Corporate Reorganisations 2021

Contributing editors
Nick Cline, Robbie McLaren and Janine Leeder

LEXOLOGY
Getting The Deal Through

© Law Business Research 2021

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer–client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between February and March 2021. Be advised that this is a developing area.

© Law Business Research Ltd 2021
No photocopying without a CLA licence.
First published 2018
Fourth edition
ISBN 978-1-83862-642-6

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Corporate Reorganisations 2021

Contributing editors
Nick Cline, Robbie McLaren and Janine Leeder
Latham & Watkins

Lexology Getting The Deal Through is delighted to publish the fourth edition of *Corporate Reorganisations*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on the Cayman Islands.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Nick Cline, Robbie McLaren and Janine Leeder of Latham & Watkins, for their continued assistance with this volume.

London
March 2021

Reproduced with permission from Law Business Research Ltd
This article was first published in April 2021
For further information please contact editorial@gettingthedealthrough.com

© Law Business Research 2021

Contents

Introduction 3
Nick Cline, Robbie McLaren and Janine Leeder
Latham & Watkins

Austria 5
Elisabeth Stichmann, Dimitar Hristov and Stephan Nitzl
DLA Piper

Belgium 11
Erwin Simons, Charlotte Peeters, Caroline Daout, Koen Selleslags, Michaël Heene, Eddy Lievens and Philippe Hinnekens
DLA Piper

Brazil 18
Manoel Ignácio Torres Monteiro
Viseu Advogados

Cayman Islands 21
Alex Potts QC
Conyers

England & Wales 28
Nick Cline, Robbie McLaren and Janine Leeder
Latham & Watkins LLP

France 35
Anne Laredo, Cécile Szymanski, Louis-Augustin Jourdan, Marie Durand-Gasselin, Philippe Danesi, Raphaël Béra and Yasmine Djerrari
DLA Piper

Germany 41
Cornelius Frie, Pascal R Kremp and Konrad Rohde
DLA Piper

Ireland 49
Fergus Bolster and Kieran Trant
Matheson

Japan 57
Takashi Toichi, Hiroyuki Yoshioka and Hiro Tanaka
TMI Associates

Luxembourg 64
Jacques Wantz, Olivier Reisch, Céline Pignon, Gersende Masfayon, Emre Akan and Cyril Poels
DLA Piper

Portugal 69
Alexandre Pedral Sampaio, André Pestana Nascimento, António Castro Caldas, Francisco Brito e Abreu, Gerard Everaert, Joana Torres Ereio and José Maria Rodrigues
Uría Menéndez - Proença de Carvalho

Singapore 76
Joe Bauerschmidt, Katherine Chew and Tan Ying Chern
DLA Piper

Slovenia 83
Domen Brus and Jasna Zwitter-Tehovnik
DLA Piper

Switzerland 89
Dominik Hohler, Urs P Gnos and Markus Vischer
Walder Wyss

Ukraine 95
Solomiia Petryk, Taisiia Asadchykh and Volodymyr G Igonin
Vasil Kisil & Partners

United States 102
Alison L Maxwell, Cisco Palao-Ricketts, Marta Segimon, Poonam Kumar, Stan Stewart and Ute Krudewagen
DLA Piper

© Law Business Research 2021

Ireland

Fergus Bolster and Kieran Trant*

Matheson

LEGAL AND REGULATORY FRAMEWORK

Types of transaction

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

In Ireland, the types of transactions that would typically classify 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;
- by way of 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.

Rate of reorganisations

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

Despite the covid-19 pandemic, corporate reorganisation activity involving Irish companies continued to increase in 2020. 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;
- the effect, and continuing uncertainty surrounding the precise form, of Brexit during 2020, in particular among international financial services groups (principally insurance companies and banks) and life sciences companies currently operating 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; and
- post-acquisition integration activity following on from global M&A activity, particularly driven by transactions involving technology companies headquartered in the United States with significant operations in Ireland.

Jurisdiction-specific drivers

3 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 has been, and 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,

© Law Business Research 2021

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 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.

The Companies Act 2014 (the 2014 Act) entered into effect on 1 June 2015 and consolidated and modernised existing Irish company law. The 2014 Act introduced flexibilities in existing corporate procedures as well as new restructuring mechanics, which facilitate the implementation of certain types of reorganisation transactions. These include:

- a new domestic merger regime, which, for the first time, 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 new domestic division process whereby, for the first time, 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 new validation process for certain restricted transactions called 'the summary approval procedure', which now 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.

Structure

4 | 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 (for example, 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.

Laws and regulations

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

The provisions of the 2014 Act, which has consolidated Irish company law, is the primary piece of legislation that needs to be considered as part of any reorganisation. The 2014 Act is the primary source of law that 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 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 Business Research 2021

National authorities

6 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 sometimes be required in advance of implement the restructuring;
- the Government Grant Authorities. In certain circumstances, the terms of grant aid funding provided by government grant aiding bodies such as Industrial Development Authority (IDA) 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 (CRO), including details of any variation of share capital, the passing of any special shareholder resolutions and revisions to the constitution of the company; and
- 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.

KEY ISSUES

Preparation

7 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 transitionary 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).

Employment issues

8 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. Where the reorganisation constitutes a transfer for the purpose of TUPE, those employees who are wholly or mainly assigned to the transferring business 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, a 30-day information and consultation period with employees is required and this time frame should be considered as part of the overall timeline of the reorganisation. However, 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.

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 the express 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.

9 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 (for example, 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 re-organisation 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.

© Law Business Research 2021

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 (for example, 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

10 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.

Common problems

11 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 (for example, as a result of filings required to be made at the CRO, the RBO, 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?

ACCOUNTING AND TAX

Accounting and valuation

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

The accounting treatment of corporate reorganisations are, 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.

Tax issues

13 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 relief are as follows:

- Capital gains tax. A 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. 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. 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. The transfer of patent rights in return for consideration may be subject to tax at 25 per cent (section 757 TCA).
- Stamp duty. A stamp duty rate of 1 per cent is applicable on the transfer of shares and 6 per cent on 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 and section 79 SDCA for group restructurings.
- Value added tax (VAT).

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 (DAC6), which are

© Law Business Research 2021

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.

CONSENT AND APPROVALS

External consent and approvals

14 | What external consents 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 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.

Internal consent and approvals

15 | What internal corporate consents 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.

ASSETS

Shared assets

16 | 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.

Transferring assets

17 | 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 is 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.

18 | 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.

© Law Business Research 2021

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 is 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.

FORMALITIES

Date of reorganisation

19 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.

Documentation

20 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 DAC6 reporting requirements (if applicable)), CRO filings, RBO filings, share certificates and updated statutory registers.

Representations, warranties and indemnities

21 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 a 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.

Assets versus going concern

22 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).

Types of entity

23 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 2014 Act, 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 Business Research 2021

Post-reorganisation steps

24 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 DAC 6 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.

UPDATE AND TRENDS

Hot topics

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

Despite restrictions introduced to deal with the covid-19 pandemic, there was a significant level of activity with international technology companies in particular looking to restructure international ownership of intellectual property rights and product delivery structures. We expect that to continue throughout 2021. The increase in corporate M&A activity in the final quarter of 2020, and general economic optimism driven by vaccine developments for covid-19 in that period, is expected to further drive reorganisational activity in 2021, in terms of post-acquisition integration activity in particular.

With the conclusion of the transition period under the withdrawal agreement between the EU and the UK on 31 December 2020 and the challenges that arose in negotiating the trade agreement between the UK and the EU, the full practical impact of Brexit on international trade is beginning to emerge. However, we expect that it will continue to further drive reorganisational activity as international companies continue to assess how they can best service both EU and UK markets in the post-Brexit era.

26 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

In August 2020, the Irish government introduced certain temporary relieving measure in the form of the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 (the 2020 Act) to ease some of the difficulties faced by Irish companies due to the covid-19 pandemic. Changes include:

- the introduction of certain flexibilities around the execution by Irish companies of documents under seal, allowing countersignature in several, separate locations;
- certain flexibilities around the holding of shareholder meetings, including annual general meetings (AGMs) of Irish companies, by electronic or hybrid means. Companies could also opt to postpone 2020 AGMs up to 31 December 2020; and
- final dividends – directors of a company can, subject to certain restrictive conditions, withdraw or amend a previous resolution to approve a final dividend if there has been a change in the financial circumstances of the company in light of actual or perceived consequences of covid-19 on the company.

The temporary measures apply for an interim period, which has been extended until June 2021 with the possibility for further extension if necessary. The extension does not apply to 2020 AGMs, which must have been held by 31 December 2020.

Employment

The main pieces of legislation introduced were the Emergency Measures in the Public Interest (Covid-19) Act 2020 and Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 (the Acts). The key measures introduced under these Acts were the Employment Wage Subsidy Scheme (formerly the temporary wage subsidy scheme); a prohibition on employees who have been temporarily laid off or put on short time due to the covid-19 pandemic from claiming a statutory redundancy payment until 31 March 2021; income payments to those unemployed or partially employed due to the pandemic and emergency measures to prevent or slow the spread of covid-19. In addition, the government introduced the Resilience and Recovery 2020–2021: Plan for Living with Covid-19 in September 2020 (the Plan). At the heart of the Plan is the framework for restrictive measures that assigns five levels of response to deal with different levels of threat based on the incidence of covid-19 in the country at any one time. The government also published the Return to Work Safely Protocol in May 2020 and a revised protocol in November 2020. The purpose of the Protocol is to ensure the safe ongoing operation of workplaces or the safe reopening of workplaces.

Managing covid-19, and all the various matters and issues it presents, is likely to continue being a key focus for organisations. In line with the Plan, we are likely to see various degrees of restrictions for much of the year ahead. What is clear is that the Irish government does not currently foresee a full return to workplaces, on a phased basis or otherwise, even where the risk of covid-19 is at its lowest and Level 1 is activated. For larger employers, the queries around health and safety continue to be at the forefront. Many international employers have considered the introduction of temperature testing, covid-19 testing and most recently covid-19 vaccinations for their employees as precautionary and preventative measures required to mitigate the risk of covid-19 in the workplace. These are complex questions from an employment and data privacy perspective that require careful consideration and analysis, but our prediction is that they will continue to be key considerations for employers in the year ahead.

Direct tax

From an Irish corporation tax and stamp duty perspective, there has been no specific legislation or amendments implemented in respect of corporate reorganisation as a result of covid-19.

Revenue have issued guidance with respect to corporation tax and the presence of employees or directors in Ireland or outside Ireland resulting from covid-related travel restrictions such that Revenue will be prepared to disregard such presence for corporation tax purposes. The individual and the company should maintain a record of the facts and circumstances for production to Revenue, if evidence is requested.

VAT

From an Irish VAT perspective, there have been significant measures introduced to cater for the impact of covid-19, particularly in the realm of VAT rates. Most materially, the standard rate of VAT is subject to a

© Law Business Research 2021

temporary reduction from 23 per cent to 21 per cent that shall be in place until 28 February 2021.

A reduced rate of 9 per cent (previously 13.5 per cent) was introduced for certain services in the hospitality and tourism sector, which includes restaurant, catering, holiday accommodation, hairdressing, entertainment services and sales of particular printed items such as brochures, maps and programmes. A zero per cent VAT rate was introduced for the supply of certain equipment for use by the Irish Health Service (HSE) in dealing with covid-19 including personal protection equipment, thermometers, hand sanitiser, oxygen, medical ventilators and specialist respiratory equipment including respirators for intensive and sub-intensive care and other oxygen therapy apparatus including oxygen tents, covid-19 vaccines, in-vitro diagnostic medical devices (testing kits) and services that are directly linked and necessary for the supply of those vaccines and testing kits. Furthermore, Revenue have also implemented EU Commission Decision 2020/491 of 3 April 2020 (as amended) to allow goods that are for the purpose of combating covid-19 to be imported, from outside the EU, free of import duties and VAT. The availability period of this temporary relief has been extended by EU Commission Decision 2020/7511 of 28 October 2020 until 30 April 2021. For organisations such as state bodies, charities and businesses importing on their behalf to avail of such relief, the entities must be authorised by Revenue and use the goods for covid-19 purposes and make such items available free of charge to people at risk.

Additionally, the Irish government announced a reduced interest rate of 3 per cent per annum for non-covid-19 related tax debts, which included VAT debts provided that the taxpayer had entered into phased payment agreements with Revenue no later than 31 October 2020. Revenue have introduced a new scheme designed to ring-fence VAT debts that were deferred while a business was unable to trade or was subject to restricted trading due to covid-19 related health restrictions. The ring-fencing arrangement will consist of three designated periods in respect of which different treatments (particularly from an interest perspective) will apply.

Revenue have emphasised that they will continue to prioritise the approval and processing of VAT repayments and refunds to taxpayers during the covid-19 crisis. Businesses are encouraged to contact Revenue when they experience any temporary cash flow or trading difficulties.

Excise and import duties

To facilitate uninterrupted importation and supply chains, critical pharmaceutical products and medicines have been given 'green routing' status from a customs perspective. Revenue have also introduced a mechanism since 30 January 2020 for refunding customs duty and VAT incurred on goods that were imported to combat the effects of covid-19.

Producers of a range of medicinal and other products such as hand sanitisers are eligible to claim relief from alcohol products tax for alcohol used in the production of such products.

* *The authors would like to thank Catherine O'Meara, Matthew Broadstock, Deirdre Cummins, Alison Finn and Mariam Asanishvili for their contribution to this chapter.*

Fergus Bolster
fergus.bolster@matheson.com

Kieran Trant
kieran.trant@matheson.com

70 Sir John Rogerson's Quay
Dublin 2
Ireland
Tel: +353 1 232 2000
Fax: +353 1 232 3333
www.matheson.com

© Law Business Research 2021

Other titles available in this series

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Business & Human Rights
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
Drone Regulation
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
Healthcare M&A
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
Luxury & Fashion
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Partnerships
Patents
Pensions & Retirement Plans
Pharma & Medical Device Regulation
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

lexology.com/gtdt

an LBR business

ISBN 978-1-83862-642-6

© Law Business Research 2021