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LEXOLOGY
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the fourth edition of *Public M&A*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Austria.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Alan M Klein of Simpson Thacher & Bartlett LLP, for his continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

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There are three principal methods used to acquire an Irish public company: a takeover offer, a scheme of arrangement and a cross-border or domestic merger. A purchaser may pay in cash, securities or a combination of both.

Takeover offer

The bidder may make a general offer to the target shareholders to acquire their shares, which must be conditional on the bidder acquiring, or having agreed to acquire (pursuant to the offer or otherwise), shares conferring more than 50 per cent of the voting rights of the target. The bidder may compulsorily require remaining shareholders to transfer their shares on the terms of the offer if it has acquired, pursuant to the offer, not less than 90 per cent of the target shares to which the offer relates, for companies listed on regulated markets in the European Economic Area (EEA) and 80 per cent on other markets (eg, the New York Stock Exchange (NYSE), Nasdaq or AIM). Dissenting shareholders have the right to apply to the High Court of Ireland (the High Court) for relief.

The most commonly used structure for the takeover of an Irish target is by way of a scheme of arrangement, either by a transfer scheme (shares are transferred to the bidder in return for consideration) or a cancellation scheme (shares are cancelled in return for consideration). To become binding on shareholders, the scheme of arrangement requires the approval of a majority in number of the shareholders of each class, representing not less than 75 per cent of the shares of each class, present and voting, in person or by proxy, at a general, or relevant class, meeting of the target company, together with the sanction of the High Court.

Merger

A cross-border merger is a statutory procedure under the European Communities (Cross-Border Mergers) Regulations 2008 (the Cross-Border Mergers Regulations) providing for business combinations between Irish companies and other EEA incorporated companies. A cross-border merger requires the approval of not less than 75 per cent of the votes cast, in person or by proxy, at a general meeting of the target shareholders, together with the sanction of the High Court. A domestic merger is a statutory procedure under the Companies Act 2014, as amended (the Companies Act), which facilitates business combinations between Irish companies and is based on the Cross-Border Mergers Regulations.

Statutes and regulations

2 | What are the main laws and regulations governing business combinations and acquisitions of publicly listed companies?

Irish Takeover Panel Act, the Takeover Regulations and the Takeover Rules

The Irish Takeover Panel Act 1997, as amended (the Takeover Act), the European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations 2006, as amended (the Takeover Regulations) and the Irish Takeover Panel Act 1997, Takeover Rules 2013 made thereunder (the Takeover Rules) primarily apply to change-of-control (acquisition of shares carrying 30 per cent of voting rights) and certain other M&A transactions involving an Irish registered target with voting shares (currently or in the last five years) admitted to trading on Euronext Dublin, operated by the Irish Stock Exchange plc (ISE), on another market operated by the ISE (eg, Euronext Growth or the Atlantic Securities Market) or on the London Stock Exchange (LSE) (including AIM), the NYSE or Nasdaq.

The Takeover Regulations and the Takeover Rules also apply to change-of-control transactions involving an Irish registered target with voting shares admitted to trading on one or more regulated non-Irish markets in the EEA, and a non-Irish registered target with voting shares admitted to trading on one or more regulated markets in the EEA including Ireland (but not in its country of incorporation).

The Takeover Rules, which are based on seven general principles set out in the Takeover Act (the General Principles), contain detailed provisions applicable to the conduct of takeovers. The spirit, as well as the strict reading, of the Takeover Rules and the General Principles must be adhered to. Among other matters, the General Principles provide that target shareholders be afforded equivalent treatment and sufficient time and information to reach a properly informed decision on an offer.

The Takeover Rules are not concerned with the financial or commercial advantages or disadvantages of a takeover or other relevant transactions. They include mandatory bid rules, share-dealing restrictions, confidentiality and disclosure obligations, and restrictions on frustrating actions.

The Takeover Rules are administered and enforced by the Irish Takeover Panel (the Takeover Panel), which has statutory powers to make rulings and give directions to ensure the Takeover Act's General Principles and the Takeover Rules are complied with. The Takeover Panel operates principally to ensure fair and equal treatment of all target company shareholders in relation to takeovers (whether structured by way of an offer or a scheme of arrangement) and certain other relevant transactions.

The Companies Act

The Companies Act is the core statute that regulates the governance and internal affairs of an Irish company, including the principal fiduciary duties of directors.

The Substantial Acquisition Rules

The Irish Takeover Panel Act 1997, Substantial Acquisition Rules 2007 (SARs) are a separate set of rules issued and administered by the Takeover Panel, which restrict the speed at which a person may increase a holding of voting shares (or rights over voting shares) in a target to an aggregate of between 15 per cent and 30 per cent. The main aim is to give target companies adequate warning of stake building.

The Competition Acts

The Competition Acts 2002 to 2017, as amended (the Competition Acts) established the Competition and Consumer Protection Commission (CCPC), which is primarily responsible for the enforcement of the Irish merger control regime. Depending on the size of the transaction, the parties and their operations in Ireland, a takeover may be required to be notified to and approved by the CCPC under the Competition Acts.

Combinations and acquisitions where at least two of the undertakings generate turnover of €10 million or more in Ireland and the undertakings together generate turnover of €60 million or more in Ireland must be notified to the CCPC prior to completion. There are criminal penalties for a failure to notify. The initial process typically takes 20 to 30 working days for mergers that do not raise potential competition concerns. There is a short-form notification for transactions meeting the relevant criteria (either 'no overlap' cases or overlapping cases where the combined market share is less than 15 per cent for horizontal overlaps and 25 per cent for vertical overlaps). However, parties should exercise caution in notifying overlapping cases using this procedure.

Larger transactions involving multiple jurisdictions may require notification to and approval by the European Commission under Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

The Market Abuse Regulation

Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2004 on market abuse (MAR) and the European Union (Market Abuse) Regulations 2016 regulate insider dealing and market manipulation by imposing significant obligations on issuers.

The Cross-Border Mergers Regulations

The Cross-Border Mergers Regulations apply where the transaction involves a merger of an Irish incorporated entity with at least one other EEA company.

The EU Prospectus Regime

The EU prospectus regime is designed to reinforce investor protection by ensuring that all prospectuses, wherever issued in the EU, provide clear and comprehensive information while making it easier for companies to raise capital throughout the EU on the basis of approval from a single competent authority.

Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 (the Prospectus Regulation) regulates public offers of securities, provides for exemptions from the scope of the prospectus regime, a simplified disclosure regime for secondary issuances, changes to public offer exemptions and the introduction of a new frequent issuer regime.

Part 23 of the Companies Act, which governs prospectus law, was amended by the Finance (Tax Appeals and Prospectus Regulation) Act 2019. These amendments included the alignment of certain definitions in the Companies Act with the Prospectus Regulation, an increase of the application threshold for the Prospectus Regulation from €5 million to €8 million and certain changes to the local offer regime in relation to the content of the local offer document.

The Transparency Regulations and the Transparency Rules

The Transparency (Directive 2004/109/EC) Regulations 2007, as amended (the Transparency Regulations), the Central Bank of Ireland (the Central Bank) guidance on the Irish transparency rules in November 2018 (the Transparency Rules), and the Central Bank (Investment Market Conduct) Rules (SI No. 366 of 2019) seek to enhance the transparency of information provided by issuers on a regulated market by requiring certain disclosure for public companies.

Listing Rules

Companies whose shares are listed on Euronext Dublin, Euronext Growth or the Atlantic Securities Market must comply with Euronext Dublin rule book (the Listing Rules), Euronext Growth rules and Atlantic Securities Market rules (respectively). The ISE website contains market and regulatory information applicable to listed companies and provides access to the various listing rules and the Irish Corporate Governance Annex published by the ISE (the Irish Annex). The UK Corporate Governance Code, as supplemented by the Irish Annex, is also applicable to these companies.

Irish companies listed on markets outside Ireland, such as Nasdaq, the NYSE and the LSE (main and AIM markets), are subject to additional rules applicable to those markets.

Some sectors have special rules and additional regulators. In particular, regulated financial services businesses are subject to rules that require change-of-control consent from the Central Bank; media mergers are subject to the approval of the CCPC and the Minister for Communications, Climate Action and Environment (the Minister); and Irish airlines are subject to foreign control restrictions.

Memorandum and articles of association

An Irish incorporated public limited company is also subject to its memorandum and articles of association (forming a contract between the company and its shareholders). The memorandum of association sets out the principal objects of the company, while the articles of association set out the internal regulations of the company, such as shareholder meetings, voting rights, powers and duties of directors, the composition of the board of directors and communications between the company and its shareholders.

Cross-border transactions

3 How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification) (as, in respect of cross-border mergers, implemented in Ireland by the Cross-Border Mergers Regulations) facilitates cross-borders transactions in Ireland.

A cross-border merger may be effected in one of the following three ways:

- Acquisition: a company acquires the assets and liabilities of one or more companies, which are dissolved without going into liquidation. The acquiring company issues shares to the members of the dissolved companies in consideration of the transaction.
- Absorption: a parent company absorbs the assets and liabilities of a wholly owned subsidiary, which is dissolved without going into liquidation.
- Formation of a new company: a newly incorporated company acquires the assets and liabilities of one or more companies, which are dissolved without going into liquidation. The acquiring company issues shares to the members of the dissolved companies in consideration of the transaction.

The procedures vary depending on the type of merger, but each involves common draft terms of the merger between the companies, an explanatory report by the directors that must be made available to the Irish company's shareholders, an advertisement of the proposed merger and, in certain cases, an auditor's report.

The High Court must review and approve both outbound and inbound mergers involving Irish companies. Where applicable, employee protection provisions involving employee participation must also be observed.

Sector-specific rules

4 Are companies in specific industries subject to additional regulations and statutes?

To protect the plurality of the media and to ensure the 'diversity of ownership and diversity of content', the Competition Acts provide for additional steps where the transaction involves an Irish media business. The term 'media business' includes traditional media, online news sources and online broadcast of certain audio-visual material. Carrying on a media business in Ireland requires an undertaking to have a physical presence in Ireland and make sales to customers located in Ireland or to have made sales in Ireland of at least €2 million in the most recent financial year.

A separate notification to the Minister is also required. The Minister has 30 working days, commencing 10 days after the determination of the CCPC, to consider the media merger. If the Minister is concerned that the merger is contrary to the public interest in protecting the plurality of the media, the Minister will request that the Broadcasting Authority of Ireland (BAI) carry out a Phase II examination. Within 80 working days of receipt of the request, the BAI must prepare a report for the Minister outlining its view on the merger with regard to media plurality and recommending whether the merger should be put into effect (with or without conditions). An advisory panel may be set up to assist the BAI in its review. The Minister will make the ultimate decision, taking into account the BAI report and, if applicable, the view of the advisory panel. The Minister's final determination must be made within 20 working days of receipt of the BAI report.

Transaction agreements

5 Are transaction agreements typically concluded when publicly listed companies are acquired? What law typically governs the agreements?

It is typical for transaction agreements to be entered into when publicly listed companies are acquired. Such transaction agreements are typically governed by Irish law.

FILINGS AND DISCLOSURE

Filings and fees

6 Which government or stock exchange filings are necessary in connection with a business combination or acquisition of a public company? Are there stamp taxes or other government fees in connection with completing these transactions?

If a notification is required to be made to the Competition and Consumer Protection Commission (CCPC), each undertaking involved must submit a merger filing, with the exception of asset-only acquisitions. Joint filings are usually submitted and the purchaser tends to take the lead on drafting the filing. A fee of €8,000 (per filing) applies.

Certain documents relating to public offers governed by the Takeover Rules require the Takeover Panel's approval, which may result in the Takeover Panel imposing charges for expenses incurred in performing its functions.

A prospectus, if required, has to be submitted to and approved by the Central Bank of Ireland prior to being published, together with the appropriate filing fee.

Certain filings may be required to be made to the Irish Companies Registration Office under the Companies Act.

The rate of stamp duty payable on transfers of shares in an Irish company is 1 per cent. The rate of stamp duty payable on the transfer of non-residential property (other than shares) is 7.5 per cent. However, certain exemptions and reliefs can apply.

Stamp duty at 1 per cent applies on cancellation schemes of arrangements if implemented pursuant to a court order issued on or after 9 October 2019. The stampable consideration is the consideration received by the shareholders and is payable by the company paying the consideration. This provision was successfully challenged before the Tax Appeals Commission and is currently the subject of an appeal before the Irish courts.

Stamp duty reorganisation relief may apply to merger or takeover acquisitions where at least 90 per cent of the consideration comprises shares in the acquiring company. Specific conditions must be satisfied for this relief to apply.

Information to be disclosed

7 What information needs to be made public in a business combination or an acquisition of a public company? Does this depend on what type of structure is used?

Before a public announcement concerning an offer or possible offer of an Irish incorporated listed public company to which the Takeover Rules apply, all persons with confidential information must maintain strict confidentiality in respect of the offer or contemplated offer, and may only pass it to another person if necessary to do so and if that person accepts the need for secrecy. All relevant persons must conduct themselves to minimise the possibility of an accidental leak of information. If, prior to an announcement, the target is the subject of rumour and speculation or there is an anomalous movement in its share price, unless the Takeover Panel consents otherwise, an appropriate announcement must be made to the market. Prior to an approach, the responsibility for making such an announcement lies with the bidder; following an approach, the responsibility shifts to the target.

Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2004 on market abuse (MAR) applies to issuers with shares admitted to trading on regulated markets and issuers of securities traded on multilateral trading facilities. MAR requires issuers to disclose inside information directly concerning them to the public as soon as possible. Where an issuer delays an announcement pertaining to inside information so as not to prejudice its 'legitimate interests' (if certain conditions are met), the issuer must inform its regulator in writing of this decision and provide a written explanation of how the conditions for the delay were satisfied, immediately after the information is disclosed to the public.

A prospectus, if required, must contain all information necessary to enable investors to make an informed assessment of the assets, liabilities, financial position, profits and losses and prospects of the issuer, and the rights attaching to the securities in question. It must also include a description of the business, audited financial information for the latest three financial years, an operating and financial review of that period and a confirmation that the issuer has sufficient working capital for its present requirements (the next 12 months). There is an exemption from the requirement to produce a prospectus in connection with securities offered in connection with a takeover or merger. However, a document containing equivalent information is generally still required but, unlike a prospectus, cannot be passported into other EU jurisdictions.

The applicable listing rules set out the content and approval requirements for circulars to shareholders and the circumstances in which they must be prepared.

The principal documents required for a takeover offer are:

- an announcement containing the bidder's firm intention to make an offer, the consideration to be offered and the other terms and conditions;
- an offer document (containing the formal offer, other terms and conditions of the offer and prescribed additional disclosure);
- a form of acceptance; and
- a response circular from the target board to its shareholders setting out, among other matters, the target board's opinion on the offer and the substance and source of the competent independent financial advice it is required to obtain – this would, in a recommended offer, commonly form part of the offer document.

If the transaction is undertaken by way of a scheme of arrangement, the documentation is almost identical, but in place of the offer document, there is a circular to target shareholders and a notice convening meetings of shareholders with proxy forms in place of the form of acceptance.

If, after an approach has been made, the target (and, in a securities exchange offer, the bidder) issues a profit forecast or a statement that includes an estimate of the anticipated financial effects of a takeover (eg, as to resulting change in profit of earnings per share), it is required to obtain and publish reports from the accountants and financial advisers concerned regarding the preparation of the forecast or statement. Save with the consent of the Takeover Panel, profit forecasts made before an approach must similarly be reported upon.

No valuation of any assets may be given by or on behalf of a bidder or a target during an offer period unless supported by the opinion of a named independent valuer.

All documents, announcements, press releases, advertisements (except for certain excluded categories) and statements issued by or on behalf of a bidder or target are required to satisfy the same standards of accuracy as a prospectus. All such documents, as well as statements despatched or published by a bidder or a target during an offer period, are required, as soon as possible following despatch or publication and, by no later than 12 noon on the following business day, to be published on a website or designated microsite.

Disclosure of substantial shareholdings

8 What are the disclosure requirements for owners of large shareholdings in a public company? Are the requirements affected if the company is a party to a business combination?

Up to the time of announcement of a firm intention to make an offer under the Takeover Rules, the Substantial Acquisition Rules (SARs) apply to a person acquiring shares and restrict the speed with which a person may increase a shareholding in the target. SAR 6 provides that, subject to limited exceptions, an acquirer is obliged to disclose to the target and the Takeover Panel any acquisition of voting rights in a target which when aggregated with its existing holding exceeds 15 per cent of the target's voting rights, or if the acquirer already holds between 15 and 30 per cent of the voting rights of the target, any acquisition that increases its percentage holding. Where such notification obligation arises, it must be discharged no later than 12 noon on the day following the relevant acquisition.

SARs 3 and 4 restrict the timing of acquisitions, such that a person may not, in any period of seven days, acquire shares (or rights over shares) in the target carrying 10 per cent or more of its voting rights if, following the acquisition, that person would hold shares (or rights over shares) carrying between 15 to 30 per cent of the voting rights in the target.

Stake-building is totally prohibited if it constitutes insider dealing.

Dealings in the securities of a target company that is in an offer period under the Takeover Rules (and, in certain circumstances, dealings in the securities of a bidder) may trigger a disclosure requirement. The Takeover Rules require that a bidder and its concert parties publicly disclose any acquisition of target securities or derivatives referenced to such securities, including those that are purely cash-settled contracts for difference. Other persons interested in 1 per cent or more of the target's securities are also required to publicly disclose their dealings during an offer period. Complex rules apply to exempt fund managers and principal traders, particularly when they are members of a group that includes the bidder or a financial adviser to the bidder.

The Transparency Rules, which may apply depending on which market the target is listed upon, require a stakeholder to notify a listed company once the percentage of voting rights acquired by that stakeholder reaches, exceeds or falls below 3 per cent; and then each 1 per cent thereafter.

The Companies Act requires notification within a prescribed time frame where there is a change in the percentage of shares held by a person in a public limited company resulting in:

- an increase from below to above 3 per cent;
- a decrease from above to below 3 per cent; or
- where the 3 per cent threshold is exceeded both before and after the transaction, but the percentage level, in whole numbers, changes (fractions of a percentage being rounded down).

The EU (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019 (the 2019 Regulations) require Irish companies to gather and maintain information on individuals who are their underlying beneficial owners (or where none can be identified, their senior managing officials), establish and maintain a local beneficial ownership register containing this information, and file their beneficial ownership details on a central beneficial ownership register. Broadly speaking, a shareholding or ownership interest (direct or indirect) above 25 per cent is indicative of beneficial ownership. The 2019 Regulations do not apply to Irish companies listed on a regulated market that is subject to disclosure requirements consistent with EU law or are already subject to equivalent international standards that ensure transparency of ownership information.

DIRECTORS' AND SHAREHOLDERS' DUTIES AND RIGHTS

Duties of directors and controlling shareholders

9 What duties do the directors or managers of a publicly traded company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination or sale? Do controlling shareholders have similar duties?

Upon appointment, a director of an Irish incorporated company is required to acknowledge that, as a director, he or she has legal duties and obligations imposed by the Companies Act, other statutes and common law.

The Companies Act contains a non-exhaustive list of eight fiduciary duties owed by a director to a company. The relevant provisions essentially codify the duties that apply to directors under common law and equity.

If an offer has been received by the company, its board of directors has a duty to obtain competent independent advice on the terms of the offer and any revised offer. The board must send a circular to its shareholders setting out the substance and source of the advice, and the considered views of the board. Under the Takeover Rules, a bidder may only announce a firm intention to make an offer when it and its financial adviser are satisfied that the bidder is, and will continue to be, able to implement the offer. Where an offer is for cash (or includes an element of cash), the bidder is required to ensure that its financial adviser confirms the availability of resources sufficient to satisfy full acceptance of the offer.

Any director with a conflict of interest in respect of the offer (and any revised offer) should be excluded from the formulation and communication of advice to the shareholders and should not make any announcement or statement in respect of the offer, unless the full nature of the conflict of interest is disclosed clearly and prominently.

The board of directors is required to obtain competent independent advice if the directors of an offeror company are faced with a conflict of interest in respect of the offer; or propose to enter into a reverse takeover, and the same obligation to issue a circular to shareholders applies.

De facto directors, and in most cases shadow directors, are bound by the same duties and obligations and are subject to the same liabilities as formally appointed directors.

Approval and appraisal rights

10 What approval rights do shareholders have over business combinations or sales of a public company? Do shareholders have appraisal or similar rights in these transactions?

The acceptance condition for a takeover offer must be set at a level that would result in the bidder acquiring more than 50 per cent of the voting rights in the target, although in practice, it is typically 80 or 90 per cent. These thresholds invoke the statutory squeeze-out procedure, pursuant to which persons who do not accept the offer may have their holdings compulsorily acquired. The threshold for a target listed on a regulated market is 90 per cent; 80 per cent is the threshold for all other targets.

A scheme of arrangement requires the approval of a majority in number of the shareholders of each class, representing not less than 75 per cent of the shares of each class, present and voting, in person or by proxy, at a general, or relevant class, meeting of the target company, together with the sanction of the High Court of Ireland.

For companies listed on Euronext Dublin, the Listing Rules provide that acquisitions of a certain size (broadly, at least 25 per cent of the size of the bidder), or with parties connected to the company (eg, a director or substantial shareholder), must be approved by a general meeting of the company's shareholders.

Rule 21 of the Takeover Rules (which applies to Irish companies listed on the Irish Stock Exchange, the London Stock Exchange, Nasdaq and the New York Stock Exchange) prohibits a target board from taking any of the following actions (except pursuant to an existing contract) without shareholder approval or the consent of the Takeover Panel, or both, in the course of an offer, or if the target board has reason to believe that a bona fide offer may be imminent:

- issue shares;
- grant share options;
- create or issue any convertible securities;
- sell, dispose or acquire material assets of a material amount;
- enter into contracts otherwise than in the ordinary course of business; or
- any other action, other than seeking alternative bids, which may result in frustration of an offer or shareholders being denied the opportunity to consider it.

COMPLETING THE TRANSACTION

Hostile transactions

11 What are the special considerations for unsolicited transactions for public companies?

The following provisions of the Takeover Rules should be given special consideration in hostile transactions:

- The offer must first be disclosed to the board of the target company or its advisers before making any announcement concerning the offer.
- All target shareholders of the same class must be treated equally.
- There are a range of restrictions and obligations on persons dealing with target stock.
- A target board is prohibited from taking certain actions (except pursuant to an existed contract) without shareholder or Takeover Panel consent, or both, in the course of an offer, or if the target board has reason to believe that a bona fide offer may be imminent.
- With limited exceptions, information given by a target to one bidder must be made available to all bidders.

In the case of an unwelcome approach, the target may, at any time following the identity of the bidder being made public, apply to the Takeover Panel to impose a time limit within which the bidder must either announce a firm intention to make an offer or that it does not intend to do so (a 'put-up or shut-up' direction). Where the bidder announces that it does not intend to make an offer, subject to certain exceptions, that bidder will be precluded from announcing or making an offer or possible offer for the target for 12 months.

Break-up fees – frustration of additional bidders

12 Which types of break-up and reverse break-up fees are allowed? What are the limitations on a public company's ability to protect deals from third-party bidders?

Break fees are permissible under the Takeover Rules provided that the Takeover Panel has expressly consented to them. The Takeover Panel customarily consents to break-fee arrangements that are, subject to specific quantifiable third-party costs, a cap of 1 per cent of the value of the offer and subject to receiving written confirmation from the target board and its financial adviser that they consider the break or inducement fee to be in the best interests of the target shareholders.

The offer document is required to contain details of any break fee agreed to by the target.

The target may enter into an exclusivity agreement, subject to the Takeover Rules and the directors' fiduciary duties. The directors of the target company may also agree to non-solicitation requirements or provide irrevocable commitments or letters of intent to accept the offer.

Government influence

13 Other than through relevant competition regulations, or in specific industries in which business combinations or acquisitions are regulated, may government agencies influence or restrict the completion of such transactions, including for reasons of national security?

In addition to the Irish merger control regime, several industries are subject to additional regulations, such as financial institutions, insurance undertakings, pharmaceutical companies, airlines and telecommunications operators.

Conditional offers

14 What conditions to a tender offer, exchange offer, merger, plan or scheme of arrangement or other form of business combination are allowed? In a cash transaction, may the financing be conditional? Can the commencement of a tender offer or exchange offer for a public company be subject to conditions?

Although it is common for bidders to include wide-ranging conditions, the practical effect of these is limited by the Takeover Rules and the Takeover Panel. Except with the consent of the Takeover Panel, or in the case of Competition Acts or EC Merger Regulation conditions, an offer may not be made subject to any condition the satisfaction of which depends solely on subjective judgements of the bidder, or which is within its control. A bidder may not invoke a condition to lapse an offer unless the circumstances giving rise to the right to invoke are of material significance to the bidder in the context of the offer and the Takeover Panel (being satisfied that in the prevailing circumstances it would be reasonable to do so) consents to the condition being invoked. It is difficult for a bidder to invoke a condition, other than a material regulatory condition, acceptance condition or a condition that is required to implement the transaction (such as bidder shareholder approval).

Preconditions may be included whereby the offer does not have to be made (that is, the offer document does not have to be posted) unless each precondition is satisfied. The Takeover Panel must be consulted in advance in order to employ the use of preconditions. Preconditions may only be used where they relate to material official authorisations or regulatory clearances, and the Takeover Panel is satisfied that it is likely to prove impossible to obtain the authorisation or clearance within the offer timetable.

Financing

15 If a buyer needs to obtain financing for a transaction involving a public company, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Consideration offered may be any combination of cash or securities or both. The securities offered may be securities of the bidder or of another company.

A bidder may only announce a firm intention to make an offer under the Takeover Rules (a Rule 2.5 Announcement) when it and its financial advisers are satisfied, after careful and responsible consideration, that the bidder is in a position to implement the offer. Where the offer is a cash offer or there is a cash alternative, the Rule 2.5 Announcement must include a confirmation from the bidder's financial adviser that resources are available to the bidder sufficient to satisfy full acceptance of the offer. Any required debt and equity funding must be fully and, except with respect to conditions relating to closing of the offer, unconditionally committed prior to the Rule 2.5 Announcement and continue to be available at all relevant times. If the confirmation proves to be inaccurate, the Takeover Panel may direct the person who gave the confirmation to provide the necessary resources, unless the Takeover Panel is satisfied that the person acted responsibly and took all reasonable steps to ensure the cash was available. A bidder that makes a Rule 2.5 Announcement is bound to proceed with a formal offer. A Rule 2.5 Announcement must contain all the terms and conditions of the offer; these terms cannot subsequently be altered without the Takeover Panel's consent.

An offer document issued under the Takeover Rules must include a description of how the offer is being financed and the source of finance, and, if the offer includes securities of a company, it must provide additional financial and other information in relation to that company.

If transferable securities are offered, the bidder must publish either a prospectus or a document containing equivalent information.

Minority squeeze-out

16 May minority stockholders of a public company be squeezed out? If so, what steps must be taken and what is the time frame for the process?

When an offer is made to gain 100 per cent control, the buyer may use a statutory procedure to compulsorily acquire the shares of dissenting shareholders (the squeeze-out procedure).

Under regulation 23 of the Takeover Regulations, the threshold for triggering the squeeze-out procedure, where the target is fully listed on a regulated market in any EU or EEA member state, is the acquisition of 90 per cent of the issued share capital. A bidder has three months from the last closing date of the offer to give notice to dissenting shareholders that it wishes to exercise its rights under regulation 23. Once a notice has been served, a dissenting shareholder has 21 days to apply to the High Court of Ireland for relief.

A bidder must receive 80 per cent acceptances in value within four months of publication of the offer to trigger the squeeze-out procedure, where the target is listed on the Euronext Growth or AIM of the London Stock Exchange, Nasdaq or the New York Stock Exchange. If the bidder already holds 20 per cent or more of the shares in the target, it must receive acceptances from shareholders holding 80 per cent in value and receive acceptances from at least 50 per cent in number of the holders of the target shares which are the subject of the offer. Once a notice has been served, a dissenting shareholder has one calendar month to apply to the High Court for relief.

Once the relevant threshold is achieved, the remaining minority shareholders can exercise buyout rights requiring the bidder to purchase their shares.

Waiting or notification periods

17 Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations or acquisitions involving public companies?

The European Communities (Assessment of Acquisitions in the Financial Sector) Regulations 2009 (the 2009 Regulations) implement Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 into domestic law and apply to:

- credit institutions;
- insurance or assurance undertakings;
- reinsurance undertakings;
- investment firms or market operators of regulated markets (MiFID firms); and
- UCITS management companies.

The 2009 Regulations require a notification to be made to the Central Bank of Ireland in respect of transactions involving the acquisition or disposal, directly or indirectly, of a 'qualifying holding' in a target entity, and the direct or indirect increase or decrease in a qualifying holding, whereby the resulting holding would reach, exceed, or drop below 20, 33 or 50 per cent of the capital of, or voting rights in, a target entity, or a target entity would become the proposed acquirer's subsidiary.

A qualifying holding means 10 per cent or more of the capital of, or voting rights in, a target entity or a holding that makes it possible to exercise a 'significant influence' over the management of a target entity.

The Central Bank uses the information to examine whether there are prudential grounds upon which it should object to, or impose any conditions on, the transaction. If it decides to oppose an acquisition, it must, within two working days of the decision being made (and before the end of the assessment period), inform the proposed acquirer in writing and outline the reasons for its decision.

OTHER CONSIDERATIONS

Tax issues

18 What are the basic tax issues involved in business combinations or acquisitions involving public companies?

The most significant tax issue for asset or share acquisitions of public companies is stamp duty, which is a liability of the buyer. The rate of stamp duty payable on transfers of shares in an Irish company is 1 per cent. The rate of stamp duty payable on the transfer of non-residential property (other than shares) is 7.5 per cent. This generally applies to transfers of property that are non-residential property; however, certain exemptions and reliefs can apply, for example, the transfer of intellectual property and loan capital can qualify for exemptions from Irish stamp duty. In addition, relief is available for intragroup transfers or reorganisations.

Following legislative changes in 2019, stamp duty at 1 per cent applies on cancellation schemes of arrangements if implemented pursuant to a court order issued on or after 9 October 2019. This provision was successfully challenged before the Tax Appeals Commission and is currently under appeal before the Irish courts.

Stamp duty continues to arise on a takeover offer and a scheme of arrangement structured as a share transfer at a rate of 1 per cent. Stamp duty is payable by the purchaser on the higher of the consideration or the market value of the shares.

Stamp duty reorganisation relief may apply to mergers or takeovers where at least 90 per cent of the consideration comprises shares in the acquiring company. Specific conditions must be satisfied for this relief to apply.

Labour and employee benefits

19 What is the basic regulatory framework governing labour and employee benefits in a business combination or acquisition involving a public company?

In a public offer governed by the Takeover Rules, a bidder is obliged in its offer document to state its strategic plans for the target company, the likely repercussions on employment and the locations of the target's places of business, and its intentions with regard to safeguarding the employment of the employees and management of the target and of its subsidiaries (including material changes in employment conditions).

The bidder and the target must make the offer document readily available to the representatives of their respective employees (if applicable) or to the employees themselves.

The board of the target is required to state in its response circular its opinion on:

- the effects of implementation of the bid on all the target's interests including, specifically, employment;
- the bidder's strategic plans for the target and their likely repercussions on employment and the locations of the target's places of business, as set out in the offer document; and
- the board's reasons for forming its opinion.

The response circular, to the extent that it is not incorporated in the offer document, must be made available to the target's employee representatives (if applicable) or to the employees themselves. Provided it is received in good time before the dispatch of the circular, the target board must append to the response circular any opinion that it receives from the target company's employee representatives on the effects of the offer on employment.

The Cross-Border Mergers Regulations provide that an employee's rights and obligations arising from his or her contract of employment will transfer to the successor company, and also specifically protect 'employee participation rights' if a system for such employee participation currently exists in any of the merging companies.

Employees will remain employed by the target company, and the transaction will not generally affect the terms of employment of the employees of the target company. In certain circumstances, employees will have negotiated a change of control clause in their contract that may grant additional rights. There may also be broader obligations to inform and consult with trade unions or other employee representative bodies about a proposed takeover. Best practice would be to keep employees informed of the transaction to avoid employee relations issues.

Subsequent business restructuring or rationalisation measures could trigger a requirement for the relevant employing entity to make redundancies, possibly triggering collective redundancy consultation obligations under the Protection of Employment Act 1977, as amended, and exposure to potential liability for employment-related claims, including unfair dismissal and discriminatory dismissal. Failure to comply with the appropriate notification and consultation obligations may result in a claim against the employer by any one of the employees.

Restructuring, bankruptcy or receivership

20 What are the special considerations for business combinations or acquisitions involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Any buyer of a target company (or the assets thereof) that is in receivership or liquidation will need to satisfy itself that the receiver or liquidator (as appropriate) has been validly appointed. Searches of the Irish Companies Registration Office should be carried out.

Anti-corruption and sanctions

21 What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations with, or acquisitions of, a public company?

Anti-corruption legislation in Ireland generally prohibits bribery of both public officials and private individuals committed in Ireland and, in certain circumstances (where the donor has a connection with Ireland), committed abroad. The offences under Irish legislation do not generally distinguish between the bribery of persons working in a public or private body with limited exceptions (eg, the presumption of corruption only applies to public officials).

The Criminal Justice (Corruption Offences) Act 2018 (the Corruption Offences Act) prohibits active bribery and passive bribery. A person is guilty of active bribery if he or she corruptly gives, agrees to give or offers a gift, consideration or advantage to an agent or any other person, as an inducement to, or reward for, or otherwise on account of the agent doing any act, or making any omission, in relation to his or her office or his or her principal's affairs or business. A person is guilty of passive bribery if he or she corruptly accepts, agrees to accept or agrees to obtain a gift, consideration or advantage, for himself or any other person, as an inducement, reward or on account of the agent doing any act, or making any omission, in relation to the agent's position, or his or her principal's affairs or business.

The Corruption Offences Act provides for the new corporate liability offence, which allows for a corporate body to be held liable for the corrupt actions committed for its benefit by any director, manager, secretary, employee, agent or subsidiary. The single defence available to corporates for this offence is demonstrating that the company took 'all reasonable steps and exercised all due diligence' to avoid the offence being committed. In practice, companies need to ensure that they have robust anti-bribery and corruption policies and procedures in place.

Extraterritorial jurisdiction exists under the Corruption Offences Act in relation to corruption occurring outside Ireland where the acts are committed by Irish persons or entities or take place at least partially in Ireland.

Depending on the nature of the transaction, a successor entity can be held liable for a prior offence committed by the target entity of bribery or corruption. Therefore, it is very important that a company's anti-bribery and corruption policies and procedures are reviewed and analysed in advance of any business merger or acquisition.

Under the Corruption Offences Act, a person or business guilty of either a corruption offence or the discrete offence of corruption in office is liable on summary conviction to a minor fine or imprisonment for a term not exceeding 12 months. A person convicted on indictment is liable to an unlimited fine or imprisonment for a term not exceeding 10 years or both.

There are restrictions on tendering for public contracts at both Irish and EU level following a conviction for an offence under anti-bribery or anti-corruption law. Where a breach of Irish bribery law is committed by a company in connection with a project funded by the World Bank and other international financial institutions, the company may be debarred from bidding on contracts funded by the World Bank, International Monetary Fund and other international financial institutions, and publicly named.

UPDATE AND TRENDS

Key developments

22 What are the current trends in public mergers and acquisitions in your jurisdiction? What can we expect in the near future? Are there current proposals to change the regulatory or statutory framework governing M&A or the financial sector in a way that could affect business combinations with, or acquisitions of, a public company?

On 31 January 2020, the UK formally left the EU with a transitionary period continuing until 31 December 2020, during which time EU law continued to apply to the UK. With effect from 1 January 2021, the shared jurisdiction regime of the Irish and UK Takeover Panels ceased to apply in the UK.

Another consequence of Brexit is that the CREST system is no longer authorised to act as a central securities depository for Irish uncertificated securities, as CREST's operator is a UK-incorporated company. Consequently, all Irish securities listed or quoted on Euronext Dublin or the London Stock Exchange (LSE) previously held through and traded via CREST, were required to migrate to Euroclear Bank (the selected replacement holding and settlement system). As this model is structurally different to CREST, the Migration of Participating Securities Act 2019 was enacted to allow existing Irish listed securities to migrate to the new holding and settlement system. This migration took place on 15 March 2020 and was the most significant change for Irish companies listed or quoted on Euronext Dublin or the LSE over the past year.

The Takeover Panel announced in its annual report for 2019 that it was undertaking a complete review of the Takeover Rules. The Takeover Panel's stated intention, as per its 2020 annual report, is to be in a position to issue a public consultation paper containing the proposed amendments in 2022.

The government has signalled its intention to introduce an investment screening regime, with the Investment Screening Bill being listed on recent legislative programmes. This takes place against the backdrop of EU Regulation (EU) 2019/452 (FDI Screening Regulation) becoming effective in October 2020. The FDI Screening Regulation sets out rules through which investment ventures pursued within the EU by third countries (non-EU members) may be scrutinised with a view to maintaining public order and security.

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Individual member states retain discretion as to whether they implement a screening system, but any such system must then meet basic criteria concerning confidentiality, transparency and the application of review time frames. Ireland has taken its first steps in this direction by establishing an FDI Screening Unit and has conducted a public consultation on prospective investment screening legislation. Ireland is also now subject to the information sharing mechanisms with other member states and the EU Commission as set out in the FDI Screening Regulation.

Coronavirus

23 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

In August 2020, the government introduced certain temporary relieving measures in the form of the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 to ease some of the difficulties faced by Irish companies due to the covid-19 pandemic, including:

- certain flexibilities around the execution by Irish companies of documents under seal, allowing countersignature in several, separate locations;
- certain flexibilities around the holding of shareholder meetings of Irish companies, by electronic or hybrid means; and
- certain flexibilities relating to final dividends – directors of a company can, subject to certain restrictive conditions, withdraw or amend a previous resolution to approve a final dividend if there has been a change in the financial circumstances of the company in light of actual or perceived consequences of covid-19 on the company.

The temporary measures apply for an interim period, which has been extended until June 2021 with the possibility for further extension if necessary.

Direct tax

There has been no specific tax or stamp duty legislation or amendments implemented in respect of corporate reorganisation as a result of covid-19.

Revenue has issued guidance with respect to corporation tax and the presence of employees or directors in Ireland or outside Ireland resulting from covid-related travel restrictions such that Revenue will be prepared to disregard such presence for corporation tax purposes. The individual and the company should maintain a record of the facts and circumstances for production to Revenue, if evidence is requested.

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