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Private Equity

Ireland
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chambers.com

2020

IRELAND

Law and Practice

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1. Trends

1.1 M&A Transactions and Deals

M&A activity in Ireland has proved resilient in recent years. Increased activity from USA and UK private equity funds has been a driver of the market and has opened up liquidity opportunities for sellers that didn't previously exist. Private equity funds are increasingly turning their attention to small to medium sized enterprises which are scaling both at a domestic level and internationally.

Recent trends in Irish M&A include the following:

- private equity funds are increasingly active in the mid-market space (up to EUR250 million);
- there is an increased focus by buyers on the environmental and social governance of the target entity;
- US private equity funds in particular are increasingly focused on compliance with anti-bribery and anti-corruption legislation; and
- there has been increased shareholder activism in Ireland (a jurisdiction which has traditionally lagged behind the US and UK in this respect) which is shaping the strategy of target entities.

The Impact of COVID-19

The full impact of the global COVID-19 pandemic on M&A activity in Ireland will not be clear for a number of months, and is likely to reshape the M&A landscape for some time to come. The immediate impact of COVID-19 has subsided and we have started to look towards the future and what it might mean for buyers and sellers alike. It is anticipated that there will be a change in the way buyers will look to structure their deals with a greater portion of the consideration likely to be deferred or subject to substantial earn-out provisions.

There is likely to be increased focus on due diligence by buyers and in particular greater scrutiny on a target entity's commercial arrangements and whether those contracts (in particular key customer contracts) are due for renewal in the short term.

1.2 Market Activity

In the last number of years M&A activity in Ireland has revolved around the areas of technology, healthcare, financial services and increasingly, the energy and infrastructure space. The outlook for these sectors remained strong at the start of 2020, notwithstanding the potential impact of Brexit and the uncertainty surrounding the US political landscape. However, the global COVID-19 pandemic has slowed M&A activity for the first half of this year.

2. Legal Developments

2.1 Impact on Private Equity

Following widespread anticipation in the Irish funds industry, the Irish Government published a draft bill in June of last year – the Investment Limited Partnership Bill 2019 – to amend the existing Investment Limited Partnership (ILP) law in Ireland. The Bill sought to introduce a number of important changes that aimed to position the ILP as a leading EU fund vehicle for private equity (PE), real assets and sustainable finance.

Despite a general election along with the impact of COVID-19, the political parties making up the recently formed new government have expressly added the ILP to the new programme for government and legislative schedule for 2020 as they acknowledge its importance to the Irish funds industry.

The updated regime for ILPs will introduce a number of positive amendments incorporating best practice features from other leading PE jurisdictions. Once the regime is enacted into legislation in due course, it will open the Irish funds market further to global PE managers, particularly those looking to establish common law partnerships for distribution to European investors via the AIFMD passport.

In the meantime, PE asset managers continue to avail of the Irish collective asset management vehicle (ICAV), a corporate vehicle designed specifically for Irish investment funds. The ICAV is the default Irish funds vehicle and, owing to its structuring flexibility, the ICAV is able to accommodate many PE strategies and PE-centric features (such as capital commitment/drawdown mechanisms, distribution waterfalls and carried interest). Furthermore, the ICAV may be treated as a tax transparent partnership for US federal tax purposes.

3. Regulatory Framework

3.1 Primary Regulators and Regulatory Issues

Monitoring M&A Activity

The sale and purchase of private and public limited companies is governed, in the first instance, by certain provisions of the Companies Act 2014 (the "Act").

The key statutory bodies which monitor M&A activity in Ireland are as follows:

- the Irish Takeover Panel (the "Panel") is the statutory body responsible for monitoring and supervising the takeover of relevant public companies in Ireland;
- The Competition and Consumer Protection Commission regulates compliance with the Competition Acts (as defined

below) and its approval is required for transactions in which the buyer and target operate in the same market and meet certain financial thresholds to ensure that the market remains competitive for consumers;
- the Central Bank of Ireland (CBI) monitors compliance by certain regulated financial services companies whose shares are listed on the ISE (as defined below) with applicable EU legislation including, but not limited to, the Prospectus Regulation and the Transparency Directive (each as defined below);
- the Irish Stock Exchange (ISE),trading as Euronext Dublin, has issued rules which any entity whose shares are listed on either its main securities market or enterprise securities market need to comply with; and
- additional statutory bodies may be involved depending on the relevant industry in which the entities operate (ie, the Commission for Aviation Regulation in the aviation industry).

In addition to the Act, the following legislation applies to the sale and purchase of private and public limited companies (as applicable) in Ireland:

- the Irish Takeover Panel Act 1997 and the Takeover Rules (the "Rules") provide the main regulatory framework for the takeover of Irish incorporated public limited companies;
- the Substantial Acquisition Rules (SARs) are administered by the Panel and outline the ways in which certain types of acquisitions of shares in a relevant public limited company may be made;
- the Competition Acts 2002 to 2014 (the "Competition Acts") determined when anti-trust approval is required for an acquisition or combination;
- the European Communities (Cross-Border Mergers) Regulations 2008 (as amended) apply in the case of mergers of an Irish incorporated company with an entity from another EEA jurisdiction;
- Regulation (EU) 2017/1129 (as may be amended, the "Prospectus Regulation"); and
- the Transparency (Directive 2004/109/EC) Regulations 2007 (as amended) (as may be amended, the "Transparency Directive").

In addition to the above legislation there is, of course, a wide range of legislation that may apply depending on the nature of a specific transaction (ie, data protection, employment and tax legislation).

Regulating Financial Services and Funds

The CBI is Ireland's regulator for financial services and has responsibility for the authorisation and supervision of Irish regulated funds as well as for managers located in Ireland.

As noted above, the most popular investment fund structure in Ireland for PE asset managers continues to be the ICAV, structured as a qualifying investor alternative investment fund (QIAIF). The CBI approval process for the QIAIF is generally a 24-hour turnaround with no "pre-review" of the relevant fund documents. While PE asset managers regularly use the ICAV structure to accommodate their PE strategies, in due course, it is hoped that the ILP will become a leading fund vehicle for PE funds in Ireland. In terms of regulatory overlay, the EU Alternative Investment Fund Managers Directive (AIFMD) provides the framework for the regulation and oversight of alternative investment fund managers, ie, the manager of the QIAIF and the QIAIF itself is subject to the CBI's QIAIF regime which is detailed in the CBI's AIF Rulebook.

In addition to the foregoing regulated structures, it is also possible to set up an unregulated fund by establishing a limited partnership under the Irish Limited Partnerships Act, 1907 (the 1907 Act). While the 1907 Act has not yet been reformed like its English counterpart, these partnerships are being used more commonly as PE managers consider alternatives to the English limited partnership – in particular, it is hoped that, post-Brexit, the interest in the 1907 Act partnerships may increase as UK limited partnerships will no longer be as attractive a legal structure for private equity and venture capital funds given that they will no longer constitute an EU AIF and therefore will not benefit from the marketing passport operating under AIFMD.

4. Due Diligence

4.1 General Information

Due diligence of a target is typically carried out on behalf of a private equity buyer by its legal and financial advisers. Legal due diligence will cover a wide number of areas including, but not limited to, employees, litigation, real estate, commercial contracts and IP/IT.

The level of due diligence undertaken will vary from transaction to transaction and will be driven by a risk assessment of the buyer. The buyer will typically be concerned with a number of specific areas which are relevant to the target entity (ie, intellectual property, property leases, etc). In Ireland there has been a recent trend towards the issuance of due diligence reports on a "red-flag" or exceptions only basis.

Data protection and GDPR issues have come into sharp focus for private equity buyers in recent years and we have seen increased concerns by US private equity sellers in particular, in relation to compliance with anti-corruption and bribery legislation. Due diligence reports are prepared by the buyer's advisers and these are commonly shared with the buyers lending institu-

tions on a non-reliance basis. As mentioned in **4.2 Vendor Due Diligence**, vendor due diligence reports may be prepared but are not common in Ireland.

4.2 Vendor Due Diligence

Vendor due diligence is relatively rare outside of an auction process sale. As part of an auction process, the seller's advisers may prepare a due diligence report which will be relied upon by the buyer.

5. Structure of Transactions

5.1 Structure of the Acquisition

The vast majority of acquisitions are by way of sale and purchase agreement whereby the buyer acquires the entire issued share capital of the target entity. Auction sales are relatively common in Ireland for certain type of transactions and by their nature can lead to a more favourable outcome for the seller(s). However, private equity buyers sometimes favour auction processes as they mitigate the risk of a protracted negotiation process and associated delays.

5.2 Structure of the Buyer

In Ireland, the structure of a private equity-backed buyer is largely driven by tax considerations. Typically, the fund making the acquisition will incorporate a special purpose vehicle which will act as the buyer entity and acquire the target with the private equity funds sitting above this entity and fund it, often through a combination of equity, loan notes and bank debt.

5.3 Funding Structure of Private Equity Transactions

It is usual for a private equity buyer to finance an acquisition using a mixture of both debt and equity funding with debt being available from banks and other institutional lenders. The provision of equity commitment letters is common in Ireland in order to give comfort to a seller.

Typically, the equity commitment letter will contain warranties from the private equity fund that it has sufficient cash in place in order to fund the equity portion of the consideration for the target. A bank or institutional lender may also provide a loan commitment letter which will be conditional on the occurrence of certain events as set out in the sale and purchase agreement. The acquisition of minority stakes (both in private and public limited companies) has been a common feature of private equity transactions in the Irish market for many years.

5.4 Multiple Investors

A consortium consisting of a number of private equity funds (possibly together with other investors) would not be typical in Ireland for structuring the acquisition of a target. However, it is common see a private equity fund take an equity stake in the acquisition company alongside management (see **8. Management Incentives**).

6. Terms of Acquisition Documentation

6.1 Types of Consideration Mechanisms

Traditionally, completion accounts were the most common pricing mechanism used in Ireland however we have seen the locked box mechanism become increasingly common over the past number of years. The locked box mechanism provides certainty over the purchase price at the outset which, in our experience, private equity buyers are in favour of. However, it is frequently a point of negotiation between the parties as to which approach is used and both mechanisms remain popular.

Earn out and deferred consideration structures are commonly used in Ireland. A point of negotiation between the parties will be the amount of consideration to be deferred and what protections a seller can obtain in order to give it comfort that the buyer will not negatively impact the underlying business with the consequence of decreasing the amount of the deferred consideration.

It is normal practice in Ireland therefore for the buyer to give covenants and undertakings in relation to the running of the business during the period from completion to the last payment date for the earn-out/deferred consideration in order to give the sellers comfort that the buyer will not manage the business in such a way so as to avoid having to pay the additional consideration.

6.2 Locked-Box Consideration Structures

It would not be usual for interest to be charged on any leakage of value from the target and/or its group.

6.3 Dispute Resolution for Consideration Structures

It would be usual to have a separate dispute resolution mechanism specifically for resolving any issues in relation to any locked box consideration. The sale and purchase agreement will typically include provisions stating that any dispute arising between the parties in relation to any portion of the consideration (or adjustment to the consideration) will be referred to an independent expert for determination if it cannot be agreed by the parties in a specified time period. This independent expert would normally be an independent accountant of high standing who will be given access to all relevant information by the

parties and come to a decision which will then be binding in all respects.

6.4 Conditionality in Acquisition Documentation

Split signing and completions are common in Ireland as the approval of certain governmental agencies (ie, the Competition and Consumer Protection Commission, the CBI and/or other regulatory approval) may be required depending on the sector in which the target entity operates. The required approval may take a number of weeks to be granted so the parties will sign the main sale and purchase agreement to give them certainty of the terms. It is common for the sale and purchase agreement in such circumstances to include conditions in relation to the running of the business in the interim period before completion.

The agreement may contain a number of "consent items" which the target entity and/or the seller(s) cannot do without the prior consent of the buyer. It is common for a material adverse change clause to also be included to give the buyer an "out" if the position of the target changes during this interim period. The material adverse change clause is usually heavily negotiated and can be a source of conflict between the parties.

In any transaction involving the change of ownership of an entity, the parties will need to consider any change of control provisions contained within contracts to which the target is a party (ie, facility agreements and/or customer contracts). These provisions will need to be waived by, or the consent to the acquisition obtained from, the relevant parties.

6.5 "Hell or High Water" Undertakings

In those deals where there is a regulatory condition, it would be very unusual for a private-equity buyer to accept a "hell or high water" undertaking in Ireland. If a regulatory authority imposed a condition to closing, it would not be usual for a party to be obliged to accept such condition set down by a regulator on any terms (ie, material disposal requirement).

6.6 Break Fees

Neither break fees nor reverse break fees are common in private equity deals involving private companies in Ireland. Instead, it is normal for each party to cover their own costs. However, there are transactions where the acquiring entity agrees to cover all costs for both the buyer and the seller(s) in the event the deal completes.

Break fees are common in the case of takeovers of public companies.

6.7 Termination Rights in Acquisition Documentation

The circumstances in which a party can terminate the sale and purchase agreement will usually be set out within the sale and purchase agreement. For instance, the parties may agree to a long-stop date by which, if completion has not occurred, either party may terminate the agreement. Completion of an acquisition is often conditional on the occurrence of certain events (ie, regulatory approval as discussed in **6.4 Conditionality in Acquisition Documentation**, repayment of the target's debt and/or the release of any security).

If any of these events have not occurred, it is a common term of the sale and purchase agreement that the buyer will not have to proceed with completion. The sellers should be given an option to cure the breach after which the buyer may terminate at its discretion. As mentioned in **6.4 Conditionality in Acquisition Documentation**, it is common for a material adverse change clause to also be included to give the buyer an "out" if the position of the target changes during the period between signing and completion.

6.8 Allocation of Risk

A private equity seller will always seek to minimise its risk – whether the buyer is a private equity buyer or not. A private equity fund will generally be required to return value to its investors shortly after selling a stake and so will not want to be burdened by escrow arrangements, changes in the completion accounts, etc, as a "normal" seller would. A private equity seller takes very little liability under the sale and purchase agreement and, as noted in **6.9 Warranty Protection**, will only give limited warranties.

6.9 Warranty Protection

A private equity seller will typically only provide warranties in relation to the ownership of its shares and its capacity to enter into the relevant transaction documents. The liability of a private equity seller will typically be capped at the cash amount of consideration it receives for its shares.

The substantive warranties in relation to the running of the business and all associated areas (ie, contracts, employees, accounts, IP/IT, etc) will be provided by management shareholders who are involved in the day to day running of the business and the target company. Warranty and indemnity (W&I) insurance is being increasingly used by private equity buyers to provide coverage where they cannot agree a liability position with the sellers or where coverage would otherwise be given by members of the ongoing management team (see **6.11 Commonly Litigated Provisions**).

Standard limitations which apply to warranties in the case of an equity investment are:

- matters disclosed will qualify warranties;
- warranty claims must be brought within certain time periods (typically between 12 to 24 months for general warranties, and five to seven years for tax warranties (reflecting the time periods in which the Irish tax authorities can assess tax liabilities)); and
- overall cap limited to funds invested (and management may be limited to one to two times their base salary).

Full disclosure of a data room has traditionally not been accepted in Ireland with buyers arguing strongly against it. However, there is an increasing trend towards sellers (particularly non-Irish sellers) seeking a greater degree of disclosure and the full disclosure of certain sections of the data room has recently been a feature of Irish transactions.

6.10 Other Protections in Acquisition Documentation

The Irish market has been influenced by the US model for warranty and indemnity cover and the inclusion of warranties and indemnities in a sale and purchase agreement is now very common in Ireland. This is largely driven by the number of trade sales involving US buyers in the Irish market.

A private equity seller will not usually provide any indemnities and instead these are given by the management shareholders. As mentioned in **6.9 Warranty Protection**, it is increasingly common in Ireland for W&I insurance to be a feature of private equity transactions. The inclusion of an escrow is common in Ireland in order to provide comfort in relation to any change in the amount of consideration due following finalisation of the completion accounts and/or for any warranty claims.

6.11 Commonly Litigated Provisions

Litigation in connection with private equity transactions is not common in Ireland for a number of reasons. Namely, it is common for management sellers to roll-up their shares into the acquiring entity and therefore be in partnership with the private equity buyer. A private equity buyer will be slow to litigate against management in the event of a warranty claim as the management are seen as their partners in the business and a key driver in its success.

7. Takeovers

7.1 Public-to-Privates

It is not unusual for private equity funds to seek to participate in offers for public limited companies in Ireland. However, it is not a very active market with only a small number of public-to-private acquisitions completed in the last 12 months (ie, the acquisition of Allergan PLC by AbbVie in May 2020 and the acquisition by Green REIT plc by private equity firm Henderson Capital Partners in November 2019).

7.2 Material Shareholding Thresholds

There are a number of disclosure requirements for owners of large shareholdings as follows:

Companies Act 2014

The Act deals with the notification of individual and group acquisitions. A person is obliged to make disclosure of a change in shareholding interest in an Irish public limited company (i) where that person acquires or disposes of an interest in shares of a class carrying voting rights which brings that person's interest in shares of that class equal to, above or below (as applicable) 3% in nominal value of the issued share capital of that class; or (ii) where that person already has an interest in shares of a voting share class equal to or greater than 3% in nominal value of the issued share capital of that class and that person acquires or disposes of an interest in shares which results in that person's interest in shares of that class increasing or decreasing by 1% or more (but their interest is still 3% or more of the relevant share capital).

The notification must be made to the company itself, rather than by public announcement, and must generally be made within five days of the change in interest arising.

Substantial Acquisition Rules (SARs)

The SARs which are issued by the Panel, are also applicable.

SARs 3 and 4 provide that a person may not (subject to certain exemptions), in any period of seven days, acquire securities (or rights over securities) carrying 10% or more of its voting rights in a company if, following the acquisition, that person would hold securities (or rights over securities) carrying 15% or more, but less than 30%, of the voting rights in the company (a "substantial acquisition").

Under SAR 6, a person must disclose to the company, the Panel and the relevant stock exchange by noon of the following business day where a person either increases its holding to over 15% of the voting rights in a company or increases an existing holding that is already over 15% by a whole percentage point.

Irish Takeover Rules

If the company is in an offer period (which, broadly commences after an announcement of an offer or potential offer is made) under the Rules additional disclosure obligations as regards to any dealings in shares will apply where a holder has an interest

in shares of 1% or more. Disclosure is public and must be made through a regulatory information service and to the Panel on the business day following the dealing.

A mandatory bid could be required or if a party and its concert parties reach 30%.

Transparency Rules
Rules issued by the Central Bank of Ireland require a shareholder to notify a public limited company once the percentage of voting rights acquired by that shareholder reaches, exceeds or falls below 3%, and then each 1% thereafter.

7.3 Mandatory Offer Thresholds

The Rules contain a mandatory offer requirement in the following circumstances:

- if a party (acting by itself or with its concert parties) acquires a holding of 30% or more of the voting rights of a company; or
- if a party (acting by itself or with its concert parties) holds 30% or more, but less than 50%, of the voting rights of the company and increases its stake by more than 0.05% in any 12-month period.

The mandatory offer must be in cash (or include a cash alternative) at a price per share not less than the highest price per share paid for by that shareholder in the 12 months immediately preceding the mandatory offer. The Panel may waive the mandatory offer requirement in certain circumstances.

7.4 Consideration

Cash consideration is more common in Ireland however we have seen a mixture of both cash and equity consideration used. If the intention is to satisfy the consideration by both a payment of cash and the issuance of shares, a buyer must be careful that the correct information is disclosed to the shareholders of the company. For instance, if transferable securities are to be issued the purchaser entity may be required to issue a prospectus as required under the Prospectus Regulation.

7.5 Conditions in Takeovers

A takeover offer is conditional on the bidder entity obtaining the consent of the existing shareholders of the company. Following the announcement of its intention to make an offer, the bidder entity must provide the existing shareholders with details of the proposed acquisition. The existing shareholders then have a period of time to either accept or reject the offer for their shares. It is usual in Ireland for this acceptance condition to be set at the approval of 80% or 90% of the issued shares of the company as these are the thresholds for invoking the statutory minority “squeeze-out” procedure.

If the consideration is to be paid in cash (or partly in cash) the offer document must contain a “cash confirmation” from the bidder entity’s financial advisors confirming that it has the necessary cash reserves to fund the acquisition. If the intention is to use debt to finance the acquisition the necessary documents will need to be in place before the offer document is published.

Break fees are very common in Ireland in relation to a takeover offer however they must first be approved by the Panel. Such fee would typically be for a maximum amount of 1% of the value of the offer.

A bidder could also seek protection by way of irrevocable commitments to accept the offer (see **7.7 Irrevocable Commitments**).

7.6 Acquiring Less Than 100%

There are two main ways to acquire an Irish public limited company – by way of a takeover offer or scheme of arrangement.

The advantage of a scheme of arrangement is that, once a bidder entity has the approval of a majority in number (representing at least 75% in value) of the members of each share class, it can petition the Irish High Court to approve the offer. If approved, such approval will be binding on all of the shareholders so the bidder entity can then acquire 100% of the issued shares of the target entity.

If a bidder seeks to acquire an Irish public limited company by way of a takeover offer and acquires less than 100% of the issued shares, the bidder entity can seek to utilise the minority “squeeze-out” procedure pursuant to which it can force the non-accepting minority shareholders to accept the offer. In Ireland, the acceptance threshold to invoke the minority “squeeze-out” procedure is 80% for all entities (other than those who are listed on a regulated market which have a 90% threshold). A bidder must notify the dissenting shareholders confirming that it intends to exercise its squeeze-out rights within three months from the closing date of the offer. Once the notice has been served, any dissenting shareholder may make an application for relief to the Irish High Court within 21 days.

7.7 Irrevocable Commitments

It is common for a bidder to obtain irrevocable commitments from major shareholders confirming that they will accept the terms of the offer and commit to sell their shares to the bidder entity. Such a commitment would be binding on the shareholder so they cannot simply walk away if they later decide that they do not like the terms of the offer. Care needs to be taken on the timing of collection of such commitments.

7.8 Hostile Takeover Offers
While hostile takeover offers are permitted in Ireland they are not common with only a few examples, none of which have been successful.

8. Management Incentives

8.1 Equity Incentivisation and Ownership
Equity incentivisation is very common in Ireland. Typically, key management receive equity (or equity-like) participation of up to 10% to 20% of the issued share capital as an incentive and a mechanism to create value, commonly referred to as "sweet equity". In the case of private equity-backed entities, key management are granted a participation in the investment vehicle before any transactions are made by it, or in the case of trading businesses, management may be granted equity before the private equity investment.

8.2 Management Participation
The management team will normally subscribe for ordinary shares in the buyer entity acquiring the target otherwise known as "sweet equity" so that they can access any upside. In some cases, key management will also be given the opportunity to invest in (or roll-over into) the institutional strip.

8.3 Vesting/Leaver Provisions
Leaver provisions can be one of the most heavily negotiated aspects of a management shareholder's package and as such, do vary from transaction to transaction. However, we would routinely see equity issued to a management shareholder (other than rolled or invested equity) to be the subject of vesting provisions – either time or performance based. Typically, time based vesting would be over the course of four years with a one year cliff.

If the individual leaves their employment before their shares have vested, they will automatically lose their right to such unvested shares. For those shares that have vested, the amount which a management shareholder will be paid in respect of such shares will typically be determined by whether they are a "good" or "bad" leaver. If they are a "good leaver" they will usually be entitled to receive the market value for their shares.

In contrast, if they are a "bad leaver" they will only be entitled to receive the nominal value of such shares. The purpose of these restrictions is to ensure management do not receive any value to which they have not contributed. What determines a "good leaver" and a "bad leaver" is often heavily negotiated.

8.4 Restrictions on Manager Shareholders
A private equity fund will be concerned with the restrictive covenants which a management shareholder is bound by. It is typical for management shareholders in Ireland to be subject to non-compete and non-solicitation restrictive covenants. In order to be enforceable, such restrictions must be the minimum necessary to protect the interests of the relevant company, and must be limited by:

- duration;
- territorial scope; and
- type of work.

Post-termination restrictions on management shareholders are generally permitted for up to two years but we would frequently see 12-month restrictions in place. More recently, non-disparagement covenants have featured more frequently in transactions. If the target entity is operating in the technology space, it is common for a management shareholder to also be required to sign a confirmation that any IP developed by them in the course of their employment is an asset of the company.

8.5 Minority Protection for Manager Shareholders
Key management that are granted a level of equity participation will usually participate at board level. The right to participate at the board will typically be determined by:

- their particular roles within the company (eg, typically the CEO will be a board member due to that position); and
- the proportion of equity retained by the management.

If management collectively hold a significant proportion of equity, they would usually seek to negotiate a right to collectively appoint a director.

It would not be typical for a full suite of veto or information rights to be granted to management shareholders in the same way as would be granted to a private equity investor. However, management may seek some (or all) of the following protections:

- tag-along rights may be important to allow management to participate in available liquidity;
- restrictions on investors transferring shares in a secondary sale (in particular to a competitor of the business);
- restrictions on transactions by the company with other investor portfolio companies;
- rights of management to transfer shares to family members or for estate planning purposes;
- rights to retain shares after they have ceased to be engaged in management and participate in value created on an exit

or IPO (subject to leaver provisions (if any) as discussed in **8.3 Vesting/Leaver Provisions**);
- no amendment to the waterfall provisions contained in the constitutional documents;
- restriction on the issuance of shares with a higher ranking than those held by management;
- mechanisms to give management liquidity in their shares if they cease to be engaged by the company, in particular, management will want to ensure that the price to be paid for their shares reflects their contribution to the success of the company. Negotiations will often include the circumstances in which a manager will be regarded as a "good leaver" or a "bad leaver" (as noted in **8.3 Vesting/Leaver Provisions**); and
- long termination notice period or a right to payment in lieu of notice.

9. Portfolio Company Oversight

9.1 Shareholder Control

A private equity shareholder will not usually seek to get involved in the day to day running of a business, however, they will want to have oversight of the business through a right to appoint directors to the board of the company. How many directors they may appoint varies from transaction to transaction and each private equity fund will have its own approach but will generally have the ability to appoint at least one director to the board.

A private equity shareholder will also want to have veto rights over certain matters which cannot occur without their consent. The list of items for which their consent will be required will be carefully negotiated between the management and the private equity shareholder.

9.2 Shareholder Liability

It is a fundamental principle of company law in Ireland that shareholders will not be liable for the actions of the company and may only be liable up to the paid-up amount on their shares. The corporate veil can however be lifted in certain limited circumstances (ie, in the case of fraud) however this is highly unusual in Ireland.

9.3 Shareholder Compliance Policy

It can be a requirement of a private equity shareholder for the company to implement certain policies that it does not already have in place at the time of the private equity fund's investment or which are deemed to be inadequate be it the private equity funds own policies or the adoption of new policies specific to the company. US private equity funds are increasingly focused on companies having substantive environmental protection, anti-corruption and anti-bribery policies in place.

10. Exits

10.1 Types of Exit

The timeframe for holding an investment will vary from private equity fund to private equity fund however we typically see private equity funds seeking to exit their position within five years of their initial investment. As noted, 2020 has been a quiet year so far, but the most common form of exit that would generally be seen is by way of sale of the entire issued share capital to a third-party buyer (ie, another private equity fund or a trade buyer). While "dual-track" exits do occur in the Irish market they are not common. It would not be common in the Irish market for a private equity fund to reinvest beyond the life of their initial investment.

10.2 Drag Rights

Drag rights are typical in equity arrangements in Ireland however they are rarely utilised. Typically, a buyer will not want to complete a sale on using a drag along. A private equity fund will be afforded rights to enable it to force any minority shareholders to sell their shares if the private equity fund wishes to sell their stake however it would not be typical for a private equity shareholder to be the subject a drag along.

The equity threshold required to enforce a drag along varies from transaction to transaction and is linked to the shareholder base but is usually set at a percentage of the shares held by the investors always to include the private equity shareholders.

10.3 Tag Rights

Tag rights are common in Ireland so that, in the event that the private equity shareholder wishes to sell its shares, the other minority shareholders also have the opportunity to sell their shares on the same terms. There is no typical threshold needed to enforce these rights, it will depend on the equity structure of the company in question.

10.4 IPO

A lock-up arrangement for a period of 12 months is common in respect of any management shareholder but not for a private equity seller. Relationship agreements are commonly entered into between the private equity seller and the target company.

The Maples Group, through its leading international law firm, Maples and Calder, advises global financial, institutional, business and private clients on the laws of the British Virgin Islands, the Cayman Islands, Ireland, Jersey and Luxembourg. With offices in key jurisdictions around the world, the Maples Group has specific strengths in the areas of corporate commercial, finance, investment funds, litigation and trusts. Maintaining relationships with leading legal counsel, the Group leverages this local expertise to deliver an integrated service offering for global business initiatives.

The firm would like to thank Jennifer Murphy and Keelin Gavagan for their contribution to this chapter.

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