by the creation of acquisition goodwill.

Advantages of Share Purchases

- Lower capital outlay (purchase of net assets only).
- Lower stamp duty payable on net assets acquired.

Disadvantages of Share Purchases

- Acquire unrealized tax liability for depreciation recovery on the difference between market and tax book value of assets.
- Liable for any claims or previous liabilities of the entity.
- No deduction for the purchase price.
- May suffer double duty or tax on asset transfers to other entities.
- Less flexibility in funding options.
- Losses incurred by any companies in the acquirer's group in years prior to the acquisition of the target cannot be offset against any profits made by the target company.

Withholding Tax Rate Chart

The rate information and footnotes contained in this table are from the 2009 IBFD/KPMG Global Corporate Tax Handbook.

Country	Dividends		Interest (%)	Royalties ¹ (%)
	Individuals, Companies (%)	Qualifying Companies ² (%)		
Australia	0	0	10	10
Austria	0	0	0	0
Belgium	-.3	-.3	0/15 ⁴	0
Bulgaria	10	5	5	10
Canada	15	5	0/10 ⁵	0/10 ⁶
Chile	15	5	5/15 ⁷	5/10 ⁸
China (People's Rep.)	10	5	10	10
Croatia	10	5	0	10
Cyprus	0	0	0	0
Czech Republic	15	5	0	10
Denmark	0	0	0	0
Estonia	15	5	10	5/10 ⁸
Finland	0	0	0	0
France	-.3	-.3	0	0
Germany	-.3	-.3	0	0
Greece	15	5	5	5
Hungary	15	5	0	0
Iceland	15	5	0	0/10 ⁹
India	10	10	10	10
Israel	0	0	5/10 ¹⁰	10
Italy	15	15	10	0
Japan	-.3	-.3	10	10
Korea (Rep.)	0	0	0	0
Latvia	15	5	10	5/10 ⁸
Lithuania	15	5	10	5/10 ⁸
Luxembourg ¹¹	-.3	-.3	0	0
Macedonia ¹⁹	10	5	0	0
Malaysia	10	10	10	8
Malta ¹⁹	15	5	0	5
Mexico	10	5	5/10 ¹²	10
Netherlands	15	0	0	0
New Zealand	0	0	10	10
Norway	15	5	0	0
Pakistan	-.3	-.3	0/- ¹³	0
Poland	15	5	0/10 ¹⁰	0/10 ¹⁴
Portugal	15	15	0/15 ¹⁵	10
Romania	3	3	3	0/3 ¹⁶
Russia	10	10	0	0
Slovak Republic	10	0	0	10
Slovenia	15	5	5	5
South Africa	0	0	0	0
Spain	0	0	0	5/8/10 ¹⁷
Sweden	0	0	0	0
Switzerland	0	0	0	0
United Kingdom	15	5	0	0
United States	15	5	0	0
Vietnam	10	5	10	5/10/15 ¹⁸
Zambia	0	0	0	0

Notes

- Under domestic law, WHT is imposed on royalties only if they relate to the use of a patent.
- Under domestic law, there is generally no WHT on dividends paid to residents of treaty countries.
- The domestic rate applies; there is no reduction under the treaty.
- The lower rate applies to interest payments between banks on current accounts and nominal advances and to interest on bank deposits not represented by bearer bonds.
- The lower rate applies to interest paid by the government or a local authority, interest on credit sales of machinery and equipment and interest paid to qualifying pension plans, etc.
- The lower rate applies to copyright royalties (excluding films), computer software, patents, and know-how.

7. The lower rate applies to interest derived from loans granted by banks and insurance companies, bonds or securities traded on a securities market, and credit sales of machinery and equipment.
8. The lower rate applies to royalties for industrial, commercial, or scientific equipment.
9. The lower rate applies to royalties for computer software, patents, and for know-how.
10. The lower rate applies to interest in connection with the sale on credit of industrial, commercial, or scientific equipment, and merchandise or on any loan granted by a bank.
11. The treaty does not apply to exempt Luxembourg holding companies.
12. The lower rate applies if the beneficial owner is a bank.
13. The domestic rate applies to interest paid, guaranteed, or approved by the government of Ireland.
14. The lower rate applies to royalties for technical services.
15. The lower rate applies if the payer is the government or a local authority.
16. The lower rate applies to copyright royalties.
17. The 5-percent rate applies to royalties for copyrights of literary, dramatic, musical or artistic work; the 8-percent rate applies to copyright royalties on films, etc., and to royalties for industrial, commercial, or scientific equipment.
18. The 5-percent rate applies to royalties for any patent, design, or model, plan, secret formula or process, or for information concerning industrial or scientific experience; the 10-percent rate applies to royalties for trademarks or for information concerning commercial experience.
19. Effective from 1 January 2010.

KPMG in Ireland

Eoghan Quigley
KPMG
1 Stokes Place
St. Stephen's Green
Dublin
2
Ireland

Tel. +353 (1) 410 2327
Fax +353 (1) 412 2327
e-Mail: eoghan.quigley@kpmg.ie

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