

CORPORATE REORGANISATIONS

Ireland



Corporate Reorganisations

Consulting editors

Nick A Cline, Robbie McLaren, Catherine Campbell, Warren Wellington

Latham & Watkins LLP

Quick reference guide enabling side-by-side comparison of local insights, including into the legal and regulatory framework; rate of reorganisations; key preparatory, employment and financing and other issues; accounting and tax; necessary consents and approvals; treatment of assets; reorganisation formalities; and recent trends.

Generated 17 March 2023

The information contained in this report is indicative only. Law Business Research is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. © Copyright 2006 - 2023 Law Business Research

Table of contents

LEGAL AND REGULATORY FRAMEWORK

Types of transaction
Rate of reorganisations
Jurisdiction-specific drivers
Structure
Laws and regulations
National authorities

KEY ISSUES

Preparation
Employment issues
Financial assistance
Common problems

ACCOUNTING AND TAX

Accounting and valuation
Tax issues

CONSENT AND APPROVALS

External consent and approvals
Internal consent and approvals

ASSETS

Shared assets
Transferring assets

FORMALITIES

Date of reorganisation
Documentation
Representations, warranties and indemnities
Assets versus going concern
Types of entity
Post-reorganisation steps

UPDATE AND TRENDS

Hot topics

Contributors

Ireland



Kieran Trant
kieran.trant@matheson.com
Matheson LLP



Fergus Bolster
fergus.bolster@matheson.com
Matheson LLP



Caroline Buckley
caroline.buckley@matheson.com
Matheson LLP



LEGAL AND REGULATORY FRAMEWORK

Types of transaction

What types of transactions are classified as 'corporate reorganisations' in your jurisdiction?

In Ireland, the types of transactions that would typically be classified as 'corporate reorganisations' are those that involve the transfer of companies, businesses or assets between related group entities, demergers and spin-out transactions, and corporate re-domiciliations. Such transactions typically involve one or more of the following legal steps to achieve the relevant business objective: share or asset transfers (including the assignment of intellectual property rights); share-for-share transactions; share-for-undertaking transactions; share capital reductions or reorganisations; mergers; divisions; voluntary strike-offs; and liquidations.

Corporate reorganisations are executed for a wide variety of purposes, including:

- as a precursor to the sale of all or part of a business to a third party;
- to facilitate a post-acquisition integration of an acquired business;
- as a precursor to a stock market listing (which may be combined with an initial public offering) of the shares of the holding company, where a pre-listing restructuring of the group may be advisable from a financial or valuation perspective, or would assist the group in complying with its post-listing compliance obligations;
- to effect the demerger or spin-out of a business, or part of a business, to a new holding company or to the existing shareholders, including in conjunction with a stock market listing, which may be combined with an initial public offering, of the shares of the new holding company;
- to effect a corporate re-domiciliation, whereby the holding company of a group is replaced with a holding company incorporated in another jurisdiction, which may either be an inbound re-domiciliation to Ireland or an outbound re-domiciliation from Ireland;
- in response to new or anticipated legal and regulatory changes (including tax changes) that will impact the business of the group;
- to facilitate a proposed expansion of the business of the group into new geographic or commercial markets;
- for treasury, accounting or tax purposes, including to facilitate the repatriation of cash to the ultimate parent company or its shareholders;
- to achieve operational or administrative efficiencies within the group's business by combining business streams, eliminating duplicative or dormant legal entities; and
- as a reaction to macroeconomic events, such as the financial crisis of 2008–2011, Brexit, etc.

Law stated - 01 February 2023

Rate of reorganisations

Has the number of corporate reorganisations in your jurisdiction increased or decreased this year compared with previous years? If so, why?

Corporate reorganisation activity involving Irish companies continued at a steady rate in 2022. This was primarily due to the following factors:

- multinational groups, primarily in the technology sector, seeking to restructure their international operations in response to or in anticipation of changes to Irish, EU and international tax laws and sentiment, in many cases involving a migration of business functions from another jurisdiction or an increase in a group's existing activities in Ireland;
- international companies reviewing their business structures and product lines and implementing internal group

- 'carve-outs' with a view to spinning out non-core parts of their businesses (including to private equity buyers looking to deploy capital post-covid-19);
- the effects of Brexit continue to drive certain reorganisational activity, in particular among international financial services groups (principally insurance companies and banks) and life sciences companies that previously operated in the EU on the basis of regulatory licences and authorisations granted in the United Kingdom, which ceased to have pan-European recognition after Brexit. Ireland's position in, and access to, one of the world's largest markets, the EU, is now even more significant than ever; and
 - post-acquisition integration activity, particularly driven by transactions involving technology companies headquartered in the United States with significant operations in Ireland.

Law stated - 01 February 2023

Jurisdiction-specific drivers

Are there any jurisdiction-specific drivers for undertaking a corporate reorganisation?

While corporate reorganisations involving Irish companies are typically driven by transactional or other commercial activity, changes to laws and regulations also influence restructuring activity.

Changes or anticipated changes to Irish, EU and international tax law (resulting in many instances from the Base Erosion and Profit Sharing initiative undertaken by the Organisation for Economic Cooperation and Development (OECD)) have been, and continue to be, drivers of corporate reorganisation activity involving Irish companies, where multinational groups are seeking to restructure their global operations to meet the evolving requirements of cross-border tax rules.

The impact of Brexit continues to be a driver of corporate reorganisation activity, whereby international financial services groups (principally insurance companies and banks), previously operating in the EU on the basis of regulatory licences granted in the UK, have restructured their operations such that they are now regulated from Ireland (to protect their pan-European regulatory status). UK life sciences companies holding European Medicines Agency authorisations have had to restructure their organisations in the same way. However, on a broader basis, outside the regulated sectors, the effects of Brexit following the ending of the Withdrawal Agreement between the EU and the UK continue to be assessed across the spectrum of UK-based international companies that carry on business in the EU and companies that are planning to expand operations into the EU. In this regard, Ireland, with its competitive corporate tax rate (together with other factors, such as its highly educated workforce, its business-friendly legal regime and being the only remaining natural English-speaking country in the EU) has been a destination of choice for companies looking to migrate operations from the UK to an EU jurisdiction or otherwise establish new operations in the EU.

Law stated - 01 February 2023

Structure

How are corporate reorganisations typically structured in your jurisdiction?

This depends on the underlying purpose or aim of the reorganisation. Most intra-group reorganisations involve share or asset transfers (including the assignment of intellectual property rights), share transfers, share-for-share transactions, share-for-undertaking transactions, share capital reductions or reorganisations, mergers, divisions, voluntary strike-offs and liquidations. Most often, a series of these steps will need to be undertaken to achieve the desired objectives of the broader reorganisation.

Demergers and spin-out transactions typically involve the packaging of the relevant demerger business assets under a

new 'spinco' that is wholly owned by the existing parent. The demerger is then effected either by directly distributing the shares of the spinco to the shareholders of the parent, effecting a tripartite share-for-undertaking type transaction by way of effecting a reduction in capital or undistributable reserves of the transferor company, or by means of a statutory scheme of arrangement. A statutory scheme of arrangement requires the approval of a majority number of parent shareholders representing at least 75 per cent in value of the shares represented in person or by proxy at a general meeting of the parent, together with a court sanction of the scheme.

Other types of transactions that could, for various reasons, form part of corporate reorganisations, would be:

- a conversion of the legal entity type (eg, a conversion of a limited liability company into an unlimited liability company to avail of certain advantages that form of legal entity is allowed under Irish law);
- a transfer of the place of management and control to or from Ireland for tax planning purposes; and
- the establishment by a foreign company of branch operations in Ireland.

In many cases, corporate reorganisations involving Irish companies will also have components involving affiliates incorporated or domiciled in other jurisdictions, meaning non-Irish law will have a bearing on the form of restructuring being undertaken and will have to be considered in conjunction with non-Irish legal and tax counsel.

Law stated - 01 February 2023

Laws and regulations

What are the key laws and regulations to consider when undertaking a corporate reorganisation?

The Companies Act 2014 (the 2014 Act) is the primary piece of legislation that needs to be considered as part of any reorganisation and contains the rules pertaining to the making of dividends and other distributions, capital reductions, the financial assistance prohibition (and exceptions thereto) and the process for effecting statutory mergers, divisions and schemes of arrangement. The 2014 Act is also the primary source of the now codified directors' fiduciary duties and rules for the preparation of individual and group statutory financial statements.

The 2014 Act provides a framework of procedures and restructuring mechanics that facilitate the implementation of certain types of reorganisation transactions. These include:

- a domestic merger regime, which permits legal mergers between two Irish private companies (whereby one company survives and the other is dissolved without entering liquidation), supplementing the cross-border merger regime introduced by the European Communities (Cross-Border Mergers) Regulations 2008 (the Cross-Border Merger Regulations), which allows for the merger of Irish limited liability companies with limited companies from other EU member states;
- a domestic division process whereby a formal division of an Irish company into two newly formed companies can be effected (with the dividing company being dissolved without entering liquidation);
- a validation process for certain restricted transactions called the 'summary approval procedure', which permits a limited company to reduce its share capital without court approval (and, in the process, create distributable profits that may be necessary to legally effect cash repatriation by way of dividend or the distribution or transfer of assets intra-group);
- the permitted use of the summary approval procedure to approve a tripartite share-for-undertaking type transaction by way of effecting a reduction in capital or undistributable reserves of the transferor company, thus enabling such a transaction to be implemented where the transferor does not have sufficient distributable profits to do so otherwise; and
- the removal of the requirement for unlimited liability companies to have distributable profits to pay dividends or

make other distributions.

The Cross-Border Merger Regulations apply to cross-border mergers between Irish and other EU incorporated companies.

In the case of a business transfer, the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (the TUPE Regulations) will be of particular importance when employees are part of the relevant business.

Additionally, there is a considerable amount of Irish legislation and regulation that could potentially have an impact when planning a corporate reorganisation, depending on the nature of the reorganisation itself, the industry sector of the group and the specific activities carried on by the relevant Irish company. The most common example is in the case of a company holding a regulatory authorisation or licence to carry on its activities in Ireland (for example, a company carrying on banking, insurance or other financial services activities), the underlying legislation may require the consent of the licensing authority (which, in the case of a financial services company, would be the Central Bank of Ireland) to be provided before the corporate reorganisation can be implemented. Data privacy law considerations, including implications under the General Data Protection Regulation (GDPR), have increasingly become a factor in various forms of corporate reorganisations.

Irish tax and stamp duty legislation will also need to be considered as part of the analysis in determining the tax implications of any proposed reorganisation.

Law stated - 01 February 2023

National authorities

What are the key national authorities to be conscious of when undertaking a corporate reorganisation?

The key national authorities are:

- the Central Bank of Ireland. Where a company holds an authorisation to carry on a financial services business from the Central Bank of Ireland, consent from that authority may be required in advance of implementing the restructuring;
- the Government Grant Authorities. The terms of grant aid funding provided by government grant aiding bodies such as IDA Ireland or Enterprise Ireland may require a consent to be obtained before certain corporate reorganisations can be implemented;
- the High Court. Under the Companies Act 2014, a court order may be required to sanction certain restricted transactions that form part of reorganisations, such as mergers, divisions, schemes of arrangement and share capital reductions;
- the Companies Registration Office. Most reorganisations involving Irish companies will require certain filings to be made at the Irish Companies Registration Office, including details of any variation of share capital, the passing of any special shareholder resolutions and revisions to the constitution of the company;
- the Registrar of Beneficial Ownership. Following the coming into effect of the European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019 (which implemented the EU's 4th Anti-Money Laundering Directive), all Irish companies are now required to make filings with the Register of Beneficial Ownership (RBO) in respect of individuals who are considered to be beneficial owners of the company. Equivalent obligations exist in other EU member states as well as in the UK. In some instances, a corporate reorganisation may result in a requirement for an Irish company to make an updated filing with the RBO where there is a change

in the company's beneficial owners; and

- the Corporate Enforcement Authority (CEA). The establishment of this new, independent statutory body was provided for in the Companies (Corporate Enforcement Authority) Act 2021 (the CEA Act). The CEA will assume the powers and functions of the former Office of the Director of Corporate Enforcement, including investigating and tackling breaches of company law and alleged criminal activity in the areas of fraudulent trading prior to insolvency, and other matters.

Law stated - 01 February 2023

KEY ISSUES

Preparation

What measures should be taken to best prepare for a corporate reorganisation?

A detailed planning exercise is an important aspect of any reorganisation to ensure an effective and efficient implementation, and to ensure all objectives are achieved both on a short-term and long-term basis. The planning actions generally required as part of any reorganisation would include the following:

- reviewing the constitution or memorandum and articles of association of the Irish company or companies in question to confirm whether the proposed transactions are permitted or whether any revisions need to be made to facilitate the proposed steps;
- identifying any company law issues or barriers (eg, availability of distributable profits or the need to create same);
- obtaining comprehensive tax and accounting advice;
- identifying material third-party agreements or regulatory authorisations that may require consent or notification (eg, by reason of the relevant contracts or authorisations containing termination on change-of-control provisions);
- identifying whether any shares or assets are pledged as security to a third-party lender or are otherwise subject to a restriction on transfer, requiring relevant releases or consent to be obtained from the third party;
- identifying any shared assets and services and agreeing how such assets and services are to be continued following reorganisation, including on a transitional basis;
- in the case of a demerger or spin-out undertaken in conjunction with a stock market listing (which may be combined with an initial public offering), consideration of all relevant capital markets laws and regulations, including the listing rules of the relevant exchange, prospectus law requirements, market abuse, and insider dealing laws and regulations; and
- with regard to the above, preparing a detailed step plan identifying the steps and the documents, corporate approvals, signatories and timing required for each of the steps involved, as well as all step dependencies (including any necessary third-party consent and notifications).

Law stated - 01 February 2023

Employment issues

What are the main issues relating to employees and employment contracts to consider in a corporate reorganisation?

The preliminary issue to be considered from an employment perspective in a corporate reorganisation is the form of the reorganisation itself. If the reorganisation takes place as a business or asset transfer, the European Communities

(Protection of Employees on Transfer of Undertakings) Regulations 2003 (the TUPE Regulations) will most likely be triggered, but an analysis must be undertaken. Where the reorganisation constitutes a transfer for the purpose of TUPE, those employees who are wholly or mainly assigned to the transferring business or undertaking will have an automatic right to transfer employment to the new or reorganised entity on the same terms and conditions of employment and with their continuity of service intact. Under TUPE, certain information must be provided to the employee representatives where reasonably practicable not later than 30 days before the transfer date, and this time frame must be considered as part of the overall timeline of the reorganisation. Consultation may also be required where measures are envisaged in relation to the employees, and this must be commenced where reasonably practicable, not later than 30 days before the transfer date. TUPE does not generally apply to share acquisitions. It is possible that the integration of two businesses following a share acquisition may give rise to a transfer under TUPE, but a detailed analysis must be undertaken.

In reorganisations involving the transfer or reorganisation of shares in an Irish company, there are fewer Irish employment law considerations. This is due to the fact that the employer entity in this scenario remains the same, albeit with a new owner, such that any subsequent changes to be made to employees' terms and conditions would have to be made in accordance with the existing variation provisions of the relevant employment contracts or on the consent of the employees. It is generally considered best practice in Ireland to inform employees in this type of reorganisation of the change in owner of their employer entity.

Law stated - 01 February 2023

What are the main issues relating to pensions and other benefits to consider in a corporate reorganisation?

Different issues will arise depending on whether the pension schemes in question are classified as defined benefit (DB) or defined contribution (DC). Generally speaking, a DB scheme will raise more issues than a DC scheme (eg, funding issues and covenant concerns). The legal nature of the change (that is, whether it is a share or asset transfer) and the reasons for the change will also determine, to a certain extent, the issues that arise in a corporate reorganisation.

In respect of a share transfer (that is, where the target continues to sponsor its own pension schemes following acquisition), both the employer company and the trustees will need to consider the effect of the reorganisation on the employer's covenant (that is, the employer's legal obligation, ability and willingness to continue to fund the scheme into the future). This could be a significant concern for pension scheme trustees, and so consideration should be given to communicating with trustees at an early stage of the transaction. As a result of the Directive (EU) 2016/2341, IORP II, which was transposed into Irish law through the European Union (Occupational Pension Schemes) Regulations 2021, there will be increased costs associated with pensions schemes. The costs to be considered are: the initial once-off cost of ensuring the scheme's process and structure compliance with IORP II; the additional cost of continuing to run the pension scheme in an IORP II-compliant manner; and (if a professional trustee is to be appointed to ensure IORP II requirements are met) the cost of payment to the professional trustee. The extent of these costs are not yet known owing to the early stage of implementation. A number of employers are considering the option of, or have already decided to, transition their defined contribution pension schemes to a 'master trust', where the master trust trustee (not related to the employer but appointed by the master trust pension provider) is responsible for the time and cost involved in IORP II compliance.

In a business and asset transfer involving employees, TUPE will apply and while, generally speaking, occupational pension schemes are exempt from the automatic transfer provisions of TUPE, both the circumstances of the reorganisation and the pension scheme documentation should be examined, as some pension benefits (eg, early retirement benefits on redundancy and bridging pensions) do not fall within the TUPE pensions exception and could, therefore, transfer with the business.

Financial assistance

Is financial assistance prohibited or restricted in your jurisdiction?

Irish companies (both private limited companies and public limited companies (PLCs)) are restricted from providing, directly or indirectly, financial assistance in connection with the acquisition of shares in the Irish company itself or any direct or indirect holding company, unless the transaction in question falls within a number of stated exceptions or the transaction is validated in advance under the summary approval procedure. Under the summary approval procedure, all or a majority of the directors of the company must sign a declaration confirming that the company will be in a position to pay all its debts as they fall due within the 12-month period following completion of the restricted transaction. The shareholder or shareholders of the company must also approve the restricted transaction by special resolution before it can be implemented.

Financial assistance considerations commonly arise as part of corporate reorganisations where loans, capital contributions, guarantees, etc, are being provided. While in most instances it will be possible to validate the transaction using the summary approval procedure, the important consideration, from a planning perspective, is that the validation must be completed in advance of the transaction's implementation.

The summary approval procedure for validation of financial assistance is not available to PLCs or their Irish incorporated subsidiaries. Accordingly, transactions involving such companies must be structured so that the relevant companies are not providing financial assistance. If they are already providing financial assistance, such assistance is brought within one of the other available exceptions.

Law stated - 01 February 2023

Common problems

What are the most commonly overlooked issues or frequently asked questions in a corporate reorganisation?

The following are examples of some of the key questions that should be asked at the planning stage of any reorganisation involving an Irish company to ensure all relevant issues are addressed and dealt with.

- What type of valuations are required to be prepared as part of the reorganisation and should the documentation include 'true up' provisions to facilitate an adjustment to any consideration paid following completion of any valuation? As additional parties may need to be engaged to perform valuations, these issues should be dealt with as early as possible.
- What details relating to the corporate reorganisation will come into the public domain (eg, as a result of filings required to be made at the Irish Companies Registration Office or the Register of Beneficial Ownership, or both), and when will this occur? The group's public relations team should be made aware of these disclosures to manage any press reporting that may result.
- What are the technical accounting implications of the steps for the Irish company or companies involved? Ideally these should be confirmed in advance with the Irish company's auditors to ensure the accounting treatment is consistent with the objectives of the reorganisation.
- Does the transaction trigger any clawback of stamp duty or other tax relief claimed previously under Irish or non-Irish tax law?

Law stated - 01 February 2023

ACCOUNTING AND TAX

Accounting and valuation

How will the corporate reorganisation be treated from an accounting perspective? How are target assets and businesses valued?

The accounting treatment of corporate reorganisations is, in our experience, generally treated in a similar way to third-party transactions, but, in all cases, the technical accounting treatment should be fully vetted and confirmed in advance by the group's accounting advisers and, as appropriate, auditors to identify any accounting issues arising.

In terms of valuations, assets and businesses can generally be transferred at book value where the transferring company has distributable profits. Unlimited companies have more flexibility in this respect as they are not subject to the requirement to have distributable profits in order to make distributions.

The potential corporate governance implications for the directors of an Irish company of transferring a business or asset for less than its full market value should be considered when it arises. This is to ensure there is a business justification for that decision and it may be appropriate, in some instances, for shareholder approval of the transaction to be obtained to support the decision of the directors.

Law stated - 01 February 2023

Tax issues

What tax issues need to be considered? What are the tax implications of carrying out a corporate reorganisation?

The tax issues to be considered in the context of a corporate reorganisation differ depending on the structure of the reorganisation being applied. Liabilities to tax can potentially arise under a number of different tax heads.

The Taxes Consolidation Act 1997 (TCA) and the Stamp Duty Consolidation Act 1999 (SDCA) prescribe that corporate reorganisations can obtain the benefit of certain tax reliefs provided that the various criteria contained therein are met. A summary of the main tax liabilities and reliefs are as follows:

- **Capital gains tax:** an Irish tax resident company is liable to capital gains tax at a rate of 33 per cent on the worldwide gains, which it realises from the disposal of its chargeable assets. Non-Irish tax resident companies fall within the charge to Irish capital gains tax where they realise a gain on the disposal of certain 'specified' assets, which include Irish land and buildings. Non-Irish resident companies also fall within the charge to Irish capital gains tax on the realisation of assets used for the purposes of a business carried on in Ireland. Tax liability of 33 per cent may apply to companies if 'chargeable assets' are being transferred, and to shareholders if shares are being sold or swapped. A number of reliefs are available under Irish tax legislation, which operate to fully relieve, or defer, the taxable gain realised on the transfer of company assets and the transfer of shares by shareholders. Relief may be available for the transfer of company assets and the transfer of shares by shareholders under various relieving provisions in Irish tax legislation.
- **Corporation tax:** in a corporate reorganisation it is possible to trigger a clawback of capital allowances that were previously claimed on the transferring assets. Separately, where a loss-making trade is the subject of the reorganisation, the future availability of those losses to the acquiring entity will need to be carefully considered. Section 400 TCA, where certain conditions are met, allows for the transfer of the capital allowances and losses from the existing company to another company. There may be a clawback of capital allowances claimed on assets that are transferring as part of a restructuring. The availability of losses carried forward in a trade that is

the subject of a restructuring must be carefully considered. The main relief available allowing for the transfer of capital allowances and losses from an existing company to a new company is under section 400 TCA. Separately, where the reorganisation relates to the transfer of patent rights by an Irish company, the consideration received for that transfer may be subject to tax at 25 per cent as opposed to 33 per cent (section 757 TCA). Transfer of patent rights in return for consideration may be subject to tax at 25 per cent (section 757 TCA).

- Stamp duty: stamp duty is a tax on certain instruments (such as written documents), wherever executed, where that instrument effects the transfer on sale of Irish situate property, which includes Irish land and shares of Irish incorporated companies, or where the instrument is executed in Ireland or relates to something to be done in Ireland. Given that the charge to Irish stamp duty is quite broad, care should be taken in implementing the reorganisation to ensure an unintended charge to Irish stamp duty does not arise. In terms of tax exposure, a stamp duty rate of 1 per cent is applicable on the market value of the transferring shares of Irish incorporated companies and 7.5 per cent on the market value of the transfer of commercial assets. There are many exemptions and forms of relief from stamp duty that may be relevant depending on the type of asset and restructuring. Generally, stamp duty relief is available under section 80 SDCA (reconstruction relief) and section 79 SDCA (associated companies relief) for group restructurings.
- Value added tax (VAT): VAT, as implemented by the Value-Added Tax Consolidation Act 2010, should be considered in the context of any corporate reorganisation. The transfer of assets within Ireland would typically be subject to VAT, and the transferor would normally be liable to pay the VAT to the tax authorities. Depending on the nature of the business of the transferee, VAT may or may not be recoverable and represent a cost. Such VAT obligations may not arise where the assets being transferred from a VAT-registered transferor to another VAT-registered transferee meet certain tests, primarily that they are a totality of a business's assets that could constitute an undertaking capable of being operated independently. Where these tests are met, 'transfer of business' relief should apply, and the entire transfer may take place without giving rise to VAT (although other obligations may arise, particularly with regard to immovable property).

The conditions to be satisfied to avail of these types of relief vary significantly and, therefore, all factors of a reorganisation should be considered carefully before seeking to rely on them.

The reporting obligations under the EU mandatory disclosure regime introduced by Council Directive (EU) 2018/822, which are provided for in Irish legislation under Chapter 3A of Part 33 TCA and the European Union (Administrative Cooperation in the Field of Taxation) Regulations 2012 (as amended), should also be considered.

Law stated - 01 February 2023

CONSENT AND APPROVALS

External consent and approvals

What external consent and approvals will be required for the corporate reorganisation?

While most third-party contracts and agreements will facilitate the assignment of a party's interest to an affiliate as part of a corporate reorganisation, there are certain circumstances where consent or notification may be required, and it is important that these are identified at an early stage. Common examples of this are as follows.

- Where shares in subsidiary companies that have been pledged as security are being transferred as part of a reorganisation, the consent of the lender or security holder will need to be obtained in advance to avoid triggering any adverse consequences under the security arrangements.
- Where a lease of premises is being transferred as part of an intra-group business or asset transfer, the consent of the landlord may be required where the lease does not contain a group-sharing provision.

- Group companies who are a party to grant aid agreements with government authorities such as IDA Ireland or Enterprise Ireland may need to obtain consent to certain reorganisations that impact the grant-aided business – the underlying agreement will need to be reviewed to confirm whether any such consent is required.

In many cases, and depending on the business involved, third parties can simply be notified with details about the reorganisation, including the relevant updated vendor or customer arrangements in good time, in advance of the implementation date.

Law stated - 01 February 2023

Internal consent and approvals

What internal corporate consent and approvals will be required for the corporate reorganisation?

For good corporate governance purposes and other reasons, corporate reorganisation transactions involving Irish companies should be approved in advance by the board of directors of the Irish company, either at a board meeting or by way of unanimous written consent, with appropriate resolutions passed authorising the relevant signatories (typically the directors themselves) to execute the required reorganisation documentation on behalf of the company.

For cross-border corporate reorganisations, evidence of the representation authority of the relevant Irish company is often required to be provided to authorities in other jurisdictions, meaning the authorising resolutions of the board will be required to demonstrate that authority.

In terms of shareholder consent, transactions being validated by way of the summary approval procedure require the shareholder of the relevant Irish company (or companies, in the case of a merger or division being approved using the summary approval procedure) to approve the transaction by passing a special resolution (a 75 per cent majority of the shareholders). In other cases where the directors may have a concern regarding the corporate benefit of a particular transaction, the passing of a shareholder resolution may be appropriate to support the position taken by the directors.

Law stated - 01 February 2023

ASSETS

Shared assets

How are shared assets and services used by the target company or business typically treated?

Where a group company that avails of shared assets or services is being sold or spun out of the group following the reorganisation, a transitional services arrangement will sometimes be agreed between the seller and the buyer to facilitate the normal operation of the business of the target company on closing and for a period thereafter, normally from three months up to two years, depending on the arrangements involved.

Law stated - 01 February 2023

Transferring assets

Are there any restrictions on transferring assets to related companies?

As a general rule, the restrictions on dividends and distributions require that, unless an Irish company has distributable profits, an upstream transfer of assets to a direct or indirect holding company, to a subsidiary of any such holding company (ie, a sister company) or otherwise to, or for the benefit of, a shareholder (or shareholder of any holding

company) must be effected at the market value of the relevant assets. If a company has distributable profits, this transfer may be transferred at book value or less, provided the difference between the price paid and book value is covered by distributable profits.

With regard to fiduciary duties, the directors of an Irish company proposing to transfer assets at less than market value also need to consider whether there is a business justification for the company doing so (ie, is the company expected to derive a commercial benefit from the transaction?). The directors should also satisfy themselves that, following the transfer, the company will be able to pay its debts as they fall due.

The directors of an Irish company may also avail of the summary approval procedure to approve a tripartite share-for-undertaking transaction by way of effecting a reduction in capital or undistributable reserves of the transferor company, thus enabling such a transfer of assets to be implemented at book value where the transferor does not have sufficient distributable profits to do so otherwise.

Apart from the above restriction, there are no general company law rules restricting the transfer of assets between related companies. Care does, however, need to be taken to ensure that the transaction in question does not constitute a transfer to a person deemed to be 'connected' to a director of the transferor company (being a spouse or close relative, a partner or body corporate controlled by that director). Similarly, loans or credit transactions between companies and connected persons are prohibited. In most cases, any such transactions implemented between wholly owned group subsidiaries fall within certain exemptions but attention does need to be paid to the rules in particular where there are principal directors involved.

Law stated - 01 February 2023

Can assets be transferred for less than their market value?

Yes, subject to certain conditions. As a general rule, the restrictions on dividends and distributions require that, unless an Irish company has distributable profits, an upstream transfer of assets to a direct or indirect holding company, to a subsidiary of any such holding company (ie, a sister company) or otherwise to, or for the benefit of, a shareholder (or shareholder of any holding company) must be effected at the market value of the relevant assets. If a company has distributable profits, this transfer may be transferred at book value or less, provided the difference between the price paid and book value is covered by distributable profits.

With regard to fiduciary duties, the directors of an Irish company proposing to transfer assets at less than market value also need to consider whether there is a business justification for the company doing so (ie, is the company expected to derive a commercial benefit from the transaction?). The directors should also satisfy themselves that, following the transfer, the company will be able to pay its debts as they fall due.

The directors of an Irish company may also avail of the summary approval procedure to approve a tripartite share-for-undertaking transaction by way of effecting a reduction in capital or undistributable reserves of the transferor company, thus enabling such a transfer of assets to be implemented at book value where the transferor does not have sufficient distributable profits to do so otherwise.

Further, where supplies are made for less than market value, it may be necessary to consider the value added tax (VAT) treatment of such supplies, as market value can be applied by the tax authorities to such supplies in certain circumstances.

Law stated - 01 February 2023

FORMALITIES

Date of reorganisation

Can a corporate reorganisation be backdated or deemed to have already taken place, for example, from the start of the financial year?

While the backdating of documents is not permitted, in some instances, it can be possible for parties to a corporate reorganisation to contractually agree to treat a transaction as having an effective date prior to the date on which it was formally documented such that the risk in, and benefit to, the assets, would contractually be apportioned between the parties from that earlier date (subject to this arrangement not prejudicing the rights of any interested third parties, including a tax authority, for example). It is worth noting the process for implementing statutory mergers between Irish companies requires common draft terms of merger to state the date on which the parties will consider the transactions of the transferor company as those of the surviving company for accounting purposes.

In some instances, companies will implement reorganisations operationally in advance of formally documenting such changes. In this instance, the typical practice is for the details of the revised arrangement to be memorialised in an agreement that states the effective date (in the past) on which the parties intended the arrangement to come into effect.

Law stated - 01 February 2023

Documentation

What documentation is required in a corporate reorganisation?

This will depend on the nature of the corporate reorganisation being undertaken. However, the primary categories of documentation required to be prepared as part of a corporate reorganisation involving an Irish company are typically as follows:

- preparatory or planning documents: step plans, document checklists, and legal, tax and accounting advice memorandums;
- operative documents: share purchase agreements, business and asset transfer agreements, contribution or distribution agreements, subscription agreements, common draft terms of merger or division, deeds, stock transfer forms and revised constitutions;
- corporate approvals: directors and shareholders' meeting minutes or written resolutions, and powers of attorney; and
- post-completion documents: tax filings (including stamp duty returns, relief applications and any Council Directive (EU) 2018/822 (DAC6) reporting requirements (if applicable)), Irish Companies Registration Office (CRO) filings, Register of Beneficial Ownership (RBO) filings, share certificates and updated statutory registers.

Law stated - 01 February 2023

Representations, warranties and indemnities

Should representations, warranties or indemnities be given by the parties in a corporate reorganisation?

In most cases, there is little basis for representations, warranties or indemnities to be given by related parties as part of a corporate reorganisation, and it would be unusual for anything other than very basic representations as to capacity and title to be included in the documentation. In limited cases, there may be justification for including representations,

warranties or indemnities where there is a specific need to demonstrate the arm's-length nature of the transactions, meaning terms that would have been negotiated and agreed between unrelated third parties should be put place.

Law stated - 01 February 2023

Assets versus going concern

Does it make any difference whether assets or a business as a going concern are transferred?

The transfer of assets within Ireland would typically be subject to value added tax (VAT) and the transferor would normally be liable to pay the VAT to the tax authorities. Depending on the nature of the business of the transferee, VAT may or may not be recoverable and represent a cost. Such VAT obligations may not arise where the assets being transferred from a VAT-registered transferor to another VAT-registered transferee meet certain tests, primarily that they are a totality of a business's assets that could constitute an undertaking capable of being operated independently. Where these tests are met, 'transfer of business' relief should apply and the entire transfer may take place without giving rise to VAT (although other obligations may arise, particularly with regard to immovable property).

Law stated - 01 February 2023

Types of entity

Explain any differences between public, private, government or non-profit entities to consider when undertaking a corporate reorganisation.

In most cases, there will be little difference to how reorganisations are restructured and implemented where public, private, government, or semi-state or non-profit entities are involved. Under the Companies Act 2014 (the 2014 Act), public limited companies (PLCs) are subject to certain restrictions over and above private companies under the 2014 Act, including the fact that the summary approval procedure is not available to validate financial assistance or share capital reductions (the latter can, however, be approved by way of a High Court order). In addition, restructurings involving publicly listed PLCs are subject to additional restrictions under the relevant stock exchange rules and the Irish Takeover Panel rules that may impact a reorganisation.

For government and semi-state entities, care should be paid at the planning stage to ensure that any requirements (in particular, any ministerial or other statutory consent) under the relevant governing legislation for the body are complied with as part of the restructuring.

As most non-profit entities are structured as companies limited by guarantee, particular care needs to be paid to the rules under the 2014 Act that apply to those companies as well the entity's constitution, which may be prescriptive as to how any reorganisation can be effected. It will likely be important that any reorganisation is structured in such a way as to preserve the tax status of the non-profit entity.

Law stated - 01 February 2023

Post-reorganisation steps

Do any filings or other post-reorganisation steps need to be taken after the corporate reorganisation?

Most corporate restructurings will require some form of post-completion filings and other action items, including the following:

- completion of any required valuations and any consideration adjustments required between the parties as a result;
- booking the transactions in the accounting records of the relevant companies, including any premium arising on the issuance of shares;
- CRO filings (in particular, documentation executed pursuant to the summary approval procedure);
- RBO filings;
- stamp duty returns and other tax filings at the Irish Revenue Commissioners (Revenue) (including relief claims or DAC6 reporting requirements (if applicable)); and
- updates to the statutory records of Irish companies to reflect changes to the share capital, directors, secretary or other details as well as any changes that need to be recorded in the company's register of beneficial ownership.

Law stated - 01 February 2023

UPDATE AND TRENDS

Hot topics

What are your predictions for next year and how will these impact corporate reorganisations in your jurisdiction (for example, expected trends or pending legislation)?

Notwithstanding the impact of covid-19 related restrictions, Ireland experienced positive levels of corporate reorganisation activity in 2022 with international technology companies in particular restructuring international ownership of intellectual property rights and product supply structures, which we expect to continue in 2023.

Upcoming changes to be introduced in 2023 as part of Ireland's implementation of Directive (EU) 2019/2121 (the Mobility Directive) will build on the existing cross-border merger framework but crucially also introduce harmonised EU laws on cross-border conversions and divisions, permitting companies from other EU member states to move their seat to Ireland by way of a corporate continuation for the first time (and vice-versa). The new measures seek to balance company mobility aims with employee, member and creditor rights but are expected to result in further reorganisational activity.

In line with other EU jurisdictions, we also expect to see an increase in competition and regulatory enforcement action in 2023, which will likely influence deal activity as companies ensure compliance with certain additional requirements from regulators that would result in a review of corporate structures. Draft Irish investment screening legislation was published in 2022 and may result in additional clearances for certain types of third country (non-EU) transactions. Increasing inflation levels, interest rate increases and general market volatility are also likely to have a certain impact that will, in particular, drive restructuring activities among global multinationals.

Environmental, social and governance reporting (ESG) is also playing an increasing role in policy and business, with growing shareholder focus on the ESG agenda. There are certain proposed directives being discussed in the area of ESG that would apply to certain large companies and their directors, namely, the Corporate Sustainability and Reporting Directive (CSRD) and the Corporate Sustainability Due Diligence Directive. On 16 December 2022, the CSRD was published in the Official Journal of the European Union and entered into force on 5 January 2023. On this basis, the CSRD must be transposed into Irish law by 6 July 2024 and will require in-scope companies to make environmental, social and governance related disclosures based on common EU sustainability reporting standards. Sustainability reporting will be put on an equal footing to traditional financial reporting, and independently audited. This focus on ESG is expected to intensify in 2023 as companies face more stringent sustainability requirements and make commitments to improve their ESG position, and this may result in further reorganisational activity.

* The authors would like to thank Tai Ogunde, Denise Moran, Catherine O'Meara, Matthew Broadstock, James Edmond,

Dorothy Hargaden and Ursula McMahon for their contributions to the chapter.

Law stated - 01 February 2023

Jurisdictions

	Austria	DLA Piper
	Belgium	DLA Piper
	Egypt	Soliman, Hashish & Partners
	Germany	DLA Piper
	Greece	PotamitisVekris
	Ireland	Matheson LLP
	Japan	TMI Associates
	Mexico	Chevez Ruiz Zamarripa
	Romania	CITR SPRL
	Slovenia	DLA Piper
	Switzerland	Walder Wyss Ltd
	United Kingdom - England & Wales	Latham & Watkins LLP