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Mergers & Acquisitions

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Editors: Michael E. Hatchard & Scott V. Simpson

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Ireland

Alan Fuller, Aidan Lawlor & William Dillon-Leetch
McCann FitzGerald

Overview

The Irish economy is experiencing a period of exceptionally strong growth and the latest forecasts suggest that this is likely to ease modestly over the course of the next two years, with the Central Bank of Ireland estimating GDP to have grown 6.6% in 2015 and the European Commission forecasting GDP growth of 4.5% for 2016 and 3.5% for 2017. In 2015, Ireland remained the fastest-growing economy in the Eurozone. Ireland's strong recovery, which was initially driven by net exports, is now, according to the European Commission, firmly based on demand across economic sectors and appears to be resilient to weaker global growth. While developments in early 2016 (such as low oil prices, the weakening of sterling, global stock market volatility and the slowdown in the Chinese economy) may give cause for caution, the positive alignment of economic factors in Ireland appears to broadly support a continued favourable outlook and an environment conducive to deal-making.

Recent data indicates that there was strong M&A activity in the Irish market in a range of sectors throughout 2014 and 2015, such activity in 2015 being particularly characterised by high-value 'mega deals' in the pharmaceutical and biotech sector. According to Experian, there were 19 deals in 2015 where the consideration exceeded €1bn, with Pfizer Inc.'s proposed €140bn merger with Dublin-based Allergan p.l.c. being the largest deal announced in that year. The aggregate value of these 19 deals was €283bn in 2015, up markedly from 2014 when nine deals made up €132bn in value. It is interesting to note that Irish transactions accounted for just 3.6% of the number of European deals announced in 2015, yet they represented a 20.5% proportion of the overall value of all European deals in that year. These figures are reflective of the attractiveness and increased flow of corporate migrations/inversion deals to Ireland and this has set the country apart as one of the most targeted countries by US companies for M&A transactions in 2015.

Significant deals and highlights

Overall M&A volume and values in Ireland have been boosted by the string of megadeals referred to above. In addition to the Pfizer deal, other deals of note were Endo's €6.9bn acquisition of Par Pharmaceuticals and Horizon's $1.1bn acquisition of Hyperion Therapeutics.

Other significant deals outside of the pharma sector included the announcement of the €8bn Paddy Power-Betfair merger, CRH's acquisition of assets from Lafarge-Holcim in a deal worth €6.5bn, and One51's strategic acquisition of Canadian plastics producer IPL, which will give it a strategic platform in North America. Bohai Leasing, the Chinese leasing company, acquired Avolon Holdings in a deal worth €6.7bn to make Avolon the core aircraft leasing brand for Bohai, and its parent, HNA Group.

During 2015 there continued to be a significant number of acquisitions made by US private equity and hedge funds in Ireland. Since Ireland's financial crisis in 2008, Irish banks have undertaken a series of sales processes for loan portfolios and other assets as part of the deleveraging of their balance sheets which has resulted in funds such as Cerebrus, Lone Star, Davidson Kempner and Avenue Capital investing in these assets in Ireland.

There were notable equity fundraisings during the year by newcomer PLCs such as Hostelworld, Cairn Homes, Dalata Hotel Group and Malin Corporation. Indeed, despite continuing volatility on global equity markets, IPOs and equity fundraisings appear to remain attractive options for companies seeking to raise funds.

The below table is a summary of the top 10 Irish transactions by deal value announced during the course of 2015.

Announced	Deal Type	Target	Bidder	Deal Value (€m)
23/11/2015	Merger	Allergan p.l.c., Dublin	Pfizer Inc, USA	143,564
27/07/2015	Acquisition	Generic Drug Business of Allergan p.l.c., Dublin	Teva Pharmaceutical Industries Ltd, Israel	35,454
04/08/2015	Acquisition	Baxalta Inc, USA	Shire Plc, Dublin	29,533
30/06/2015	Merger	Towers Watson & Co, USA	Willis Group Holdings p.l.c., Dublin	15,566
22/01/2015	Acquisition	Certain Assets of Holcim and Lafarge	CRH p.l.c., Dublin	7,671
18/05/2015	Acquisition	Par Pharmacuetical Holdings Inc, USA	Endo International p.l.c., Dublin	6,975
03/09/2015	Acquisition	Avolon Holdings Ltd, Dublin	Bohai Leasing Co Ltd, China	6,755
02/11/2015	Acquisition	Dyax Corp, USA	Shire p.l.c., Dublin	5,200
02/11/2015	Acquisition	King Digital Entertainment p.l.c., Dublin	Activision Blizzard Inc, USA	5,200
12/01/2015	Acquisition	NPS Pharmaceuticals Inc, USA	Shire Plc, Dublin	4,665

(Source: UK and Republic of Ireland Deal Review and League Tables 2015, Experian)

Key developments

Competition and Consumer Protection Act 2014

The Competition and Consumer Protection Act 2014 (the "**Competition Act 2014**") introduced a number of important amendments to the Irish merger control regime. Key changes include revised merger notification thresholds, a revised concept of a notifiable asset acquisition, longer review periods, greater flexibility as regards the timing of a notification filing, and an overhaul of the regime for the review of media mergers.

Revised merger notification thresholds: For a relevant merger or acquisition, the Irish merger control regime is now only focused on that part of the turnover of the undertakings involved which is derived from sales or services supplied to customers located in Ireland. Worldwide turnover is now irrelevant to the assessment of whether or not a transaction is notifiable. In terms of the new thresholds, a relevant merger or acquisition will be notifiable to the Irish Competition and Consumer Protection Commission (the "**CCPC**") if, in the most recent financial year:

- the aggregate turnover in Ireland (ROI) of the undertakings involved is not less than €50,000,000; and
- the turnover in Ireland (ROI) of each of two or more of the undertakings involved is not less than €3,000,000.

Previously, for a transaction to be notifiable, one party to the transaction had to have turnover in Ireland (ROI) of €40,000,000 or more, both parties had to carry on business on the island of Ireland, and both parties had to have worldwide turnover of €40,000,000 or more. The purpose of the statutory revision was twofold: to ensure that only those transactions with a real connection to Ireland would fall within the Irish merger control regime, and to bring within the regime smaller transactions involving businesses with revenue of less than €40,000,000. The revision has had the desired effect as during 2015 there was an increase in the notifications of acquisitions of relatively small businesses and properties to the CCPC and an increase in the number of notified deals which concerned an Irish target. For example, two separate notifications made during the course of 2015 sought the approval of the CCPC: for the acquisition of a single hotel; and for the acquisition of a single Dublin office building. As for effects in Ireland, 80% of deals notified in 2015 concerned an Irish target, compared with a 35% average over previous years.

<u>Asset acquisitions/Property deals</u>: The Competition Act 2014 also amended the concept of a notifiable asset acquisition and since its introduction, an acquisition of an asset or assets that "constitute a business to which a turnover can be attributed" will be notifiable to the CCPC if the new thresholds are satisfied. One consequence of this amendment (and the lower financial thresholds) is a surge in the notification to the CCPC of property acquisitions where the property generates a rental turnover. This is relatively new territory for the CCPC as, prior to the introduction of the Competition Act 2014, commercial property deals did not feature in the Irish merger control regime. The CCPC has tended to focus on the competitive effects at the local level when reviewing these notifications, but it has also indicated that it will review and consult on its interpretation of what constitutes a notifiable asset acquisition in early 2016.

<u>Increased review periods</u>: Another important change brought about by the Competition Act 2014 has been the extension of the applicable review periods for mergers/acquisitions and the introduction of a power on the part of the CCPC to 'stop the clock' during a Phase 2 investigation.

The CCPC now has an initial Phase 1 review period of 30 working days in which to decide whether to allow a transaction to be put into effect or to open a Phase 2 process (subject to any suspension of that time period for a formal information request or where the parties have offered commitments). The Phase 2 review period is now 120 working days from the date of receipt of the notification (subject also to any suspension for a formal information request or where the parties have offered commitments). The power to suspend a Phase 2 review was introduced in the Competition Act 2014 and allows the CCPC to suspend the 120-working day period if it issues a formal request for further information within 30 working days of the decision to open a Phase 2 investigation.

In practice, the CCPC has been utilising its power to avail of additional time for review under the revised statutory periods and therefore deal reviews are now taking longer than before. In 2015, the CCPC took on average over five weeks (37 days) at Phase 1 to decide whether to approve the transaction or to open a Phase 2 review. This is an increase from the 2014 average figure of four weeks (27 days). There were only two Phase 2 investigations opened in 2015, which took 26 weeks (184 days) and 19 weeks (134 days) respectively. Prior to the introduction of the new merger control regime, a Phase 2 investigation used to take 16 weeks (118 days) on average.

Greater flexibility in timing of filings: The Competition Act 2014 brought the Irish merger regime into line with the European merger regulation, as it is now possible to notify a merger/acquisition to the CCPC where it can be demonstrated that a good faith intention to conclude an agreement or merger/acquisition exists. It is also possible to make a notification if one of the undertakings involved publicly announces an intention to make a public bid, or makes a public bid which has not been accepted.

New media merger regime: The Competition Act 2014 also overhauled the Irish media merger regime. Changes were made to the definition of a media merger, the definition of a media business, review periods, and the reviewing bodies. The key procedural issue is that a media merger is now subject to two separate, consecutive reviews before it can be put into effect:

- a merger control review by the CCPC (regardless of whether or not the turnover thresholds are exceeded); followed by
- a media plurality review by the Minister for Communications, Energy and Natural Resources (which consists of an initial investigation of 30 working days with the possibility of a full investigation if media plurality concerns exist).

In 2015, media transactions took on average 13 weeks (91 days) to clear both regulatory hurdles. Ministerial approval took on average six weeks (43 days). However, it is possible for the Ministerial review of a controversial media merger to last 130 working days (subject to extension). To date, none of the notified media mergers have been subject to a full investigation and all notified media mergers have been cleared unconditionally by both the CCPC and the Minister.

Companies Act 2014

The new Companies Act 2014 ("**Companies Act**") came into force on 1 June 2015, consolidating over 50 years of company legislation into a single statute and introducing significant reforms to Irish company law. The Companies Act is intended to make it easier for a company to do business in Ireland, whether domestically or by using Ireland as a regional or a global base. Although the Companies Act emphasises efficiency and simplicity, it is itself the largest piece of legislation in the history of the State. However, not all company-related enactments are consolidated in the Act: some areas of legislation (such as the accounting rules for credit institutions and for insurance undertakings) remain in separate enactments.

The key changes include provision for new types of companies as well as changes to governance, capacity, organisation and procedures of companies.

Company types: The Companies Act provides for several new types of company, into one of which every existing company has to migrate:

(a) an LTD (the new form of the private company limited by shares);
(b) a designated activity company or 'DAC' (a company with restricted objects, including what was previously a company limited by guarantee and having a share capital);
(c) an unlimited company with a share capital (a "ULC");
(d) a public unlimited company with a share capital (a "PUC");
(e) a public unlimited company not having a share capital (a "PULC");

(f) a company limited by guarantee not having a share capital (a 'CLG'); and
(g) the PLC continues to be recognised.

The Irish Collective Asset-management Vehicles Act 2015 was signed into law on 4 March 2015 and establishes a legislative framework in Irish law for open-ended investment companies. The provisions of the Act relating to investment companies are not affected.

Under the Companies Act, an LTD now has a single constitutional document, effectively amalgamating the memorandum of association and the articles of association of an existing private limited company. The Companies Act also permits a company of any type to be incorporated with a single member and an LTD is permitted to have a maximum of 149 members (compared with 99 for a private limited company, under previous Companies Acts). An LTD can also have a single director, but a sole director is not permitted to be the company secretary, therefore requiring a second person to perform that role. A company other than an LTD will continue to require at least two directors.

<u>Fiduciary duties of a director</u>: The Companies Act now places the fiduciary duties of a director on a statutory basis, but not all directors' duties. This is a significant qualification as, while the Companies Act brings the common law fiduciary duties into legislation, the many statutory duties (under previous Companies Acts and otherwise) that existed prior to the Companies Act are not affected. The duties apply to all directors, whether or not appointed formally (e.g. including shadow directors). A director is subject to an objective standard of care, skill and diligence rather than by reference only to his or her actual knowledge and experience. The Companies Act provides that, where a company director acts in breach of any of his or her statutory fiduciary duties (with the exception of the duty to act honestly and responsibly in relation to the conduct of the affairs of the company), then the director is liable to account to the company for any gain which he or she makes directly or indirectly from that breach of duty, and/or may be required to indemnify the company for any loss or damage resulting from the breach.

<u>Compliance Statement</u>: The Companies Act provides that directors of a PLC (other than an investment company), and those of an LTD, a DAC or a CLG the balance sheet of which exceeds €12.5m and the turnover of which exceeds €25m, must prepare a compliance policy statement ("**Compliance Statement**"). Unlimited companies are not subject to this requirement. The Compliance Statement must set out the company's policies which, in the opinion of the directors, are appropriate to the company regarding its compliance with its obligations under the Companies Act, the contravention of which constitute more serious 'category 1'/'category 2' offences, Market Abuse offences or Prospectus offences, and regarding its compliance with its obligations under tax law ("**Relevant Obligations**").

Directors of an in-scope company must include with their directors' report for every financial year a statement acknowledging that they are responsible for ensuring the company's compliance with the Relevant Obligations, confirming that the company has drawn up a Compliance Statement and has put in place appropriate structures to secure material compliance with the company's Relevant Obligations, and that the company reviews those structures during the financial year. If these actions have not been taken, an explanation of the reasons why must be provided.

<u>AGM</u>: Subject to conditions, an LTD (whether having a single member or multiple members) is entitled to adopt written procedures in place of formally convening and holding an annual general meeting. Any DAC, PLC, CLG and unlimited company having not more than one member is allowed to dispense with the requirement to hold an AGM.

Summary approval procedure: The Companies Act introduces a simplified written approval process (a "whitewash") by directors and/or members, not requiring any court order, for certain transactions with a director, a reduction in capital, a members' voluntary winding-up or the use of pre-acquisition profits.

Financial assistance: The Companies Act relaxes the prohibition on giving financial assistance for the acquisition of a company's own shares by focusing on the provision of financial assistance for the purpose of an acquisition of shares in the company or of its holding company, rather than, as previously, prohibiting financial assistance "in connection with" such a purchase or subscription.

Reduction of capital: A reduction in the issued share capital of a limited company can be effected by employing the summary approval procedure (a PLC, however, may not use the summary approval procedure to approve a capital reduction) or by passing a shareholders' resolution that is to be confirmed by the court. The reduction in capital can happen by extinguishing or reducing the liability of any of the members on any of its shares in respect of share capital not paid up, or by paying off paid-up share capital. Such a reduction is categorised by the Companies Act as a distribution and, as such, will have to be made out of profits available for that purpose (or distributable profits). The Companies Act provides that, subject to any provision to the contrary in a court order or resolution or in the company's constitution, a reserve arising from the reduction of a company's company capital is to be treated as a realised profit.

Migration of existing companies: The Companies Act provides a transition period (ending on 30 November 2016) for companies that exist on 1 June 2015, provided that, in the case of an existing private company wishing to become a DAC, it resolves formally to do so no later than 31 August 2016. If, by the end of that period, a private limited company has not itself converted to a type that is recognised under the Companies Act, the company automatically becomes an LTD (however, certain limitations exist in respect of the power to convert: for example, a credit institution may not be an LTD). Thereafter, a company of any type may, by following the relevant procedures in the Companies Act, re-register as a company of any other type for which the Companies Act provides.

Industry sector focus

Clearly pharmaceutical manufacturing was Ireland's busiest sector in 2015 in terms of M&A transaction volume and the financial services sector also featured strongly in activity, with Bohai Leasing's acquisition of Avolon Holdings being the stand-out transaction in that sector.

A significant number of Irish software/technology companies were acquired by US and overseas companies during 2015, indicating that M&A activity continues apace in the tech sectors where venture capital funds appear to be realising their investments and exiting high-growth Irish tech companies. The leisure sector in Ireland was particularly active with Jurys Inns Group being acquired by US private equity firm Lone Star for €911m, and with the ownership of other landmark hotels passing such as Adare Manor, Castlemartyr Resort and the Gresham Hotel. International Consolidated Airlines Group's acquisition of Aer Lingus for €1.36bn was also a transaction that captured the headlines in the transport sector, marking the closing of the chapter on the Irish State retaining a stake in the airline.

The below table is a breakdown of aggregate deal values and number of deals completed across each industry sector in Ireland during 2015.

Sector	Value (€m)	No. of Deals
Medical: Pharmaceuticals	205,818	7
Financial Services	7,274	10
Computer Software	4,551	18
Leisure	1,150	16
Transportation	817	2
Services (other)	668	13
Internet/e-commerce	320	4
Medical	264	6
Energy	244	4
Media	216	7
Consumer: Foods	186	8
Construction	93	6
Telecommunications: Hardware	93	5
Computer: Semiconductors	64	1
Consumer: Retail	48	6
Industrial products and services	25	4
Manufacturing (other)	14	1
Industrial: Electronics	10	1
Computer services	Not Available	3
Consumer: other	Not Available	1
Telecommunications: Carriers	Not Available	1
Real Estate	Not Available	1
Total	221,853	125

(Source: MergerMarket)

The year ahead

Unsurprisingly, the pharmaceutical sector is expected to be to the forefront of M&A activity in 2016 and, although pharma deals of the scale seen during 2015 are unlikely to be repeated, significant acquisitions in this sector are expected in the coming year. On 19 November 2015, the US Treasury issued a notice to limit the benefits of corporate inversion deals for US companies owning between 60–80% of a merged entity and this development is likely to have an impact on the prevalence of inversion transactions in Ireland. Accordingly, any US pharma company that wants to complete a tax inversion deal with a European peer would now have to comply with the criteria set down by the US Treasury, leaving a more limited pool of potential inversion targets for US acquirers. The US Treasury has acknowledged that it cannot stop corporate inversions without statutory authority but it has created a legal regime that makes it less desirable than before to structure corporate inversions in a number of different ways. Ultimately, the US Treasury needs Congress to act but it appears that Congress is reluctant to address corporate inversions without addressing reform of the overall US tax code, which may take time. It is therefore likely that these transactions will continue albeit to a limited extent given the uncertainty surrounding what regulatory action the US government might take to tackle corporate inversions.

It is anticipated that M&A activity in 2016 will be driven by strategic corporate players rather than by private equity. Now that the Irish banks have largely completed their deleveraging processes, a series of secondary sale processes are likely, with global private equity funds seeking to capitalise on higher valuations in the Irish market by cashing out on quality assets bought at depressed prices during the economic downturn.

The technology and agribusiness/food sectors are expected to see a continued upward trend in deal-making for 2016. This year is also likely to see the sale by the Irish Government of at least 25% of Allied Irish Banks p.l.c. (AIB), one of Ireland's pillar banks, and the re-admission of its shares to trading on the main markets of the London Stock Exchange and Irish Stock Exchange. The Irish Government currently owns 99.8% of the issued share capital of AIB and, on the basis of AIB's market capitalisation, this should represent one of the largest Dublin and London IPOs in 2016.

Therefore, although official forecasts point to positive economic news for 2016 and 2017, Ireland's open, globalised economy is still exposed to a possible deterioration in the external environment which could influence conditions here significantly. Ireland has recently been the beneficiary of low oil prices, low interest rates, low borrowing costs and good growth in the US and Britain; however, it remains to be seen how global stock market volatility in early 2016, a possible slowdown in global growth, and the upcoming referendum on a British exit from the EU might impact on M&A activity and investment decisions in Ireland.

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Sources

The information in this chapter is based on reports in the financial press, publications of the Central Bank of Ireland and European Commission, specialist reports, company and financial websites (Experian, Mergermarket, etc.) and other publicly available information.

Alan Fuller
Partner, Head of Corporate Group
Tel: +353 1 607 1372 / Email: alan.fuller@mccannfitzgerald.ie
Alan is a partner in, and head of, the firm's Corporate Group and specialises in private company M&A and private equity transactions, and has advised on a number of energy sector transactions. Alan has advised a number of private equity funds in relation to acquisitions of large portfolios of loan assets and has also advised institutional sellers of loan portfolio assets.

Aidan Lawlor
Partner, Head of Corporate Finance Group
Tel: +353 1 607 1450 / Email: aidan.lawlor@mccannfitzgerald.ie
Aidan is a partner in, head of, the firm's Corporate Finance Group and specialises in equity capital markets, corporate finance and private and public company M&A. Aidan also advises on private company acquisitions and disposals.

William Dillon-Leetch
Senior Associate, Corporate Group
Tel: +353 1 607 1487 / Email: william.dillonleetch@mccannfitzgerald.ie
William joined McCann FitzGerald in 2013 and has over seven years' international M&A experience. Prior to joining McCann FitzGerald, William trained and practised with a top-five Irish corporate law firm and then practised for three years with the US global law firm K&L Gates in Sydney, Australia. William's practice includes mergers & acquisitions, initial public offerings, advisory work, management buyouts, venture capital, joint ventures and corporate reorganisations.

McCann FitzGerald

Riverside One, Sir John Rogerson's Quay, Dublin 2, Ireland
Tel: +353 1 829 0000 / Fax: +353 1 829 0010 / URL: http://www.mccannfitzgerald.com

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