Introduction

With the introduction of the Companies Act 2014 ("the Act") it will now be possible, for the first time in Irish law, to effect a merger between two private Irish companies¹ so that the assets and liabilities (and corporate identity) of one are transferred by operation of law to the other before the former is dissolved without going into liquidation.

Forms of Merger

There are three forms of domestic merger, as follows:

Merger by absorption

A merger by absorption is effected by one company, on being dissolved without going into liquidation, transferring all of its assets and liabilities to a company that is the holder of all of the shares representing the capital of the first-mentioned company.

¹ Provided that none of the companies is a PLC and at least one of the companies is a LTD.
Merger by acquisition

A merger by acquisition is effected by an existing company acquiring all assets and liabilities (and corporate identity) of one or more transferor companies in exchange for the issue to shareholders of the transferor(s) of shares in the acquiring company (with or without any cash payment), with the transferor(s) being dissolved without going into liquidation.

Figure 2: Merger by acquisition

Merger by formation of a new company

This is effected by one or more companies transferring all assets and liabilities to a successor company incorporated for the purpose of the merger in exchange for the issue to their shareholders of shares in the successor company (with or without any cash payment), with the transferor(s) being dissolved without going into liquidation.

Figure 3: Merger by formation of a new company

Two Merger Processes

Domestic mergers under Chapter 3 of Part 9 of the Act may be effected by using either the Summary Approval Procedure (SAP) in Chapter 7 of Part 4 of the Act or a court approval process.

Below is a comparison table setting out the key differences between proceeding with a merger by means of an SAP as opposed to a court approval procedure:

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**Table: Key Differences Between SAP and Court Approval**

<table>
<thead>
<tr>
<th>SAP</th>
<th>Court Approval</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assets &amp; Liabilities</td>
<td>Assets &amp; Liabilities</td>
</tr>
<tr>
<td>Shares</td>
<td>Shares</td>
</tr>
<tr>
<td>Dissolved</td>
<td>Dissolved</td>
</tr>
<tr>
<td>Successor company</td>
<td>Successor company</td>
</tr>
<tr>
<td>Transfer company</td>
<td>Transfer company</td>
</tr>
</tbody>
</table>

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### Table 1: Comparison of SAP and court approval procedure

<table>
<thead>
<tr>
<th>Action</th>
<th>SAP</th>
<th>Court approval procedure</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Principal documents</strong></td>
<td>Common draft terms</td>
<td>Common draft terms</td>
</tr>
<tr>
<td></td>
<td>Directors' explanatory report*</td>
<td>Directors' explanatory report*</td>
</tr>
<tr>
<td></td>
<td>Expert's report*</td>
<td>Expert's report*</td>
</tr>
<tr>
<td></td>
<td>* Can be waived with unanimous consent of shareholders</td>
<td>Merger financial statement*</td>
</tr>
<tr>
<td></td>
<td></td>
<td>* Can be waived with unanimous consent of shareholders</td>
</tr>
<tr>
<td><strong>Declaration of solvency</strong></td>
<td>Directors must make a declaration of solvency in respect of the debts and liabilities of the transferor company and the successor company.</td>
<td>No declaration of solvency is required.</td>
</tr>
<tr>
<td></td>
<td>Directors must prepare a supplemental document under the Act.</td>
<td></td>
</tr>
<tr>
<td><strong>Registration and publication</strong></td>
<td>Declaration – a public document filed in the Companies Registration Office (CRO) not later than 21 days after the date on which the restricted activity is commenced.</td>
<td>Common draft terms filed in the CRO and a notice published in the CRO Gazette and a daily national newspaper.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Website publication possible.</td>
</tr>
<tr>
<td><strong>Inspection</strong></td>
<td>Document must be available for inspection by members for 30 days.</td>
<td>Document must be available for inspection by members for 30 days.</td>
</tr>
<tr>
<td><strong>Shareholder approval</strong></td>
<td>Unanimous shareholder approval required.</td>
<td>Approval by way of special resolution</td>
</tr>
<tr>
<td><strong>Court application</strong></td>
<td>No court application.</td>
<td>Court application, but court also considers minority shareholder rights and creditors.</td>
</tr>
<tr>
<td><strong>Creditor protection</strong></td>
<td>No benefit of court scrutiny and approval.</td>
<td>Benefit of court approval and open process where creditors can be heard.</td>
</tr>
<tr>
<td><strong>Transfer of assets/liabilities</strong></td>
<td>Assets transfer by operation of law; however, provisions in the Act concerning the entering of transfer of assets in relevant registers apply only on production of court order, not SAP resolution.</td>
<td>May be easier to register transfers of assets with court order.</td>
</tr>
<tr>
<td><strong>Effective date</strong></td>
<td>Merger takes effect on date specified in common draft terms or supplemental document.</td>
<td>Merger takes effect on date that court appoints.</td>
</tr>
<tr>
<td><strong>Post-merger</strong></td>
<td>Act does not include automatic requirement for registers to be updated on production of any documentation. May be more difficult to require registers to be updated (depending on the approach of the relevant registrars)</td>
<td>On production of certified copy of court order, keepers of any register in the State must update the relevant register.</td>
</tr>
</tbody>
</table>
SAP v court
Where possible, parties may wish to use the SAP, as it is arguably less complex and more cost effective and time efficient. However, there are circumstances in which it will not be possible to use the SAP, e.g. where one of the merging companies has a restricted director or where not all of the shareholders of each of the merging companies will consent to the merger.

Further, the court approval procedure may be perceived to be more credible (in particular, when dealing with regulated entities) and it will be recognised internationally. The downside is that the procedure is more costly and there is more publicity. Creditors also have an opportunity to be heard by the court, which may complicate and potentially delay matters (depending on the view taken by the court).

Practical Benefits and Issues to be Aware of
It is expected that domestic mergers will be an attractive form of effecting group reorganisations as an alternative to the conventional business transfer procedure. The automatic nature of the transfer of assets and liabilities under the Act has various benefits for merging companies, e.g. on a business transfer, the consent of a counter-party is required in order for third-party contracts to be novated to the transferee. This provides the counter-party with the opportunity to renegotiate contracts, resulting in execution risk, timing and financial consequences. On a merger, assets and liabilities (including contracts, agreements and instruments, e.g. leases) transfer automatically from the transferor to the transferee without the need for counter-party consent.

Finally, it is important to note that there are “known unknowns” with this new merger procedure, set out below, which may impact on a projected timeline.

Regulatory requirements
Where a regulated entity, such as an insurance company, is involved, regulatory requirements can have a significant impact on timing.

Due diligence
The transferor companies will need to undertake due diligence, in particular with respect to any material contracts that are governed by laws outside Ireland or that include rights that are personal to the transferor company and cannot be transferred to the successor company.

Employees
As the transfer of the assets and liabilities of the transferor company to the successor company will constitute the transfer of an undertaking, it will be necessary to comply with the requirements of the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (“TUPE Regulations”).

Tax Issues on Domestic Mergers
The types of merger outlined above that can be now undertaken between two domestic companies are based on those available under Council Directive 2005/56/EC, which was given effect by the European Communities (Cross-Border Mergers) Regulations 2008. Part 21 of TCA 1997 was implemented with the purpose of providing tax neutrality in relation to cross-border mergers, divisions, transfers of assets and exchanges of shares. Part 21 sets out a number of very specific reliefs that address the capital gains tax and corporation tax that may arise on the transfer of assets for such transactions. Finance Act 2012 inserted s87B SDCA 1999, which provides that cross-border mergers effected under the Regulations are not chargeable to stamp duty.

It should be noted at this juncture that because the legislation referred to above is specific to cross-border mergers and imports definitions from the Regulations, it does not apply to domestic mergers under the Act, with one exception, discussed below.

There are a number of domestic tax provisions under which relief may be obtained from a potential capital gains tax, corporation tax or stamp duty charge arising on a merger. The availability of such relief depends entirely on the particular circumstances of the merger. As things currently stand, it appears that these provisions are the only ones that can be employed to achieve tax neutrality in the case of domestic mergers.

As the Act was commenced on 1 June 2015, it is hard to fathom why the opportunity was not taken in Finance Bill 2015 to amend and extend Part 21 TCA 1997 and s87B SDCA 1999 to apply to domestic mergers effected under the Act or to introduce new provisions to ensure tax neutrality on a merger (cross-border or domestic). It is also regrettable that Revenue’s Operational Manual, SDCA, which was updated in January 2016, addressed none of the issues outlined below.

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2 No need to appoint a liquidator and commence a members’ voluntary liquidation.
3 Due diligence is nonetheless required because a counter-party may have rights that could arise before the effective date of the merge.
**Charge to tax on a merger**

The potential charges to tax arising on a domestic merger under the Act are as follows.

**Capital gains tax**

The transfer of a chargeable asset by the transferor to the successor company on any form of merger will constitute a disposal of the asset by the transferor.

The dissolution of the transferor company following any form of merger constitutes a disposal of shares in the transferor company.

**Stamp duty**

The transfer of the assets and liabilities of a company pursuant to a merger where the instrument giving rise to the transfer is executed in Ireland, or, if not executed in Ireland, relates to property situated in Ireland or to any matter or thing to be done in Ireland, will be chargeable to stamp duty.

**Corporation tax**

The transfer of a trade is generally treated as a cessation of a trade, so on a merger the transferor company will have ceased a trade, creating a charge to corporation tax on the transferor company.

Balancing allowances and charges will be triggered on the cessation of the trade in the transferor company.

**Tax relief on a merger**

**Capital gains tax**

Relief may be available under s615 TCA 1997 where a company disposes of a business or part of a business to another company pursuant to a scheme of reconstruction or amalgamation and the transferor receives no consideration for the disposal other than the acquiring company taking over the liabilities of the business.

As there are no shares issued on a merger by absorption, relief from capital gains tax may be available under s617 TCA 1997, which provides relief where a member of a group of companies disposes of an asset to another member of the group.

There is a clawback provision in s623 TCA 1997, which provides for a deemed disposal of the asset and a charge to tax thereon for the successor company if it leaves the group in the ten-year period after the transfer. The dissolution of the transferor after the merger may result in no “group” remaining and therefore a technical breaking of the group for the purposes of s623 TCA 1997. However, s623(1)(d) disappplies the section where a group relationship is broken as a result of one of the companies being “dissolved”, and it is assumed that a dissolution following a merger falls within the remit of this sub-section. Confirmation from Revenue that this is the case would be welcomed.

In Part 21 TCA 1997 there is a specific provision under s633D to ensure that the dissolution of the transferor/subsidiary company after a merger by absorption shall not be treated as a disposal of the shares in the subsidiary by the parent company. The section has been drafted using generic language such as “subsidiary”, “parent” and “dissolved”, and therefore the view of the authors is that it can equally be read to apply to domestic mergers by absorption, thereby ensuring that there is no chargeable disposal of shares by the parent company on the dissolution of the transferor. Again, confirmation from Revenue that this interpretation is correct would be welcomed.

**Corporation tax**

Section 400 TCA 1997 provides relief in certain circumstances, where a trading company ceases to carry on a trade and, after the cessation, another company carries on the trade. To avail of relief under s400 TCA 1997, the same persons must own at least a 75% share in the trade at any time within one year before the change in the company carrying on the trade and at any time within two years after the change. In such circumstances, trading losses unused by the transferor company may be used by the transferee company against profits of the same trade. In addition, the transferor company will be deemed to have acquired the assets at their tax-written-down values. Section 400(6) TCA 1997 provides for any balancing allowances and balancing charges to be given to or made on the transferor.
company as if it had owned the assets since they were acquired by the transferee.

Where it is not possible to obtain relief under s400 TCA 1997 – for example, if the 75% share requirement is not fulfilled – unused trading losses carried forward by the transferor company may be lost.

Stamp duty
Section 87B SDCA 1997 provides that cross-border mergers effected under the Regulations are not chargeable to stamp duty. There is no such provision for domestic mergers, and therefore relief under s80 and s79 SDCA 1999 must be considered.

Relief under s80 SDCA 1999 should be available where there exists a scheme for the bona fide reconstruction or amalgamation of a company or companies.

As noted above, no shares are issued in a merger by absorption, and therefore no relief under s80 SDCA 1999 can apply and one must look to s79 SDCA 1999. Section 79 SDCA 1999 relieves from stamp duty a transfer of assets between group companies. There are two issues with the operation of this section as regards mergers.

First, s79(7) SDCA 1999 provides that this relief will be clawed back, and stamp duty will be payable, where the transferor and transferee cease to be associated within a period of two years from the date of the transfer. As the transferor company will automatically be dissolved after the merger, the group relationship is broken and a clawback will occur under this sub-section. It may be that Revenue intends to extend the current concession that applies where the group relationship is broken on a liquidation to a dissolution on a merger. However, as Revenue’s Operational Manual, SDCA, updated in January 2016, included no commentary or reference to any such extension, it is impossible to give a definitive view as to Revenue’s position. It is suggested that an amendment to s79 SDCA 1999 providing a carve-out similar to s623(1)(d) TCA 1997, as referred to above, would be sufficient to disapply the clawback.

Second, s79(5)(c) SDCA 1999 states that there is no relief under the section if the transaction was entered into with the intention that the transferor and transferee would cease to be associated. Therefore, on first principles, s79 SDCA 1999 should never apply to a merger by absorption.

These issues with the application of s79 SDCA 1999 will need to be addressed sooner rather than later, to avoid the position of company law permitting mergers but the tax legislation being at odds with the legal position and essentially acting as a potential blocker to the legal process.

The foregoing discussion in relation to s79 SDCA 1999 may in fact be moot. The authors are aware of, and in agreement with, the view that on a merger there is no instrument of transfer and therefore no charge to stamp duty arises in the first instance. This view is predicated on the legal process involved in both a merger by court application and a merger using the Summary Approval Procedure. It is the court order or the resolution approving the merger (SAP) that effects the merger, and it is by operation of law that the transfer of any assets occurs, with no requirement for any additional instrument(s) to complete the transfer. As there is no specific stamp duty exemption for court orders, the commentary below applies equally to mergers by court order and SAP.

The commentary by Revenue on s87B SDCA 1999 in its Operational Manual, SDCA, where it is stated that “where it can be shown to the satisfaction of the Revenue that, as a consequence of a legal or administrative act effecting a dissolution or merger, the beneficial interest in Irish property is transferred from one company to another, any instrument executed to transfer the legal interest in the property will not attract a liability to duty”, suggests that Revenue is of the view that the beneficial interest moves by operation of law on a merger and that a further instrument transferring the legal interest may be required. Presumably, the reasoning, with which the authors would agree, for no charge on the transfer of the legal interest is that any instrument transferring the legal interest
after a merger amounts to a mere conveyance and therefore does not fall within the charge to stamp duty. However, the authors are of the view that the interpretation of a further instrument of transfer being required does not correlate with the legal process of a merger, whereby the assets transfer by operation of law on the effecting of the merger and there is no requirement for any other instrument of transfer to complete the transfer (of the beneficial or legal interest) of the assets.

In light of these issues, the authors are of the view that there is an urgent need for Revenue to make a number of confirmations, as mentioned above, on the application of existing legislative provisions to mergers and/or for new legislation to be enacted to remove any uncertainty and rectify the application of s79 and/or s87B SDCA 1999 to mergers.