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M&A for Regulated Financial Services Firms

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Ireland's international financial services sector is renowned globally, with particular strengths in administration and management of investment funds, reinsurance, cross-border insurance and specialist finance such as aviation leasing and asset finance.

- Over 250 of the world's leading financial services firms, including half of the world's top 50 banks, have operations in Ireland with an international focus.
- Over 1,000 asset managers from 54 countries have assets administered in Ireland.
- 17 of the top 20 global asset managers have established investment funds in Ireland.

Ireland offers asset managers access to the EU-wide marketing and management passports for UCITS and AIFs.

With such a vibrant sector, the opportunities for mergers and acquisitions involving regulated financial services firms in Ireland is ever growing. Our experience in this area has shown a sharp increase in M&A activity in recent years, which looks set to continue.

In this article, we discuss some of the particular issues that arise in M&A transactions involving regulated financial services firms.

Gap Between Signing and Completion

The prior consent of the Central Bank of Ireland (CBI) is required before it is possible for parties to proceed to complete an M&A transaction, if a regulated financial services firm is involved. This would include regulated financial services firms such as AIFMs, credit institutions, insurance or assurance undertakings, reinsurance undertakings, MiFID firms or UCITS management companies.

The process for procuring CBI consent is discussed later in this article, however firstly, in order to seek such consent, a signed agreement between the parties is typically required. Therefore, the acquisition agreement will contain provisions that provide for a gap in time between when the agreement is signed by the parties (and at that point becomes legally binding), and also when completion (i.e. when ownership transfers) under that agreement occurs.

These provisions will typically deal with:

1. A specific list of conditions precedent, which will need to be satisfied or waived before completion can occur.
2. The consequences of particular conditions being waived rather than satisfied (for example, if there is to be a consideration adjustment, and the mechanism for calculating it).
3. Restrictions on activities of the target during the interim period without the consent of the purchaser, and information rights for the purchaser in respect of the activities of the target during this period.
4. Which warranties (if any) provided at signing will be repeated at completion, and the extent the warrantors will be able to disclose against those repeated warranties.
5. A longstop date, after which if the conditions precedent have not been satisfied or waived, the

agreement terminates.
6. The respective liabilities of the parties if the transaction fails to complete and the agreement is terminated.

Conditions Precedent

In relation to the conditions precedent, these are matters which must be dealt with to the purchaser's satisfaction before it will proceed to completion and it purchases the target. This enables the parties to sign the acquisition agreement and therefore be bound by the agreement subject only to the appropriate preconditions being satisfied.

The consent of the CBI will be a mandatory condition that cannot be waived. There are also a wide variety of other matters that a purchaser might seek to add as conditions precedent, many of which will be strongly resisted by a seller. In particular, any internal or discretionary condition in favour of the purchaser (such as board approval, or financing approval) should be resisted by the seller, because it effectively changes an acquisition agreement and gives the purchaser the ability to unilaterally choose not to complete the transaction.

The following are examples of other conditions precedent that might be required or included following negotiations between the parties:

1. Competition and Consumer Protection Commission (CCPC) approval.
2. No material adverse change (MAC) having occurred.
3. Completion of consultation and notification requirements with employees under the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003.
4. Obtaining consents in relation to key contracts (customers/suppliers/banks) which have change of control provisions therein.
5. Obtaining approval in relation to certain grants or governmental aid.
6. Completion of property or environmental surveys.
7. Entry into particular client contracts.

Conditions create uncertainty and add complexity to both the process and the drafting of the acquisition agreement. Before a condition is added it should be considered whether it is really necessary, or whether it is a matter than can be dealt with prior to signing, or if the issue can be addressed by a covenant or indemnity within the acquisition agreement.

Material Adverse Change (MAC) Provision

A purchaser might propose a broad material adverse change (MAC) clause. This is normally resisted by the seller as it gives the purchaser too much discretion to decide not to proceed to completion. A seller will only want regulatory approvals as conditions precedent.

If a MAC clause is agreed, it may be negotiated to refer to specific limited circumstances in which it would apply. For example, a purchaser will want to be able to decide not to complete the transaction if a substantial litigation is initiated in the intervening period. A seller will want to exclude macro events and matters beyond their control, such as changes in law, pandemics, the impact of Brexit, changes that do not disproportionally affect the target compared to competitors in the financial services industry, etc.

CBI Approval

Sellers and purchasers of regulated financial services firms should be aware that the CBI has to be consulted where there is a transaction involving the change of ownership of shares or voting rights of a regulated financial services firm. Failure to obtain the approval of the CBI will, depending on the type of regulated financial services firm, result in the transaction being void. Furthermore, the provision of false or misleading information to the CBI is a criminal offence.

The main piece of legislation relating to acquiring an in-scope regulated financial services firm is the European Communities (Assessment of Acquisitions in the Financial Sector) Regulations 2009

(Regulations), which are supplemented by the Joint Guidelines on the Prudential Assessment of Acquisitions and Increases of Qualifying Holdings in the Financial Sector (Guidelines). Not all businesses in the financial services sector are in scope of the Regulations, but the CBI has evolved its practice so that any entity proposing to acquire a regulated financial services firm must, using a detailed form, known as the Acquiring Transaction Notification Form (ATNF), provide the CBI with prior notification of a proposed acquisition or disposal. The CBI uses the information provided in the ATNF, and supporting documentation, to examine whether there are prudential grounds upon which it should object to the transaction and if it ought to impose any conditions on an approval of the acquisition.

The CBI has sixty working days to assess an ATNF. The clock starts ticking when the CBI informs the applicant that it has received a complete ATNF and all of the ancillary documentation it requires. At any time before the fiftieth working day the CBI can request further information, which has the effect of stopping the clock until the CBI acknowledges receipt of the additional information. If the transaction is rejected by the CBI then the only recourse is to the Irish Financial Services Appeals Tribunal.

The Regulations require the parties involved (including the target) to notify the CBI of:

- The acquisition, directly or indirectly, by a "proposed acquirer" of a "qualifying holding" in a regulated financial services firm.
- Any subsequent direct or indirect increase in a "qualifying holding", whereby the resulting holding would reach, or exceed, 20%, 33% or 50% of the capital of, or voting rights in, a regulated financial services firm, or that a regulated financial services firm would become the proposed acquirer's subsidiary.

For these purposes, a "proposed acquirer" means a natural or legal person who, whether individually, or acting in concert with another person or persons, intends to acquire or to increase, directly or indirectly, a qualifying holding in a regulated financial services firm.

A "qualifying holding" means a direct or indirect holding in a regulated financial services firm which represents 10% or more of the capital or of the voting rights or which makes it possible to exercise a significant influence over the management of that regulated firm.

The Regulations also apply on the disposal of a qualifying holding or a holding which results in the disposer's interest in the regulated firm falling below the thresholds above or results in the regulated firm ceasing to be a subsidiary of the disposer.

Final thoughts

Despite the effects of COVID-19 on general market activity, we have advised on a significant number of M&A transactions that involved regulated financial services firms, which have completed during the first half of 2020, and there are a number of others that are due to complete in the second half of 2020. We expect M&A activity will remain steady as parties find opportunities for investment and divestment within the current market and adapt to the current circumstances.

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