# Key differences between Ireland and the US in M&A transactions

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Ireland and the United States share many cultural and historic ties. Although there are more similarities than differences between the two jurisdictions' approach to M&A transactions, there are some differences that US investors into Ireland should be aware of.

This is particularly so where Irish law governs the transaction documents, which will often be the case where the target is an Irish company (although the choice of governing law of the transaction documents is always negotiable).

## Repetition of warranties

Where there is a period between signing and completion (for example, where the transaction is conditional upon obtaining a required regulatory consent), it is usual in Irish M&A transactions only for so-called fundamental warranties (title, capacity and solvency) to be repeated at both signing and completion. Other warranties are generally only given at signing, with the seller covenanting to run the target's business on agreed terms in the interregnum.

In the US, we have seen that buyers often expect all warranties, including non-fundamental ones, to be repeated at closing, with a concomitant right to walk away if any warranty has been breached between signing and completion.

## Liability under warranties

A noticeable difference in legal approach is the Irish treatment of liability under contractual warranties. In Ireland, absent a specific indemnity, a breach of a warranty leads to a contractual claim for breach which, in turn, leads to a contractual claim for damages. These damages are calculated with reference to the actual diminution of value of the target company's shares caused by the breach. A claimant under a breach of warranty must prove the breach and is also under a

duty to mitigate the loss occasioned by the breach of warranty.

US investors expect damages flowing from a breach of a warranty to be calculated on an indemnity basis – ie all loss expense and loss incurred as a result of the contractual promise being untrue is claimable. This is a routinely heavily negotiated term of any acquisition by a US company of an Irish target. Similarly, most Irish M&A transactions provide for *de minimis* thresholds, under which no warranty claim will arise. This is uncommon in US M&A transactions.

## Disclosure

A typical Irish disclosure letter will contain both general and specific disclosures against the warranties, while such broad disclosures are rare in US M&A deals, which usually detail specific disclosures only.

## Purchase price adjustments

In both the US and Ireland, the two main methods for calculating the final purchase price in an M&A transaction are either the "completion accounts" method or the "locked box". In the US, the former method, which generally favours the buyer, is preferred. In Ireland, however, the "locked box" mechanism is becoming increasingly popular.

Under the "locked box", the purchase price is calculated with reference to pre-closing financial statements of the target, at which date (called the locked box date) risk passes to the buyer. The seller remains in control of the target between the locked box date and completion. Various restrictions are placed on the seller regarding the conduct of the target's business during the period between the locked box date and completion and expenditure outside of set parameters is deducted from the purchase price. A profit ticker is sometimes added to the purchase price to account for profits between the locked box date and completion.

Although the "locked box" method is not unheard of in the US, the closing accounts / working capital adjustment method is generally preferred. Under this method, completion accounts prepared as at the date of completion are prepared after completion and an adjustment is made to the purchase price based on the net assets and/or available working capital as at completion as depicted in the completion accounts. At completion, the buyer pays the seller an estimate of the purchase price, and the seller is usually required to deposit a portion of this into escrow as security for any post-completion adjustment.

## Taxation

The USA has a complex tax system with federal and state laws and taxes that can affect M&A transactions. Ireland on the other hand is known for its favourable corporate tax rate and has a

number of tax incentives that can be advantageous in M&A transactions. Ireland's tax treaties and EU membership can also influence cross-border M&A activity.

In the US, nominal transfer taxes are usually split between the parties, whereas in Ireland stamp duty on shares (1% of consideration) is paid by the buyer.

## Market practices

The US has a highly developed and liquid capital market, which can influence the structuring and financing of M&A deals. Private equity and venture capital play significant roles in the M&A landscape.

Ireland, while having a developed market, is smaller in scale compared to the USA. Cross-border M&A is common, and many transactions involve foreign investors due to Ireland's position as an attractive gateway to the EU market.

## Restrictive covenants

In the US, restrictive non-compete and non-solicitation covenants often last for up to five years, while in Ireland both the courts and the Irish competition authorities are unlikely to accept a period longer than two to three years.

## W&I insurance

Warranty and indemnity insurance remains relatively rare in US M&A deals, while this is quite well established in Ireland, particularly where there is concern around a seller's financial strength.

## Formalistic differences

When it comes to form, US investors are often surprised, if not bewildered, by the formalistic approach the Irish take to the execution of Irish law governed transaction documents, evidencing a formalism inherited from the English common law.

Although only a limited number of agreements must, to be effective in law, be executed and 'delivered as deeds' (which, for an Irish company, means being executed in 'wet ink' under the common seal of the company, by two directors or a director and the company secretary), many transaction documents and security documents are routinely executed as deeds. This is primarily because the effect of executing and delivering a document as a deed is to do away with any potential future arguments around the sufficiency of consideration and also to extend the applicable prescription period from six years to 12.

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