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Taxation of Cross-Border Mergers and Acquisitions

Ireland

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Introduction

Irish tax provisions on mergers and acquisitions (M&A) have been evolving gradually in recent years. There have been no fundamental changes since the capital gains tax participation exemption was introduced in 2004. However, there have been some important amendments and enhancements to the relevant provisions, notably in relation to the tax implications of the acquisition of intellectual property (IP).

This chapter addresses three fundamental decisions facing a prospective purchaser:

- What should be acquired: the target's shares or its assets?
- What will be the acquisition vehicle?
- How should the acquisition vehicle be financed?

Tax is only one area to consider in structuring an acquisition. Other areas, such as company law and accounting issues that are outside the scope of this chapter, are also relevant when determining the optimal structure.

Recent developments

Intangible assets

The most significant recent Irish tax development is the introduction in 2009 of tax relieving provisions relating to the acquisition of intangible assets. Traditionally, the majority of M&A transactions have tended to be structured as share purchases for the reasons outlined later in this chapter. The new provisions require the structuring of acquisitions involving substantial components of intellectual property to be carefully reconsidered.

Irish companies are now entitled to claim a tax write-off for the capital cost of acquiring or developing qualifying intangible assets for the purposes of their trade. Where such qualifying intangible assets are amortized or depreciated for accounting purposes, the tax write-off is available in line with the accounting write-off.

Alternatively, if the qualifying intangible asset is not amortized or depreciated for accounting purposes, or indeed has a very long life, a company can elect to take the tax write-off over a 15-year period. A rate of 7 percent applies for years one to 14, and a 2 percent rate applies for year 15. Tax relief is also available where the asset is impaired in any one year.

The definition of qualifying intangible assets is broad and encompasses patents, design rights, brands, trademarks, domain names, computer software acquired for commercial exploitation and certain know-how, along with applications for the grant of registration of these items. Goodwill qualifies to the extent that it is directly attributable to qualifying intellectual property.

Certain restrictions and anti-avoidance measures apply to the relieving provisions. Primarily, any activity involving a specified intangible asset on which relief is being claimed must be treated as a separate activity for these purposes. Relief for capital allowances and certain interest costs is restricted to 80 percent of the annual income arising from this separate trade. Unused allowances or interest can be carried forward to future accounting periods.

Tax residency

Another recent Irish development is the amendment of tax residency legislation in 2013. Previously, it was possible for Irish incorporated companies to be 'stateless' in certain limited circumstances. This was a perceived anomaly in Irish tax law that the new provisions sought to remove.

Previously, an Irish incorporated company that was not managed and controlled in Ireland could be stateless if it was (or was related to) a company carrying on a trade in Ireland and was either:

- ultimately controlled by persons resident in the European Union (EU) or a territory with a tax treaty with Ireland, and not controlled from Ireland, or
- part of a group quoted (publicly listed) in the EU or a treaty country.

Under the amendment, an Irish incorporated company is regarded as Irish tax resident if:

- it is managed and controlled in an EU Member State or in a country with which Ireland has a tax treaty, and
- that country has a 'place of incorporation' test but not a 'central management and control' test.

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Thus, these rules affect any Irish incorporated companies managed and controlled in the US. However, companies that are centrally managed and controlled in a jurisdiction that regards them as tax resident by virtue of this management and control and that would have been non-resident in Ireland under the pre-existing rules remains non-resident in Ireland for tax purposes.

The new provision applies to all new companies incorporated in Ireland from 24 October 2013, and to existing Irish incorporated companies from 1 January 2015.

This change is not expected to materially affect international business in Ireland.

Foreign tax credits

Another significant Irish development relates to the introduction in 2012 of additional foreign tax credits on certain foreign dividends. To be eligible for the additional credit, certain conditions must be met. In particular, the dividend must be paid by a company resident in an EU or European Economic Area (EEA) country with which Ireland has a tax treaty.

In effect, the additional foreign credit provisions allow for increased double taxation relief on qualifying dividends. The credit provides relief by reference to the statutory or headline rate of corporation tax in the country from which the dividend is paid rather than the actual withholding tax suffered or foreign tax paid on the underlying profits out of which the dividend was paid.

This provision should provide additional relief to companies because the actual foreign tax paid is often lower than the headline tax rate or even nil due to the availability of exemptions, reliefs or the utilization of tax losses or other credits such as R&D credits in the country from which the dividend is paid.

The provisions allow for an additional credit against Irish tax on foreign dividends, which can be used in addition to the credit available as calculated using the existing rules, should the credit calculated under the existing rules not be sufficient to relieve Irish corporation tax arising on such dividends. However, any excess credits calculated using the new rules are not eligible for pooling or carry forward to future periods. In addition, the credit is only available once any credit calculated using the old rules has been fully utilized.

Real estate investment trusts

In 2013, a tax regime for real estate investment trusts (REIT) was introduced. On electing into this regime, a qualifying company is not be liable to corporate tax on income and capital gains arising from its property investment business. Investors may be subject to tax on income distributions or disposal of their investment in the REIT, depending on the tax rules of their country of residence. Dividend withholding tax applies on distributions from REITs, although treaty relief may be available for non-residents of Ireland. A company must meet various conditions to qualify as a REIT. For example, the company must be publicly listed, maintain certain ratios of income to financing cost and loan to value, and 75 percent of its assets and income must derive from its property rental business.

Incentive capital gains tax relief

A special capital gains tax incentive was introduced in 2011 and applies until 31 December 2014. Under this measure, where a property purchased during this period is held for at least 7 years, no capital gains tax applies to the capital gain relating to that seven-year holding period.

Asset purchase or share purchase

The following sections provide insight into the issues that should be considered by buyers and sellers when a purchase of either assets or shares is contemplated. The advantages and disadvantages of both alternatives are summarized at the end of this chapter.

Purchase of assets

A purchase of assets usually results in an increase in the base cost of those assets for both capital gains tax and capital allowance purposes. The purchaser may be entitled to use the new intellectual property amortization rules discussed earlier in this chapter. However, a sale of assets (as opposed to shares) may trigger a clawback of capital allowances on plant and on industrial buildings, which can be avoided in some instances. Higher stamp duty costs are also likely to arise for the purchaser. (Certain assets, such as intangibles, may be exempt from stamp duty; see this chapter's section on transfer taxes below.)

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Purchasers may be reluctant to acquire shares, as opposed to acquiring assets and a business, from the company because of the exposure they would assume to the existing liabilities of the company, not all of which may be certain and known.

A shareholder may have a different base cost for their shares than the company has with respect to its trade and undertaking. This may influence a seller's decision on whether to sell shares or have the company sell the business assets. Where a company sells a business, the shareholders may become liable for a second charge to capital gains tax, or charges to income tax, if they attempt to extract the sales proceeds from the company. For this reason, the sale of shares directly may be more attractive to a seller than the sale of the company's assets.

Purchase price

For tax purposes, it is necessary to apportion the total consideration among the assets acquired. It is generally advisable for the purchase agreement to specify the allocation. This is normally acceptable for tax purposes provided it is commercially justifiable.

When a business is purchased for a single price that is not allocated by the purchase agreement to the individual assets, there are no statutory rules for the allocation. It is necessary to agree the apportionment of the price over the assets with the Revenue Commissioners, normally by reference to the assets' respective market values. The Revenue Commissioners have the power to apportion the sales proceeds of a building that has attracted capital allowances between that part relating to the expenditure that attracted the allowances and that part relating to expenditure that did not attract allowances. Usually this does not significantly affect the apportionment of price between goodwill and other assets.

If consideration over 500,000 Euros (EUR) is paid for certain assets, including Irish real estate and goodwill, the vendor must provide a tax clearance certificate prior to the payment of the consideration. If not, the purchaser is obliged to withhold 15 percent of the consideration to be paid.

Goodwill

Goodwill paid for a business as a going concern is neither deductible nor capable of being depreciated or amortized for Irish tax purposes unless the goodwill is directly attributable to qualifying intellectual property (as discussed earlier in this chapter). Where the purchase price for a business (as opposed to shares) contains an element of goodwill, the purchaser commonly seeks to arrange the purchase agreement so that the price is payable for the acquisition of tangible assets and qualifying intellectual property, thus reducing or eliminating the element of purchase price assignable to non-deductible goodwill. The Revenue Commissioners would normally accept this where commercially justifiable prices are assigned to the various assets.

While the allocation of the purchase price for a business primarily to assets other than goodwill may benefit the purchaser, such allocation can have disadvantages for the seller. Such allocation may lead to a clawback (called a balancing charge) of capital allowances given previously, where a higher price is paid for plant and machinery or industrial buildings; there could be income tax implications where the price is allocated to trading stock; capital gains tax implications may also arise. The purchaser must also consider the stamp duty implications, as stamp duty is payable by the purchaser rather than the seller. In many instances, the seller may have a zero or very low base cost for capital gains tax purposes for goodwill; in this case, minimizing the amount of the consideration referable to goodwill could also benefit the seller.

Depreciation

Tax depreciation (known as capital allowances) is available as a deduction for expenditure incurred on plant and machinery in use for the purpose of a trade or profession or for the purpose of leasing, and for industrial buildings and (for a limited period) for commercial buildings situated in certain areas that have been specially designated for urban renewal. With certain minor exceptions, capital allowances on plant and machinery are calculated on a straight-line basis at a rate of 12.5 percent per year. Industrial buildings are subject to a straight-line rate of 4 percent per year.

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The new provisions relating to the tax deductibility of the depreciation of qualifying intangible assets (discussed earlier in this chapter) dealt with an anomaly whereby the depreciation of such assets usually could not be deductible for tax purposes. As also discussed earlier, computer software acquired for the purpose of commercial exploitation now falls under the intangible asset regime. An election can be made for capital expenditure incurred on such computer software between 4 February 2010 and 4 February 2012 to be deductible under the old regime, which provided for the amortization at 12.5 percent per year for 8 years.

Tax attributes

Tax losses are not transferred on an asset acquisition. They remain with the vendor company.

Value added tax

Like other EU Member States, Ireland operates a system of valued added tax (VAT) based on the European VAT Directives (principally the sixth and eighth Directives). The standard rate of VAT is currently 23 percent; lower rates of 9 percent and 13.5 percent apply in certain circumstances.

VAT does not apply on the sale of a business by one taxable person to another taxable person. Where the purchaser is not a taxable person at the time of the sale but will be as a result of carrying on the business post acquisition, the Revenue Commissioners generally accept that the transfer is not liable to VAT.

The recoverability of VAT on transaction costs is a complex area, particularly as VAT does not apply to related transaction. Early professional advice is recommended to minimize the amount of irrecoverable VAT arising.

Transfer taxes

Stamp duty is chargeable on documents that transfer ownership of property, when the document is executed in Ireland or the document relates to property in Ireland or things to be done in Ireland. Many assets may be transferred without the use of a document (e.g. transfer by delivery of plant and machinery). Interests in land can only be transferred by use of a document, and failure to stamp that document can have serious implications for title to the land. A company secretary cannot act on share transfer documents relating to shares in Irish companies unless they are stamped. Where shares in a company are issued instead of cash or other consideration, a return must be made to the company's office; this return attracts stamp duty even if the underlying assets to which the return relates have been transferred by delivery rather than by means of a written document.

The rate of stamp duty for transfers of non-residential property is 2 percent. The rate of stamp duty for transfers of Irish shares and marketable securities is 1 percent. The transfer of non-Irish shares and securities is normally exempt.

There are exemptions from stamp duty, particularly in relation to the financial services industry and the transfer of certain intangible assets. There are also reliefs from stamp duty (subject to conditions for certain group reconstructions and amalgamations) in respect of transactions within a 90 percent worldwide group.

Purchase of shares

The purchase of a target company's shares does not result in an increase in the base cost of the company's assets. There is no deduction for the difference between underlying net asset values and consideration.

A sale of shares by an Irish holding company may be exempt from Irish capital gains tax provided the conditions contained within the holding company participation exemption are satisfied. Thus, the availability of this exemption may influence a shareholder's decision on whether to sell shares or assets and whether the sale should be made by the shareholder directly or by a holding company owned by the shareholder.

In addition, provided it is not part of a tax avoidance arrangement, an exchange of shares for other shares does not usually give rise to Irish capital gains tax as the charge is deferred until the newly acquired shares are disposed of. For this treatment to apply, the company issuing the shares must control the target company or acquire control of it as a result of the exchange. Alternatively, the shares should be issued as a result of a general offer made to members of the other company or any class of members, and the offer should be made in the first instance on such conditions that, if satisfied, the acquiring company would have control of the target company. This relief may make it attractive to shareholders in a target company to accept shares rather than cash for their shares. The standard rate of capital gains tax in Ireland is 33 percent.

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Tax indemnities and warranties

In the case of negotiated acquisitions, it is usual for the purchaser to request and the seller to provide indemnities and warranties as to any undisclosed taxation liabilities of the target company. The extent of such indemnities or warranties is a matter for negotiation.

Tax losses

In principle, carried forward Irish tax losses generated by the target company transfer along with the company. However, losses arising prior to a change in ownership may no longer be available for carry forward against subsequent profits in the following circumstances:

- Within any period of 3 years, there is both a change in the ownership of a trading company and a major change in the nature or conduct of the company's trade.
- At any time after the level of activity in a company's trade has become small or negligible and before any considerable revival of the trade, there is a change in the company's ownership (this anti-avoidance measure aims to prevent 'loss buying' by companies).

Capital losses that accrue to a company prior to its acquisition cannot be used to relieve gains on pre-acquisition assets of the acquiring group. Unrealized losses on pre-acquisition assets of a target company are similarly ring-fenced.

Crystallization of tax charges

The purchaser should satisfy itself that it is aware of all intragroup transfers of assets within 10 years prior to a transaction occurring. The sale of the target company could trigger a degrouping capital gains tax exit charge for the chargeable company, which is the company leaving the group and the company being acquired in most transaction. It is usual for the purchaser to obtain an appropriate indemnity from the seller.

Pre-sale dividend

In certain circumstances, the seller may prefer to realize part of the value of its investment as income by means of a pre-sale dividend. The rationale is that the dividend may be subject to a low effective rate of Irish tax, but it reduces the proceeds of sale and thus the taxable capital gain on sale, which may be subject to a higher rate of tax. The position is not straightforward, however, and each case must be examined on the basis of its own facts.

Transfer taxes

Stamp duty is payable on transfers of shares in Irish companies. The normal rate of stamp duty for shares is 1 percent. As mentioned, relief is available (subject to conditions) on such stamp duty arising in share-for-share swaps and shares-for-undertaking swaps and also for certain intragroup transactions and mergers. Where the purchaser undertakes to pay debt to the target company, separate to consideration payable for the shares, in certain cases, the amount of the debt repayable give rises to an additional 1 percent charge to stamp duty.

Tax clearances

It is not possible to obtain a full clearance from the Revenue Commissioners regarding the present and potential tax liabilities of a target company. The target company's tax advisers can usually obtain a statement of the company's tax liabilities as known at that point in time from the Revenue Commissioners. However, such a statement does not prevent the Revenue Commissioners from reviewing those liabilities and subsequently increasing them.

If the value of shares is mainly derived from Irish real estate and the purchase consideration exceeds EUR500,000, the vendor is obliged to furnish a capital gains tax clearance certificate to the purchaser prior to the payment of consideration. If not, the purchaser is obliged to withhold 15 percent of the consideration.

Choice of acquisition vehicle

The following vehicles may be used to acquire the shares or undertaking of the target company.

Irish holding company

An Irish holding company might be used if it is desired to obtain a tax deduction for interest on acquisition financing in Ireland or otherwise integrate the target into an Irish operating group.

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Ireland also has two favorable attributes as a holding company regime, particularly as a European headquarters location:

- an exemption from capital gains tax in connection with gains arising on the disposal of certain shares
- a form of onshore pooling, which does not exempt dividends from foreign subsidiaries from corporate tax but substantially reduces (or eliminates) Irish taxation attributable to foreign dividends.

The capital gains tax exemption exempts gains arising on the disposal of certain shares accruing to an Irish holding company from Irish capital gains tax. Capital losses arising on such shares are not deductible against other capital gains accruing to that company.

The conditions applying to the holding company are as follows:

- It must hold the shares in the investment and meet conditions discussed later in this chapter for an uninterrupted period of at least 12 months.
- The investor company must hold not less than 5 percent of the investee company's equity share capital.
- At the time of disposal, the business of the investee company must consist wholly or mainly of carrying on a trade or trades, or it must be part of a trading group whose business consists wholly or mainly of the carrying on of a trade or trades.
- The investee must be an EU or tax treaty resident at the time of disposal.
- The investee must not derive the greater part of its value from Irish real estate.

The onshore pooling of dividends affects the taxation of dividends received by a holding company from its offshore investees. Generally, foreign dividends received by a holding company from trading subsidiaries in EU or treaty countries are chargeable to tax at a rate of 12.5 percent. The rules extend the 12.5 percent rate to dividends from non-treaty, non-EU locations where the paying company is a quoted (publicly listed) company, or is owned directly or indirectly by a quoted company. Otherwise, the dividends generally are taxable at a rate of 25 percent.

The onshore pooling regime allows an Irish company to aggregate all the credits on foreign dividends received for set-off against the Irish tax arising on these dividends. Excess tax credits can be carried forward for use in future tax years.

As noted, provisions introduced in 2012 provide for an additional credit for foreign taxes on foreign dividends. These provisions allow for increased double taxation relief on qualifying dividends as relief is provided by reference to the statutory or headline rate of corporation tax in the country from which the dividend is paid (rather than the actual withholding tax suffered or foreign tax paid on the profits giving rise to the dividend). However, excess credits under the new provisions are not eligible for pooling or carry forward to future periods. The credit is only available after the full utilization of any credit calculated using the original onshore pooling regime.

Foreign parent company

The foreign purchaser may choose to make the acquisition itself, perhaps to shelter its own taxable profits with the financing costs. This would not necessarily cause any Irish tax problems as Ireland does not tax the gains of non-residents disposing of Irish share investments unless the shares derive greater than 50 percent of their value from assets related to Irish real estate.

Dividends and other distributions from Irish resident companies are subject to dividend withholding tax (WHT) at the standard rate of income tax (currently 20 percent). There are numerous exemptions from dividend WHT, which generally depend on the recipient making written declarations to the paying company. Exemptions are available in relation to dividends paid to Irish resident companies, companies resident in the EU or treaty states, companies ultimately controlled from the EU or treaty states, and certain quoted (publicly listed) companies.

Non-resident intermediate holding company

The analysis in the foreign parent section earlier in this chapter also applies in this situation. The payment of dividends to intermediate holding companies that are resident in tax haven jurisdictions can give rise to WHT. However, depending on the residence of the ultimate parent company, it may be possible to take advantage of exemptions from dividend WHT.

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Local branch

A branch of a non-resident company may qualify for the 12.5 percent rate of corporation tax (applicable to trading income). There are no Irish capital gains tax advantages to using a branch over a resident company structure. A sale of branch assets is subject to Irish capital gains tax, but the tax only applies on a non-resident's sale of shares in an Irish company if the value of the shares is mainly derived from Irish real estate-type assets.

Some forms of tax relief depend on the use of company based in the EU or a country with which Ireland has a tax treaty. Acquiring an undertaking through the branch of a foreign company offers certain advantages:

- Dividend WHT does not arise on the repatriation of branch earnings abroad. This is not a major advantage when the holding company is resident in or controlled from a treaty state because exemptions are generally available for Irish resident-paying companies.
- The repatriation of profits abroad other than by way of dividends may be important in the context of controlled foreign company (CFC) legislation in the investor's home country (such as the US Subpart F rules). A Netherlands-resident company with an Irish branch is frequently used to avoid such problems.

Joint venture

Joint ventures can be either corporate (with the joint venture partners holding shares in an Irish company) or unincorporated (usually an Irish partnership). In practice, there may be non-tax reasons that lead a purchaser to prefer using a corporate joint venture. Factors such as the availability of Irish tax deductions for acquisition financing or the differing tax attributes of investors (e.g. individuals versus corporations) might mean a corporate joint venture is substantially more favorable from a tax perspective.

Consortium loss provisions allow the surrender of losses to Irish corporate joint venture investors in certain cases where they might not have the 75 percent majority shareholding required to meet the normal tax loss group relief conditions.

Choice of acquisition funding

Where loans are required to finance the takeover, the structure used for the takeover may be influenced by the need to obtain tax relief (in Ireland, elsewhere or both) for interest on those loans. Ireland does not have specific thin capitalization rules (see the deductibility of interest section later in this chapter).

Debt

Interest is deductible for Irish corporation tax purposes in the following circumstances:

- It is incurred wholly or exclusively for the purposes of a trade.
- It is incurred on loans used to acquire, improve or maintain a rental property (in which case it is deductible only against the rental income and is subject to certain restrictions).
- It is annual interest paid on loans used to acquire a shareholding in an Irish rental income company, a trading company, or the holding company of such companies, or in lending money to such companies, provided the company controls more than 5 percent of the target company and has a common director.

Interest is deductible on an accruals basis in the first two circumstances above but only when paid in the third circumstance.

Deductibility of interest

Ireland does not have thin capitalization rules per se. However, certain aspects of the legislation treating interest as distributions (see earlier in this chapter) have a similar effect in that interest on convertible loans (among others) may be regarded as a distribution.

The rules for the deductibility of interest are outlined earlier in this chapter. Annual interest paid after deduction of tax (or paid gross where the legislation or a tax treaty provides, or in certain cases where the Revenue Commissioners have provided consent) is deductible for corporation tax purposes when the loan was used to acquire shares in or advance moneys to a trading or Irish rental income company or a holding company of such companies in which the investing company has a greater than 5 percent interest and a common director. The interest deductibility is restricted in certain instances for borrowings between connected companies. Subject to certain exceptions, relief is not available where intragroup borrowings are used to finance the intragroup acquisition of assets. Relief also is restricted in certain circumstances where the loan is used to fund foreign connected parties.

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When interest is set at a rate that is more than a reasonable rate of return on the loan in question, it may be regarded as a distribution and not as interest. No other transfer pricing rules apply specifically interest.

Withholding tax on debt and methods to reduce or eliminate it

Ireland imposes WHT on Irish source annual interest only (i.e. interest on a loan that can be outstanding for more than one year). Such interest must be paid after deduction of tax if paid by a company resident in the state or paid by any Irish-resident person to a non-resident person.

Exceptions are available where:

- interest is paid by and received by banks carrying on a bona fide banking business in the state
- interest is paid to or by a qualifying securitization vehicle
- the Revenue Commissioners approve making the payment gross
- interest is paid by a company in the ordinary course of a trade or business to a company resident in a treaty state or in the EU, provided the country in question imposes a tax that generally applies to foreign-source interest income receivable.

Interest WHT does not apply to interest that is treated as a distribution, as explained earlier in this chapter. The rate of WHT on interest is the standard rate of income tax (currently 20 percent). A tax treaty may eliminate the obligation to deduct tax or reduce its rate of deductibility. However, payment should be made gross or at a reduced rate only with the prior consent of the Revenue Commissioners. Without such consent, the recipient may have to seek a tax refund (where applicable).

Checklist for debt funding

- Ireland has no thin capitalization rules.
- Since many Irish companies pay tax at a rate of 12.5 percent, it is sometimes more beneficial to obtain tax relief for the loans in another jurisdiction, where the acquiring company also has taxable income, than it is to obtain such relief in Ireland. However, it is difficult to generalize in this area.
- The tax-deductibility of certain types of acquisition financing is subject to the satisfaction of detailed conditions, is only available on a paid basis (and not on an accruals basis), and can only be used to offset Irish group profits in the year of payment.
- Subject to treaty relief, WHT of 20 percent may apply on interest payments to entities outside the EU.

Equity

A purchaser may use equity to fund its acquisition, possibly by issuing shares to the seller in satisfaction of the consideration or by raising funds through some form of placing. Further, the purchaser may wish to capitalize the target post-acquisition. Ireland has no capital duty on the issue of shares.

However, as Ireland has no thin capitalization rules, the choice of equity as part of the funding does not tend to be driven by the purchaser's Irish tax considerations. Where vendor financing is provided, it often takes the form of equity so the vendor can defer paying capital gains tax.

A key drawback of equity funding is that it offers less flexibility than debt should the parent subsequently wish to recover the funds. An Irish-incorporated company may buy back its own shares and cancel them, or, to a limited extent, hold them as treasury shares. It may convert ordinary share capital into redeemable share capital and then redeem it. Such buy-backs and redemptions of shares generally must be done out of distributable profits. Under existing tax legislation, to the extent that shares are bought back or redeemed for an amount in excess of their issue price by an unquoted company, the excess is treated as a distribution. Share buy-backs and redemptions of shares by public companies are generally treated as capital gains tax transactions; these transactions are subject to anti-avoidance legislation and a requirement to notify the Revenue Commissioners of such a transaction occurring in a relevant accounting period.

There is an exception with respect to the buy-back or redemption of shares in trading companies or holding companies of trading companies (in certain circumstances only and usually limited to minority shareholdings). Under this exception, the transaction is treated as being subject to capital gains tax rules rather than distribution rules. In some cases, it may be more tax-efficient for a seller to have their shares redeemed or bought back by the company in a manner that subjects the transaction to income tax, rather than to dispose of the same shares in a manner that attracts capital gains tax. Similarly, a dividend from a company prior to sale can be a tax-efficient method of extracting funds in some instances, although anti-avoidance legislation may apply. Where a company borrows money to fund a buy-back or redemption of its shares, interest on such loans may not be deductible, depending on the circumstances.

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The payment of an intragroup dividend between Irish-resident companies generally has no tax implications; the recipient company receives the dividend. The exemption does not apply where the paying company has moved its tax residence to Ireland in the previous 10 years and the payment relates to profits earned when the company was non-Irish-resident.

It may be possible for overseas shareholders in Irish companies to receive dividends free of tax in their home country (and free of tax in Ireland), under either the domestic law of the shareholder's country (participation privilege-type exemptions) or a tax treaty.

Hybrids

The distinction between debt and share capital for tax purposes is based on the legal distinction involved. Only share capital that is in accordance with company law is share capital for tax purposes. Only a dividend that is a dividend for the purposes of company law is a dividend for tax purposes. However, interest on debt instruments may be treated as a distribution (akin to a dividend) in certain circumstances.

Interest is a distribution when it is paid with respect to a security:

- that is convertible into shares, provided the security is neither quoted (listed) on a recognized stock exchange nor issued on terms comparable with those so quoted
- the interest on which depends to any extent on the company's business results
- that is connected with shares in the company where, owing to the nature of the rights attaching to the securities or shares, it is necessary or advantageous for a person to hold a proportionate holding of each; the circumstances in which such interest is treated as a distribution are broader for interest paid to a non-resident than for interest paid to an Irish-resident company or a company trading in Ireland through a branch or agency
- where the interest gives more than a reasonable rate of return
- that is issued by the company and held by a company resident outside the state
- where the company that issued the security is a 75 percent subsidiary of the other company
- where both companies are 75 percent subsidiaries of a third company that is not resident in the state.

The treatment of interest as a distribution only because it is paid to a non-resident associate does not apply where the recipient is a resident of the EU or treaty state and the interest is paid for the purposes of a trade.

When interest is payable in the ordinary course of a trade to a 75 percent non-resident affiliate company located in a non-treaty jurisdiction, the Irish company can choose whether the payment should be treated as interest or as a distribution.

The interest is rarely treated as a distribution where it is payable to a company that is subject to corporation tax in Ireland in the case of:

- convertible securities
- securities whose interest varies with the company's results
- securities connected with shares in the company.

In these cases, interest is treated as a distribution only if certain additional conditions are met, which makes the provision non-applicable in most such situations.

Share options are not treated as share capital for tax purposes. Options are subject to capital gains tax treatment, other than in the hands of a dealer in shares or a financial institution. When exercised, the grant and acquisition of the option generally merge with the acquisition and disposal of the asset over which the option existed, other than in the hands of a share dealer or financial institution. Special rules are applicable to share options granted in the context of an office or employment. Employment-related share options are broadly treated within income tax rather than capital gains tax. However, the rules can vary depending on the nature of the scheme.

Discounted securities

The tax treatment of securities issued at a discount to third parties might follow the accounting treatment, enabling the issuer to obtain a tax deduction for the discount accruing over the security's life. However, there are some uncertainties surrounding the tax treatment of discount (including WHT obligations, if any). Specific advice should be sought when contemplating the use of discounted securities.

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Deferred settlement

Interest is not imputed where the consideration for the disposal of shares is left outstanding or takes the form of debentures, and when no interest is payable or a rate of interest lower than market value is payable on the debentures or outstanding consideration. Interest would be deemed to arise only when the purchase agreement specified a purchase price and the total consideration finally payable was a greater sum.

In most instances, the date of disposal of an asset for capital gains tax purposes is the date on which the contract for the disposal of the shares becomes unconditional. For that reason, liability to capital gains tax can arise at a date in advance of the date of receipt of consideration. Although it is possible to defer payment of the capital gains tax, interest may arise. In certain circumstances, deferred consideration may be regarded as an asset in itself, constituting consideration for the disposal (at its discounted open market value at the date of the disposal). The final receipt of the consideration may then involve a disposal of the deemed asset consisting of the right to receive the consideration. The stamp duty implications of any deferred payment arrangement also should be considered.

Other considerations

Concerns of the seller

The principal concerns of a seller of a business or of assets are likely to be:

- reducing any capital gains tax exposure
- minimizing the clawback of capital allowances on assets being sold.

Concerns that a seller may have in connection with a sale of shares are as follows:

- A sale of shares may be preferable to a sale of an undertaking because the gain may be exempt under the holding company regime mentioned earlier in this chapter.
- If not exempt under the holding company regime, only one charge to capital gains tax potentially arises before the seller has direct possession of the sales proceeds. When an undertaking owned by a company is sold, as opposed to a sale of shares, capital gains tax may arise both on the sale of the undertaking and subsequently on the disposal of shares in the company when the shareholder attempts to realize the cash proceeds.
- The capital gains tax base cost of shares in a company may not be the same as the base cost of the company's undertaking and assets.
- The availability of capital gains tax losses for offset against taxable gains arising on the disposal may differ for the shareholder and the company. The availability of losses to one but not the other (arising out of previous transactions) might dictate a preference for the sale of the shares or the undertaking. Care should be taken in relation to anti-avoidance provisions regarding loss buying by companies.
- Capital gains tax liabilities on a disposal of shares or an undertaking generally may be deferred if the consideration consists of other shares (subject to conditions).
- The seller would usually try to avoid a clawback of capital allowances on the disposal of assets.
- A clawback of inheritance tax or gift tax relief on shares in the company may occur if those shares are disposed of within 6 years of the date of a gift or inheritance.
- Non-Irish-resident sellers of shares are only subject to Irish capital gains tax on the sale of the shares if the shares derive the greater part of their value from Irish real estate-type assets (or certain other specified assets). Consequently, the above concerns might not be relevant for non-Irish sellers.

Stamp duty is not normally a concern of the seller other than in the context of an arrangement to avoid capital gains tax or the clawback of capital allowances. The effect of a change in ownership on trading losses carried forward from previous periods does not normally concern the seller, although it may be of concern to the purchaser. Recognition of deferred capital gains tax on a company leaving a group, as discussed earlier, when the company owns assets obtained from other group companies on which capital gains tax was deferred at the time of transfer, does not concern the seller but may concern the purchaser.

When the seller has been entitled to relief for interest on loans to finance their shareholdings, all or some of the relief would be lost on the sale of the shares. The relief is unlikely to be lost on the sale of an undertaking rather than shares.

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Company law and accounting

A merger usually involves the formation of a new holding company to acquire the shares of the parties to the merger. The merger generally is achieved by issuing shares in the new company to shareholders of the merging companies, who swap their shares in those companies for shares in the new company. The new company may (but need not) have the old companies wound up and their assets distributed to the new company once the liabilities have been discharged or the creditors have agreed to the new company assuming the liabilities.

A takeover may be achieved by the bidder offering cash, shares, loan notes or a mixture of all three in exchange for either the shares of the target company or its undertaking (broadly speaking, its business) or assets.

An amalgamation, such as a share-for-share exchange or share-for-undertaking exchange, is possible without court approval. In the case of a share-for-undertaking exchange, where the shares issued by the acquirer are received directly by the shareholders in the target company, the target company must have sufficient distributable reserves to effect the transaction and the transaction must not involve a reduction in the company's share capital. However, when a compromise arrangement is proposed between a company and its creditors, an application to the court is necessary (section 203 CA 1963) in connection with a proposed reconstruction of a company or an amalgamation of two or more companies. The court may either sanction the reconstruction or amalgamation or make provisions for any matters it deems suitable (by order under section 203).

A proposed merger or takeover may require notification to the competition authority in writing within one month of a public offer that can actually be accepted. The authority must be notified where the following conditions are met in the most recent financial year:

- The worldwide turnover of each of two or more of the undertakings involved in the merger or acquisition is EUR40 million or more.
- Each of two or more of the undertakings involved carried on business in any part of Ireland.
- The turnover in the state of any of the undertakings involved in the merger or acquisition is not less than EUR40 million.

The competition authority will determine whether, in its opinion, the result of the transaction would be substantially to lessen competition in Ireland.

Company law and accounting standards predominantly determine the accounting treatment of a business combination. Generally, most combinations are accounted for as acquisitions, and merger accounting is only applied in limited circumstances. Merger accounting is not allowed under International Financial Reporting Standards (IFRS); all business combinations must be accounted for as acquisitions. The relevant Irish accounting standards and company law restrict merger accounting to a very small number of genuine mergers and group reorganizations.

One of the main practical distinctions between acquisition accounting and merger accounting is that acquisition accounting may give rise to goodwill. The net assets acquired are brought onto the consolidated balance sheet at their fair values, and goodwill arises to the extent that the consideration given exceeds the aggregate of these values. Under Irish Generally Accepted Accounting Principles (GAAP), the goodwill is then amortized through the profit and loss account over its useful economic life. Acquisition accounting principles also apply to purchases of trade and assets, with any goodwill and fair value adjustments appearing on the acquirer's own balance sheet. In merger accounting, goodwill does not arise because the acquirer and the seller are treated as though they had operated in combination since incorporation; adjustments are made to the value of the acquired net assets only to the extent necessary to bring accounting policies into line.

Another important feature of Irish company law concerns the ability to pay dividends. Distributions of profit may be made only out of a company's distributable reserves. For groups, this means the reserves retained by the holding company (or its subsidiaries) rather than those of the consolidated group. Regardless of whether acquisition or merger accounting is adopted in the group accounts, the ability to distribute the pre-acquisition profits of the acquiring company may be restricted.

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Finally, a common issue on transaction structuring arises from the provisions concerning financial assistance. Broadly, these provisions say that it is illegal for a public company (or one of its private subsidiaries) to give financial assistance, directly or indirectly, for the purpose of acquiring that company's shares. Similar provisions apply to acquisitions of private companies unless a 'whitewash' procedure is carried out whereby the directors to make statutory declarations about the company's solvency.

Group relief/consolidation

Tax relief is available for groups of companies. A group is defined differently depending on the type of tax relief involved.

An EU-resident company and its EU-resident 75 percent-owned (or greater) subsidiaries can form a group for the purposes of surrendering losses between group members. Thus, Irish losses arising from trading (principally) in one company may be surrendered to another group member to offset Irish trading income arising in the same year and the previous year. Share-of-profits and share-of-assets tests must be met when determining whether one company is a 75-percent subsidiary of another.

Losses may also be surrendered by a company to members of a consortium owning the company. This relief is available where five or fewer EU-resident companies control 75 percent of the ordinary share capital of the surrendering company and all of the shareholders are companies. Other forms of loss relief for trading losses are available to reduce tax on non-trading income and on capital gains on a group basis. Trading losses are relieved on a value basis against non-trading income of group companies, in a similar manner to that described earlier in this chapter.

Following the European Court of Justice (ECJ) judgment in *Marks & Spencer*, an Irish-resident company can now claim group relief from a surrendering company that is resident in an EU Member State or in an EEA Member State with which Ireland has a tax treaty. The surrendering company must be a direct or indirect 75-percent subsidiary of the claimant company. Group relief cannot be claimed by an Irish resident company in respect of losses of a foreign subsidiary that are available for offset against profits in another jurisdiction or that can be used at any time by way of offset against profits in the country where the losses arise.

Transfer pricing

Ireland introduced a transfer pricing regime as of 1 January 2011. Before then, Ireland had no specific transfer pricing regime, although there was always a requirement for transactions to be entered into at arm's length. The current legislation covers domestic and international trading transactions entered into between associated companies. The regime applies to trading transactions only and requires specific covered transactions to be entered into at arm's length. The rules only apply to large enterprises that exceed certain employee, asset and turnover thresholds on a global basis.

Dual residency

Residence in Ireland for tax purposes can be based on either the registration of the company in Ireland or the location in Ireland of the central management and control of a company registered elsewhere. When a tax treaty treats an Irish-registered company as resident in another state, it is not treated as resident in Ireland under Irish domestic law. An Irish-incorporated company is not treated as resident in Ireland merely by virtue of incorporation in Ireland where it carries on a trade in Ireland (or is related to a company that does) and either is:

- ultimately controlled by persons resident in the EU or a tax treaty territory and not controlled from Ireland
- part of a group quoted (publicly listed) in the EU or a tax treaty territory.

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An amendment to the above exemption was introduced in December 2013. The new provisions regard an Irish incorporated company as Irish tax resident where:

- it is managed and controlled in an EU or tax treaty territory, and
- that territory has a place of incorporation test but not one of central management and control.

Thus, any Irish incorporated companies managed and controlled in the US is considered Irish tax-resident under the new rules. However, companies that are centrally managed and controlled in a jurisdiction that regards them as tax-resident by virtue of this management and control, and that would have been non-resident in Ireland under the pre-existing rules, remain non-residents of Ireland for tax purposes.

The new provision applies to new companies incorporated in Ireland from 24 October 2013, and to existing Irish incorporated companies from 1 January 2015.

Residence in Ireland for tax purposes is also based on the location in Ireland of central management and control of the company's affairs. Thus, it is possible for a company that is managed and controlled in Ireland but registered in another jurisdiction to be dual resident if the other jurisdiction in which it is registered recognizes residency on the basis of place of registration. A company may also be dual resident if the company is Irish-incorporated but centrally managed and controlled in a jurisdiction that treats the company as being resident in that jurisdiction (subject to the exception noted earlier in this chapter regarding residence under a tax treaty). There are no particular advantages from the viewpoint of Irish taxation in having dual residency.

Foreign investments of a local target company

Where the Irish target company holds overseas investments while resident in Ireland, it is liable to tax in Ireland on income from such investments and on gains on the disposal of those investments unless exemption is available under the holding company regime.

Comparison of asset and share purchases

Advantages of asset purchases

- A tax basis for assets acquired, such as trading stock, is available, which is deductible at 12.5 percent.
- Amortization or tax depreciation is tax-deductible for certain IP, plant and equipment and certain buildings.
- A market value tax basis can facilitate the extraction of valuable assets, such as IP, from the Irish tax net and thereby reduce the Irish tax base.

Disadvantages of asset purchases

- Irish VAT can arise (certain reliefs may be available to reduce the liability).
- Purchaser can pay higher stamp duty.
- No succession to accumulated losses forward.
- Practical issues such as potential need to renegotiate employment and supplier agreements.

Advantages of share purchases

- Purchaser can inherit accumulated losses (subject to specific 'loss buying' anti-avoidance rules).
- Lower stamp duty of 1 percent.
- No Irish VAT.
- Efficient for the vendor.

Disadvantages of share purchases

- No step-up in basis in the underlying assets for the purchaser.
- Potential clawback of tax reliefs claimed on previous intercompany transactions.
- Purchaser inherits the tax history of the company and so full due diligence of the company's tax affairs is required.

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Ireland – Withholding tax rates

This table sets out reduced WHT rates that may be available for various types of payments to non-residents under Ireland's tax treaties. This table is based on information available up to 1 December 2013.

Source: International Bureau of Fiscal Documentation, 2014

	Dividends		Interest[1] (%)	Royalties[2] (%)
	Individuals, companies (%)	Qualifying companies[3] (%)		
Domestic rates				
Companies:	20	0	0/20	0/20
Individuals:	0/20	N/A	0/20	0/20
Treaty rates				
Treaty with:				
Albania	10	5	7	7
Armenia	15	0/5	0/5/10[4]	5
Australia	0	0	10	10
Austria	0	0	0	0
Bahrain	0	0	0	0
Belarus	10	5	5	5
Belgium	–/0[5,6]	–/0	0/15[7]	0
Bosnia and Herzegovina	0	0	0	0
Bulgaria	10	5	5	10
Canada	15	5	0/10[8]	0/10[9]
Chile	15	5	5/15[10]	5/10[11]
China (People's Rep.)	10	5	10	10[12]
Croatia	10	5	0	10
Cyprus	0	0	0	0
Czech Republic	15	5	0	10
Denmark	0	0	0	0
Estonia	15	5	10	5/10
Finland	0	0	0	0
France	–/0	–/0	0	0
Georgia	10	0/5	0	0
Germany	15	5	0	0
Greece	15	5	5	5
Hong Kong	0	0	0/10[13]	3

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	Dividends		Interest[1] (%)	Royalties[2] (%)
	Individuals, companies (%)	Qualifying companies[3] (%)		
Hungary	15	5	0	0
Iceland	15	5	0	0/10[14]
India	10	10	10	10
Israel	0	0	5/10[15]	10
Italy	15	15	10	0
Japan	–/0	–/0	10	10
Korea (Rep.)	0	0	0	0
Latvia	15	5	10	5/10
Lithuania	15	5	10	5/10
Luxembourg[16]	–/0	–/0	0	0
Macedonia	10	5	0	0
Malaysia	10	10	10	8
Malta	15	5	0	5
Mexico	10	5	5/10[17]	10
Moldova	10	5	0/5[18]	5
Montenegro	10	5	10	5/10
Morocco	10	6	0/10[19]	10
Netherlands	15	0	0	0
New Zealand	0	0	10	10
Norway	15	5	0	0
Pakistan	–/0	–/0	0/–[20]	0
Panama	5	5	0/5	5
Poland	15	5	0/10	0/10[21]
Portugal	15	15	0/15[22]	10
Romania	3	3	3	0/3[23]
Russia	10	10	0	0
Saudi Arabia	5	0[24]	0	5/8
Serbia	10	5	0/10[25]	5/10[26]
Singapore	0	0	5	5
Slovak Republic	10	0	0	0/10[27]
Slovenia	15	5	5	5

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	Dividends		Interest[1] (%)	Royalties[2] (%)
	Individuals, companies (%)	Qualifying companies[3] (%)		
South Africa	10	5	0	0
Spain	0	0	0	5/8/10[28]
Sweden	0	0	0	0
Switzerland	0	0	0	0
Turkey	15	5	10/15[29]	10
United Arab Emirates	0	0	0	0
United Kingdom	15	5	0	0
United States	15	5	0	0
Uzbekistan[30]	10	5[31]	5	5
Vietnam	10	5	10	5/10/15[32]
Zambia	0	0	0	0

Notes:

1. Many treaties provide for an exemption for certain types of interest, e.g. interest paid to the state, local authorities, the central bank, export credit institutions or in relation to sales on credit. Such exemptions are not considered in this column.
2. Under domestic law, withholding tax is imposed on royalties only if they relate to the use of a patent.
3. Under domestic law, there is generally no withholding tax on dividends paid to residents of treaty countries.
4. The 0 percent rate applies to interest paid to the state or any institution wholly owned by the state. The 5 percent rate applies, inter alia, to interest paid to banks.
5. The domestic rate applies; there is no reduction under the treaty.
6. The 0 percent rate applies only for Irish surtax.
7. The lower rate applies to interest payments between banks on current accounts and nominal advances and to interest on bank deposits not represented by bearer bonds.
8. The lower rate applies, inter alia, to interest paid by the government or a local authority and interest paid to qualifying pension plans, etc.
9. The lower rate applies to copyright royalties (excluding films), computer software, patents and know-how.
10. The lower rate applies, inter alia, to interest derived from loans granted by banks and insurance companies, bonds or securities traded on a securities market.
11. The lower rate applies to royalties for industrial, commercial or scientific equipment.
12. On royalties for the use of (or the right to use) industrial, commercial, or scientific equipment, the rate applies on 60 percent of the gross amount of the royalties.
13. The lower rate applies, inter alia, to interest paid to a bank or other financial institution, interest paid by a bank or other financial institution, and interest paid to a recognized pension plan.
14. The lower rate applies to royalties for computer software, patents and for know-how.
15. The lower rate applies, inter alia, to interest on any loan granted by a bank.
16. The treaty does not apply to exempt Luxembourg holding companies.
17. The lower rate applies if the beneficial owner is a bank.
18. The lower rate applies, inter alia, to interest paid by public bodies and to interest paid to financial institutions.
19. The lower rate applies, inter alia, to interest paid to pension funds.
20. The domestic rate applies to interest paid, guaranteed or approved by the government of Ireland.
21. The lower rate applies to royalties for technical services.
22. The lower rate applies if the debtor is the government or a local authority or it is paid to the government, a local authority or any connected institution.
23. The lower rate applies to copyright royalties.
24. The zero rate applies if the recipient is (i) a company that holds directly at least 25 percent of the capital in the paying company; or (ii) the government of Saudi Arabia, the Saudi Arabian Monetary Agency or any institution, agency or fund wholly owned by the government of Saudi Arabia.
25. The zero rate applies, inter alia, to interest paid to the government, the Central Bank or any financial institution wholly or partly owned by the government.
26. The lower rate applies to copyright royalties, including films, etc. and excluding computer software.
27. The lower rate applies to copyright royalties including films, recordings on tape or other media used for radio or television broadcasting or other means of reproduction or transmission.
28. The 5 percent rate applies to royalties for copyrights of literary, dramatic, musical or artistic work; the 8 percent rate applies to copyright royalties on films, etc. and to royalties for industrial, commercial or scientific equipment.
29. The lower rate applies to interest paid in respect of a loan or other debt claim for a period exceeding 2 years or if the interest is received by a financial institution.
30. Effective from 1 January 2014.
31. The 5 percent rate applies if the beneficial owner holds directly at least 10 percent of the capital of the company paying the dividends.
32. The 5 percent rate applies to royalties for any patent, design or model, plan, secret formula or process, or for information concerning industrial or scientific experience; the 10 percent rate applies to royalties for trade marks or for information concerning commercial experience.

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