Ireland

Negotiated M&A Guide 2022

Corporate and M&A Law Committee

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1. INTRODUCTION AND SCOPE

Private company business combinations in Ireland usually take the form of either a purchase of the issued share capital of a company (share purchase), or a purchase of a company's trade or business in the form of assets and/or liabilities (asset purchase). This guide provides an overview of negotiated M&A practice in Ireland, primarily in in relation to share purchases of private companies.

In the context of an Irish share purchase or asset purchase, there is no codified system of protections afforded to a prospective buyer (the purchaser) nor a codified set of obligations imposed on a seller (the vendor), nor is there an implied duty of good faith (unlike certain European jurisdictions). Instead, the common law principle of *caveat emptor* (buyer beware) applies. The purchaser must therefore build protections into the share purchase agreement (the SPA) or asset purchase agreement (the APA).

The principal law relating to the constitution and governance of companies in Ireland, and the rights of shareholders as the members of these companies, is the Companies Act 2014 (the Companies Act), which came into effect on 1 June 2015 and which reflects EU company law. The Companies Act is widely regarded as 'business friendly', modernising what was previously viewed as outdated legislation. The Act introduced new procedures for the merger and division of private companies in certain circumstances. While helpful, these procedures are of somewhat limited application and, as before, the law generally governing the sale and purchase of companies is common law contract.

1.1 Share purchases

The majority of company acquisitions are structured as share purchases. Consistent with international practice, the advantage of purchasing a company (often referred to as the target) by buying its shares is that the target continues in its existing form and the purchaser merely steps into the shoes of the vendor. With this form of purchase, it is the ownership of the company that is acquired (rather than just the assets and liabilities). As a result, in acquiring the company, the purchaser acquires the company with both its assets and liabilities 'as is'. The level of awareness of, or disclosure to, the purchaser of those assets and liabilities is not generally relevant in terms of what is acquired. However, in light of those principles, and the important related principle of *caveat emptor*, the SPA contains extensive representations, warranties and transaction-specific indemnities from the vendor (supplemented with disclosures, commonly in the form of a disclosure letter) following a due diligence exercise. As a result, the primary liability of a vendor for undisclosed liabilities and obligations, or assets which fall short of expectation, is detailed in the contractual terms of the SPA.

1.2 Asset purchases

With an asset purchase, the vendor is the company and the company remains owned by the company's shareholders (not the purchaser). This form of sale can be more advantageous to a purchaser than a share purchase in circumstances where the purchaser does not want to assume all the target's assets and liabilities. This may arise where there is specific interest in certain assets, or uncertainty surrounding identifiable or hidden liabilities. In a scenario where known liabilities are unquantifiable, an asset purchase may also be the more attractive option. The purchaser can cherry-pick the desired assets while avoiding undesired liabilities. The completion of an asset purchase is often more complicated than a share purchase because the agreement and ancillary documentation must provide for the transfer of title to different classes of assets (each with different transfer rules) rather than a single transfer of shares. European employment regulations make general provision for the transfer of employees on existing terms with the sale of a business (often referred to as TUPE) and add a further degree of complexity in in circumstances where employees transfer with the assets.

Tax considerations can also have an impact on whether to structure a deal as a share purchase or an asset purchase. In terms of the sale transaction, stamp duty on a transfer of shares is charged at 1 per cent of the market value of the shares purchased or the consideration paid (whichever is the higher), while the stamp duty payable on assets can be up to 6 per cent depending on the class of assets purchased (with the exception of certain long-term leases, which can attract rates of 6–12 per cent based on average yearly rental yield). Additionally, with a share purchase the vendor is the shareholder who receives the sale proceeds, whereas in an asset sale scenario, the company receives the sale proceeds in its capacity as vendor. As a result, asset sales often require additional tax planning for the shareholders to receive any proceeds.

1.3 Merger and divisions of private companies under the Companies Act

The Companies Act introduced a new procedure under which two Irish private companies, at least one of which is a private limited company – also referred to as a CLS (as defined in Section 2 (Overview of the Irish Company Structures)) – may merge, so that the assets and liabilities of one or more companies are transferred to another, and the transferring company or companies are dissolved without going into liquidation. Such mergers require a Summary Approval Procedure (as defined in Section 5.3 (Financial Assistance)) to be complied with, or court sanction to be obtained.

A similar procedure permits the division of private companies, whereby the assets and liabilities of one company are acquired by two or more companies. However, a division can only be done with court approval.

2. OVERVIEW OF IRISH COMPANY STRUCTURES

In the context of M&A, there are two types of limited companies: public limited companies and private limited companies. The principal differences between public and private companies are that private companies: (1) have limits on the number of shareholders (149); (2) have limited liquidity or transferability of shares; and (3) in certain circumstances, cannot make public offers of their securities. This chapter addresses the stages inherent in private company acquisitions.

The Companies Act created new forms of private companies replacing the old 'private limited company'. The most common of these new form companies is the private company limited by shares (CLS or LTD) and the designated activity company limited by shares or by guarantee with a share capital (DAC) (together private limited companies). The CLS is the most similar to the old private limited company, except that it has greater flexibility around its capacity and governance than the DAC or the old private limited company. Both the CLS and the DAC have limited liability: once their shares are fully paid up, members or shareholders who are not directors in the company have no further liability or obligation to creditors (there are a small number of exceptions).

Private limited companies are formally established once a certificate of incorporation is issued by the Irish Companies Registration Office (the CRO). In order to be incorporated, a company must file a statutory document along with its constitution (its charter and by-laws) with the CRO.

Private limited companies must have at least one director who is a European Economic Area (EEA) resident. If one director is not an EEA resident, a company can purchase a bond in the amount of €25,000 which is then filed with the CRO. Alternatively, a company can apply to the CRO for a certificate stating that the company has a 'real and continuous link with one or more economic activities that are being carried on in the State'; if granted, the company will be exempt from the requirement to have an EEA-resident director.

3. STRUCTURE OF M&A TRANSACTIONS

The lifecycle of an M&A transaction can be broadly split into three stages:

- Stage 1: Pre-agreement documentation and processes;
- Stage 2: Completion documentation and processes; and
- Stage 3: Post-completion documentation and processes.

The Figure 1 demonstrates the documentation that a vendor and purchaser can expect to negotiate in Stage 1 and Stage 2 of the transaction.

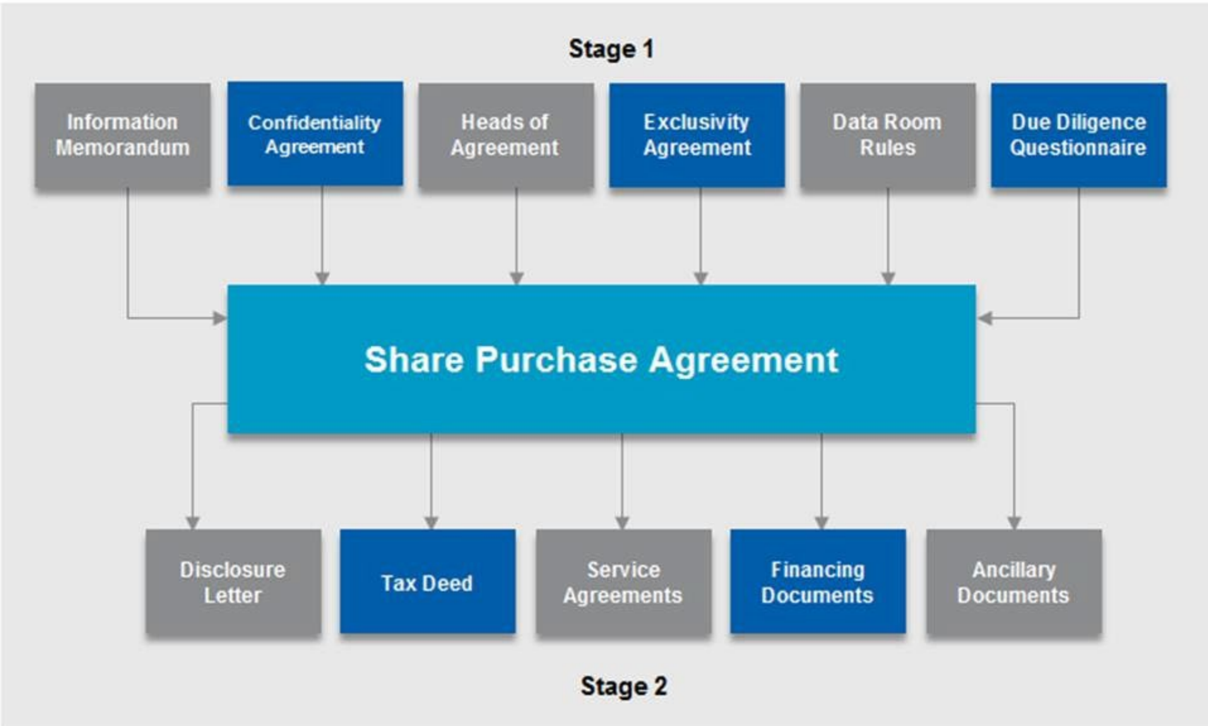

Figure 1: Lifecycle of a private M&A transaction

4. STAGE ONE: PRE-AGREEMENT DOCUMENTATION AND PROCESSES

In the initial stages of the negotiation of a share purchase, and prior to the completion of the legal documentation, it is customary in Ireland for certain pre-agreement documentation to be issued or made available and to be agreed between the vendor and the purchaser.

4.1 Information memorandum

An information memorandum (IM) prepared by a vendor (or its advisers) sets out information about the target. The IM will usually incorporate a history of the company, its strategy, some market analysis, financial information and a guide to past performance.

In the context of a negotiated sale between only two parties, it is unusual for a vendor to prepare an IM. However, it would be customary where there are a number of potential purchasers, and where an auction process is envisaged. The corporate finance adviser will prepare the IM and circulate it to certain parties that it has identified in the market as potential suitors. The release of the IM to potential suitors is usually conditional on the execution by the parties of a confidentiality agreement.

4.2 Confidentiality agreement

In the course of due diligence and any subsequent negotiations between parties, non-public and commercially sensitive information will usually be disclosed to a potential purchaser. The vendor will be concerned about any potential onward dissemination or disclosure of such information to third parties (particularly competitors) and will therefore usually require that the prospective purchaser sign a confidentiality agreement, also known as a non-disclosure agreement (NDA). In an auction process, NDAs are commonly negotiated with individual purchasers before execution.

The terms of the NDA usually contain a definition of what information will be considered to be confidential, and in what manner such information may be disclosed and stored. The NDA will contain restrictions on the use of such confidential information and is designed to prevent an unsuccessful purchaser from disclosing information it has received. NDAs often try to limit the use of the confidential information by a disclosee by incorporating provisions that require any documentation or information provided to be returned to the discloser and/or destroyed.

A purchaser might seek to incorporate an exclusivity period into the NDA, preventing the vendor from negotiating with third parties for a predetermined amount of time. Alternatively, these provisions can be incorporated into a separate exclusivity agreement.

4.3 Exclusivity agreement

Exclusivity agreements (otherwise known as lock-out or shut-out agreements) provide that the vendor will not negotiate or solicit offers from parties other than one prospective purchaser for a fixed period of time.

This commitment from a vendor offers the potential purchaser comfort that they can undertake an extensive due diligence exercise and incur other transaction costs safe in the knowledge that they have exclusive negotiation rights. The exclusivity agreement can also prevent the vendor from using the purchaser’s offer as leverage to encourage further offers.

Break fees or expense reimbursement arrangements may be agreed if the transaction is aborted. The liability to pay these fees or expenses may lie with either the vendor or the purchaser depending on the relative strengths and bargaining power of the parties.

It is important that any restriction periods are fixed, certain and reasonable. A clause which prevents one party from negotiating for a period which is not fixed in time or which is deemed unreasonable is less likely to be enforceable. Once the parties have reached agreement in principle on the substantial terms of a transaction, they will usually seek to put heads of agreement (heads) in place.

4.4 Heads of agreement/memorandum of understanding

Heads are normally entered into by the vendor and a prospective purchaser immediately after the key commercial terms of the deal have been agreed in principle. These agreements (also known as heads of terms, letters of intent or memoranda of understanding) are usually short documents setting out the high-level agreement between the parties on issues such as the shares to be acquired, the consideration payable, any conditions to completion, timetable and process, responsibility for drafting agreements, due diligence, warranty cover, confidentiality and exclusivity.

The heads can therefore be a useful mechanism for helping the parties identify key terms and for setting out a road map to completion.

As a rule, heads are stated to be not legally binding (except as to confidentiality and exclusivity obligations which will be explicitly binding); however, they are often considered 'morally binding' by the parties. As such, a purchaser or vendor can find it difficult at a later stage in the transaction to materially vary the deal terms from those set out in the heads, other than through negotiation.

4.5 Due diligence

Offers to purchase a target are usually conditional on the purchaser being satisfied with the results of a due diligence evaluation of the target. The process of due diligence is designed to determine whether the assets or business of the target supports the proposed valuation of the purchaser.

In the context of a share purchase, due diligence will usually encompass the investigation of the commercial, business, legal and financial affairs of the target. In addition to the usual litigation, pensions, property, competition and banking due diligence, if there are aspects of the target's business subject to industry-specific regulation, the due diligence may include environmental, actuarial, IT or financial services matters. Any issues that arise out of the due diligence process can be used by the purchaser to renegotiate the price or the terms of the deal. The results of the due diligence process will also impact directly on the warranties and indemnities that will be sought by the purchaser in the SPA. Equally, it also helps to identify any conditions or consents needed for the SPA.

Structuring the due diligence process in a streamlined and effective manner is essential to achieving a comprehensive review of the target. The process will usually involve a diverse number of professionals, such as lawyers, accountants, corporate finance advisers and specialists. It is imperative for a purchaser to decide at an early stage on the extent of the due diligence, and any special areas to be explored, as the process will vary considerably depending upon the nature of the transaction.

4.6 Virtual data rooms

In smaller transactions, due diligence can be as informal as the exchange between the parties of a due diligence questionnaire drafted by the purchaser and completed by the vendor. In larger transactions, a more in-depth review is usually required. Historically, due diligence required the purchaser's due diligence team to carry out its investigations 'on site' by reviewing hard copy documents at the offices of the vendors or their advisers. While in certain circumstances on-site reviews are still necessary (eg, for premises and machinery inspections), the vast majority of due diligence is conducted through the use of virtual data rooms (VDR) enabling prospective purchasers in M&A transactions to conduct due diligence online instead of in a physical data room.

There are several advantages to conducting due diligence through VDRs. They greatly accelerate the M&A process as access is not confined to business hours and multiple potential purchasers can view due diligence information simultaneously. From the vendor's perspective, they provide better supervision of the prospective purchaser's activities and the VDR allows it to audit the information reviewed by potential buyers from phase to phase in a deal.

To protect confidential information, VDR providers incorporate a variety of security features into the VDR, such as displaying documents in a read-only format, inserting watermarks on printed documents and requiring viewers to enter and re-enter passwords and usernames regularly.

5. STAGE TWO: TRANSACTION DOCUMENTATION AND PROCESSES

The purchaser should determine at a very early stage how the acquisition will be structured, as this can have a fundamental impact on the cost and timing of the transaction itself and the post-completion integration process. In the context of either an asset purchase or a share purchase, the transaction may also require some pre- or post-transaction restructuring. Often more than one process will run parallel to the actual acquisition (eg, the negotiation of financing documentation with banks and/or investors).

5.1 Consideration

The purchaser and the vendor will commonly negotiate the structuring of the consideration together. In an Irish context, purchasers may offer cash, shares,[1] loan notes, warrants, promissory notes, or any combination of these as consideration. In certain circumstances, a purchaser will want to hold back a percentage of the consideration until some point in the future or until the occurrence of certain events. In Ireland, there are several standard methods in which the purchase price can be deferred, or in which payment of consideration can be made conditional.

5.1.1 Earn-out

An earn-out is a mechanism where a portion of the purchase price is held back, and payment is determined by reference to the future performance of the target. It is most common where some of the vendors are executives who will remain with the target post-completion, with the aim of incentivising them to continue to grow and develop the business.

The advantages of an earn-out mechanism to a purchaser are (1) that payment is conditional and deferred; and (2) key management is incentivised to stay with the target and generate profits. Conflicts can occur where the vendor and the purchaser have different priorities. The vendor will want an outcome or performance by the end of the earn-out period consistent with optimal payment. Conversely, a purchaser may wish to focus on longer-term or strategic issues. Governance arrangements for the earn-out period need careful negotiation and can sometimes be contentious as the parties seek to balance competing priorities.

The definition and calculation of the key target metrics are commonly subject to considerable negotiation, and the accountants and financial advisers of each party will be involved in the formulation of the earn-out mechanism.

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[1] A purchaser should expect to have to provide warranties to the vendor where the purchaser's shares are issued as consideration.

The purchaser will usually seek some form of set-off for any deferred consideration against any warranty or indemnity claims.

5.1.2 Post-completion accounts

A post-completion accounts mechanism is designed to protect the purchaser who is seeking assurances on the value of the shares of the target prior to paying over the entire consideration. Post-completion accounts are therefore normally prepared where the parties have agreed to a post-completion adjustment to the consideration based on profits, net assets or a valuation of specific assets of the target. This mechanism is usually requested by the purchaser where specific assets are key to the deal, or the last set of audited accounts relate to an extended period prior to completion. The purchaser will usually seek some form of set-off for any deferred consideration against any warranty or indemnity claims.

The method of preparation of the accounts, the process for agreeing on the accounts, and any dispute resolution procedures are again subject to extensive negotiation. The accountants and financial advisers of each party tend to be heavily involved in the negotiation of the post-completion accounts mechanism.

5.1.3 Locked box mechanism

An alternative to the post-completion accounts mechanism as set out above (which is generally considered to be purchaser-friendly in terms of process) is the locked box mechanism (which is generally considered to be vendor-friendly in terms of process). The locked box is a mechanism pursuant to which the parties agree on a price payable for the target, generally based on a balance sheet drawn up and settled between the parties to an agreed date in advance of signing the SPA. The commercial principle behind the locked box mechanism is that the balance sheet of the target will be 'locked up' as at an agreed date, and the purchaser will commercially bear all risks in the target business and receive all profits after the locked box date.

There will usually be considerable negotiation in relation to what actions on the part of the vendor are and are not permissible during the period. In particular, the purchaser will be keen to ensure that there is no leakage (eg, through payments to shareholders – also known as 'leakage') from the target business during this period. What is considered to be leakage (and any 'permitted leakage') will again be decided between the parties.

5.1.4 Deferred consideration

A purchaser may request that a certain proportion of the consideration is held back (or held in escrow) in circumstances where there is a concern regarding potential breaches of warranties in the agreement, or a concern that the vendors may not be in a financial position to satisfy warranty claims that may arise (or occasionally, where the purchaser's funding model involves staged payments). Unlike the earn-out model, the deferred consideration payment is not usually dependant on or contingent upon the performance of the business.

The purchaser will usually strive to include an explicit right in the agreement which confirms that the purchaser will be entitled to reduce the deferred consideration to be paid by the amount of any warranty or indemnity claims, notwithstanding any equitable right of set-off that a purchaser may have. There will be negotiation on the duration of the deferral and as to whether deferred consideration can be set off against claims notified to the vendor, or whether claims have to be adjudicated by a competent Irish court to be validly set off.

5.2 Consents required

It is critical that any third-party or regulatory consents are identified at an early stage in the transaction process. Such consents may have a significant impact on timing and cost. Consents and approvals that are customary in the Irish context include those which can be categorised as transactional consents and those which are corporate or commercial consents.

5.2.1 Transactional consents

Principal transactional consents identified in Ireland are:

(a) merger/competition clearance; and
(b) regulatory consent.

These consents are transactional consents, and the transaction cannot proceed until specific approval has been obtained.

Merger/competition clearance

Mergers with a European Union dimension are governed by Council Regulation 139/2004 on the control of concentrations between undertakings (EMCR). If the EMCR applies, and the merger or acquisition has an EU dimension, the European Commission (not the Irish Competition and Consumer Protection Commission (the CCPC)) will have exclusive jurisdiction over the notification.

Mergers which are not caught under the EMCR but which meet the compulsory notification conditions under the Irish Competition Act 2002[2] (as amended by the Competition and Consumer Protection Act 2014) (the Irish Competition Act) must be notified to the CCPC. A number of important changes to the regime took effect on 31 October 2014.

CCPC mergers

Mergers, acquisitions (of shares and/or assets that constitute a business to which a turnover can be attributed, including goodwill) and full-function joint ventures created on a 'lasting basis' may be notifiable to the CCPC. The acquisition of 'control' is a requirement for a notifiable merger (generally seen as the ability to exercise decisive influence). The CCPC will consider purchaser and vendor group companies in its determination.

If such a transaction is a qualifying transaction and if the notification thresholds under the Irish Competition Act (notification thresholds) are satisfied, then notification to and approval from the CCPC must be made and obtained before the merger is put into effect. Failure to make a compulsory notification is an offence which will result in liability being imposed on the undertaking concerned, or on the person in control of the undertaking who knowingly and wilfully authorised or permitted the breach.

The notification thresholds for a mandatory notification to the CCPC are, in their most recent respective financial years (including unaudited):

[2] The text of the Competition (Amendment) Bill 2022 has been published, which proposes changes to the Irish Competition Act to give effect to the implementation of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 empowering Member States' competition authorities to be more effective enforcers and to ensure the proper functioning of the internal market.

a) the aggregate turnover in Ireland of all the undertakings involved is at least €60m; and
b) the turnover in Ireland of each of at least two of the undertakings involved is at least €10m.

Turnover under Irish merger control comprises sales made or services supplied to customers in Ireland. These financial thresholds do not apply in the case of media mergers, to which a special regime applies.

Notification may take place before an agreement that will result in a merger is signed, eg where the undertakings involved demonstrate a good faith intention to conclude an agreement or where an intention to make a public bid has been publicly announced by one of the undertakings involved. The notification process comprises two assessment phases. Phase 1 lasts up to 30 working days (including the date of notification) but can be extended to 45 days if the notifying parties offer commitments. Phase 2 can take an additional 120 days, with the possibility of an extension to 135 working days where commitments are offered by the notifying parties. A standstill period is also available where further information is requested by the CCPC – time will recommence once the information sought has been furnished.

In Phase 1, the CCPC must clear a notified merger or refer it to Phase 2. In Phase 2, the CCPC must clear (with or without conditions) or prohibit a merger. The test applied by the CCPC is whether the merger would substantially lessen competition in any market in Ireland. Most transactions which are notified to the CCPC are cleared at Phase 1.

Even if the thresholds are not met, it may still be advisable to make a voluntary notification under the Irish Competition Act where the merger raises competition law concerns. A voluntary notification will generally be advisable if the merger will either constitute an agreement which restricts competition or constitutes an abuse of a dominant position in Ireland or in a substantial part of Ireland. While there is no obligation to make a voluntary notification (and no fine can be imposed for non-notification), parties which enter into such mergers without clearance under the Irish Competition Act run the risk of having their merger declared void. The advantage of a voluntary notification in these circumstances is that the merger will be immune from challenge under the anti-competitive and abuse of dominance provisions of the Irish Competition Act (provided it is cleared). There are, however, disadvantages in making a voluntary notification such as: (1) the fact that the notification is made public; (2) there could be a delay in issuing a decision; (3) third parties or competitors may be invited to comment; and (4) the possibility that the CCPC may either prohibit the transaction or impose conditions.

All media mergers must be notified to the CCPC, regardless of whether they meet the monetary thresholds applied to non-media mergers. 'Media business' is defined in the Irish Competition Act as relating to publication of newspapers or periodicals, providing a broadcasting service, and providing a broadcasting services platform: it encompasses online media, such as the publication of newspapers or periodicals consisting substantially of news and comment on current affairs on the internet.

There are further exemptions applying to mergers or acquisitions involving financial institutions, which were introduced in particular as a result of the financial crisis in 2008.

EMCR mergers

A transaction with an EU dimension must be notified to and cleared by the European Commission prior to implementation. There are two alternative tests in determining whether there is an EU dimension and a notification is required. The transaction has an EU dimension where:

- the combined aggregate worldwide turnover of all the undertakings concerned is more than €5bn; and
- the aggregate EU-wide turnover of each of at least two of the undertakings concerned is more than €250m (unless each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover in one and the same EU Member State).

If the transaction does not meet the thresholds listed above, it shall have an EU dimension where:

- the combined aggregate worldwide turnover of all the undertakings concerned is more than €2.5bn; and
- in each of at least three EU Member States, the combined aggregate turnover of all the undertakings concerned is more than €100m; and
- in each of at least three EU Member States referenced above, the aggregate turnover of each of at least two of the undertakings concerned is more than €25mn; and
- the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than €100mn (unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same EU Member State).

Regulatory consent

In an Irish context, acquisitions which involve regulated entities usually require notifications and/or consent from competent authorities, such as the Financial Regulator, the Minister for Finance or the Central Bank. A comprehensive review of the specific consents required in each case is beyond the scope of this chapter as each consent will be transaction specific.

Other transactional consents

The nature of these consents will vary from case to case. However, examples which are relevant where less than 100 per cent of the shares are being bought, include the consent of other shareholders.

5.2.2 Corporate or commercial consents

A purchaser will also need to establish what corporate or commercial consents may be required for a transaction. These consents usually arise out of contractual obligations, either because a change of control gives the counterparty the right to terminate or renegotiate a material agreement with the target, or because the sale will result in an event of default by the target. Examples of such consents are:

(a) material customer or supply contracts;
(b) banking or other funding contracts;
(c) grant aid contracts; and
(d) joint venture agreements involving the target and third parties.

It is customary for such consents or warrants to be obtained either in the period leading up to completion, or as a condition to completion.

In circumstances where a vendor is in receipt of grant aid from an Irish statutory or semi-state body, consent will usually be required (unless all grant monies are to be repaid). The usual grant authority consents that are required in an Irish context are from Enterprise Ireland (a semi-state body tasked with promoting and supporting indigenous Irish companies) and from the Industrial Development Agency (IDA) (also a semi-state body, tasked with promoting foreign direct investment in Ireland). Enterprise Ireland and the IDA should be kept abreast of the transaction from an early stage to ensure that such consents can be delivered in a timely manner.

In circumstances where due diligence has identified a corporate or commercial consent that is business-critical (eg, a change of control clause in a material contract), or has identified a transactional consent, the parties will often have a split signing and completion. This means that the parties will execute the agreement but the completion of the transaction will be conditional on the consents being obtained. In such circumstances, it is usual for a purchaser to seek to include a right to terminate the agreement (or walk away) if the consents are not obtained (with acceptable conditions) by a certain date.

5.3 Financial assistance share sale

The Companies Act prohibits a target giving commitments or permitting its assets to be used to leverage the acquisition or its funding, either directly or indirectly (financial assistance).

The rationale behind the prohibition is to avoid a reduction in shareholder funds by a limited liability company and to prevent prejudicial action by shareholders to prioritise their rights and entitlements at the expense of creditor protection. Financial assistance can be provided by a private limited company if an approval procedure (the summary approval procedure) is followed.

This requires the directors of the target to swear a statutory declaration that the company will be able to discharge its debts and other liabilities in full within the 12-month period following the transaction or arrangement. The declaration must also outline the nature of the benefit which will accrue to the target directly or indirectly from the transaction. The transaction requires the approval of at least 75 per cent of the shareholders of the target not more than 12 months in advance of any financial assistance being provided.

The summary approval procedure rules provide that an Irish court may, on application of a liquidator, creditor, member or contributory of the target, or the Director of Corporate Enforcement, declare a director personally responsible without any limitation of liability, for all or any liabilities of the target where a declaration is made without having reasonable grounds for the opinion on the solvency of the target as set out in the declaration. Importantly, it will be assumed that the directors did not have reasonable grounds for swearing the statutory declaration if the target is wound up within 12 months of the swearing of the statutory declaration.

Although not within the scope of this guide, it should be noted that the summary approval procedure is not available to public limited companies, other than in very limited circumstances.

5.4 The share purchase agreement

The SPA, whether in respect of a share purchase or an asset purchase, can generally be divided into four parts: (1) the parties, recitals and definitions; (2) the completion and consideration provisions; (3) the warranties; and (4) the boilerplate provisions. We have summarised the principle clauses below.

5.4.1 Parties

Where corporate entities are parties to the SPA, the company number as well as the company's registered name and address should be stated (as the name may change). In the case of a share sale where the legal and beneficial ownership of the shares is held by separate entities, it is recommended that both the legal and beneficial owners are joined as parties to the SPA. The target may in certain circumstances be joined as a party to the SPA so that it can directly enforce certain provisions of the SPA (eg, restrictive covenants, confidentiality obligations and warranties) against the vendors, but this is rare.

If the vendor is not an Irish company, a purchaser will usually seek an appropriate opinion from the vendor's local lawyers confirming that the vendor has capacity to enter into the transaction, and that the SPA is enforceable in accordance with its terms and vice versa.

5.4.2 Recitals

The recitals simply set out the basic purpose of the SPA. Where there is a conflict between the terms of the recitals and the body of the SPA, the latter will prevail.

5.4.3 Definitions and interpretation

The definitions section is a simple glossary of terms used in the SPA and is usually followed by interpretation provisions which set out how the SPA is grammatically structured.

5.4.4 Sale of shares – in the case of a share sale

It is important for a purchaser to have an explicit assurance as to title to the shares in the main body of the SPA, notwithstanding any protection in the warranties. The sale clause will usually also provide (assuming 100 per cent of the shares are being sold) that the purchaser does not have to complete the deal if all the shares are not sold simultaneously, or if the vendors are not in a position to sell 100 per cent of the shares at completion. It is important that the legal and beneficial ownership of the shares is sold, and that they are sold free from encumbrances.

5.4.5 Sale of other assets

Depending on the nature of the assets being sold, different sale and transfer mechanics will be involved. For example, real estate sales will usually involve standard property assurance and transfer mechanics.

5.4.6 Consideration and completion

This clause sets out the formalities that actually have to occur for the transaction to close. The clause will set out how and where completion is to take place, the vendor's obligations at completion and the purchaser's obligations. Most importantly the clause will set out how the consideration is to be calculated, the manner in which the consideration is to be paid, and how the receipt of which is acknowledged. It is common for the consideration to be discharged by bank transfer, and receipt of same to be acknowledged by the vendor's solicitor.

In circumstances where there is a gap between signing and completion, this clause will set out the conditions that have to be satisfied for completion to take place.

5.4.7 Conduct of business

If there is a gap between signing and completion, the purchaser will want to ensure that the vendor operates the business in the usual course. Accordingly, this clause sets out the matters which the vendors will covenant between signing and completion (eg, that it will not incur capital expenditure above €X, that the business will be run in the ordinary course, and that no material commitments will be made). The conduct of business terms can be extensive depending on the risk to the purchaser and the value of the transaction.

5.5 Warranties and indemnities

5.5.1 Warranties

In common with practice in most common law jurisdictions, the SPA normally includes extensive warranties that are set out in a relatively standard format (supplemented by certain target or sectoral-specific additions) relating to the business and affairs of the target. The existence of a due diligence exercise does not usually change this, as liability is not usually accepted by the vendor for information made available (possibly to a number of potential suitors) at the due diligence stage. In addition, as indicated earlier, the principle of *caveat emptor* applies.

Warranties are usually a series of statements about the target, its business and affairs, and the shares being sold. Disclosures specific to the target are then made in a separate document, usually known as a disclosure letter, which is prepared by the vendor and negotiated and agreed with the purchaser before the signing of the SPA. The liability of a vendor to a purchaser is, therefore, usually limited to the extent of the matters fairly disclosed in the disclosure letter. The warranties can satisfy two key objectives:

(a) apportionment of risk and liability as between the vendor and purchaser by providing a contractual remedy of damages for any breach of warranty; and
(b) gathering information on the target. Notwithstanding extensive due diligence, it is often the case that issues will only come to light when a vendor considers the warranties.

Typical warranties sought by a purchaser in relation to a share sale would include, among others, the following:

- capacity of vendors (and purchaser), and title to the shares/asset;
- corporate governance and compliance with laws;
- accounting provisions, debts, profits, encumbered assets/shares and financial records of the company;
- employment;
- IP/IT and licensing;
- property;
- pensions;
- litigation;
- environmental; and
- tax.

In relation to asset sales, warranties are more tailored to the specific assets in question.

The main purpose and effect of the warranties therefore is to impose legal liabilities upon the vendors, and to provide the purchaser with a remedy if statements made by the vendors prove to be incorrect, reducing the value of the target. Where there is a particular concern over any potential liability or defect that a vendor has disclosed, it will often be addressed through a specific indemnity.

5.5.2 Warranty limitations

The warranties provided by a vendor are usually limited in time and scope.

Time limitation

In share sales, a period of time in which warranty claims can be brought is often the subject of heavy negotiation. A period of two or three years from completion is common, except in respect of tax matters when a period of five years is common (having regard to the entitlement of the Irish fiscal authorities to look back for that period).

Aggregate minimum claims: de minimis

It is normal market practice for a purchaser to be precluded from bringing a claim for small or immaterial matters (often referred to as 'nuisance claims'). The parties usually agree to provisions in the SPA whereby a purchaser cannot bring a claim for breach unless a warranty claim exceeds a fixed amount. It is also common to provide that individual qualifying claims must reach a minimum aggregate threshold before a purchaser can bring a claim (often referred to as a 'basket').

Maximum liability

This provision sets a cap on the potential liability of the vendors under the warranties. In smaller deals or deals with a trade vendor, the cap may be agreed at the level of the consideration paid. In larger deals, and particularly with financial vendors (eg, private equity funds), the cap is often agreed at a percentage of the consideration paid.

Non-application of limitations

This provision sets out any circumstances in which the limitations should not apply. For example, the purchaser would not usually accept a cap or time limit for warranties that relate to the title of the vendor to the shares as these are fundamental to the acquisition.

5.5.3 Indemnities

Purchasers can often discover an issue in the course of due diligence, or as part of the disclosure process, that is material to the transaction. In some cases, this will lead to a price reduction. In other cases, the issue may be material but its impact or financial risk may be uncertain. In those cases, an indemnity specific to the issue may be agreed instead of a price reduction.

5.5.4 Difference between warranties and indemnities

A warranty is a statement by the vendor about a particular state of affairs of the target. Under Irish law, if a warranty is untrue it will only give rise to a successful claim in damages if the purchaser can show that the warranty was breached and that the effect of the warranty being untrue is to reduce the value of the shares acquired. In contrast, an indemnity is an undertaking to pay an amount equal to the loss or liability arising due to a specified matter or event (eg failure to make tax payments when due). The amount is usually calculated on a euro-for-euro basis and the diminution in value does not have to be established by the party claiming. The other key differences between a warranty and an indemnity are as follows:

- *mitigation*: a purchaser is obliged under common law to mitigate any loss for a breach of warranty. Failure to do so may diminish liability for the claim. There is no equivalent obligation relating to an indemnity;
- *disclosure:* disclosures may be made against warranties but are usually not permitted against indemnities; and
- *purchaser's knowledge of breach:* a purchaser who is actually aware that a warranty is untrue could be precluded from bringing a claim on the basis that there was no loss suffered. However, knowledge of a breach will not usually preclude a purchaser making a claim under an indemnity. To the contrary, the existence of the issue in question has often given rise to the indemnity.

5.5.5 Warranty and indemnity insurance

There is an increasing trend in private M&A for parties (both on the buy and sell-side) to take out warranty and indemnity (W&I) insurance. W&I insurance covers against financial loss that may arise from a breach of warranty or indemnity in an underlying transaction document.

5.6 Restrictions on vendors

A purchaser will usually want to ensure that the goodwill of the target/assets is protected and that the vendor does not immediately start up in competition with the target/vendor after completion. Accordingly, in the context of a share sale in particular, the purchaser will seek covenants from the vendors who do not remain with the target from carrying on business in competition with the target.

Under Irish law, restrictive covenants will only be enforceable if they are reasonable and are no wider than necessary to protect the legitimate interests of the purchaser. The restrictive covenants must therefore be reasonable and must be limited in geographic scope, length and type of business to which the restriction applies. If the covenants are too broad and unreasonable, they will be deemed to be void. Restrictive covenants usually also extend to restrictions on the solicitation of customers, employees and suppliers. A period of up to two years from completion is not uncommon.

5.7 Boilerplate clauses

5.7.1 Announcements

In the context of confidential or sensitive transactions, the parties usually agree that no announcements can be made by either party without the consent of the other party.

5.7.2 Confidentiality

It is reasonable for the purchaser to require the vendor to keep confidential all it knows about the business so that the target's goodwill is protected.

5.7.3 Assignment

The basic principle at common law is that the benefit (but not the burden) of a contract may be assigned without the consent of the other parties to the SPA, unless there is a specific provision in the SPA which prohibits or restricts assignment.

A purchaser may wish to have flexibility in relation to the assignment of the SPA (eg, it may wish to assign the benefit as part of a purchaser group re-organisation or the benefit of the SPA to a third-party purchaser). In such circumstances the purchaser will seek specific rights on assignment. A vendor will usually be reluctant to permit assignment to subsequent purchasers.

5.7.4 Severability

Parties who have entered into the SPA may subsequently find that it contains provisions which are illegal, invalid or unenforceable. The purpose of a severance clause is to make it clear that, in such a case, the parties intend the SPA to survive by means of the severance of the offending provisions from the rest of the SPA. The effectiveness of this clause is limited under Irish law by the fact that, if an Irish court is asked to adjudicate on an SPA, it will not permit a clause to be severed where it would result in a new SPA between the parties, whether by re-writing the existing SPA or by altering its fundamental purpose.

5.7.5 Whole agreement

The purpose of an entire agreement clause is to allow the parties to clarify that the SPA itself sets out the entire agreement between them. It prevents either party relying on other documents, representations or understandings (oral or written) which have not been included as part of the SPA. Generally, this clause is in the vendor's interests as it attempts to ensure that it will not have any liability for any representations made to the purchaser about the business prior to completion, other than those in the SPA.

5.7.6 Survival

This clause is intended to capture a situation where parties have proceeded to completion and certain parties have failed to perform all their obligations. It makes clear that, notwithstanding completion, all obligations that are outstanding must still be performed.

5.7.7 Remedies cumulative

The principle behind this clause is that notwithstanding any express remedies within the SPA, the parties' rights outside of the SPA are not limited.

5.7.8 Waiver

The waiver clause in the SPA operates generally for the benefit of the purchaser only. The purpose of the clause is to ensure that failure by a party to enforce contractual rights under the SPA, whether deliberately or not, does not result in waiver of those rights or remedies for their breach.

5.7.9 Further assurance

This clause provides that the vendor will execute any necessary documentation to perfect the transfer of title to the shares or other assets.

5.7.10 Notices

The customary notice clause provides for personal delivery, ordinary post, airmail, registered post and fax.

5.7.11 Jurisdiction and arbitration

The jurisdiction clause enables the parties to agree which country's courts are to have jurisdiction to hear disputes arising from the SPA.

5.7.12 Execution of the SPA

Different execution formalities apply for individuals and companies. In addition, execution formalities differ if the SPA is to be executed as a written contract under hand or as a deed, and may depend on the nature of assets being sold. The advantages to executing the contract as a deed are that (1) the limitation period for actions brought on a deed is 12 years from the cause of the action, while it is six years in respect of a contract executed under hand; and (2) deeds are enforceable despite lack of consideration.

5.8 Tax deed of indemnity

While most matters, other than those that raise a specific concern for the purchaser, are dealt with by warranties, it is common practice in Ireland to have a separate deed of indemnity to the SPA in respect of any tax liability of the target that arises outside of the ordinary course of business. This tax indemnity will share many of the limitations and caps on liability that are in the SPA, but recovery for any taxation loss will be on an indemnity basis due to the strict liability nature of the offence.

The tax indemnity will normally last for a minimum of four years, this being the length of time the Irish fiscal authorities have to bring a claim. In addition to the tax indemnity, it is common to see tax warranties in the SPA with the proviso that there can be no double recovery under the warranties for a claim that has been recovered under the tax indemnity and vice versa.

6. STAGE THREE: COMPLETION AND POST-COMPLETION DOCUMENTATION AND PROCESSES

6.1 Completion

Whilst the completion and post-completion processes for M&A deals vary from transaction to transaction, certain procedures are standard. In a share sale scenario, the following would normally occur at the completion meeting:

- A meeting of the board of the target occurs, at which the transfer of the shares by the vendor to the purchaser is approved, the purchaser replaces the vendor in the register of members, the vendor's share certificates are returned and cancelled, and new certificates are issued to the purchaser.
- Various corporate secretarial issues are addressed relating to the sale, such as a resignation of the officers and the appointment of the purchaser's nominees, the change of the registered office and the handing over to the purchaser of corporate records and statutory registers.
- Formal transfers of the shares need to be formally delivered and are required to be stamped with a 1 per cent duty on the market value or, if higher, the price paid. In appropriate cases,

the transaction can be structured in a way which avoids this tax.

- The purchase price is paid. While there may be deferred consideration, it is less usual for a deposit to have been paid at the signing of the SPA. In certain cases, the purchaser can be required to make a withholding from the sale proceeds (eg, where the shares derive the greater part of their value from lands, minerals and/or exploration rights in the Republic of Ireland), unless appropriate forms are completed and delivered by the vendor to the purchaser.
- In the case of a leveraged buy-out or other acquisition where the assets of the target are being used as collateral for acquisition funding, various board declarations as to the solvency of the target will need to be made and shareholder resolutions will also need to be passed. As board members can attract personal accountability for declarations improperly made, it is normally the case that the purchaser's nominees to the board need to make these declarations rather than the retiring board (who usually have greater knowledge).
- Finally, any indebtedness of the target (save to the extent agreed in the SPA) will normally be discharged at completion and all encumbrances and other security discharged by the vendor.

The completion processes involved in an asset sale are usually more complex than in a share sale. This is because in a share sale, only the shares of the target are being sold – not the individual assets and/or liabilities of the target. With an asset sale, the assets transfer individually and the nature of those assets – and any change in ownership registration process (where ownership of the assets is registered) – needs to be considered and coordinated on an asset-by-asset basis.

6.2 Post-completion

Post-completion activities in the Irish context also vary from transaction to transaction but can include such diverse matters as:

(a) the preparation of earn-out accounts;
(b) the preparation of post-completion accounts;
(c) the completion of funding and security arrangements with banks; or
(d) the performance of transitional arrangements (customary in a share sale where target becomes part of a larger corporate group and there is a requirement to reverse-engineer IT systems or merge the corporate structure into a new group) between the vendor and the purchaser.