Ireland


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1 Overview

1.1 What are the most common types of private equity transactions in your jurisdiction? What is the current state of the market for these transactions? Have you seen any changes in the types of private equity transactions being implemented in the last two to three years?

The most commonly executed private equity ("PE") transactions are buyouts (including management buyouts, institutional buyouts and public-to-private transactions), growth capital transactions, exits (including trade sales, secondary buyouts and, to a lesser extent, IPOs) and recapitalisations and restructurings.

2019 was a strong year for Irish PE activity. During Q3 of 2019, Mergermarket reported that Irish PE buyouts stood at their second highest year-to-date ("YTD") volume on record (worth €1.9 billion) and accounted for 19.8% of Irish M&A deals, representing the highest percentage since the 2008 financial crisis. This increased activity is partly attributable to the huge amounts of "dry powder" available to PE firms following a number of years of strong fundraising and to the health of the Irish economy, which provided the necessary conditions for robust deal-flow throughout the year. However, market conditions have now changed significantly following the outbreak of COVID-19. See further details in question 1.2.

As regards developing trends, recent years have witnessed an increasing number of PE exits, as funds continue to successfully monetise their earlier investments, as well as an increasing number of secondary buyout transactions. There has also been an increase in buy-and-build transactions, as PE firms focus on growing and diversifying their portfolios.

1.2 What are the most significant factors currently encouraging or inhibiting private equity transactions in your jurisdiction?

Significant encouraging factors include: an attractive tax regime which incorporates a low corporate tax rate of 12.5%, favourable tax structures/schemes and access to an extensive tax treaty network; membership of the EU; a young and well-educated, English-speaking workforce; and a highly developed communications and technology infrastructure.

While the relatively small number of assets and businesses available for acquisition (when compared with larger markets such as the UK) does tend to limit PE deal activity somewhat, the most significant factors currently inhibiting PE transactions in Ireland are the severe economic shock that the Irish economy has experienced as a result of the outbreak of COVID-19, and the measures implemented by the Irish government in order to contain its spread. The effect of these factors has seen a dramatic slow-down in commercial activity in Ireland since March 2020. Although the full extent of the economic impact in Ireland is not yet known, global deal-making has slowed down significantly and this will likely negatively impact on PE activity for the remainder of 2020 and possibly beyond. However, strongly capitalised PE funds are well placed to take advantage of any investment opportunities that may arise from the uncertainty.

1.3 Are you seeing any types of investors other than traditional private equity firms executing private equity-style transactions in your jurisdiction? If so, please explain which investors, and briefly identify any significant points of difference between the deal terms offered, or approach taken, by this type of investor and that of traditional private equity firms.

PE-style transactions backed directly by high-net-worth individuals have long been a feature of the Irish M&A market, in particular from 2000 to 2007. These have continued to be a feature of the market, albeit on a smaller scale than during that period.

More recently, family offices (from Ireland, other European countries, or the US) have executed PE-style transactions in Ireland, albeit often in transactions employing little or no direct leverage.

2 Structuring Matters

2.1 What are the most common acquisition structures adopted for private equity transactions in your jurisdiction?

Typically, PE acquisitions are structured using a double or triple NewCo structure. The PE sponsor and management will generally hold shares in the holding company at the top of the acquisition chain ("TopCo") and an intermediate company ("MidCo") may be used as the issuer of loan notes to the sponsor (and any management who are participating in the institutional strip), while the company at the bottom ("BidCo") will acquire the shares in the target company and may also act as borrower under any debt facilities.

Where the target company is Irish, BidCo would typically be an Irish tax resident limited company. However, the jurisdiction of incorporation of the companies in the acquisition chain will vary depending on tax and capital structuring considerations.

2.2 What are the main drivers for these acquisition structures?

The key drivers for this structure are ensuring structural subordination of sponsor's equity and shareholder debt to any third-party debt, facilitating the structuring of third-party lenders' security and tax considerations. In addition, the structures are designed to allow any future sale proceeds on exit to be returned to the PE sponsor (and its investors) on exit with minimal delay, tax liabilities and other friction costs.

2.3 How is the equity commonly structured in private equity transactions in your jurisdiction (including institutional, management and carried interests)?

A small proportion of the funding committed by the PE investor to the transaction will be by way of subscription for ordinary shares in TopCo. The remainder is typically invested by way of preference shares or shareholder debt in the form of loan notes. This total mixed investment is known as the "institutional strip".

Typically, management will subscribe for a portion of the ordinary shares in TopCo, known as "sweet equity". These structures are designed to ensure that management remain incentivised to increase value in the business and that their interests are aligned with those of the PE investor. Sweet equity structures are often combined with management ratchets, which allow management to make larger returns in the event of a successful exit.

In some cases, particularly in secondary buyouts where management are rolling over some of their sale proceeds, management may invest in the institutional strip. Often, further equity may also be offered to management or other key employees by way of equity-based incentive plans.

Carried interests are more commonly relevant at the PE fund level than at the level of the target company and its equity structuring.

2.4 If a private equity investor is taking a minority position, are there different structuring considerations?

In transactions where the PE investor is taking a minority stake, particularly if there is no third-party debt involved, the structure of the deal may be simpler, with no triple NewCo stake and an investment directly into the target holding company. However, this is not necessarily the case and minority investments can use the structure referred to in the response to question 2.2.

A PE investor taking a minority position will usually seek the same contractual protections that a PE investor typically requires in a control transaction, including tag-along rights, (drag-along rights and a right to board representation), as well as veto rights over material non-ordinary course issues including major changes to the business plan and strategy, the issuance of new equity or debt, share redemptions, acquisitions and disposals of assets, and changes to the constitutional documents. One possible difference is that a minority investor will often only have the right to appoint one or two directors, rather than the right to control the board.

2.5 In relation to management equity, what is the typical range of equity allocated to the management, and what are the typical vesting and compulsory acquisition provisions?

The portion of equity allocated to management will vary as between transactions, though it would typically be in the region of between 5% and 15%.

Management equity that is issued pursuant to an incentive plan is typically subject to time-based vesting, so that that a manager's equity will likely vest in increments over a specified period of time, typically between three and five years. Vesting can be straight-line or cliff vesting, and is usually accelerated in full on a successful exit.

In the vast majority of cases, a manager's sweet equity shares will be subject to compulsory acquisition in the event that he or she ceases to be employed in the business. Typically, a good leaver will receive fair market value for their vested shares, and cost for their unvested shares. A bad leaver will receive cost for all of their shares.

See question 2.6 for further details on the applicable good leaver/bad leaver criteria.

2.6 For what reasons is a management equity holder usually treated as a good leaver or a bad leaver in your jurisdiction?

The criteria for good leavers and bad leavers are always a matter for negotiation in the specific deal, and the circumstances of the deal, together with the "house style" of the PE sponsor, will impact on this. For example, in a highly contested auction of a PE-backed company, management will usually be in a strong position to negotiate favourable leaver definitions.

Death and permanent incapacity are almost invariably good leaver events, and voluntary resignation and dismissal for gross misconduct are typically bad leaver events. All other circumstances are a matter for negotiation. It is increasingly common for "dismissal for cause" to constitute a bad leaver event, although the meaning of this phrase in an Irish law context can be a matter for debate.

Generally, the board will also have discretion to treat a manager as a good leaver notwithstanding that he/she does not fall within the definition of same.

3 Governance Matters

3.1 What are the typical governance arrangements for private equity portfolio companies? Are such arrangements required to be made publicly available in your jurisdiction?

The governance arrangements for PE portfolio companies are typically documented in a shareholders' agreement. This agreement will cover matters including the agreed conduct of business of the company, board representation rights, information rights and wide-ranging controls for the PE investor through the form of vetoes over material issues (as outlined in questions 2.4 and 3.2). The shareholders' agreement is a private contract between the shareholders of the portfolio company and the company itself and does not generally need to be made publicly available.

Governance matters will also be included in the constitutional documents of the company. However, the constitution is a publicly filed document and a shareholders' agreement is therefore a more suitable vehicle to address sensitive or internal company issues that are not intended for public consumption.

3.2 Do private equity investors and/or their director nominees typically enjoy veto rights over major corporate actions (such as acquisitions and disposals, business plans, related party transactions, etc.)? If a private equity investor takes a minority position, what veto rights would they typically enjoy?

PE investors normally enjoy extensive veto rights over major corporate actions and strategic decisions (including acquisitions and disposals, major litigation, incurring indebtedness, controls over the business plan, strategy and budget) through shareholder veto rights and/or director veto rights exercisable by their nominee directors. These vetoes are usually structured in such a way that management's ability to make day-to-day decisions is not unduly hindered.

In a minority investment position, the list of veto rights afforded to the PE investor will be similar to a control transaction, although this will be influenced by the respective bargaining strength of the parties.

3.3 Are there any limitations on the effectiveness of veto arrangements: (i) at the shareholder level; and (ii) at the director nominee level? If so, how are these typically addressed?

Veto arrangements at shareholder level are generally upheld as they are contractual rights conferred on the PE sponsor by the shareholders' agreement. However, such arrangements may be deemed unenforceable in whole or in part by the Irish courts where they: (a) unlawfully fetter any statutory powers of an Irish company; (b) have the effect of unfairly prejudicing a minority shareholder(s); or (c) are illegal or contrary to public policy.

Veto arrangements at director nominee level are also subject to the foregoing considerations. In addition, the directors owe fiduciary duties to the portfolio company and these duties will override, and could therefore limit, the effectiveness of certain vetoes.

3.4 Are there any duties owed by a private equity investor to minority shareholders such as management shareholders (or *vice versa*)? If so, how are these typically addressed?

As a matter of Irish company law, a shareholder does not typically owe duties to other shareholders of a company in its capacity as shareholder. However, any board nominees of the PE investor will owe fiduciary duties to the company and will, in limited circumstances, owe duties to its shareholders and, where the company is insolvent, its creditors.

In limited situations, shareholders may be able to bring derivative actions on behalf of the company against the PE-appointed directors. However, there is a very high bar to be met in order to establish legal standing to do so.

It might also be noted that, although it is unlikely, liability towards a minority shareholder could potentially arise for a PE investor to the extent that it is deemed to be a shadow director of the portfolio company. Pursuant to s. 221 of the Companies Act 2014 ("CA"), this finding can be made where the directors are accustomed to act in accordance with the directions and instructions of the PE investor. If such a determination is made, the PE investor will be treated as a director of the portfolio company and all directors' duties would apply to it.

3.5 Are there any limitations or restrictions on the contents or enforceability of shareholder agreements (including (i) governing law and jurisdiction, and (ii) non-compete and non-solicit provisions)?

Shareholders' agreements concerning an Irish company will typically be upheld in full by the Irish courts provided that their provisions do not fall under any of the proscribed headings outlined in the response to question 3.3 above.

While shareholders' agreements relating to an Irish company are generally governed by the laws of Ireland, so as to ensure consistency with the laws applicable to the company, it is open to the parties to choose another governing law and jurisdiction for resolving disputes should they wish, and such choice will usually be respected by the Irish courts.

Non-compete and non-solicit provisions will be enforced to the extent they are limited to what is reasonably necessary to protect the investment of the PE sponsor. Any such provisions that go beyond this and are overly broad as regards geographical, temporal or sectoral scope, may be found to be unenforceable by the Irish courts as an unfair restraint of trade.

3.6 Are there any legal restrictions or other requirements that a private equity investor should be aware of in appointing its nominees to boards of portfolio companies? What are the key potential risks and liabilities for (i) directors nominated by private equity investors to portfolio company boards, and (ii) private equity investors that nominate directors to boards of portfolio companies?

To be eligible to act as a director of an Irish company, the director must not be: (a) under the age of eighteen; (b) a body corporate; (c) an undischarged bankrupt; (d) disqualified or restricted from acting as a director; and (e) already a director of more than 25 companies unless those other companies are exempted for the purpose of this rule.

All directors of Irish companies share the same general fiduciary and statutory duties to the company of which they are a director, notwithstanding the manner of their appointment and whether they are considered to be an "executive" or "non-executive" director. Directors may also owe fiduciary duties to creditors of the portfolio company in the event such entity is within the zone of insolvency. As such, PE-nominated directors face the risk of incurring personal liability for breach of any of their duties. PE investors will typically seek to mitigate the impact of this risk through directors' and officers' insurance policies.

A PE investor will not incur direct liability for the actions of its nominee directors. However, it could potentially incur liability if found to be a shadow director of the portfolio company as outlined at question 3.4.

3.7 How do directors nominated by private equity investors deal with actual and potential conflicts of interest arising from (i) their relationship with the party nominating them, and (ii) positions as directors of other portfolio companies?

The CA imposes a positive obligation on directors of Irish companies to avoid any situations of conflict between the directors' duties to the company and the directors' other (including personal) interests. However, this duty is not absolute and a director may be released from it either by the constitution of the relevant company or by a resolution of the company in a general meeting. Typically, any such prospective release or waiver

contained in the constitution will require the director to make disclosure of the circumstances of the conflict to the board of the company and may also prescribe further procedures to be followed. The constitution will usually also stipulate whether a director is entitled to participate in the decision-making process having made such disclosure to the board.

As a practical matter, nominee directors should ensure to actively monitor any potential or actual conflict situation that arises by virtue of their relationship with the PE sponsor or their directorship of other portfolio companies. They should also ensure to act in accordance with any provisions of the constitution dealing with conflicts, and where none are in place, they should inform the other board members of any conflict situation that does arise and recuse themselves from the relevant decision-making process unless released by a resolution of the company in a general meeting.

4 Transaction Terms: General

4.1 What are the major issues impacting the timetable for transactions in your jurisdiction, including antitrust and other regulatory approval requirements, disclosure obligations and financing issues?

The factor most likely to impact on transaction timetables in Ireland is the requirement to obtain regulatory approval or consent for certain transactions. Approval is generally sought between signing and closing and the approvals that are most commonly required are merger control clearance from the Competition and Consumer Protection Commission (the "CCPC") and industry-specific approvals or consents (e.g. approval from the Central Bank of Ireland ("CBI") in relation to certain investments in regulated financial services businesses).

The imposition of conditionality in relation to the acquisition of debt financing is not common in Irish PE transactions.

4.2 Have there been any discernible trends in transaction terms over recent years?

Recent years have seen a trend towards increasingly seller-friendly transaction terms (such as shorter limitation of liability periods and the limiting of conditionality) as the market has shifted towards a seller's market due to strong valuations, widespread availability of financing, and healthy competition from international and local, financial and strategic buyers.

There has also been a continuing upward trend in the use of warranty and indemnity ("W&I") insurance in M&A transactions generally and particularly in those that involve a PE seller, who may be unable to take on liability under its fund rules and/or who needs to make immediate distributions of sale proceeds. Furthermore, increased competition between W&I insurers in the Irish market has driven innovation with more bespoke insurance solutions and policy enhancements now available for previously uninsurable matters.

The use of locked-box consideration mechanisms has also gained momentum in recent years and is particularly favoured in PE deals.

5 Transaction Terms: Public Acquisitions

5.1 What particular features and/or challenges apply to private equity investors involved in public-to-private transactions (and their financing) and how are these commonly dealt with?

Public-to-private transactions of Irish companies are generally governed by a statutory scheme of takeover regulation comprising a set of rules (the "Takeover Rules") that have the force of law and are administered by the Irish Takeover Panel.

The Takeover Rules apply to takeovers or substantial acquisitions of securities of Irish-incorporated companies whose securities are quoted on certain "recognised" stock exchanges and are principally for the purpose of protecting shareholders of the target by ensuring they receive equal treatment in the conduct of any relevant transaction.

The framework imposed by the Takeover Rules is significantly more prescriptive than that which applies to private transactions, and advice of counsel should always be sought in order to navigate it successfully. However, the following features of the Takeover Rules might be of particular note to PE investors:

- the timetable applicable to a takeover (tender) offer is strictly regulated;
- where the offer is for cash or includes an element of cash, a cash confirmation (usually made by the bidder's financial adviser) that the bidder has sufficient resources available to it to satisfy full acceptance of the offer must be included in any announcement of a firm intention to make an offer and any offer document. Practically speaking, this will mean that any acquisition financing will need to be in place on a committed basis on or before the date of the offer announcement; and
- once a firm intention to make an offer is announced, a bidder will generally be bound to proceed with the offer.

Conditions to the transaction will be negotiated between the bidder's and target's advisers but there is an accepted minimum market standard. The conditions will typically include positive conditions relating to matters that must occur before the conditions are fulfilled (such as target shareholder approval, specified regulatory clearances, and any listing of consideration shares becoming effective), and negative conditions that will relate to certain circumstances not having occurred, including a material adverse change condition relating to the target business. In the case of these negative conditions, the Irish Takeover Panel will not allow a condition to be invoked unless:

- the circumstances that give rise to the right to invoke the condition are of material significance to the bidder in the context of the bid; and
- it would be reasonable in the circumstances for the bidder to invoke the condition.

The Irish Takeover Panel sets a very high standard for material adverse change in these circumstances and scope to withdraw by involving these conditions is very limited.

5.2 What deal protections are available to private equity investors in your jurisdiction in relation to public acquisitions?

The Takeover Rules limit a target company's ability to agree deal protection measures. The Takeover Rules would, however, permit a relatively customary non-solicit provision to be built into the transaction agreement (this is in contrast to the position under the UK's Takeover Code which prohibits such

provisions). A break fee arrangement may also be agreed by the target company. However, the Takeover Rules limit the target break fee amount to 1% of the deal value to cover costs reimbursement only (i.e. whichever is lower) payable only where the target board withdraws or modifies its recommendation of the transaction, or where a competing offer is successful. Subject to limits in the Takeover Rules on the bidder's ability to invoke conditions, the rules are not concerned with reverse break fee arrangements, which will therefore be a matter for negotiation between the parties.

The transaction documentation would also typically include a confidentiality agreement and a commitment to cooperate to obtain regulatory clearances.

6 Transaction Terms: Private Acquisitions

6.1 What consideration structures are typically preferred by private equity investors (i) on the sell-side, and (ii) on the buy-side, in your jurisdiction?

Sell-side PE investors tend to prefer a "locked-box" consideration structure as it provides purchase price certainty, affords greater seller control over the process and represents a cost saving as there is no requirement to review and agree completion accounts post-closing, which in turn facilitates the immediate distribution of sales proceeds following closing.

Completion account structures are also commonly used, which involve a post-completion adjustment to the purchase price by reference to the working capital and/or net debt position of the target at completion as compared with an agreed target position on which the purchase price was based.

On the buy-side, it would be common for PE investors to look for a portion of the consideration to be deferred by way of earn-out or other contingent payments linked to the successful performance of the target or to be held in escrow as security for warranty and/or indemnity claims.

6.2 What is the typical package of warranties/ indemnities offered by (i) a private equity seller, and (ii) the management team to a buyer?

Typically, a PE seller will only provide fundamental warranties relating to its title and its authority and capacity to sell. Business and operational warranties will usually be given by the senior management team as they are involved in the day-to-day running of the business and therefore better placed to do so. The management team would also usually provide the customary indemnity for pre-completion tax liabilities of the target. These warranties and indemnities are generally subject to relatively low liability caps (depending on the percentage ownership of the management warrantors). As such, the warranty package may form the basis for W&I insurance protection as the buyer will want to ensure coverage above this liability cap. Increasingly, where W&I insurance is available, the liability of the management warrantors will be capped at €1 .

6.3 What is the typical scope of other covenants, undertakings and indemnities provided by a private equity seller and its management team to a buyer?

PE sellers and management will ordinarily provide a suite of pre-completion undertakings including: (i) covenants regarding the conduct of the business between signing and closing; (ii) undertakings to assist with regulatory filings or satisfy other closing conditions; and (iii) a no-leakage covenant (in the case of a "locked-box" pricing structure).

The management team will also typically provide non-compete and non-solicit covenants where they are exiting the target business. It would be extremely rare for a PE investor to give any non-compete covenants and rare for it to give any non-solicit covenants.

6.4 To what extent is representation & warranty insurance used in your jurisdiction? If so, what are the typical (i) excesses / policy limits, and (ii) carve-outs / exclusions from such insurance policies, and what is the typical cost of such insurance?

W&I insurance is becoming more prevalent in the Irish M&A landscape as a means of bridging the gap between the buyer's need for strong deal protection and a seller's desire for a clean exit free of residual liabilities. Indeed, PE sellers will often insist as part of the transaction terms that the buyer take out buy-side insurance to cover the business warranties provided by management.

Most W&I insurance policies will be subject to an excess which will ideally be set to match the aggregate liability cap of the sellers, so that as soon as the sellers' liability is exhausted, the policy will respond. However, to the extent there is a gap, management may be asked to bridge some or all of that gap. Excess limits tend to be between 0.5% and 1% of the enterprise value of the target, although recently this limit has been trending downwards with caps of €1 becoming increasingly common.

Typical exclusions from such policies include coverage for product liability, liability arising as a result of bribery, corruption or fraud, pollution/contamination, criminal fines and penalties, and pension underfunding. Known liabilities or risks are also excluded from coverage.

The cost of insurance would typically be in the range of 1%–1.5% of the policy limit.

6.5 What limitations will typically apply to the liability of a private equity seller and management team under warranties, covenants, indemnities and undertakings?

As noted previously, a PE seller will usually only provide certain fundamental warranties and, as such, its liability will typically be unlimited or capped at the purchase price and perhaps subject to a claims period of three to six years from closing.

Liability for leakage claims should be several and limited to leakage received by the PE seller itself and is typically uncapped. Usually the applicable claims period is six to 12 months post-closing.

The management team's liability for business warranties is normally limited by applying an aggregate liability cap (which will depend on the transaction value and the availability of W&I insurance) and *de minimis* and basket thresholds (ordinarily set at 0.1% and 1% of the purchase price, respectively) below which no claim can be made. Such warranties typically survive for 12–24 months post-closing. Management may further limit their liability by giving the warranties on a several/proportionate basis and subject to their actual awareness.

6.6 Do (i) private equity sellers provide security (e.g. escrow accounts) for any warranties / liabilities, and (ii) private equity buyers insist on any security for warranties / liabilities (including any obtained from the management team)?

While escrow accounts are sometimes used and often sought by a PE buyer in respect of management warranties, they are becoming less common due to the increase in the use of W&I insurance. Escrow accounts will usually be strongly resisted by PE sellers on the basis that the risk of breach for the fundamental warranties given by PE sellers is very low and security is not therefore required. This also means that PE sellers can distribute the full sale proceeds to their investors as soon as possible post-closing.

6.7 How do private equity buyers typically provide comfort as to the availability of (i) debt finance, and (ii) equity finance? What rights of enforcement do sellers typically obtain in the absence of compliance by the buyer (e.g. equity underwrite of debt funding, right to specific performance of obligations under an equity commitment letter, damages, etc.)?

PE buyers will typically issue an equity commitment letter to the seller from the PE sponsor undertaking to fund BidCo with sufficient equity capital to cover the relevant portion of the purchase price, subject only to satisfaction of the conditions in the acquisition agreement and "certain funds" debt financing being available.

The debt finance portion may be confirmed by binding financing term sheets, and commitments may also be given in the commitment letter by the PE fund in relation to BidCo drawing down the requisite funds under the "certain funds" debt financing. The seller can then enforce its rights to specific performance of this commitment letter directly against the PE fund if it fails to comply with its terms.

6.8 Are reverse break fees prevalent in private equity transactions to limit private equity buyers' exposure? If so, what terms are typical?

Reverse break fees are not a common feature of PE transactions in Ireland.

7 Transaction Terms: IPOs

7.1 What particular features and/or challenges should a private equity seller be aware of in considering an IPO exit?

Typically, a PE seller looking to exit by way of an IPO of an Irish company will look to listing venues in Ireland and either the US or UK.

Although an IPO exit can present the most lucrative form of exit for a PE seller, there are a number of issues that should be considered, including:

- Delayed/Incomplete Exit – a PE seller may not be able to effect a full and immediate exit upon IPO as, in order to support the IPO and post-IPO price, the sponsor or underwriter will typically require PE sellers both to retain a holding in the issuer post-IPO and to enter into lock-up agreements that restrict the disposal of the retained holding for a set period post-IPO. The PE seller will be exposed to price fluctuations during this lock-up period which may impact on the final return to the PE seller's investors.
- Costs – an IPO exit is likely to be significantly more expensive than a private sale due to the number of advisers and parties involved in, and the length (approximately six months) of, the process required to execute an IPO.
- Risk – an IPO exposes PE sellers to significant market risk compared to the comparative certainty of a private sale and, if the IPO is not successful, there is the added risk of potential reputational damage. Furthermore, a PE seller will likely be required to provide the underwriters with certain warranties relating to title to its shares and, in some cases, the underlying business as well as an indemnity covering any losses the underwriters may incur in connection with the transaction. Under Irish law, there is potential prospectus liability for selling shareholders involved in an IPO of an Irish company which PE sellers may not be in a position to assume.
- Control – as a result of adaptations required to be made to the company's corporate governance regime in order to render it fit for an IPO, a PE seller will likely lose the benefit of certain control or minority protection rights.

7.2 What customary lock-ups would be imposed on private equity sellers on an IPO exit?

The length of any lock-up period imposed on a PE seller post-IPO will be determined by regulation and market practice applicable to the chosen listing venue and may be negotiated, but would customarily be for a period of six months from listing. Following expiration of the lock-up period, PE sellers will sometimes agree with the issuer and underwriters of the IPO to continue to be subject to "orderly market" limitations on the timing, volume and manner of the disposal of their shares.

7.3 Do private equity sellers generally pursue a dual-track exit process? If so, (i) how late in the process are private equity sellers continuing to run the dual-track, and (ii) were more dual-track deals ultimately realised through a sale or IPO?

Exits by PE sellers by way of IPO have not been a feature of the Irish market in recent years and almost all exits have been implemented by way of sale process. As such, there is no established market practice or pattern as regards the pursuit of a dual-track process. In our experience, PE sellers would run a dual-track process up until the point at which an investor "road show" in relation to the IPO process would be due to start and then decide which path to take. It would be unusual to continue to run a sale process in conjunction with the sharing publicly of extensive information on the business in a "road show" process.

8 Financing

8.1 Please outline the most common sources of debt finance used to fund private equity transactions in your jurisdiction and provide an overview of the current state of the finance market in your jurisdiction for such debt (particularly the market for high yield bonds).

While there has been a noticeable increase over the past number of years in the use of non-traditional sources of financing for corporate transactions in Ireland, the most common source of

debt finance used to fund PE transactions in Ireland continues to be traditional bank-led loan financing.

The rise in alternative lenders, such as direct lending funds and other institutional investors, has created a more competitive lending landscape in Ireland which, prior to the outbreak of COVID-19, had resulted in the widespread availability of credit being offered on attractive terms and in increasingly innovative and flexible formats. These include term loan B facilities, mezzanine and unitranche loans and the use of payment-in-kind ("PIK") or convertible debt.

Bond issuances are rare in PE acquisition finance in Ireland.

8.2 Are there any relevant legal requirements or restrictions impacting the nature or structure of the debt financing (or any particular type of debt financing) of private equity transactions?

Generally speaking, there are no particular Irish law requirements or restrictions that would dictate or otherwise impact the nature or structuring of the debt financing of PE transactions, and such considerations will depend on the particular circumstances of the transaction in question.

In this regard, it might be noted that there could be industry-specific requirements or regulations that may apply to a particular transaction, and PE investors should ensure they are cognisant of, and comply with, these as well as the broader regulatory regime affecting PE transactions.

8.3 What recent trends have there been in the debt financing market in your jurisdiction?

As noted in response to question 8.1, there has been increased competition in the Irish lending market in recent years due to the growing presence of non-traditional lenders which has led to the greater availability of credit and a wider array of innovative debt products.

However, more recently the outbreak of COVID-19 has caused severe disruption to this previously buoyant market. In an effort to mitigate the impact of the financial turmoil caused by this health crisis, a significant number of wide-ranging regulatory measures have been announced by the CBI, the European Central Bank and other relevant supervisory authorities in respect of the banking sector, which range from flexibility in meeting minimum regulatory ratio requirements to the postponement of certain reporting requirements.

Given the extent of the unknowns still surrounding this pandemic, it is not yet possible to predict exactly how the loan market in Ireland will be affected by COVID-19 or the measures that have been introduced to address the economic challenges posed by it.

9 Tax Matters

9.1 What are the key tax considerations for private equity investors and transactions in your jurisdiction? Are off-shore structures common?

The key considerations include the holding company regime, tax costs on transactions, debt-financing matters, the management/mitigation of tax on cash flows from portfolio companies to the investors and management of tax liabilities on an exit.

Ireland offers an attractive holding company regime due to its low corporation tax rate of 12.5% on trading profits and 25% on non-trading profits. Dividends from Irish subsidiaries are exempt from tax. A generous and flexible foreign tax credit system usually eliminates or reduces any Irish tax liability on the receipt of dividends from foreign subsidiaries.

There is no capital gains tax on the disposal of ordinary shares in a trading subsidiary, resident in the EU or a country with which Ireland has a tax treaty, where the Irish holding company has (directly or indirectly) a minimum of 5% shareholding for 12 months or more, within the previous two years where certain conditions are met.

CFC rules, which attribute undistributed profits of a CFC arising from non-genuine arrangements for the purposes of avoiding tax to the controlling company in Ireland, apply for accounting periods beginning on or after 1 January 2019. The introduction of CFC rules is unlikely to have a significant impact on Irish holding companies due to the low rates of corporation tax and availability of various exemptions and reliefs.

In respect of transaction tax costs, stamp duty at 1% on the consideration paid (or market value, if higher) will generally arise upon the acquisition of an Irish incorporated company. Subject to certain conditions, associated companies and reconstruction reliefs may apply. A higher rate of stamp duty applies when acquiring shares in certain real estate companies.

Irish holding companies may be financed principally by means of debt. Trading companies can generally take a deduction for interest incurred wholly and exclusively for the purposes of the trade. Subject to certain conditions, a deduction should be available (on a paid basis) for interest paid by an Irish holding company in connection with the acquisition of shares. While there are no thin capitalisation rules in Ireland, interest may be re-characterised as a distribution and therefore as non-deductible in certain circumstances.

There are wide exemptions from withholding tax on dividends, interest and royalties.

Ireland also offers a beneficial tax regime to a range of fund vehicles which are exempt from tax on income and gains irrespective of where their investors are resident. The Irish Collective Asset Management Vehicle (the "ICAV") is a popular fund vehicle for PE investors as it can elect (i.e. "check the box") to be treated as a flow-through or partnership for US tax purposes.

PE investors will be focused on achieving capital gains tax treatment on an exit (see question 9.3).

While offshore structures feature occasionally, Irish transactions tend to utilise Irish incorporated and tax resident entities.

9.2 What are the key tax-efficient arrangements that are typically considered by management teams in private equity acquisitions (such as growth shares, incentive shares, deferred / vesting arrangements)?

A restricted share scheme can offer an abatement of up to 60% on the taxable value of the shares, where certain conditions are satisfied.

Growth share schemes are implemented with an expectation of a nominal liability to income tax on acquisition and capital gains treatment on a disposal of shares. Careful structuring is required to avoid falling foul of anti-avoidance for income tax purposes.

The Key Employee Engagement Programme ("KEEP") is a tax-efficient, share-based remuneration scheme for small- and medium-sized enterprises only. Where conditions are satisfied, qualifying share options can be granted to and exercised by employees free from income tax, universal social charge and Pay Related Social Insurance ("PRSI"). A subsequent disposal of shares will generally be subject to capital gains tax.

The tax treatment of many common share incentive schemes are not particularly advantageous for Irish tax resident employees or directors as marginal rates of income tax, universal social charge and PRSI generally apply on any benefits obtained.

Certain income tax reliefs for employees such as the Special Assignee Relief Programme ("SARP") may be relevant.

9.3 What are the key tax considerations for management teams that are selling and/or rolling-over part of their investment into a new acquisition structure?

While a disposal of shares will generally be subject to capital gains tax, management will also be keen to ensure capital gains treatment on a roll-over so that reorganisation relief ("share-for-share") may apply to defer any potential liability relating to the disposal of the original shareholding.

Relief from stamp duty for the acquiring company in the context of a roll-over may also be relevant.

9.4 Have there been any significant changes in tax legislation or the practices of tax authorities (including in relation to tax rulings or clearances) impacting private equity investors, management teams or private equity transactions and are any anticipated?

The Irish tax landscape has been subject to various changes in recent years as a result of Ireland's obligations under the OECD's Base Erosion and Profit Shifting Project ("BEPS") and the Anti-Tax Avoidance Directive ("ATAD").

New anti-hybrid rules, which aim to deny tax benefits resulting from mismatches between different jurisdictions, apply to payments made or arising after 1 January 2020.

Transfer pricing rules have been extended to include non-trading transactions so intra-group, cross-border, non-trading transactions should be considered in light of the arm's length principle.

The EU mandatory disclosure regime ("DAC6") for certain cross-border transactions is effective from 1 July 2020.

10 Legal and Regulatory Matters

10.1 Have there been any significant legal and/or regulatory developments over recent years impacting private equity investors or transactions and are any anticipated?

The following are some of the most significant developments introduced or announced in Ireland in the last year that may impact on PE investors or transactions:

- On 20 June 2019, the Investment Limited Partnership (Amendment) Bill 2019 was published which proposes a number of changes to the existing Irish legislative framework regulating investment limited partnerships, with the aim of modernising this framework so as to better reflect changes in the global PE market. Once enacted, the reformed legislation should greatly enhance the attractiveness of Ireland as a jurisdiction of choice for the domiciling and servicing of PE funds.
- A new, simplified notification procedure for mergers that meet the relevant Irish mandatory merger control notification thresholds (where the acquirer and target each generate €10 million (or more) and together generate €60 million (or more) of turnover in Ireland), but do not raise competition concerns in Ireland, commenced on 1 July 2020. The aim of the simplified procedure is to decrease review periods and reduce the burden on notifying parties to non-controversial transactions.
- The Alternative Investment Fund Managers Directive ("AIFMD") applies to most PE capital funds that operate in the EU. On 10 June 2020, the European Commission published a report on its findings from its review of the scope and application of the AIFMD and whether it is achieving its stated objectives. The report notes that PE fund managers encounter significant barriers to marketing their funds in other Member States and that there is an argument that the AIFMD could be amended to better accommodate the PE sector by removing unnecessary charges and seeking more effective ways to protect non-listed companies or issuers.

10.2 Are private equity investors or particular transactions subject to enhanced regulatory scrutiny in your jurisdiction (e.g. on national security grounds)?

PE investors are not generally subject to enhanced regulatory scrutiny in Ireland. However, transactions involving businesses operating in certain regulated sectors will be subject to additional regulatory consents or approvals. These include, amongst others, acquisitions of a qualifying holding (10% or more of the capital or voting rights or the ability to otherwise exercise significant influence over management) in firms regulated by the CBI, mergers of Irish media businesses, and acquisitions of stakes in Irish airlines that are subject to European foreign control restrictions. Public-to-private transactions also need to comply with the Takeover Rules as discussed in section 5.

10.3 How detailed is the legal due diligence (including compliance) conducted by private equity investors prior to any acquisitions (e.g. typical timeframes, materiality, scope, etc.)?

The level of legal due diligence conducted will vary from transaction to transaction and depends on factors such as the nature and size of the target business and whether the sale is bilateral or by way of auction – which may also influence the applicable timeframe. Typically, external legal counsel is engaged to conduct legal diligence on a "red flag issues"-basis with materiality thresholds reflecting the size of the deal.

10.4 Has anti-bribery or anti-corruption legislation impacted private equity investment and/or investors' approach to private equity transactions (e.g. diligence, contractual protection, etc.)?

The enactment in Ireland of the Criminal Justice (Corruption Offences) Act 2018, which introduced potential criminal liability for corporate bodies for the acts of directors, managers, employees, agents or subsidiaries who commit an offence under the Act for the company's benefit, and the extraterritorial reach of the UK Bribery Act and the US Foreign Corrupt Practices Act, have led to increased concern and focus from PE investors in Ireland on compliance with such legislation. As a result, more emphasis is placed on the warranty protections in this regard in the sale/investment agreement.

10.5 Are there any circumstances in which: (i) a private equity investor may be held liable for the liabilities of the underlying portfolio companies (including due to breach of applicable laws by the portfolio companies); and (ii) one portfolio company may be held liable for the liabilities of another portfolio company?

Where the portfolio companies are incorporated as limited liability companies, Irish courts will typically respect the separate legal personality of each entity and will not impose liability on their shareholders or on other companies in the group for their activities save in very exceptional circumstances, such as where it is being used for a fraudulent purpose or to evade legal obligations. If an unlimited company or partnership is used, its shareholders or partners can be liable for the entity's debts.

11 Other Useful Facts

11.1 What other factors commonly give rise to concerns for private equity investors in your jurisdiction or should such investors otherwise be aware of in considering an investment in your jurisdiction?

There are limited additional issues to be considered when planning a PE investment in Ireland that are not already addressed above. Ireland represents a very stable and economically appealing location for PE investors with a sophisticated financial sector and a common law legal system similar to that in the US and the UK. There are also attractive tax structuring options for non-Irish PE investors (see section 9 above).



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