

Approved Housing Bodies ('AHBs') - Checklist and Points to Consider re M&A Activity

Context and Drivers for M& A Activity:	
Regulatory burden	<p>Primary Regulation:</p> <ul style="list-style-type: none"> • Currently regulated by Housing Agency "<i>Regulation Office</i>" - interim regulator - "<i>Voluntary Regulation Code</i>" + 3 Standards; • Since Jan 2017 AHB's have to be able to demonstrate compliance with Code and to be registered with Housing Agency to obtain gov funding; • New Housing (Regulation of Approved Housing Bodies) Bill 2019- establishes new independent regulator - Approved Housing Bodies Regulatory Authority; • Clearly moving from Voluntary to Mandatory Reg Regime - Smaller AHB's anticipated to have difficulty complying with new regime; • Anticipated that Regulatory Authority will be established - Jan 2021; • AHB must be on AHB Register with new regulator to obtain funding. Registration does not mean automatic entitlement to funding. AHB's can be removed from new register; • Local Authorities also relevant to this activity.
Renewal and succession planning	<ul style="list-style-type: none"> • Smaller and <u>voluntary</u> AHB's actively considering future viability; • "Regulatory Storm" - combined with impact of Covid 19; • Can't wait until "Insolvent"; • Consolidation may be only way to protect future viability and <u>Tenants interests</u>.
Identified concerns/problems	<ul style="list-style-type: none"> • Charities Regulator is increasingly active and is identifying failures; • Interim Regulator is identifying compliance failures - jeopardising funding; • New AHB Regulator will investigate compliance with mandated standards; • Failures will result in cancellation of registration - and no funding.
Increase services/scale/borrowing powers/economies of scale	<ul style="list-style-type: none"> • Self-evidently smaller players are finding it harder to fund their activities; • Charities Regulator and Housing Agency are encouraging consolidation; • Assets maintained and renovated to a higher standard; • Assets managed professionally and an overall reduction in risk for the management of the housing stock.

Regulation/Regulators relevant to M&A activity in AHB space:-	
<ul style="list-style-type: none"> • To be approved by the Housing Agency to be an AHB entity must be a GLG - Charitable Trust or Registered Society 	
Company law	<ul style="list-style-type: none"> • CLG- Limited Liability; • Members of CLG are not shareholders and don't have a distinct economic interest in assets of CLG; • Constitution of CLG with Charitable status is required to prohibit distribution of assets to members; • Directors of a CLG with Charitable status in addition to Directors duties also must comply with "charitable trustee" obligations; • Check CLG Constitution and provisions re: <ol style="list-style-type: none"> a) transferability of membership/replacement of members;

	<ul style="list-style-type: none"> b) transfer of surplus assets to similar charity (failing which “Cy-Pres” application required); and c) assets must be transferred/Cy-Pres application made before commencement of winding up of CLG; • Merger under SAP?
Unincorporated Societies Acts	<ul style="list-style-type: none"> • Registered under Industrial & Provident Societies Acts, 1893 - 2018; • Formed under “Rules”; • Has Limited Liability; • Check constituting documents re replacement of members/Sale of assets/Winding up;
Trust Law	<ul style="list-style-type: none"> • Incorporated under the Charities Act 2009; • Trusts don’t have separate legal personality from Trustees; • Trust/Trustees don’t have limited liability; • Check Trust Deed re replacement of Trustees/Sale of assets/Winding up; • Trustees still deemed to hold remaining assets on trust to be used for charitable purposes; • Personal liability for failure by Trustees in that duty- therefore get Charities Regulator blessing before winding up+ for transfer of surplus; • Consider converting to CLG for Trustee Protection reasons?;
Charities Regulation	<ul style="list-style-type: none"> • As most AHB’s are charities they have to be registered with Charities Regulator; • Use all income for charitable purpose only. • All Registered Charities must comply with Charities Governance Code etc
Revenue Charities and Sports Exemptions Unit	<ul style="list-style-type: none"> • Obligated to notify unit of any change in details or activities.
Residential Tenancies Board	<ul style="list-style-type: none"> • Since April 2016 all AHB’s must register their tenancies with the RTB;
New AHB Regulatory Authority	<ul style="list-style-type: none"> • Anticipated that Regulatory Authority will be established - Jan 2021;

General advice re M&A Transactions:

Necessity for Expert advice	<ul style="list-style-type: none"> • Most M&A transactions absorb large amounts of management time and resources; • M&A transactions in Charities sector can be more complex than private sector.
Acquisition of AHB entity/Asset Transaction/Merger	<ul style="list-style-type: none"> • Entity Acquisition/Asset Purchase/Merger transactions are each very different transactions- but each transaction type requires detailed tax advice • Acquisition of AHB entity: <ul style="list-style-type: none"> a) Take separate legal entity- warts and all; b) May not be appropriate/difficult for Unincorporated societies or trusts. • Assets sales: <ul style="list-style-type: none"> a) possible to pick and choose assets and leave behind liabilities- but difficult in Charities context; b) TUPE; c) Specific assignments/novation’s. • Third party consents may be required in each case. • Domestic Merger under SAP- Probably not suitable as: <ul style="list-style-type: none"> a) One of merging companies must be private company limited by shares; b) Tax reliefs on merger speak to “Group” reliefs;

	<ul style="list-style-type: none"> c) Requirement for Unanimity- “Common terms of Merger” (otherwise Court order); d) Directors Declaration of Solvency- debts as they fall due for 12 months. <p>Also Relevant:</p> <ul style="list-style-type: none"> • Joint Ventures; and • Procurement Groups.
Agreement of Goals	<ul style="list-style-type: none"> • Normal “Commercial” concerns usually not relevant for transactions in Charities space as goal is to transfer all assets and liabilities to mutual advantage- prioritising interests of Tenants- not to generate a “profit”.
Diligence -liabilities	<ul style="list-style-type: none"> • Vital to identify whether target has liabilities that will eat acquirer.
Consents	<ul style="list-style-type: none"> • Third party consents required? - e.g. lenders
Transaction Plan	Step plan vital in any M& A Transaction- to include identifying deliverables, conditions to completion, specifying timings and allocating responsibilities.

Specific risks for M&A Transactions in the AHB Space:

	<ul style="list-style-type: none"> • Consolidation not yet common in Charities space- concerns that 2 entities becoming one will halve income/grant availability. • Term “Merger” too loosely used in Charities space- really talking about consolidation by entity purchase or asset acquisition • Domestic Mergers under Companies Act rare and unlikely.
Regulatory/Structural complexities	<ul style="list-style-type: none"> • An M&A transaction may need to be a 2-step process- where a new CLG is first incorporated (as a special purpose vehicle (an SPV)) and relevant assets transferred into that SPV by the old “Transferor”- and the purchaser then buys that new SPV. However, such structural changes are difficult in regulated Charities sector and may have tax risks; • Availability of transfer of Business Relief?; • Interim Regulator must be notified of significant changes in an AHB’s balance sheet- including the impact of an M& A transaction; • Interim Regulator has stated that: <ul style="list-style-type: none"> a) It expects AHB’s’s to operate in an open and transparent manner and to be “co-operative”; b) It expects boards / Trustees to “conduct a full appraisal and evaluation” of all consolidation options; c) Interests of tenants must be at heart of decision making process; d) Compliance with governance/finance/performance standards must be a key outcome of consolidation; e) It expects “an orderly transfer of assets and associated liabilities” as part of a consolidation; f) Expects AHB’s to have a “Project Plan” and to appoint a “Project Manager” to manage consolidation process.
Charities Law	<ul style="list-style-type: none"> • Must notify Charities Regulator in advance of an M&A transaction involving a registered charity and agree a “plan” with Regulator; • Plan needs to particularly confirm “alignment” with other entity and set out how surplus assets/funds will be dealt with; • Surplus assets can’t be paid to members without Charities Regulators’ consent. • Wind down of transferor Registered Societies/Trusts and termination of risks for trustees difficult
Varying degrees of available time/resources + professionalism/experience	<ul style="list-style-type: none"> • M&A process can be resource intensive with a lot of money and time being spent on due diligence, professional advice

	<p>etc. This “resource” burden poses a risk and sometimes a barrier to the process;</p> <ul style="list-style-type: none"> Acquiring a small AHB that is in distress may take a disproportionate amount of time and resources, benefits may not be immediate, and It may not be a quick fix.
High incidence of legacy liabilities	<ul style="list-style-type: none"> Title issues; Property condition and costs; Tenancy disputes/litigation; Employee disputes/Litigation; Restrictions on gifted assets; Funding challenges/encumbrances.
Likelihood of NO warranties/indemnities	<ul style="list-style-type: none"> M&A Transaction likely to be at nil consideration- limited/no warranties etc in such circumstances.
Requirement to priorities tenants interests	<ul style="list-style-type: none"> Regulator also requires “appropriate communication with tenants and other stakeholders throughout the process”;
Cultural misalignment risks	<ul style="list-style-type: none"> Housing Agency expects AHB’s to utilise the Irish Council for Social Housing to identify the right consolidation partner; Objects of AHB’s “consolidating” must be similar; Lots of commentary about misalignment/suspicion between AHB’s- particularly across different tiers; Concerns about “legacy” of smaller AHB’s being lost;
Shut down post Asset sale	<ul style="list-style-type: none"> Charities Regulator; Notification to Revenue; Trustees;

Taxation matters:	
<p>Tax exemption</p> <ul style="list-style-type: none"> Income Tax Corporation Tax Capital Gains Tax Deposit Interest Retention Tax Capital Acquisitions Tax Dividend Withholding Tax Professional Services Withholding TAX Stamp Duty <p>Other taxes</p> <ul style="list-style-type: none"> VAT PAYE/PRSI/USC LPT 	<p>AHB’s with charitable tax exemption are exempt from the taxes listed.</p> <p>AHB’s for the most part must therefore focus on VAT, payroll taxes and LPT.</p> <p>Relevant contracts tax (“RCT”) may also be consideration, particularly in the context of maintenance and repair activities, so its application should be addressed on a case by case basis.</p>
<p>VAT</p> <ul style="list-style-type: none"> Charities VAT Compensation Scheme VAT on property issues re property portfolio Letting of residential property - VAT exempt, no option to tax Register for VAT and reverse charge accounting <p>PAYE/PRSI/USC</p> <ul style="list-style-type: none"> Key risk in event of Revenue audit <p>LPT</p> <ul style="list-style-type: none"> Recording of housing stock People with special housing needs Discharging LPT liabilities 	<p>With regard to VAT, the AHB must address its VAT status and determine what VAT exempt and/or VATable activities, if any, it undertakes.</p> <p>The letting of residential property is, in most cases, a VAT exempt activity and the option to tax is not available. No VAT recoverability exists for VAT exempt businesses. VAT incurred on the acquisition of residential property in such circumstances represents a real cashflow cost for the AHB.</p> <p>Where goods and services are acquired from EU and non-EU countries, the AHB may have a requirement to register for VAT and account for VAT on a reverse charge basis.</p> <p>Re PAYE/PRSI/USC risks, remuneration strategies must be reviewed carefully, particularly in the context of reimbursement of expenses etc.</p>

	With regard to LPT, the development of appropriate systems to record the housing stock, claim exemptions where appropriate and discharge LPT liabilities are important consideration for AHB's.
<p>Continuing to be tax compliant</p> <ul style="list-style-type: none"> • Charitable status with Revenue Commissioners • Use all income for main charitable purpose only • Keep proper records and accounts • Notify the Charities and Sports Exemptions Unit of any change to the charity's details/activities • Manage funds accumulated and high cash balances • Tax clearance certificates 	AHB's are regulated entities and have compliance obligations across a number of areas. Maintaining an excellent tax compliance record is important for the continued application of charitable exemption. The activities of the organisation must be consistent with its charitable objectives and it is necessary to engage with the Revenue Commissioners where these change. If AHB's have significant cash reserves these must be managed. The ongoing activities of a AHB may require it to have a tax clearance certificate and the existence of outstanding tax returns and/or unpaid taxes will jeopardise the issuance of this certificate.
<p>M&A transactions</p> <ul style="list-style-type: none"> • Unwind - unable to carry out charitable purpose • Change legal structure - apply for new CHY number • Selling residential property portfolio subject to lease, license etc • Transfer of business relief? Meaning of accountable person? Meaning of undertaking? • Sale of "new" property • Second disposal within 5 years of completion of property - occupied vs non-occupied for 24 months • Repair and leasing scheme 	AHB consolidations implemented in the form of asset sales will give rise to VAT on property issues that will need to be managed carefully. The composition of the asset portfolios e.g. residential or otherwise and whether they are new or second properties will drive the tax complexities. Advice should be requested on these issues as early into the consolidation project as possible.

General advice re M&A Transactions from a Real Estate Perspective:

Necessity for extra Transferee Input	<ul style="list-style-type: none"> • Tier 1/Tier 2 Board of Directors often voluntarily appointed and are unable to provide detail and context for each Property; • Transferee expected to make own enquiries as only limited warranties and undertakings will be provided (similar to a receivership acquisition in terms of knowledge); • Physical Inspections of the Property is essential and detailed history of Property occupation should be requested; • Property typically occupied so additional caution should be taken to the level of due diligence to be applied towards the history of the occupant in addition to the Property; • Local Authority consent often required for the M&A to protect its charge/interest in the Property.
Detailed Lease Reports	<ul style="list-style-type: none"> • Standard vs Enhanced Lease (often Standard Lease for Tier 1/Tier 2 AHBs);

	<ul style="list-style-type: none"> • Level of management required by the Transferee will be dictated based on the type of Lease in place - inspection key again to decipher cost and risk appetite; • AHB guarantees the payment of rent irrespective of occupancy so review of occupancy history vital (e.g. rent collection issues, sinking fund reserve etc).
Title Remediation	<ul style="list-style-type: none"> • Any material title issues will be a barrier to obtaining finance - key to work with lender's lawyers from the outset; • Title Deeds missing - explore the possibility of obtaining a Title Insurance Policy and naming both the Transferee, the Land Registry and the Transferee's lender on the policy; • Adverse Possession - detailed declarations should be sought from the Transferor based on its knowledge of the history of the Property and should be tidied up pre-completion; • Breach of Covenants - detailed declarations should be sought in relation to the compliance with all conditions relating to documentation on title.

General advice re M&A Transactions from an Employment Perspective:

Things to watch out / consider	<ul style="list-style-type: none"> • Does TUPE apply - remember all terms and conditions transfer. • Undergo a detailed due diligence process, in particular look out for: <ul style="list-style-type: none"> - Unworkable historic terms and conditions - Collective agreement - Legacy employment litigation / disputes - Any employees on long term sick leave - Employees disguised as independent contractors? • Insist on suitable warranties, and indemnities, where applicable.
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