Public M&A

Contributing editor
Alan M Klein

2018

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Public M&A 2018

Contributing editor
Alan M Klein
Simpson Thacher & Bartlett LLP

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

First published 2018
First edition
ISBN 978-1-78915-059-9

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Preface

Public M&A 2018

First edition

Getting the Deal Through is delighted to publish the first edition of *Public M&A,* which is available in print, as an e-book and online at www.gettingthedealthrough.com.

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 **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

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.

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 assistance in devising and editing this volume.

GETTING THE
DEAL THROUGH

London
May 2018

Ireland

Madeline McDonnell and Susan Carroll

Matheson

Types of transaction

1 How may publicly listed businesses combine?

There are three principal methods used to acquire an Irish public company, namely 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.

Under a takeover offer, the bidder will make a general offer to the target shareholders to acquire their shares. The offer 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 any remaining shareholders to transfer their shares on the terms of the offer if it has acquired, pursuant to the offer, not less than a specific percentage of the target shares to which the offer relates. The percentage for companies listed on regulated markets in the European Economic Area (the EEA) is 90 per cent. The percentage for companies listed on other markets (eg, the New York Stock Exchange (NYSE), NASDAQ or AIM) is 80 per cent. 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. This is a statutory procedure which involves the target company putting an acquisition proposal to its shareholders, which can be: (i) a transfer scheme, pursuant to which their shares are transferred to the bidder in return for the relevant consideration; or, more usually, (ii) a cancellation scheme, pursuant to which their shares are cancelled in return for the relevant consideration, with the result in each case that the bidder will become the 100 per cent owner of the target company. 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. The scheme also requires the sanction of the High Court. Subject to the requisite shareholder approval and sanction of the High Court, the scheme will be binding on all shareholders. Dissenting shareholders have the right to appear at the High Court hearing and make representations in objection to the scheme.

Publicly listed companies can also combine by way of a cross-border merger or a domestic merger. A cross-border merger is a statutory procedure under the European Communities (Cross-Border Mergers) Regulations 2008 whereby a variety of business combinations between Irish companies and other EEA incorporated companies (including mergers) can be effected. Among other matters, a cross-border merger will require 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, which facilitates business combinations between Irish companies and is based on the European Communities (Cross-Border Mergers) Regulations 2008.

Statutes and regulations

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

The main laws and regulations governing business combinations and acquisitions of publicly listed companies include the following.

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

M&A transactions in Ireland involving public companies are primarily regulated by 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).

The Takeover Act, the Takeover Regulations and the Takeover Rules primarily apply to change-of-control and certain other M&A transactions involving an Irish registered target with voting shares admitted to trading (or whose voting shares had, in the previous five years, been admitted to trading) on: (i) a market regulated by the Irish Stock Exchange (ie, including junior markets such as the Enterprise Securities Market or the Atlantic Securities Market); or (ii) the London Stock Exchange (including AIM), the New York Stock Exchange or NASDAQ.

The Takeover Regulations and the Takeover Rules also apply to change-of-control transactions involving: (i) an Irish registered target with voting shares admitted to trading on one or more 'regulated markets' (within the meaning of article 4(14) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments) in the EEA (other than Ireland); and (ii) 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). Change-of-control transactions involve the acquisition of shares carrying 30 per cent or more of voting rights of a target company.

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 and they include mandatory bid rules, share-dealing restrictions, confidentiality and disclosure obligations, and restrictions on frustrating actions.

The Takeover Rules establish timelines within which offers must be conducted and declared unconditional in all respects. There is greater flexibility around the timeline applied to takeovers carried out by way of scheme of arrangement than by way of offer as the Irish High Court's timetable must also be taken into consideration.

The Takeover Rules are administered and enforced by the Irish Takeover Panel (the Takeover Panel), which is the supervisory body for takeovers in Ireland and the designated competent authority under Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.

The Takeover Panel has statutory power to make rulings and to give directions to ensure the 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 Takeover

Panel operates on a day-to-day basis through its executive, the members of which are available for consultation and guidance on the operation of the Takeover Rules. The Takeover Panel is designated as the competent authority for the purposes of article 4(1) of the Takeover Regulations.

The Companies Act

The Companies Act 2014, as amended, (the Companies Act) contains, among other matters, the applicable legislative basis for a scheme of arrangement. The Companies Act is also the core statute which 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 (the SARs) are a separate set of rules issued and administered by the Takeover Panel. The SARs 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 thereby providing the means by which acquisitions of shares in public limited companies may be made.

The main aim of the SARs is to give target companies adequate warning of stake building. Subject to limited exceptions, a person may not, in any period of seven days, acquire shares (or rights over shares) in a target company, which carry 10 per cent or more of its voting rights, if, following such acquisition, that person would hold shares (or rights over shares) carrying 15 per cent or more, but less than 30 per cent, of the voting rights in the target company.

The Competition Acts

The Competition Acts 2002 to 2017 (the Competition Acts) govern the regulation of competition law in Ireland. The Competition Acts established the Competition and Consumer Protection Commission (the CCPC), which is primarily responsible for the enforcement of the Irish merger control regime. Depending on the size of the transaction and scale of 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. 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 EC Merger Regulation).

The CCPC shares responsibility for media mergers with the Minister for Communications, Climate Action and Environment (the Minister). The Irish courts have jurisdiction to adjudicate on any allegation of breach of the Competition Acts and on any appeal against a merger decision by the CCPC.

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 (MAR Regulations) regulate insider dealing and market manipulation by imposing significant obligations on issuers.

The Cross-Border Mergers Regulations

The European Communities (Cross-Border Mergers) Regulations 2008 (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 Irish Prospectus Regulations, the Prospectus Directive and the New Prospectus Regulation

The EU prospectus regime harmonises requirements for the drafting, approval and distribution of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market in an EU member state. It is designed to reinforce investor protection by ensuring that all prospectuses, wherever issued in the EU, provide clear and comprehensive information while at the same time making it easier for companies to raise capital throughout the EU on the basis of approval from a single competent authority.

Currently in Ireland, the Prospectus (Directive 2003/71/EC) Regulations 2005, as amended, (the Irish Prospectus Regulations) regulate public offers of securities. The Irish Prospectus Regulations derive from Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading (the Prospectus Directive).

The Prospectus Directive is soon to be repealed by Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC (the New Prospectus Regulation). The New Prospectus Regulation was published in the Official Journal on 30 June 2017 and it has been designed to repeal and replace the existing body of prospectus law. It will apply on a rolling basis, with full application from 21 July 2019 and will be directly effective in EU member states, meaning that it does not strictly need any national transposing measures to take effect.

The Transparency Regulations and the Transparency Rules

The Transparency (Directive 2004/109/EC) Regulations 2007, as amended (the Transparency Regulations) seek to enhance the transparency of information provided by issuers on a regulated market by containing certain disclosure requirements for public companies. Further guidance and procedural and administrative requirements were issued by the Central Bank of Ireland (the Central Bank) when it, pursuant to the Companies Act, issued the Irish transparency rules in November 2016 (the Transparency Rules).

The listing rules of the relevant stock exchange or market

Companies whose shares are listed on the Main Securities Market (the MSM) of the Irish Stock Exchange (ISE) must comply with the ISE listing rules (the Listing Rules). The ISE website (www.ise.ie) contains market and regulatory information applicable to listed companies. It also provides access to the Listing Rules and the Irish Corporate Governance Annex published by the ISE (the Irish Annex). The UK Corporate Governance Code (the Code), as supplemented by the Irish Annex, is also applicable to these companies. Where applicable and in addition to the Listing Rules, companies whose shares are listed on the MSM must comply with the requirements of various European Directives (and implementing measures in Ireland) including:

- Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, and its implementing measure in Ireland,
- the Markets in Financial Instruments and Miscellaneous Provisions Act 2007, as amended; and
- the Takeover Regulations.

Companies whose shares are listed on the Enterprise Securities Market of the ISE (the ESM) must comply with the following:

- the ESM rules, which are published by the ISE, (the ESM Rules);
- the Takeover Act, the Takeover Rules and the SARs;
- the Code; and
- the MAR.

There are a number of Irish public listed companies listed on markets outside Ireland, such as the NASDAQ, the NYSE and the London Stock Exchange (main and AIM markets), and these companies are subject to additional rules applicable to those markets.

Some sectors have special rules and additional regulators may be required to get involved. In particular, regulated financial services businesses are subject to rules which require change-of-control consent from the Central Bank; media mergers are subject to the approval of the CCPC and the Minister; and Irish airlines are subject to foreign control restrictions.

An Irish incorporated 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 regarding matters 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.

Transaction agreements

3 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 usually governed by Irish law.

Filings and fees

4 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?

Under the Irish merger control regime, a transaction may require a notification to be made to the CCPC. Each 'undertaking involved' in the transaction must submit a merger filing. In practice, joint filings are submitted and the purchaser tends to take the lead on drafting the filing. A filing fee of €8,000 (for each filing) currently applies.

Certain documents relating to public offers governed by the Takeover Rules require the Takeover Panel's approval. The Takeover Act gives the Takeover Panel the power to impose charges for the purpose of defraying expenses incurred by it in performing its functions.

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

Additionally, certain filings may be required to be made to the Irish Companies Registration Office under the Companies Act.

See question 18 (Tax issues) for information in relation to stamp taxes.

Information to be disclosed

5 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, the fundamental obligation is that all persons with confidential information (including the bidder and target, their respective directors and other persons acting in concert with them and their respective advisers) must maintain strict confidentiality in respect of the offer or contemplated offer. Every person who is privy to confidential information, and particularly price sensitive information, concerning an offer or contemplated offer is obliged to treat the information as secret and may only pass it to another person if it is necessary to do so and if that person accepts the need for secrecy. All relevant persons must conduct themselves so as to minimise the possibility of an accidental leak of information.

The MAR extends the application of the market abuse and inside information regime beyond issuers with shares admitted to trading on regulated markets (such as the MSM) to include issuers of securities traded on multilateral trading facilities (such as the ESM). The MAR requires companies with traded securities within the scope of the regulation to disclose inside information directly concerning them to the public as soon as possible. An issuer may delay an announcement pertaining to inside information so as not to prejudice its 'legitimate interests', provided that certain conditions are met (including that the information can be kept confidential and that delayed disclosure would not be likely to mislead the market). Where an issuer chooses to delay its disclosure of inside information so as not to prejudice its legitimate interests, the issuer will be required to inform its regulator in writing, and immediately after the information is disclosed to the public, of its decision to delay the announcement. The MAR also requires an issuer to provide its regulator with a written explanation of how the conditions for the delay were satisfied.

A prospectus, to the extent required, must contain all information necessary to enable investors to make an informed assessment of the assets and liabilities, the financial position, the profits and losses, and the prospects of the issuer, as well as the rights attaching to the securities in question. In addition to this overriding requirement, there are detailed rules as to content, including 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 information equivalent to that in a prospectus will generally still be required. One disadvantage of an 'equivalent' document is that, unlike a prospectus, it cannot be passported into other EU jurisdictions.

The preparation of a circular will be required for certain categories of information to be provided by a listed company to its shareholders. If applicable, the Irish Listing Rules and the ESM Rules set out the content and approval requirements for circulars to shareholders, and also 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 (setting out the consideration to be offered and the other terms and conditions of the offer);
- an offer document (containing the formal offer, the other terms and conditions of the offer and prescribed additional disclosure (including financial and other information on the bidder and the target, which in the case of historical financial information, may be incorporated by reference));
- a form of acceptance (by which the offer can be accepted); 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 in terms of content, 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. Separately, court, competition/antitrust or regulatory filings may be required.

If, after an approach has been made, the target (and in a securities exchange offer, the bidder) issues a profit forecast or a statement which 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 accountants and financial advisers concerned regarding the preparation of the forecast or statement. Save with the consent of the 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, advertisement (save 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. Furthermore, 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, in any event, by no later than 12 noon on the following business day), to be published on a website or designated micrcosite. Information that is incorporated by reference to another source must be published on a website or microsite by no later than the date on which the relevant document incorporating such information is despatched or published.

6 Disclosure of substantial shareholdings

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 by a bidder to make an offer under the Takeover Rules, the SARs apply to a person acquiring shares. The SARs restrict the speed with which a person may increase a holding of shares 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 per cent and 30 per cent of the voting rights of the target, any acquisition that increases their percentage holding. Where any such notification obligation arises, it must be discharged no later than 12 noon on the day following the relevant acquisition.

SARs 3 and 4 also restrict the timing of acquisitions. They provide 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 15 per cent or more, but less than 30 per cent, of the voting rights in the target.

Stake-building will also be 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 exempt 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 introduced a statutory disclosure regime (replacing the regime existing under previous legislation) requiring 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 the 3 per cent threshold;
- a decrease from above to below the 3 per cent threshold; 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 European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016 (the 2016 Regulations) came into operation on 15 November 2016. The 2016 Regulations require Irish companies to gather and maintain information on individuals described as their 'ultimate beneficial owner'. The 2016 Regulations do not apply to certain listed companies. Broadly speaking, a shareholding or ownership interest (direct or indirect) above 25 per cent is indicative of beneficial ownership. It is expected that legislation to be introduced in 2018 will require beneficial ownership information to be submitted to a publicly accessible central register.

7 Duties of directors and controlling shareholders

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?

Each director of an Irish incorporated company has a duty to ensure that the company complies with the Companies Act. Upon their appointment, a director 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.

Previously, directors' duties were contained in a range of statutes and common law. The Companies Act contains a non-exhaustive list of 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, as well as amending and restating the applicable statutory obligations under existing company legislation. The eight primary fiduciary duties set out in the Companies Act are as follows:

- a director must act in good faith in what the director considers to be the interests of the company;
- a director shall act honestly and responsibly in relation to the conduct of the affairs of the company;
- a director shall act in accordance with the company's constitution and exercise his or her powers only for the purposes allowed by law;
- a director shall not use the company's property, information or opportunities for his or her own or anyone else's benefit unless that is expressly permitted by the company's constitution or the use has been approved by a resolution of the company in general meeting;
- a director shall not agree to restrict the director's power to exercise an independent judgement unless this is expressly permitted by the company's constitution or approved by the company's members in general meeting;
- a director shall avoid any conflict between his or her duties to the company and to his or her other (including personal) interests, unless that director is released from this duty in accordance with the company's constitution or by a resolution of the company's members;
- a director shall exercise the care, skill and diligence that would be exercised in the same circumstances by a reasonable person having both the knowledge and experience that may reasonably be expected of a person in the same position as the director and the knowledge and experience that the director has; and
- a director shall have regard to members' interests (in addition to the duty to have regard to the interests of the company's employees in general).

A director's additional statutory duties include various duties of disclosure, as well as duties to ensure that the company keeps adequate accounting records and that it meets various company secretarial compliance obligations.

Directors' duties are owed to the following:

- the company: directors primarily owe their duties to the company;
- shareholders: the Companies Act provides that a director must have regard to the interests of its shareholders (but this is subject to the overriding obligation to act in the best interests of the company);
- employees: the Companies Act provides that directors must have regard to the interests of employees in the performance of their functions;
- creditors: where a company is insolvent, even if not yet in liquidation, the directors must also have regard to the interests of the company's creditors. A company is considered to be insolvent if it is unable, or is deemed to be unable, to pay its debts as they fall due. Directors must not ignore the interests of creditors if there is a significant risk that the company will become insolvent. Where a company's situation is such that any creditor could cause it to be wound up on the ground of insolvency, the company ceases to be the beneficial owner of its assets. The directors have a duty to the creditors to preserve the assets or at least not to dissipate them in such circumstances; and
- the appointing shareholder: the Companies Act allows a 'nominee' director who has been appointed by a shareholder to have regard to the interests of that appointing shareholder. This is without prejudice to a director's general obligation to act in the best interest of the company.

Directors of all public limited companies (excluding certain investment companies) are required to prepare a compliance statement (which will be included in the statutory directors' report to the financial statements for each financial year commencing on or after 1 June 2015). The compliance statement must:

- acknowledge that the directors are responsible for securing the company's compliance with certain Irish company law obligations and Irish tax law (referred to as 'relevant obligations'); and
- confirm that each of the following has been done (or, if it has not been done, specifying the reasons why it has not been done):
  - a statement setting out the company's policies (that in the directors' opinion, are appropriate to the company) respecting compliance by the company with its relevant obligations has been drawn up;
  - appropriate arrangements or structures, that are, in the directors' opinion, designed to secure material compliance with the company's relevant obligations have been put in place; and
  - during the financial year to which the relevant statutory directors' report relates, a review of the arrangements or structures referred to above has been conducted.

Breaches of the Companies Act may give rise to criminal or civil liability on the part of the director. The Companies Act also provides a statutory right of indemnity and account of profits in relation to breach of certain duties. In times of financial distress, directors may find themselves and their actions exposed to increased scrutiny, whether by shareholders, the Office of the Director of Corporate Enforcement, or the Irish courts.

Controlling shareholders are not subject to the above duties in their capacity as shareholders. However, the Companies Act allows an oppressed minority shareholder to apply to court to obtain an order to end the oppression.

Individuals who are not formally appointed to the board of directors but act as directors and occupy the position of director, known as de facto directors, are bound by the same duties and obligations and are subject to the same liabilities as formally appointed directors.

A shadow director is an individual who has not been formally appointed to the board of directors but is a person in accordance with whose directions or instructions the directors of the company are accustomed to act. In most respects, Irish company law treats such a person as a director and holds him or her to the same duties and liabilities.

8 Approval and appraisal rights

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

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 set at either 80 per cent or 90 per cent. These are the thresholds for invoking the statutory 'squeeze-out' procedure, pursuant to which persons who do not accept the offer may have their holdings compulsorily acquired. Ninety per cent is the threshold for a target listed on a regulated market; 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. The scheme of arrangement also requires the sanction of the High Court. Subject to the requisite shareholder approval and sanction of the High Court, the scheme will be binding on all shareholders.

For companies listed on the MSM, 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 (for example, 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 ISE, the London Stock Exchange, NASDAQ and NYSE) prohibits a target board from taking any of the following actions (except pursuant to a contract previously entered into) without shareholder approval or the consent of the Takeover Panel or both, either in the course of an offer, or if the target board has reason to believe that a bona fide offer may be imminent:

- the issue of any share;
- the grant of share options;
- the creation or issue of any convertible securities;
- the sale, disposal or acquisition of material assets of a material amount;
- the entry into of 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.

9 Hostile transactions

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

A number of provisions in the Takeover Rules (although technically applying to all public offers, whether hostile or recommended) should be given special consideration in hostile transactions. The following are particularly noteworthy:

- the offer must first be disclosed to the board of the target company or its advisers before making any announcement concerning the offer. In practice, an approach is frequently, although not always, made in writing from the potential bidder to the chairman or chief executive of the target. Such correspondence is often preceded by a telephone call giving basic details of the bidders' proposal;
- 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 a contract previously entered into) without shareholder approval or the consent of the Takeover Panel or both, either in the course of an offer, or if the target board has reason to believe that a bona fide offer may be imminent; and
- with limited exceptions, information given by a target to one bidder must be made available to all bidders. A second or subsequent bidder will have to request specific information; it is not entitled, by asking in general terms, to receive all information supplied to the first bidder.

The Takeover Rules provide that the board of the target must obtain competent independent advice on every offer in respect of the target and must dispatch to its shareholders a circular setting out the substance and source of such advice, together with the considered views and opinion of the board of the target on the offer. An independent committee may need to be established to consider the offer in the event that any directors have a conflict of interest. As an Irish company, the fiduciary duties and other obligations of target directors will be governed by Irish law. These duties and other obligations will apply to the target directors in deciding whether to engage in a process with a potential bidder, which may result in an offer for the target, and ultimately in deciding whether to recommend, or not recommend, an offer.

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. This is commonly referred to as 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, among other matters, be precluded from announcing an offer or possible offer, or making an offer for the target for a period of 12 months.

In the case of an unwelcome approach, the target board is unlikely to engage is negotiations or allow due diligence and 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. For so long as a target board is engaged in meaningful discussions, it is unlikely to make such application.

A transaction cannot practically proceed by way of a scheme of arrangement without support from the target board (notwithstanding some commentary on how a target could perhaps be legally compelled to do so). As a result, a hostile transaction will begin as a takeover offer. It would not be unusual, however, for a recommendation to be obtained after the launch of an offer (possibly following a revision to terms) and, in that case, it would be possible, with Takeover Panel consent, to switch from a takeover offer to a scheme of arrangement to implement the transaction.

10 Break-up fees – frustration of additional bidders

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, pursuant to Rule 21.2 of the Takeover Rules. The Takeover Panel will customarily grant consent to break-fee arrangements that are normally be limited to specific quantifiable third-party costs subject to a cap of 1 per cent of the value of the offer and to receiving confirmation in writing 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 company.

The target may enter into an exclusivity agreement, however, this is subject to the Takeover Rules and to the directors' fiduciary duties. The directors of the target company may also agree to non-solicitation requirements. It is also common, in a recommended transaction, for a bidder to receive irrevocable commitments or letters of intent to accept the offer from the directors of the target and some shareholders.

11 Government influence

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.

See also question 16 (Waiting or notification periods) and question 17 (Sector-specific rules).

12 Conditional offers

What conditions to a tender offer, exchange offer, mergers, plans or schemes of arrangements 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 in a public offer to include wide-ranging conditions in the terms of an offer, the practical effect of these is limited by the Takeover Rules and the Takeover Panel's approach to the application of the Takeover Rules. Save 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. In practice it is very difficult for a bidder to invoke a condition, other than a material regulatory condition, acceptance condition or a condition that is required in order to implement the transaction (such as bidder shareholder approval).

Having regard to the desirability for clarity and consistency, and to ensure that there is a high degree of certainty, the Takeover Panel stated (in a practice statement issued in 2017) that it expects that implementation agreement termination events will be expressly included as conditions to the offer and stated in terms compliance with the Takeover Rules. The Takeover Panel further emphasised that the invocation of a condition to an offer, including any such condition, is subject to the consent of the Takeover Panel and falls to be assessed against the 'material significance' and 'reasonableness' tests prescribed by the Takeover Rules. The Takeover Panel also noted that the fact that it allows or approves the entry into by parties to an offer of an implementation agreement shall not be taken into account in any determination of the Takeover Panel under the Takeover Rules as to whether, in the prevailing circumstances, it would be reasonable for a party to invoke a condition to the offer to lapse or withdraw the offer.

Preconditions may be included whereby the offer does not have to be made (namely, 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.

13 Financing

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?

In financing a transaction, consideration offered by a bidder may take the form of 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 adviser 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 (or another appropriate person) that cash resources are available sufficient to satisfy full acceptance of the offer. Any required debt and equity funding for the offer must be fully and, save with respect to conditions relating to closing of the offer, unconditionally committed prior to the Rule 2.5 Announcement. 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 (including the repayment terms and names of lenders).

In the event that the offer of consideration includes securities of a company, the offer document must include additional financial and other information in relation to that company and dealings in its securities under the Takeover Rules. A valuation report must also be provided in the case of an offer structured as a scheme of arrangement.

If transferable securities are to be offered, the bidder must publish either a prospectus or a document containing equivalent information. A prospectus or equivalent document must be approved by the Central Bank or the competent authority of another EEA member state and passported into Ireland.

14 Minority squeeze-out

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 in order to gain 100 per cent control of the target, 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 relevant threshold for triggering the squeeze out procedure where the target is fully listed on a regulated market in any European Union or EEA member state (such as the MSM or the London Stock Exchange) 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 for relief.

The relevant threshold for triggering the squeeze-out procedure where the target is listed on ESM or AIM of the London Stock Exchange, NASDAQ or NYSE, is set out in the Companies Act. A bidder must receive 80 per cent acceptances in value within four months of the publication of the offer in order to trigger the squeeze-out procedure. 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 of the remaining target shares 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.

In addition to the squeeze-out procedure, once the relevant threshold is achieved, the remaining minority shareholders can exercise buy-out rights requiring the bidder to purchase their shares.

In the case of schemes of arrangement, approval of a majority 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 is required. The scheme of arrangement also requires the sanction of the High Court. Subject to the requisite shareholder approval and sanction of the High Court, the scheme will be binding on all shareholders.

15 Cross-border transactions

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

Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (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 three ways, namely by:

- 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; and
- 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 for a cross-border merger vary depending on the type of merger undertaken, but each involves the preparation of common draft terms of the merger between the companies involved (the contents of which are prescribed by the Cross-Border Mergers Regulations), the drafting of an explanatory report by the directors that must be made available to the Irish company's shareholders and an advertisement of the proposed merger.

The High Court must also review and approve both outbound and inbound mergers involving Irish companies. Where applicable, employee protection provisions involving employee participation must also be observed. In certain cases, an auditor's report on the merger will be required.

16 Waiting or notification periods

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?

In 2009, the European Communities (Assessment of Acquisitions in the Financial Sector) Regulations 2009 (the Assessment of Acquisitions in the Financial Sector Regulations) came into effect in Ireland, implementing Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 into domestic law. The main objectives of these regulations were to do the following:

- create greater transparency in the financial services sector;
- assist the local financial services regulators in their supervisory roles over the sector;
- harmonise information provided by relevant firms on the notification and assessment procedures to be followed with regard to acquiring and disposing transactions in the financial services sector; and
- enhance the existing anti-money laundering regime in Europe.

The Central Bank is the body designated to supervise acquiring or disposing transactions in the Irish financial sector and has issued a notification form to notify of a proposed acquisition of, or increase in, a direct or indirect qualifying holding in respect of any of the prescribed categories of Irish authorised entities under these regulations. The Central Bank uses the information provided in the form to examine whether there are prudential grounds upon which it should object to the transaction and if it ought to impose any conditions on an approval of the acquisition.

The Assessment of Acquisitions in the Financial Sector Regulations apply to the following categories of entities:

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

The Assessment of Acquisitions in the Financial Sector Regulations apply to transactions involving the acquisition, directly or indirectly, of a 'qualifying holding' in a target entity. They also apply to the direct or indirect increase in a 'qualifying holding', whereby the resulting holding would reach, or exceed, 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 Assessment of Acquisitions in the Financial Sector Regulations also apply on the disposal of a qualifying holding or a holding which results in the disposer's interest in the target entity falling below the thresholds above or results in the target entity ceasing to be a subsidiary of the disposer.

A complete notification must be acknowledged in writing by the Central Bank within two working days of receipt of the notification form and it is required to carry out the assessment of a proposed acquisition within 60 working days of the date of the written acknowledgement. The Central Bank may request additional information in respect of a proposed acquisition no later than the 50th working day. Such a request for additional information will interrupt the assessment period until a response is received or 20 working days have elapsed. In certain circumstances the interruption period may be extended to 30 working days.

The Central Bank may, based on a prudential assessment of the proposed acquisition, decide to oppose or to approve of a proposed acquisition. In assessing a proposed acquisition, the Central Bank will look at:

- the likely influence of the proposed acquirer on the financial institution concerned; and
- the suitability of the proposed acquirer and the financial soundness of the proposed acquisition based on the reputation of the entities, whether the entity can and will continue to comply with financial legislation.

The Central Bank may set a maximum period within which the proposed acquisition is to be completed or may impose additional conditions or requirements to be met in respect of a proposed acquisition. 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. This decision may be appealed to the High Court.

See also questions 2 (Statutes and regulations), 14 (Minority squeeze-out) and 17 (Sector-specific rules).

17 Sector-specific rules

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

There is a special regime for media mergers contained in the Competition Acts 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 two or more undertakings involved carry on a media business in Ireland or one or more of the undertakings involved carry on a media business in Ireland and one or more undertakings carry on a media business elsewhere'. The term 'media business' is defined in the Competition Acts and has been expanded to include online news sources and online broadcast of certain audio-visual material.

To carry on a media business in Ireland requires an undertaking to have either 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.

In addition to the requirement to notify the CCPC, the Competition Acts require a separate notification to the Minister who has an additional responsibility for consideration of media mergers. 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 (the 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.

See also question 11 (Government influence) and question 10 (Waiting or notification perids).

18 Tax issues

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

Where an Irish public company is to be acquired by a target company by way of a scheme of arrangement structured as a cancellation scheme (rather than a share transfer), no stamp duty arises. This is because no share transfer takes place in circumstances where the old shares are cancelled and the new shares are issued to the acquiring target company. Stamp duty may 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 and is payable on the higher of the consideration or the market value of the shares.

The most significant tax issue for asset or share acquisitions of public companies is stamp duty, as mentioned above. As mentioned above, the rate of stamp duty payable on transfers of shares is 1 per cent. The rate of stamp duty payable on the transfer of non-residential property increased from 2 per cent to 6 per cent for transactions on or after 11 October 2017. The 6 per cent rate 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 is broadly exempt from Irish stamp duty. In addition, relief is available for intra-group transfers or reorganisations.

In recent years, the paper stamping system was abolished and replaced with e-stamping which means that stamp duty returns and stamp duty payments must be made online through Irish Revenue Commissioner's Online Service (ROS). A full 'self-assessment' regime for stamp duty now applies which means that each stamp duty return must contain an assessment of the amount of stamp duty that, to the best of the purchaser's knowledge, information and belief, ought to be payable. Stamp duty due must be paid within 30 days of the date of execution of the transfer instrument. However, in practice, the Irish Revenue Commissioners allow a further period of 14 days in which to file an e-stamping return and pay the stamp duty.

19 Labour and employee benefits

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 and their likely repercussions on employment and on the locations of the target's places of business, together with its intentions with regard to safeguarding the employment of the employees and management of the target and of its subsidiaries (including any material change in the conditions of employment).

Simultaneously with the dispatch of the offer document, both the bidder and the target must make the offer document readily available to the representatives of their respective employees or, where there are no such representatives, to the employees themselves.

The board of the target company 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 on 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 or, where there are no such representatives, 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.

Under the Cross-Border Mergers Regulations, an employee's rights and obligations arising from his contract of employment will transfer to the successor company. The Cross-Border Mergers Regulations 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 such a 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 (for example, the right to resign without giving the statutory notice period or the right to be paid a severance sum). In addition, there may be broader obligations to inform and consult with trade unions or other employee representatives bodies (including any works councils that may exist) about a proposed takeover, perhaps under the terms of any separate information and consultation agreement, collective agreement, agreement with a works council or with any other employee representative body. In any event, best practice would be to keep employees informed of the transaction so as to avoid employee relations issues.

Further, subsequent business restructuring or rationalisation measures could trigger a requirement for the relevant employing entity to make redundancies, in turn possible triggering collective redundancy consultation obligations under the Protection of Employment Act 1977, as amended (the Collective Redundancies Legislation), and exposure to potential liability for employment-related claims, including unfair dismissal, discriminatory dismissal, etc. Failure to comply with the appropriate notification and consultation obligations under the Collective Redundancies Legislation (where applicable) may result in a claim against the employer by any one of the employees where an Adjudication Officer of the Workplace Relations Commission can award compensation of up to four weeks' gross remuneration per employee. Criminal sanctions may also be imposed on an employer for failure to comply with the provisions of the Collective Redundancies Legislation, which include a potential fine of up to €250,000 where collective redundancies are effected by an employer before the expiry of the 30-day period.

20 Restructuring, bankruptcy or receivership

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 of a target company) that is in receivership or liquidation will need to satisfy itself that the receiver or liquidator (as appropriate) has been validly appointed. In the context of purchasing assets from a company in receivership, the buyer should request, at the very least, a copy of the deed of appointment and charge documentation. In a liquidation, the buyer will want to satisfy itself that the liquidator was appointed validly by court order or pursuant to a duly executed creditors' voluntary liquidation process. Searches of the Irish Companies Registration Office should be carried out.

21 Anti-corruption and sanctions

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

When considering a business combination, purchasers should consider potential liabilities arising from non-compliance with the Irish, anti-corruption and bribery regimes and the sanctions which may result.

Anti-corruption legislation in Ireland generally prohibits bribery of both public officials and private individuals committed in Ireland

Update and trends

2017 saw growing strength in domestic and international capital markets with significant IPOs occurring throughout the year. According to published sources, the most active sectors for M&A activity in 2018 are expected to be the agribusiness and food, technology, healthcare and property sectors.

Takeover Panel Practice Statement: In 2017, the Takeover Panel, noting that it has become customary for bidder and target companies to enter into an implementation agreement, issued a practice statement (the Practice Statement) in relation to the circumstances in which the parties may lapse an offer by invoking conditions to the effect that: (i) the implementation agreement has not terminated; or (ii) the other party has not complied with specified terms of the implementation agreement. In the Practice Statement, the Takeover Panel noted that the Takeover Rules do not prohibit parties to an offer agreeing contractual arrangements regulating the conduct of the offer. The Takeover Panel's practice has been to permit parties to an offer to enter into an implementation agreement including terms under which the parties reserve the ability, in a wide range of circumstances, to terminate the agreement. The Takeover Panel also noted that the Takeover Rules do not prohibit the inclusion of conditions to an offer that the implementation agreement has not been terminated, or that parties have complied with specified terms of the implementation agreement, unless the satisfaction of any such condition depends solely on subjective judgments by the directors of the party for whose benefit the condition is expressed or is within the control of such party. Having regard to the desirability for clarity and consistency, and to ensure that there is a high degree of certainty, the Takeover Panel has stated in the Practice Statement that it expects that implementation agreement termination events will be expressly included as conditions to the offer and stated in terms compliance with the Takeover Rules. The Takeover Panel further emphasised that the invocation of a condition to an offer, including any such condition, is subject to the consent of the Takeover Panel and falls to be assessed against the 'material significance' and 'reasonableness' tests prescribed by the Takeover Rules. The Takeover Panel also noted that the fact that it allows or approves the entry by parties into an offer of an implementation agreement shall not be taken into account in any determination of the Takeover Panel under the Takeover Rules as to whether, in the prevailing circumstances, it would be reasonable for a party to invoke a condition to the offer to lapse or withdraw the offer.

Companies (Amendment) Act 2017 changes in respect of US Securities and Exchange Commission (SEC) regulated companies: section 279 of the Companies Act (and its predecessor, section 1 of the Companies (Miscellaneous Provisions) Act 2009), as amended, allowed, by way of permissive exemption, certain Irish holding companies whose securities were listed on US stock exchanges to use US generally accepted accounting principles (US GAAP) in the preparation of their statutory financial statements for a limited period of time, instead of International Financial Reporting Standards (IFRS) or Irish GAAP, which would otherwise be required. The exemption was originally introduced as international negotiations on the convergence of US GAAP and IFRS standards were taking place and in the context of an expectation then held that the SEC (would allow IFRS to be used by domestic US registrants. The process of convergence was originally expected to have been concluded by 2015 but, to date, has not progressed materially in the manner anticipated in 2009. The section 279 exemption was due expire for financial years ending after 31 December 2020. The Irish government, in recognition of the underlying rationale for the exemption, in particular the avoidance of costly duplicative financial reporting, has, in the Companies (Amendment) Act 2017, extended the exemption period to cover financial periods to 31 December 2030 for existing companies incorporated before 18 July 2017. However, the exemption will no longer be available for new holding companies incorporated after that date. In Matheson's view, the extension of the section 279 exemption is to be welcomed given, on a practical level, it extents an important cost saving measure currently availed of by many Irish companies listed in the US for an additional 10 years.

Companies (Accounting) Act 2017: running to over 100 sections, the Companies (Accounting) Act 2017 represents the most significant update to the Companies Act since it came into operation in 2015. The main purpose of the Companies (Accounting) Act 2017 is to transpose EU Directive 2013/34/EU into Irish law but it also seeks to address certain anomalies which were identified in the Companies Act.

Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups has been transposed into Irish law by the European Union (Disclosure of Non-Financial and Diversity Information by certain large undertakings and groups) Regulations 2017 (the 2017 Regulations). Under the 2017 Regulations, certain Irish incorporated companies are obliged to make annual disclosures on certain non-financial and diversity matters for financial years beginning on, or after, 1 August 2017. There are two distinct obligations introduced under the 2017 Regulations: (i) non-financial reporting and (ii) diversity reporting – and each has different qualifying criteria. It is possible for a company to fall under the scope of either one or both reporting obligations. Any relevant disclosures are required to be included in the directors' report which accompanies the annual statutory financial statements, or otherwise, in the case of the non-financial matters, published using the alternative method of publication.

Prospectus Regulation 2017: as referred to in question 2 (Statutes and regulations), the Prospectus Directive is soon to be repealed by the New Prospectus Regulation, which was published in the Official Journal on 30 June 2017. It has been designed to repeal and replace the existing body of prospectus law and will apply on a rolling basis, with full application from 21 July 2019. The New Prospectus Regulation will be directly effective in EU member states, meaning that it does not strictly need any national transposing measures to take effect. Notable changes to the prospectus regime include: exemptions from the scope of the prospectus regime; a simplified disclosure regime for secondary issuances; changes to public offer exemptions; the introduction of a new frequent issuer regime; the expansion of the wholesale disclosure regime; the introduction of a new EU growth prospectus; prospectus general content requirements; formatted prospectus summary; incorporation of documents by reference; and provisions on a supplementary prospectus.

Brexit: Economic uncertainty typically reduces the level of M&A activity in an economy. However, there appears to be an acceptance that business cannot stand still. Brexit and the UK's negotiation of its withdrawal from the EU is likely to positively impact M&A in Ireland. Brexit presents strategic opportunities for Ireland, particularly within the financial services sector. It is expected that we will see an increasing number of Brexit-motivated investments across other sectors. However, until greater clarity is brought to the UK negotiation, it is difficult to be definitive on the impact.

and, in certain circumstances (where the donor has a connection with Ireland), committed abroad. In contrast with other jurisdictions, the offences under Irish legislation do not generally distinguish between the bribery of persons working in a public or private body with limited exceptions (for example, the presumption of corruption only applies to public officials).

The primary legislation governing corruption and bribery are as follows:

- the Public Bodies Corrupt Practices Act 1889, as amended by the Prevention of Corruption Act 1916 and the Ethics in Public Office Act 1995 (the Public Bodies Act); and
- the Prevention of Corruption Act 1906, as amended by the Prevention of Corruption (Amendment) Act 2001 and the Prevention of Corruption (Amendment) Act 2010 (the Prevention of Corruption Act).

The offences under the Public Bodies Act deal with corruption in Irish public office and apply in situations where a corrupt payment is being made to, or for the benefit of, an office-holder, their special adviser, a director, or an employee of an Irish public body and a presumption of corruption can be applied to certain offences under this regime.

The Prevention of Corruption Act prohibits the following three offences that apply both in respect of public and private bribery:

- corruptly accepting a gift, consideration or advantage;
- corruptly giving a gift, consideration or advantage; and
- making a false statement.

A company can itself be found liable under common law for the criminal acts carried out by its officers and employees by way of vicarious liability. Vicarious liability deems the company liable for the acts of its employees, but those acts remain the acts of the employees and not of the company. The company can also be directly liable where crimes of the company's controlling officers are viewed as those of the company. This 'identification' doctrine has been accepted by the Irish courts in a civil context, although there are no reported decisions of the Irish courts in a criminal context.

Irish anti-bribery law does not provide for the prosecution of foreign companies for bribery outside the Irish state. The Prevention of Corruption Act is based on the concept of territoriality – acts committed outside Ireland can only be prosecuted, if certain connections to Ireland can be shown, such as the offence having involved the bribery of an Irish official, or the person carrying out the bribe being an Irish citizen or company.

Under the Prevention of Corruption Act, an officer of a company that commits an offence under the legislation will also be guilty of an offence, if the offence is proved to have been committed with the consent, connivance or approval of the officer, or is attributable to the neglect of the company's officers. However, to date, there are currently no recorded prosecutions of companies or their officers under Irish anti-corruption legislation.

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 of foreign officials.

There are a number of criminal and civil sanctions open to companies if found guilty of an offence under Irish anti-bribery and anti-corruption law.

Under the Prevention of Corruption 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.

On summary conviction for an offence under the Public Bodies Act, a person or business may be liable to a minor fine or imprisonment for up to 12 months, or both. On indictment, an individual may be liable to a substantial fine or imprisonment for up to seven 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, such companies may be debarred from bidding on contracts funded by the World Bank, International Monetary Fund and other international financial institutions, and publicly named.

The Criminal Justice (Corruption Offences) Bill 2017 (the 2017 Bill) was presented on 31 October 2017, having been on the Irish legislative agenda for a number of years. It has not yet been brought into law. The draft scheme proposes to repeal numerous pieces of anti-corruption legislation in Ireland and replace them with one consolidated piece of legislation. Some features that will be of interest to public companies considering combinations include the following:

- The 2017 Bill provides for the offence of both active (bribe-giving) and passive (bribe-taking) bribery, criminalising both the giving and receiving of a bribe in return for a person doing an act in relation to their office, employment, position or business.
- The creation of a new offence of active and passive trading in influence, which prohibits the active and passive bribery of a person who may be in a position to exert an improper influence over an act of a public official.
- Extra-territorial jurisdiction 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.
- The 2017 Bill provides for various presumptions of corruption in respect of certain corruption offences where, for example, a gift has been given to an official or a connected person of an official by a person who has an interest in the discharge by the official of any of a number of prescribed functions.
- An important development, companies shall be held liable for the corrupt actions committed for the benefit of the company by a director, manager, secretary, employee, agent or subsidiary. This will make it easier for companies to be prosecuted for corruption. It will be a defence for a company to show that it took all reasonable steps and exercised all due diligence to avoid the commission of the offence. In practice, therefore, companies will need to ensure that they have robust anti-bribery and corruption policies and procedures in place.

The 2017 Bill sets out a range of penalties for the offences under the 2017 Bill. All summary offences will be subject to imprisonment of up to 12 months and a minor fine, or both. Indictable offences (with limited exceptions) will be subject to unlimited fines and imprisonment of up to 10 years, or both. The 2017 Bill also includes a facility for the seizure of bribes and forfeiture of suspected bribes.

The 2017 Bill is still going through the legislative process and is not expected to be enacted until later in 2018. Accordingly, there may be further changes to the provisions as it passes through the various stages of the legislative process.

Matheson

Madeline McDonnell **madeline.mcdonnell@matheson.com**
Susan Carroll **susan.carroll@matheson.com**

70 Sir John Rogerson's Quay
Dublin 2
Ireland

Tel: +353 1 232 2000
Fax: +353 1 232 3333
www.matheson.com

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

ISBN 978-1-78915-059-9