Financial Institutions Group

Integration in the Irish Broker Market

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Matheson LLP

The last number of years have seen a significant rise in consolidation within the Irish insurance broker market, with 46 deals in this sector having been reported to Merger Market for the period 1 January 2021 – 31 December 2022.

Following multiple acquisitions, firms are now turning their focus to entity rationalisation and integration projects ("**R&I Projects**").

We have prepared this roadmap to assist clients in understanding the key considerations to be taken into account when planning and implementing R&I Projects including:

- identifying the most suitable legal mechanism to rationalise the corporate structure;
- regulatory engagement with the Central Bank of Ireland ("**CBI**") in relation to project;
- the key implementation steps involved; and
- post-completion requirements.

As a regulated sector, it is important that Irish broking groups fully consider both the corporate and regulatory aspects of an R&I Project at an early stage in the planning process to ensure a smooth and successful outcome.

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Stage 1 Planning

(a) Identify Transfer Mechanism

As a first step in any R&I Project, it is necessary to identify the target corporate and operating structure for the group and most effective legal mechanisms to achieve this.

As the majority of intermediaries are established as limited companies and can avail of the domestic merger regime, this note principally considers the requirements for a domestic merger in light of the advantages and efficiencies this process would bring for an R&I Project from both a corporate and regulatory perspective. Where an intermediary is established as another form of company, or an asset transfer is the preferred mechanism, different requirements may apply.

Domestic Mergers

Domestic mergers are increasingly considered an efficient and attractive entity consolidation or rationalisation tool for Irish domiciled subsidiaries.

A domestic merger involves the merger of two or more Irish limited companies, with the all the contracts, assets, liabilities and employees of the merging company (the "**Transferor**") automatically transferring to the other company (the "**Successor**") by operation of law. As part of the merger, the Transferor is dissolved without going into liquidation, which removes the requirement to carry out a members' voluntary liquidation ("**MVL**").

A domestic merger can be carried out either by way of a merger by absorption or a merger by acquisition. The distinction between these is that:

- in a merger by absorption scenario, the Successor must be the parent company of the Transferor, holding all shares representing the share capital of the Transferor; whereas
- in a merger by acquisition scenario, it is not necessary for the Successor to be the parent company of Transferor. However, a merger by acquisition will involve the issuance of shares in the Successor to the members of the Transferor (with or without additional cash payment).

A domestic merger can be effected by way of the summary approval procedure or a court approved order, each of which are discussed in further detail below.

Asset Transfer

As an alternative to a domestic merger, firms could consider an asset transfer process as a means of integrating various regulated businesses. This option allows for the transfer of select assets and liabilities only, which may be advantageous if, for one reason or another, it would be preferable to carve out certain assets and liabilities of the Transferor. However, an MVL process would be required if the intention is to ultimately dissolve the Transferor entity post-transfer, which would lengthen the overall project timeline.

In addition, carving out certain liabilities may impact on any post-transfer regulatory obligations such as maintaining run-off professional indemnity insurance cover or surrendering the authorisation of the Transferor to the CBI.

(b) Prior Engagement with the Central Bank

We would recommend engaging with the CBI at an early stage in relation to the R&I Project. This presents an opportunity to provide the CBI with a general overview of and rational for the project, proposed implementation timelines, the post-project organisational structure and any other pertinent information such as post-completion licence surrenders.

A key focus of the CBI will be on ensuring appropriate consumer protection measures are in place. Therefore, it is important that prior to engaging with the CBI due consideration has been given to the policyholder communication process.

Prior engagement at the outset of the project should ensure that the CBI is fully appraised of the overall project and allow for any potential regulatory concerns to be identified and addressed at an early stage.

(c) Material Change of Business Plan

The integration of regulated activities, products, employees, internal functions, outsourcing arrangements and commercial partnerships into a single regulated entity will trigger a notification requirement to the Central Bank and necessitate regulatory approval of a material change in business plan for the Successor. The regulatory approval process should be factored into the project timeline.

(d) R&I Project Roadmap

Once the target corporate structure and preferred legal mechanism(s) to achieve this have been determined and any regulatory requirements established, it is important to produce a clear roadmap of the corporate and regulatory steps and timelines required to implement the project.

We have set out a number of the key steps to be considered by firms in this regard at Stage 2 below.

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Stage 2 Implementation Roadmap

(i) Due Diligence

In the context of the Irish broker market, where many firms are likely to have recently undertaken due diligence in respect of any Irish acquisitions, detailed due diligence may not be required. However, this will need to be considered by firms based on the particular circumstances in question. For example, notwithstanding the automatic transfer of contracts upon a merger, certain contacts may provide for automatic termination immediately prior to a proposed merger (i.e. as an event of default etc).

In addition, where a domestic merger is being undertaken, consideration will need to be given to the effect of the merger on any assets located outside of Ireland or any foreign law governed contract. Therefore, it may nonetheless be prudent to carry out a more limited / refresher due diligence in certain cases .

(ii) Corporate Approvals

We would expect the board of directors of each impacted subsidiary to be fully appraised of the R&I Project and for their consideration and approval of same to be duly minuted at meetings.

Specific approvals from the board of directors and the shareholders of both the Transferor and Successor are required for domestic mergers. In addition, board approval would be required for any proposed surrender of an authorisation to the CBI.

(iii) Pre-merger Reorganisation

As the Transferor dissolves automatically, a pre-merger reorganisation may be required in order to transfer assets and/or liabilities of the Transferor elsewhere within the Group where it is not intended that such assets or liabilities are to transfer as part of the merger.

It is also possible for more than one company to be merged into a single surviving Successor. However, careful consideration would need to be given to the existing corporate structure and target operating structure to identify whether any pre-merger corporate restructuring is required to simplify the operation of the merger. For example, a merger by acquisition involves the issuance of shares in the Successor to any members of the Transferor. Whereas in a merger by absorption scenario, the Transferor is the direct subsidiary of the Successor and there is no additional issue of shares. Therefore, it may be beneficial to consider whether any pre-merger corporate restructuring is required to ultimately simplify the operation of the merger.

(iv) Court Approved Domestic Merger

In broad terms, a domestic merger may take effect as follows:

(a) the directors of both the Transferor and Successor prepare the relevant merger documentation which must be filed in the Companies Registration Office ("**CRO**") and published in the CRO Gazette and one national newspaper;

(b) after a 30 day period has elapsed, the common draft terms of merger must be approved by a special resolution passed at a general meeting of each of the merging companies;

(c) the Transferor and Successor may then make a joint application to the Court for an order confirming the merger.

A court order can be beneficial in evidencing the merger should any questions or issues arise post-merger particularly with respect to counter-parties or creditors. However, there are additional costs and time associated with a court approved merger.

(iv) Domestic Merger under the Summary Approval Procedure

While court approval is one route that can be taken to implement a domestic merger, an alternative process is available which does not require court approval. In our experience, this summary approval process ("**SAP**") as it is known, is more commonly used to implement domestic mergers in Ireland. In place of an application to the Court, the following process applies:

(a) a majority of the board of directors of both the Transferor and Successor are required to sign a declaration of solvency confirming that they have made a full inquiry into the affairs of the merging companies and that, having done so, they have formed the opinion that the Successor will be able discharge its own debts and those of the Transferor for 12 months following the merger.

(b) the declaration referred to at (a) above must be accompanied by a document prepared by the directors / majority of directors of each of the Transferor and Successor confirming certain particulars with respect to the merger;

(c) a unanimous shareholder resolution approving the merger

The availability of the SAP for the purposes of a domestic merger is useful as it removes court involvement which can be costly and time consuming.

(v) Account Requirements

For a domestic merger, both the Successor and the Transferor's audited financial statements for the previous three years must be made available to their shareholders as part of the merger inspection process. As a result, aligning the timing of the merger vis-à-vis the audit cycle is crucial. For example, in proposed mergers involving companies with a financial year end of 31 December, the merger process cannot, subject to limited exceptions and workarounds, be commenced in the current year until the audited financial statements for the previous year to 31 December are available. A workaround to this potential blackout period in moving ahead with a merger, is to commence the merger process in the lead up to year-end (when the previous year's audited financial statements are available), and to complete the merger during the following year (on a date of the company's choice).

(vi) Timing

Domestic Merger

The timing involved in implementing a domestic merger is considered an attractive feature. In contrast, in a liquidation scenario following an asset transfer, the timing involved to complete a MVL and for liquidators to discharge their duties, can vary and be dependent on the particular circumstances of the liquidation (including the asset/liability profile of the company). There are also additional costs associated with this process.

In addition, in a merger scenario, the company can elect the effective date of the merger. In contrast, the date of the dissolution in a MVL scenario (i.e. the conclusion of the liquidation) cannot be determined or set in advance and is subject to change. As a result, the certainty of the merger date is advantageous for group planning purposes to various stakeholders within the business (e.g. tax and finance teams).

Leaving aside the preparation and due diligence phases associated with the merger, the approximate timing to implement a domestic merger effected by way of the SAP, assuming the required financial statements are available, can take as little as 32 days to implement (and, on average, 6 – 8 weeks).

Where a domestic merger is effected by way of a court order there is a less flexible timetable and the process will be in the public domain.

Regulatory

The Consumer Protection Code requires regulated entities to provide affected customers with two months' advance notice prior to merging or transferring regulated activities. Where an R&I Project involves multiple transfers or mergers, the policyholder communication process and regulatory timeline for same will need to be properly factored into the project plan.

(vii) CRO Filings

In a domestic merger scenario, copies of: (i) the directors' declarations of solvency; and (ii) the shareholder approvals, will be publicly filed with the Irish Companies Registration Office (the "**CRO**"). A copy of the merger terms (merger proposal) will not be made publicly available.

No documents are made publicly available in the context of an asset transfer. However, in the context of a subsequent MVL, all filings made with the CRO will be a matter of public record, as above, and to the extent there is court involvement, such proceedings will be in public. MVLs are discussed in more detail below.

(viii) Perfection

The automatic transfer effect of a domestic merger is particularly useful in a large group entity rationalisation project. However, certain additional considerations, actions or documentation may be required to perfect the automatic transfer depending on the asset and liability profile of the relevant Transferor. Some common examples of this include:

- assignment / novation of contracts which are not governed by Irish law;
- the transfer of assets located outside of Ireland;
- the completion of intellectual property registrations;
- the transfer of real estate interests;
- the transfer of employees (including satisfaction of any obligations under the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (TUPE));
- data protection considerations.

These should be identified at the outset of the R&I Project and included in the step plan.

(ix) PCF Approvals / Resignations

We would expect any R&I Project to result in a revised organisational structure. To the extent that such changes give rise to changes to Pre-Approval Controlled Functions ("**PCFs**"), CBI consent must first be obtained to any new appointments. Any resignations arising out of the R&I Project must also be notified to the CBI. To ensure any regulated subsidiaries continue to meet the Central Bank's regulatory expectations as regards staffing and the board during and after implementation of the project, the timing of approvals and resignations should be factored into the step-plan.

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Stage 3 Post-Completion Requirements

(i) Surrender of Authorisation

Any rationalisation of a regulated group structure is likely to give rise to a requirement to surrender the Transferors' licence(s) to the CBI. This is the case even where a transfer has been effected by way of a merger by absorption and the Transferor is dissolved without going into liquidation.

In order for an intermediary to formally surrender its licence, it will be required to complete the CBI's Voluntary Revocation Form. The Form requires the firm to provide confirmations / information to the CBI including:

- that there are no outstanding legal or regulatory issues regarding the firm;
- that appropriate arrangements have been made to deal with any claims / complaints that are ongoing or could arise post-revocation;
- that two months' notice has been provided to affected customers or the firm has no active customers;
- whether run-off professional indemnity cover has been taken out;
- the reasons for the revocation;
- that the firm's website has been de-activated;
- that all liabilities, duties and obligations of the firm have been/will be discharged in due course;
- that all of the directors/partners of the firm are aware of and consent to the authorisation(s)/ registration(s) being revoked; and
- that all requirements relating to premium handling, client monies handling and deposit handling have been complied with.

In circumstances where the transfer is effected by way of a merger, with all of the liabilities of Transferor transferring to the Successor, it should be relatively straightforward to satisfy the CBI that customers will continue to have a full right of recourse in respect of any claims or complaints against the Successor.

(ii) Members' Voluntary Liquidation

As referenced above, where an R&I Project is completed by way of an asset transfer, a members' voluntary liquidation would be required to dissolve the Transferor. To place a solvent Irish company into liquidation, the directors of the company must first make a formal declaration of solvency to the effect that the company will be able to pay its debts in full within 12 months from the commencement of the liquidation.

The directors must then obtain a report of the auditors confirming that the formal declaration of solvency is not unreasonable. The shareholders must then pass a special resolution to place the company into members' voluntary liquidation and to appoint a liquidator.

(iii) Evidence of Merger

Upon completion of the relevant merger filings with the CRO, the CRO will proceed to update their public records to reflect that any Irish Transferor has been dissolved by way of merger and the company status will thereby change to "dissolved by way of merger". However a certificate of merger will not be issued by the CRO. Instead companies will typically provide evidence of completion of a merger to third parties or authorities by providing copies of: the Irish Transferor's CRO record showing it as having been dissolved by way of merger or the merger terms.

As outlined above, a court order in a court approved domestic merger can be beneficial in evidencing the merger should any questions or issues arise post-merger.

How we can assist

Matheson's Financial Institutions Group is unique in the Irish market in that it combines transactional and regulatory lawyers in one group with a focus on advising regulated financial clients. This means that we are uniquely placed to assist firms on both the regulatory and corporate aspects of an R&I Project. As a full service law firm, we will also leverage the support of other practice areas of the firm where the need arises including employment, pensions, tax, competition, commercial real estate, technology and innovation, as required.

For more information on the above, or for further guidance and insight in respect of the regulatory and corporate queries that arise for insurance intermediaries and financial institutions generally, please contact Darren Maher, Gráinne Callanan, Elaine Long, Catherine Macfarlane or your usual Financial Institutions Group contact at Matheson.

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