



Matheson

## Guide to merging financial businesses

**Financial Times 2012-2015**

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Introduction	3
Scheme of Arrangement	4
Cross-Border Merger	6
Private Company Merger	9
PLC Merger	12
Insurance Portfolio Transfer	15
Statutory scheme for transfer of banking business	17
Companies Act 2014	20
Comparative Analysis Table	23

In this guide we summarise the key features of the different types of merger which can be implemented under Irish legislation. These procedures differ from the two most common ways in which businesses come together - acquisition of the shares or assets of one company by another - in one key respect. They can allow the parties to merge the assets and/or liabilities of two separate entities onto one balance sheet, without the need to novate and/or assign contracts from one entity to the other. In practice, this can be a very significant logistical benefit in using these procedures. The extent to which that facility is available depends on the type of merger involved.

Deciding which of these procedures is suitable in the circumstances, or whether a combination of two of them should be used, requires a careful assessment of the assets to be merged, the potential impact of the law of jurisdictions outside Ireland, the likely timescales and the impact on, and likely reaction of, third parties. An assessment of the impact on employees and the potential impact of TUPE will also need to be considered.

We have considerable experience advising on these alternatives. We were the first law firm in Ireland to advise on the use of Schemes of Arrangement to merge businesses involving multiple third party contracts. We also drafted the legislation to provide for Cross-Border Mergers and have implemented more Cross-Border Mergers than any other Irish law firm, including implementing “back-to-back” mergers.

The Companies Act 2014 (which came into force on 1 June 2015) simplified certain aspects of merging Irish businesses and introduced new procedures which may now be followed to implement mergers and divisions.

We hope you will find this guide helpful and would be happy to hear from you if you have any queries.



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## Scheme of Arrangement

## Process

This is a statutory procedure under Section 450 of the 2014 Act.

A Scheme can be used to implement the merger of two companies. All or part of the assets and liabilities (including contracts with third parties) of a transferor company (the “Transferor”) can be transferred to a transferee company (the “Transferee”) by Court Order. This obviates the need for individual assignments/novations of contracts.

Approval of the “Scheme” is required at meetings of relevant shareholders/creditors convened by the directors of the Transferor or, if the directors do not exercise this power, the High Court (upon an application to it by certain persons such as a shareholder or creditor).

Where a majority in number representing 75% in value of those voting at the meetings approve the Scheme, the Court can subsequently order that the Scheme be binding – even on dissenting, absent or untraceable members or creditors. Dissenting members and creditors will have an opportunity to object at the hearing at which the Order is sought.

A notification to, or the approval of, the Central Bank may be required and any relevant regulatory issues in jurisdictions outside Ireland need to be addressed.

The Transferor may apply to the Court for a cancellation of its existing share capital and for its dissolution without needing to go through a winding up process. Alternatively, the Scheme can be effected as a transfer or partial transfer of business such that the Transferor is not dissolved and may remain in existence or commence a voluntary winding up procedure.

## Points to Note

The Scheme may not be legally effective in the case of contracts which are not governed by Irish law if, under the relevant governing law, the Scheme would not be recognised. Steps may need to be taken, depending on the relevant governing law, in order to assign or novate these contracts outside the Scheme process. Similarly a Scheme may not be effective to transfer assets of the Transferor located outside Ireland.

Change of Control provisions in contracts need to be reviewed to determine whether the Scheme will trigger a right to terminate, as the Court Order will not override those termination provisions.

The requirement for Court approval in order to make the Scheme binding means there is a less flexible timetable and the process will be in the public domain. However, this inflexibility has been mitigated by the 2014 Act as only one court application is now required, provided the directors exercise their power to convene the relevant shareholder / creditor meetings. Under the prior Companies Acts, at least two court applications were necessary in order to bring a Scheme into effect.

If an insurance business is being merged under a Scheme then a separate Portfolio Transfer is required. The two Court processes for the Scheme and for the Portfolio Transfer will run in tandem.



Cross-border Merger

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## Process

The European Communities (Cross-Border Mergers) Regulations 2008 (the “2008 Regulations”) provide for Cross-Border Mergers between Irish limited liability companies and limited liability companies in other EEA Member States. We advised the Government on the drafting of the 2008 Regulations.

Under a Cross-Border Merger, all of the assets and liabilities (including contracts) of one or more Transferor Companies are automatically transferred to a Successor Company by way of universal succession and each of the Transferor Companies is then dissolved without going into liquidation. The 2008 Regulations provide specifically for mergers between parent company and subsidiary, as well as between sister companies and unrelated companies.

The procedure to be followed in order to effect a Cross-Border Merger involves:

- the preparation of certain documents by each party to the Cross-Border Merger, including the common draft terms of the Cross-Border Merger;
- the approval of the Cross-Border Merger by the members of every merging company;
- the application by every Irish merging company to the High Court to confirm that the various requirements under the 2008 Regulations have been complied with; and
- where the Successor Company is an Irish company, an application to the High Court for a court order to approve the Cross-Border Merger.

A notification to, or the approval of, the Central Bank may be required and any relevant regulatory issues in jurisdictions outside Ireland need to be addressed.

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### Points to Note

An advantage to the Cross-Border Merger over a Scheme is that it will be recognised throughout the EU/EEA and so foreign law governed contracts are only potentially problematic if the governing law jurisdiction is not an EU/EEA member.

The same Change of Control issues arise as with a Scheme.

In the case of a merger involving insurance businesses, a separate Portfolio Transfer may be required but in practice the two Court processes for the Cross-Border Merger and the Portfolio Transfer can be run in tandem.

A key practical difference between a Cross-Border Merger and a Scheme is that, in a Cross-Border Merger, the two entities involved must be in different EU/EEA member states. Consequently to merge two Irish companies using Cross-Border Mergers a “back to back merger” involving a third company in another EU/EEA member states jurisdiction would be required. The 2014 Act introduced a new form of merger between two private companies incorporated in Ireland.

Partial transfers are not achievable under a Cross-Border Merger, whereas they are under a Scheme.

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 Cross-Border Merger.

The process also allows for employee participation rights which are not a feature of Schemes or Private Company or PLC Mergers.

The process to implement a Cross-Border Merger is, as a general comment, more streamlined than the process for a Scheme.





## Private Company Merger

The 2014 Act provides, for the first time under Irish law, for a new form of merger that can be effected between private companies incorporated in Ireland (“Private Company Merger”). The procedure is only available where none of the merging companies are a plc and one, at least, of such companies is a private company limited by shares.

The process to be followed in implementing a Private Company Merger is very similar to the Cross-Border Merger process, as the relevant provisions of the 2014 Act have been modelled on the 2008 Regulations.

All of the assets and liabilities of one or more Transferor Companies can be transferred to a Successor Company; the Transferor Companies are then dissolved without going into liquidation.

In broad terms, the merger may take effect as follows:

- (a) the directors of both the Transferor and Transferee 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; and
- (c) the Transferor and Transferee may then make a joint application to the Court for an order confirming the merger.

As an alternative to the process above, the 2014 Act has introduced a simplified process which can be followed by companies to implement certain activities (which would otherwise be subject to restrictions under the 2014 Act), known as the summary approval procedure (“SAP”). The SAP may be used to implement a merger and involves the following steps:

- (a) a declaration of solvency that complies with Section 206 of the 2014 Act to be sworn by the directors / a majority of directors of each of the merging companies;
- (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 Transferee confirming certain particulars with respect to the merger; and
- (c) a unanimous shareholder resolution approving the merger.

**Points to Note**

As the Private Company Merger is a new procedure, there is limited precedent in Ireland with respect to such mergers to date.

The availability of the SAP for the purposes of a Private Company Merger is useful as it removes court involvement which can be costly and time consuming. The Court process will remain relevant for PLC Mergers as such companies cannot avail of the SAP to effect a merger.

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.

No employee participation rights arise under a Private Company Merger (by contrast with a Cross-Border Merger).

A Private Company Merger may not be legally effective in the case of contracts which are not governed by Irish law. Depending on the relevant governing law, it may be necessary to assign or novate certain contracts outside the merger process. Similarly, the merger may not be effective to transfer assets of the Transferor located outside of Ireland. The same Change of Control issues arise as with a Scheme and a Cross-Border Merger.

Partial transfers are not achievable under a Private Company Merger. The 2014 Act does however provide for divisions of private companies and a subsequent merger process or transaction could be conducted with the relevant part of the divided entity. A notification to, or the approval of, the Central Bank may be required and any relevant regulatory issues in jurisdictions outside Ireland need to be addressed.



PLC Merger

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**Process**

The 2014 Act introduces a process for the merger of public limited companies registered in Ireland (“PLC Merger”), which replaces the previous regime governing PLC Mergers under the European Communities (Mergers and Division of Companies) Regulations 1987. This mechanism is available under the 2014 Act, provided at least one of the merging companies is a plc.

A PLC Merger is very similar to a Cross-Border Merger, as the relevant provisions of the 2014 Act have been modelled on the 2008 Regulations.

In order to implement a PLC Merger the directors of both the Transferor and Transferee must prepare the relevant merger documentation which must be filed in the CRO and be published in the CRO Gazette.

After a 30 day period has elapsed, the draft terms of merger must be approved by a special resolution passed at a general meeting of each of the merging companies. The Transferor and Transferee may then make a joint application to the Court for an order confirming the PLC Merger.

The Court may make an order confirming the PLC Merger provided the requirements of the 2014 Act have been complied with and proper provision has been made for any dissenting creditors or shareholders. Holders of securities other than shares must, in certain circumstances, be given the same interests in the Transferee. The order of the Court will cause all the assets and liabilities of the Transferor Company to transfer to the Transferee Company in accordance with the draft terms of merger as approved by the Court. The Transferor is dissolved on the merger becoming effective.

A notification to, or the approval of, the Central Bank may be required and any relevant regulatory issues in jurisdictions outside Ireland need to be addressed.

**Points to Note**

As the PLC Merger is a new procedure, there is limited precedent in Ireland with respect to such mergers under the 2014 Act to date.

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.

No employee participation rights arise under a PLC Merger (by contrast with a Cross-Border Merger). As with a Scheme and the Private Company Merger, a PLC Merger may not be effective for the purposes of non-Irish law governed contracts and/or the transfer of assets outside of Ireland. The same Change of Control issues also arise as with a Scheme, a Cross-Border Merger and a Private Company Merger.

Partial transfers are not achievable under a PLC Merger.



## Insurance Portfolio Transfer

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**Process**

A portfolio transfer (“Portfolio Transfer”) involves the transfer of the insurance assets and liabilities (or a portion thereof) of one authorised insurer (the “Transferor”) to another authorised insurer (the “Transferee”) and is a process which is recognised throughout the EU/EEA.

In order to transfer insurance business which has been concluded in Ireland, section 13 of the Assurance Companies Act 1909 and section 36 of the Insurance Act 1989 require that an application for court sanction is made by way of petition to the Irish High Court. In addition, the European Union (Insurance and Reinsurance) Regulations 2015 also require that the Irish High Court sanctions any scheme of assignment or transfer of insurance business concluded in Ireland.

In order to obtain the approval of the High Court, certain conditions are required to be fulfilled including the following:

- the consent of the Central Bank must be obtained. The Central Bank will in turn liaise with any other relevant regulatory authorities (including the regulatory authority responsible for supervising the Transferee);
- policyholder notifications (including an independent expert report, where necessary) must have been made in the approved format; and
- any publication requirements imposed must have been satisfied.

The insurance business of the Transferor is consolidated into the insurance business of the Transferee, without the Transferee having to acquire the corporate entity of the Transferor.

It is possible as part of a Portfolio Transfer to obtain an ancillary order from the Irish High Court under section 36 of the 1989 Act (“Section 36”) which effects the transfer of non-insurance assets and liabilities of the Transferor to the Transferee.

**Points to Note**

A disadvantage is that where the non-insurance assets and liabilities of the Transferor are located in EU/EEA Member States outside Ireland or where contracts to which the Transferor is a party are governed by the law of an EU/EEA Member State other than Ireland, there is some doubt as to the effectiveness of an order granted under Section 36 to transfer such assets and liabilities. Recent practice in Ireland therefore has been to effect the transfer of insurance assets and liabilities by way of a Portfolio Transfer and the non-insurance assets and liabilities by way of a Cross-Border Merger.





Statutory scheme for transfer of  
banking business

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## Process

The transfer of assets and liabilities relating to a banking business from one Irish licensed bank (or a “passport branch” of an EU Credit Institution) to another Irish licensed bank (or a “passport branch” of an EU Credit Institution) may be effected by way of a statutory scheme of transfer as set out in Part III of the Central Bank Act 1971 (the “1971 Act”).

The parties must submit a scheme for the transfer (“Bank Scheme of Transfer”) to the Minister for Finance (the “Minister”) for his approval. The Bank Scheme of Transfer should be submitted not less than four months prior to the proposed transfer date.

The Minister, after consultation with the Central Bank, will either approve or decline to approve the proposed Bank Scheme of Transfer by order not less than two months before the transfer date.

The steps to effect a Bank Scheme of Transfer are as follows:

- A Bank Scheme of Transfer is drafted, together with a related transfer agreement;
- The Central Bank and the Department of Finance “pre-clear” the draft Bank Scheme of Transfer in advance (this review generally takes about one month);
- The Bank Scheme of Transfer and executed transfer agreement must be submitted to the Minister for Finance at least four months prior to the proposed transfer date;
- The Minister, after consultation with the Central Bank, will either approve or decline to approve the proposed Bank Scheme of Transfer by order (effected pursuant to a Statutory Instrument) not less than two months prior to the proposed transfer date; and
- Following the approval of the Bank Scheme of Transfer by the Minister, notice of the Bank Scheme of Transfer must be published in at least one daily newspaper at least one month prior to the proposed transfer date.

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**Points to Note**

One advantage of a Bank Scheme of Transfer is that any potential issues will be identified in the pre-clearance phase and can be remedied prior to the formal submission of the Bank Scheme of Transfer to the Minister. The risk of issues emerging which may affect the timetable is reduced.

The Bank Scheme of Transfer may not be legally effective in the case of contracts which are not governed by Irish law if, under the relevant governing law, the Bank Scheme of Transfer would not be recognised. Steps may need to be taken, depending on the relevant governing law, in order to assign or novate these contracts outside the Bank Scheme of Transfer process. Similarly, a Bank Scheme of Transfer may not be effective to transfer assets located outside Ireland.

There is no Court process, which reduces costs and the related impact on timing.

A disadvantage is the timeline associated with this process. Documentation must be finalised at least five months prior to the proposed transfer date.

There is some debate as to the extent of assets which may be transferred under a Bank Scheme of Transfer, however, the Department of Finance and the Central Bank have approved Bank Schemes of Transfer where the assets and businesses included were not specifically referenced in the 1971 Act.

The 1971 Act has been amended to provide specifically for Bank Schemes of Transfers which, in the opinion of the Minister, are intended to “preserve or restore the financial position of the transferor or transferee”. The process under the 1971 Act has been adapted to apply in that situation. The changes were introduced under the Credit Institutions (Stabilisation) Act 2010 and were part of the measures to deal with the Irish banking crisis.



Companies Act 2014

In addition to the mechanisms for merging financial businesses described previously in this Guide, the 2014 Act includes the following procedures which may be useful when implementing such transactions or re-organisations.

### **Divisions of Private Companies**

The 2014 Act provides for the division of private companies. In a “division by acquisition” two or more companies acquire between them all the assets and liabilities of another company in exchange for shares in those companies with or without an accompanying cash payment. The transferring company is dissolved without going into liquidation. In a “division by formation of new companies”, the same process is followed save that the acquiring companies are newly formed.

The division process is similar to the merger process under the 2014 Act, however the SAP which is available for the purposes of merging Irish private companies, may not be employed for the purposes of a division of a company.

Common draft terms of division and, in certain cases, a directors' explanatory report and an expert's report to shareholders must be provided. Each company involved in the division must pass special resolutions approving the division and the division must then also be confirmed by the High Court.

### **Share Capital Reduction**

When implementing the different types of merger referred to in this Guide, it may be desirable or necessary to reduce a company's share capital. Under the prior Companies Acts, a capital reduction required a shareholder resolution which was confirmed by Court order. The 2014 Act introduced a simplified process for companies (other than plcs) to effect a capital reduction namely, the SAP.

The 2014 Act also modified the Court process by shifting the timing of the advertisement of the reduction.

The Court process remains relevant for plcs as such companies will not be able to avail of the SAP to effect a capital reduction and it still open to all companies to follow the Court process instead of availing of the SAP (if preferable).

Using the SAP to implement a capital reduction requires:

- (a) a declaration of solvency in respect of the company to be sworn by its directors / a majority of its directors;
- (b) a report of a person who is qualified to be the company's statutory auditor which would state whether, in that person's opinion, the directors' declaration is not unreasonable; and
- (c) the approval of a special resolution of shareholders (75% threshold).

**Variation of Capital on Reorganisation**

The 2014 Act includes provisions whereby a company may transfer or dispose of assets and / or liabilities or undertakings to a transferee company in exchange for securities in the transferee company being allotted to members of the company or its holding company (rather than the company itself). Such a transaction was previously regarded as a distribution which was required to be supported by distributable reserves. If such reserves were unavailable then the transaction constituted a form of capital reduction. As with a capital reduction, such a variation is capable of being implemented by using the SAP as outlined above (unless the relevant company is a plc) or by following the Court process which is identical to the Court process in respect of a capital reduction.

	Scheme	Cross-Border Merger	Private Company Merger	Division (Private Company)	PLC Merger	Insurance Portfolio Transfer	Reinsurance Portfolio Transfer	Bank Scheme of Transfer
Legally effective throughout EU/EEA.	Not necessarily. Due Diligence required.	Yes.	Not necessarily. Due Diligence required.	Not necessarily. Due Diligence required.	Not necessarily. Due Diligence required.	Yes.	Yes but some question marks over Irish process.	Not necessarily. Due Diligence required.
Partial Transfers possible.	Yes.	No.	No.	No.	No.	Yes.	Yes.	Yes.
Court Application required.	Yes.	Yes.	Only if SAP not availed of.	Yes.	Yes.	Yes.	No.	No.
Effective to merge any type of asset.	Yes, apart from insurance business.	Yes, apart from insurance business.	Yes, apart from insurance business.	Yes, apart from insurance business.	Yes, apart from insurance business.	Only insurance business	Only reinsurance business.	Some doubt about the ambit of this.
Can Change of Control clauses be triggered?	Yes.	Yes.	Yes.	Yes.	Yes.	Yes.	Yes.	Yes.