ICLG

The International Comparative Legal Guide to:

Mergers & Acquisitions 2018

12th Edition

A practical cross-border insight into mergers and acquisitions

Published by Global Legal Group, with contributions from:

Aabø-Evensen & Co Advokatfirma
Advokatfirman Törngren Magnell
Alexander & Partner
Ashurst Hong Kong
Astrea
Atanaskovic Hartnell
Bär & Karrer Ltd.
BBA
Bech-Bruun
Bonn Steichen & Partners
Corpus Legal Practitioners
Cyril Amarchand Mangaldas
Debarliev, Dameski & Kelesoska Attorneys at Law
Dittmar & Indrenius
E & G Economides LLC
ENSafrica
Ferraiuoli LLC
G. Elias & Co.
Gjika & Associates Attorneys at Law
HAVEL & PARTNERS s.r.o.
Houthoff
Indrawan Darsyah Santoso
Maples and Calder
Matheson
Mehrteab Leul & Associates Law Office
MJM Limited
Motta Fernandes Advogados
Nader, Hayaux & Goebel
Nishimura & Asahi
Nobles
Oppenheim Law Firm
Popovici Nițu Stoica & Asociaţii
Ramón y Cajal Abogados
SBH Law Office
Schoenherr
SEUM Law
Skadden, Arps, Slate, Meagher & Flom LLP
Škubla & Partneri s.r.o.
Slaughter and May
SZA Schilling, Zutt & Anschütz Rechtsanwaltsgesellschaft mbH
Ughi e Nunziante Studio Legale
VCI Legal
Villey Girard Grolleaud
Vukić and Partners
Wachtell, Lipton, Rosen & Katz
WBW Weremczuk Bobeł & Partners Attorneys at Law
WH Partners
Zhong Lun Law Firm

glg
global legal group

The International Comparative Legal Guide to: Mergers & Acquisitions 2018

global legal group

Contributing Editors
Scott Hopkins and Lorenzo Corte, Skadden, Arps, Slate, Meagher & Flom (UK) LLP

Sales Director
Florjan Osmani

Account Director
Oliver Smith

Sales Support Manager
Toni Hayward

Editor
Nicholas Catlin

Senior Editors
Suzie Levy
Caroline Collingwood

Chief Operating Officer
Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
March 2018

ISBN 978-1-911367-97-0
ISSN 1752-3362

Strategic Partners

ECLA – European Company Lawyers Association

FSC – MIX – Paper from responsible sources – FSC® C011748

General Chapters:

Country Question and Answer Chapters:

Continued Overleaf →

global legal group

Country Question and Answer Chapters:

Ireland

Fergus A. Bolster

Matheson

Brian McCloskey

1 Relevant Authorities and Legislation

1.1 What regulates M&A?

M&A transactions in Ireland involving public companies are primarily regulated by the Irish Takeover Panel Act 1997, as amended (the "**Act**"), the European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations 2006, as amended (the "**Regulations**"), and the Irish Takeover Panel Act 1997, Takeover Rules 2013 made thereunder (the "**Rules**").

The Act, the Regulations and the 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): (i) on the Main Securities Market of the Irish Stock Exchange; (ii) on another market regulated by the Irish Stock Exchange (i.e., the Enterprise Securities Market or the Atlantic Securities Market); or (iii) on the London Stock Exchange (including the AIM), the New York Stock Exchange or Nasdaq.

The Regulations and the 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 European Economic Area (other than Ireland); and (ii) a non-Irish registered target with voting shares admitted to trading on one or more regulated markets in the European Economic Area, including Ireland (but not in its country of incorporation).

Change-of-control transactions involve the acquisition of shares carrying 30% or more of voting rights of a target company.

The Rules, which are based on seven general principles set out in the Act (the "**General Principles**"), contain detailed provisions applicable to the conduct of takeovers. 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 Rules include mandatory bid rules, share-dealing restrictions, confidentiality and disclosure obligations, and restrictions on frustrating actions.

The Rules are administered and enforced by the Irish Takeover Panel (the "**Panel**"), which is the supervisory body for takeovers in Ireland. The Panel has statutory power to make rulings and to give directions to ensure the General Principles and the Rules are complied with. The 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 Rules. The Panel is designated as the competent authority for the purposes of Article 4(1) of the Regulations.

Other relevant sources of law applicable to M&A transactions involving public companies include the following:

- The Irish Takeover Panel Act 1997, Substantial Acquisition Rules, 2007 (the "**SARs**"), which are a set of rules, also administered and enforced by the 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% and 30%.
- The Companies Act 2014, as amended (the "**Companies Act**"), which, among other matters, contains the applicable legislative basis for a scheme of arrangement, the most commonly used takeover structure for an Irish target. 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 Competition Acts 2002 to 2014 (the "**Competition Acts**"), which govern the regulation of competition law in Ireland. Depending on the size of the transaction and scale of the parties and their operations in Ireland, a takeover may require to be notified to and approved by the Competition and Consumer Protection Commission ("**CCPC**") under the Competition Acts. Larger transactions, involving multiple jurisdictions, may require to be notified to and approved 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 Prospectus (Directive 2003/71/EC) Regulations 2005, as amended, which regulate public offers of securities and the Transparency (Directive 2004/109/EC) Regulations 2007, as amended, which contain certain disclosure requirements for public companies.
- Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2004 on market abuse (market abuse regulation) ("**MAR**") and the European Union (Market Abuse) Regulations 2016 ("**MAR Regulations**"), which regulate insider dealing and market manipulation.
- The listing rules of the relevant stock exchange or market.

1.2 Are there different rules for different types of company?

In the case of change-of-control transactions involving: (i) an Irish registered target with voting shares admitted to trading on one or more regulated markets in the European Economic Area (the "**EEA**") (other than Ireland); or (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), regulation of the transaction will be split between the country of incorporation and the country in which the regulated market on which the target's shares are traded is situated; in such circumstances, not all the Rules will apply.

1.3 Are there special rules for foreign buyers?

With only a few exceptions, there are no special rules for foreign buyers. The most significant of these is that, as with other EU Member States, Irish airlines must be at least 50% owned by EU residents.

1.4 Are there any special sector-related rules?

Some sectors have special rules. In particular, regulated financial services businesses are subject to rules which require change-of-control consent from the Central Bank of Ireland; media mergers are subject to the approval of the CCPC and the Minister for Communications, Climate Action and Environment; and, as referred to in question 1.3, above, Irish airlines are subject to foreign control restrictions.

1.5 What are the principal sources of liability?

A party to a takeover risks enforcement action from the Panel if that party breaches the Rules, including by failing to comply with a ruling or direction given by the Panel. The Act gives the Panel the power to enquire into the conduct of any such person where it has reasonable grounds for believing that a breach of the Rules has occurred or may occur. Following such an enquiry, the Panel may advise, admonish or censure such person, and may do so privately or publicly. Where the Panel considers that one of its rulings or directions has not been, or is unlikely to be, complied with, it may apply under the Act to the High Court of Ireland for a court order for enforcement of its ruling or direction.

Any interested person may make a complaint to the Panel concerning an alleged or potential breach of the Rules.

A bidder and its directors personally would be liable for misrepresentations in the offer document, if successfully proved.

Civil and criminal liability may arise under the MAR Regulations for insider dealing activity or market abuse in connection with a takeover.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

There are two principal methods used to acquire an Irish public company. These are: (i) a takeover offer; and (ii) a scheme of arrangement.

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% 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 EEA is 90%. The percentage for companies listed on other markets (e.g. the NYSE, Nasdaq or AIM) is 80%. Dissenting shareholders have the right to apply to the High Court of Ireland for relief.

A scheme of arrangement 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 (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% 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% 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 of Ireland. Subject to the requisite shareholder approval and sanction of the High Court of Ireland, the scheme will be binding on all shareholders. Dissenting shareholders have the right to appear at the High Court of Ireland hearing and make representations in objection to the scheme.

In addition to the two principal methods described above, a takeover could also be effected as a cross-border merger or a domestic merger, but neither method has been successfully used to date. A cross-border merger is a statutory procedure under the European Communities (Cross-Border Mergers) Regulations 2008 (the "**Cross-Border Mergers' Regulations**") 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% 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 of Ireland. A domestic merger is a statutory procedure under the Companies Act which facilitates business combinations between Irish companies and is based on the Cross-Border Mergers' Regulations 2008.

2.2 What advisers do the parties need?

The parties will generally engage financial advisers, legal advisers, tax advisers, accountants and public relations advisers. Under the Rules, a target board is specifically required to obtain competent independent financial advice on every offer and revised offer (and is required to send to its shareholders a circular setting out the substance and source of such advice together with its considered views). Under the 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. Additionally, where an offer is for cash (or includes an element of cash), the bidder's financial adviser is required to confirm the availability of resources to satisfy the cash consideration in full.

2.3 How long does it take?

The Rules contains detailed provisions on the timetable for a bid.

The period from initial approach to the date of announcement of a firm intention to make an offer (from which point the bidder will be obliged to proceed) will depend, in the case of a recommended offer, on how quickly the parties can reach agreement. 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 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.

Following the announcement of a firm intention to make an offer, save with Panel consent, the formal document containing the offer (the "**offer document**") must be posted to shareholders within 28 days. The acceptance condition of the offer must be satisfied within a further 60 days (i.e., day 60). The acceptance condition must be set at a level that would result in the bidder acquiring more than 50% of the voting rights in the target, although in practice it is typically set at either 80% or 90%. 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 (90% is the threshold for a target listed on a regulated market; 80% is the threshold for all other targets). There is then an additional 21 days to satisfy all other conditions of the offer (i.e., day 81). Following the offer being declared unconditional, and provided the relevant statutory squeeze-out threshold is attained, the process for completing the squeeze-out and acquiring 100% can be completed in an additional 30 days (assuming no objection is filed with the High Court of Ireland).

In the case of a scheme of arrangement, save with Panel consent, the formal document containing the scheme proposal (the "**scheme document**") must be posted to shareholders within 28 days of the announcement of a firm intention to make an offer. The timetable, which must be agreed with the Panel, is influenced by the requirement for court hearings and the demands on the High Court of Ireland's time. As a general rule, it should be possible to reach a conclusion within three months assuming that there are no substantive competition/anti-trust or other regulatory issues that would lead to a delay.

If the target is US listed, the requirements of US securities law must also be complied with. This will necessitate the offer document (or scheme document, as the case may be) being prepared to include additional disclosure requirements of US securities law and the allowance of additional time for potential review by the US Securities and Exchange Commission (the "**SEC**"). Given the time required to prepare such additional disclosure and engage with the SEC, it would be usual to look for, and obtain, an extension from the Panel to the 28-day time period to post the offer document (or scheme document, as the case may be) following the announcement of a firm intention to make an offer.

2.4 What are the main hurdles?

The main hurdle is to achieve a sufficient level of target shareholder support. This is easier if the recommendation of the target board is obtained. It is considered to be necessary for the bidder to arrange, and fully document, committed financing (effectively conditional only on the bid becoming unconditional) before the announcement of a firm intention to make an offer. The other main hurdle can be obtaining competition/anti-trust or other regulatory approval, where required.

2.5 How much flexibility is there over deal terms and price?

General Principle 1 requires that all target shareholders of the same class must be afforded equivalent treatment. This is translated into detailed provisions in the Rules which, with limited exceptions, require that the same consideration must be offered to all target shareholders and prohibit special deals with some target shareholders.

One area where an exception is permitted is where a bidder proposes to enter into incentivisation arrangements or proposals with management of the target who are interested in target shares. Details of such incentivisation arrangements or proposals must be disclosed in the offer document (or scheme document, as the case may be) and the independent financial adviser to the target is required to state publicly that, in its opinion, the arrangements or proposals are fair and reasonable. The Panel, having regard to the General Principles, may also require that the implementation of incentivisation arrangements or proposals be made subject to a vote of independent target shareholders.

General Principle 1 also underpins other provisions in the Rules which dictate the value and form of consideration that must be offered if the bidder acquires target shares other than through the formal offer (or scheme of arrangement):

(i) An offer must not be made at a per share price which is less than the highest price per target share paid by the bidder during the period of three months prior to the commencement of the offer period (which, in most cases, will: (a) commence at the time of the first announcement by either the bidder or the target of that offer as a possibility; and (b) end when the bidder announces that it does not intend to make an offer or, if it makes one, when the offer becomes unconditional as to acceptances or lapses). This three-month period may be extended to 12 months by the Panel in certain circumstances.

(ii) If the bidder has acquired 10% or more of the target's shares during the period of 12 months prior to the commencement of the offer period or the bidder acquires any shares during the offer period, the offer must be in cash or include a cash alternative (at a per share price which is not less than the highest price per target share paid by the bidder during the relevant period).

(iii) If the bidder: (a) makes an acquisition of shares which results in its holding 30% or more of voting rights of a target; or (b) in circumstances where it holds more than 30% but less than 50% of the voting rights of a target, it increases that holding by more than 0.05% within any period of 12 months, save with the consent of the Panel, the bidder will be required to make an offer for the target (a "**mandatory offer**"). The mandatory offer must be in cash or include a cash alternative (at a per share price which is not less than the highest price per target share paid by the bidder during the period commencing 12 months prior to the announcement of a firm announcement to make the mandatory offer and ending when the offer closes for acceptances). A mandatory offer can only be conditional on the bidder acquiring greater than 50% of the voting rights in the target and the receipt of mandatory competition/anti-trust approvals.

2.6 What differences are there between offering cash and other consideration?

The principal difference between offering cash and other consideration is in relation to the amount of information required to be disclosed to shareholders and the process for preparing and finalising the definitive offer documentation. In particular, 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: (a) the Central Bank of Ireland; or (b) the competent authority of another EEA Member State (designated as such for the purposes of 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, as amended, (the "**Prospectus Directive**")) and passported into Ireland. The Rules also impose enhanced disclosure obligations in terms of the content of the offer document (or scheme document, as the case may be) where non-cash consideration is offered.

While a bidder may only announce a firm intention to make any offer (whether offering cash or non-cash) 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), there is an additional requirement that the bidder's financial adviser confirm the availability of resources to satisfy the cash consideration in full.

2.7 Do the same terms have to be offered to all shareholders?

See question 2.5, above.

2.8 Are there obligations to purchase other classes of target securities?

Save with the consent of the Panel, a comparable offer must be made for each other class of equity share capital, whether or not the other classes confer voting rights. "Equity share capital" of a company means its issued share capital, excluding any part thereof which, neither as respect dividends or capital, carries any right to participate beyond a specified number in a distribution.

2.9 Are there any limits on agreeing terms with employees?

See question 2.5, above.

2.10 What role do employees, pension trustees and other stakeholders play?

To the extent employees and pension trustees hold shares in the target, they will, in choosing whether to accept the offer (or vote in favour of the scheme, as the case may be), have a role in determining whether the offer or scheme is successful. Apart from that, there is no requirement to obtain the separate approval of an offer from employees, their representatives, pension trustees or any other stakeholders.

However, there are certain provisions in the Rules applicable to employees specifically. After the announcement of a firm intention to make an offer, both the bidder and the target are obliged to make that announcement, or a circular summarising the terms and conditions of the offer, readily and promptly available to the representatives of their respective employees or, where there are no such representatives, the employees themselves. Additionally, in the offer document (or scheme document, as the case may be), a bidder must state: (a) its strategic plans for the target and their likely repercussions on employment and on the target's places of business; and (b) its intentions with regard to safeguarding the employment of the employees and management of the target group, including any material change in the conditions of employment.

2.11 What documentation is needed?

The principal documentation required for a takeover offer is: (i) 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); (ii) 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); (iii) a form of acceptance (by which the offer can be accepted); and (iv) 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, 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.

If the consideration includes transferable securities, a prospectus (or equivalent document) prepared in accordance with the requirements of the Prospectus Directive will be required (as discussed in question 2.6, above).

Separately, court, competition/anti-trust or regulatory filings may require to be prepared.

2.12 Are there any special disclosure requirements?

The offer document is required to set out the formal 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.

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.

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 (e.g. 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 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 12:00 noon on the following business day), to be published on a website. Information that is incorporated by reference to another source must be published on a website by no later than the date on which the relevant document incorporating such information is despatched or published.

2.13 What are the key costs?

The principal costs are the professional fees of the advisers to the bidder and the target – financial, legal, tax, accountancy, public relations, etc., together with the costs of printing and posting documents to shareholders. The Panel also applies charges based on the value of an offer. Where a bidder proposes to borrow funds to finance the consideration, the relevant amounts will need to be committed and available on a "certain funds" basis prior to the bidder announcing its firm intention to make an offer (see question 2.16, below). Banks can charge significant commitment fees for "certain funds" facilities. Stamp duty of 1% of the market value of the consideration is payable on a transfer of shares pursuant to a successful takeover offer. If the transaction is structured as a cancellation scheme of arrangement, no stamp duty is payable.

2.14 What consents are needed?

In addition to target shareholder acceptance or approval (see question 2.15, below), the principal consents that are most typically required are competition/anti-trust and other regulatory approvals. As with any M&A transaction, change-of-control requirements in the target's contractual arrangements may be relevant and it may be necessary for a bidder to obtain the approval of its own shareholders.

The approval of the High Court of Ireland is also required if the transaction is structured as a scheme of arrangement.

2.15 What levels of approval or acceptance are needed?

The acceptance condition for a takeover offer must be set at a level that would result in the bidder acquiring more than 50% of the voting rights in the target, although in practice it is typically set at either 80% or 90%. 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. 90% is the threshold for a target listed on a regulated market; 80% 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% 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 of Ireland. Subject to the requisite shareholder approval and sanction of the High Court, the scheme will be binding on all shareholders.

2.16 When does cash consideration need to be committed and available?

The cash consideration needs to be committed and available prior to the bidder announcing its firm intention to make an offer.

As set out above, under the 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, and, where an offer is for cash (or includes an element of cash), the bidder's financial adviser is required to confirm the availability of resources to satisfy the cash consideration in full. In giving this confirmation, the financial adviser would expect to carry out due diligence on the bidder and the offer structure, including a detailed review of all facilities to be used to produce the funds to ensure that those facilities provide "certain funds" (i.e., that there are no conditions that would prevent drawdown once the offer becomes unconditional).

3 Friendly or Hostile

3.1 Is there a choice?

Yes, a bidder may choose to pursue a friendly deal (with the support of the target board) or launch a hostile transaction.

3.2 Are there rules about an approach to the target?

Under the Rules, a person intending to make an offer for a target is required to disclose that intention (together with the identity of the potential bidder) to the target board 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 a letter is often preceded by a telephone call giving basic details of the bidder's proposal.

Prior to an announcement concerning an offer or possible offer, the bidder, the target and their respective advisers are required to maintain strict confidentiality in respect of the offer or contemplated offer, and negotiations or discussions concerning the offer or possible offer must be kept to a very restricted number of people. 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 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, responsibility shifts to the target.

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 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. See question 2.3, above.

3.3 How relevant is the target board?

The target board is very relevant. Under the Rules, a target board is specifically required to obtain competent independent financial advice on every offer and revised offer and is required to send to its shareholders a circular setting out the substance and source of such advice together with its considered views. If the target board determines to recommend the offer, this can greatly assist in achieving the requisite level of target shareholder support necessary to consummate the transaction.

In the case of an unwelcome approach, the target board is unlikely to engage in negotiations or allow due diligence and may, at any time following the identity of the bidder being made public, apply to the 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 (see question 2.3, above). For so long as a target board is engaged in meaningful discussions, it is unlikely to make such application.

Additionally, a transaction cannot practically proceed by way of scheme of arrangement without support from the target board, thereby limiting a hostile bidder to proceeding by way of takeover offer (at least initially). See question 3.4, below.

3.4 Does the choice affect process?

A transaction cannot practically proceed by way of 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 Panel consent, to switch from a takeover offer to a scheme of arrangement to implement the transaction.

4 Information

4.1 What information is available to a buyer?

Save with the co-operation of the target, unless information has previously been made available to another bidder, the only information available to the bidder will be information that is publicly available.

Under the Rules, a target board is required to provide any information specifically requested by a *bona fide* bidder if, and to the extent that, the same or substantially the same information has previously been made available to another bidder (e.g. in the context of a negotiations that it hoped would lead to a recommended transaction).

4.2 Is negotiation confidential and is access restricted?

Negotiations may be conducted confidentially. If, however, the target is the subject of rumour and speculation or there is an anomalous movement in its share price, unless the Panel consents otherwise, an 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, responsibility shifts to the target. Such announcement may be brief and, in the case of a target, may simply refer to the fact that talks are taking place or that an approach has been received which may or may not lead to an offer (there is no requirement to name the bidder). In the case of a bidder, it is enough to say that it is considering an approach or an offer.

4.3 When is an announcement required and what will become public?

In addition to the circumstances outlined in question 4.2, assuming the transaction has remained confidential to that point, save where the Panel otherwise consents, an announcement will be required:

(i) immediately after a firm intention to make an offer has been notified to the target board;

(ii) the threshold requirement to make a mandatory offer has been reached (see question 2.5);

(iii) where negotiations or discussions concerning a possible offer are about to be extended to include more than a very restricted number of people (any bidder which proposes to approach a wider group of people than those who need to know in the companies concerned and the immediate financial and legal advisers to those companies, including where a group is being organised to make or finance an offer, is required to consult the Panel);

(iv) where a purchaser is being sought for a holding of 30% or more of a company and: (a) the company is the subject of rumour and speculation, or there is an anomalous movement in its share price; or (b) the number of potential purchasers is about to be increased to include more than a very restricted number of people; and

(v) where after an announcement that discussions are taking place or that an approach or an offer is contemplated, the discussions are terminated or the bidder decides not to proceed with the offer.

Aside from the announcement of a firm intention to make an offer, the other announcements can be brief. In the case of a firm intention to make an offer, such announcement is required to set out the consideration to be offered and the other terms and conditions of the offer and may only be when the bidder and its financial adviser are satisfied that the bidder is, and will continue to be, able to implement the offer.

If the target is listed on the New York Stock Exchange or Nasdaq, additional announcements may be required by the SEC.

4.4 What if the information is wrong or changes?

The Rules provide little protection for the bidder if the information provided to it by the target is wrong or changes. It may seek to claim compensation from the target or members of the target board, although the terms on which access to information is provided will generally preclude this.

If discovered before the announcement of a firm intention to make an offer by the bidder, the bidder will have the option of pulling out of the process. If discovered after it has announced a firm intention to make an offer, the bidder will only be able to pull out of the offer to the extent that it has included appropriate conditions and is able to invoke them (see question 7.1).

Each of the bidder and the target is required to announce without delay details of any material change, which occurs during the offer period, in any information previously published by it or on its behalf and, if required by the Panel, may be obliged to despatch a circular to the target's shareholders.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Subject to certain restrictions, shares can be bought outside the offer process. Such purchases may have an effect on the terms that must be offered (see question 2.5). Disclosures may be required (see question 5.3).

A potential bidder may not buy shares before an announcement if the target has supplied confidential information to the bidder or its advisers. Furthermore, pursuant to the SARs, a person may not increase its holding by 10% or more in any seven-day period, where that would bring the bidder's holding of voting shares, or rights over voting shares, in a target, to an aggregate of between 15% and 30%, save, among other exceptions, where such shares are acquired from a single holder.

5.2 Can derivatives be bought outside the offer process?

Like shares, subject to certain restrictions, derivatives can be bought outside the offer process.

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

Prior to and during the offer period, the general regime governing the purchase of interests in shares of public companies under the Companies Act requires disclosure to the company of any acquisition that gives a person an interest of 3% or more in the voting shares of the company (or any class of voting shares) or results in that interest changing through a whole percentage level.

In addition, during an offer period, the 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% 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.

5.4 What are the limitations and consequences?

There are restrictions on the ability of a person to acquire shares under the SARs (see question 5.1, above).

Separately, the Rules prohibit a person from: (a) making an acquisition of shares which results in it holding 30% or more of voting rights of a target; or (b) in circumstances where it holds more than 30% but less than 50% of the voting rights of a target, increasing that holding by more than 0.05% within any period of 12 months, unless, among other matters, such acquisition: (i) is from a single shareholder; (ii) precedes the announcement of a firm intention to make a recommended offer and the acquisition is conditional on the making of the announcement; or (iii) follows the announcement of a firm intention to make a recommended offer and satisfies a pre-condition to the making of the offer. Unless made in conjunction with a recommended offer, the acquisition of 30% or more of the voting rights of a target will trigger the mandatory offer requirement (see question 2.5, above).

6 Deal Protection

6.1 Are break fees available?

Except with the consent of the Panel, break fees and similar arrangements are prohibited.

The Panel will customarily grant consent to break-fee arrangements subject to an upper limit of 1% of the value of the offer, and to confirmation in writing to the Panel from the target board and its financial adviser that they consider the proposed arrangement to be in the best interests of the target shareholders. The Panel will only give its consent on the basis of certain trigger events which are acceptable to it.

6.2 Can the target agree not to shop the company or its assets?

Yes, subject to the fiduciary duties of the directors, which must be considered in each situation.

6.3 Can the target agree to issue shares or sell assets?

Following an approach or at any earlier time at which the target board has reason to believe that the making of an offer is, or may be, imminent, the target cannot agree to issue shares or sell material assets without shareholder approval at a general meeting (or, in certain cases, the approval of the Panel). Such actions would be regarded as frustrating actions (see question 8.2, below).

6.4 What commitments are available to tie up a deal?

In addition to break-fee arrangements and "no-shop" covenants, the bidder and the target will frequently enter into an implementation agreement at the time of the announcement of a firm intention to make a recommended offer. 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.

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

While it is common for bidders to include wide-ranging conditions in the terms of their offer, often with few or no materiality qualifications, the practical effect of these is limited by the Rules and the Panel's approach to the application of the Rules.

The Rules provide that offer conditions must not normally include any condition the satisfaction of which depends solely on subjective judgments by the directors of the bidder or the target (as the case may be), or which is within their control.

Furthermore, the Rules provide that, except for specified competition/anti-trust conditions and the acceptance condition, a bidder shall not invoke any condition so as to cause the offer not to proceed, to lapse or to be withdrawn unless the circumstances that give rise to the right to invoke the condition or pre-condition are of material significance to the bidder in the context of the offer and the bidder has consulted the Panel, and the Panel is satisfied that in the prevailing circumstances it would be reasonable for the bidder to do so. Accordingly, there are two tests that must be satisfied before a bidder can rely on a condition for its benefit:

- The first and primary test is the test of "material significance". A bidder is not permitted to invoke a condition unless it satisfies the Panel that it would otherwise incur material adverse commercial consequences. This test is not restricted to any particular type of condition.
- The second test is the "reasonableness" test. A bidder who has met the "material significance" test must also convince the Panel that it is reasonable in the circumstances to invoke the condition. The Panel considers that, in most cases, a bidder, acting in good faith, that meets the "material significance" test will also meet the "reasonableness" test.

The Rules also provide for similar "material significance" and "reasonableness" tests that must be satisfied before a target can invoke any condition to an offer.

See also question 10.1, below.

7.2 What control does the bidder have over the target during the process?

In a negotiated transaction, the implementation agreement will generally include covenants that obligate the target company to operate its business in the ordinary course between announcement and the offer being declared unconditional in all respects or lapsing. The target will covenant not to take actions outside of the ordinary course, including specific actions set forth in the agreement, without the prior consent of the acquiring company. Competition/anti-trust considerations may limit the extent of these covenants pending clearance.

7.3 When does control pass to the bidder?

Control will pass to the bidder, in the case of a takeover offer, when the offer is declared unconditional in all respects, or, in the case of a scheme of arrangement, when the scheme has been approved by the High Court of Ireland. At this point, in each case, the bidder will control target shares carrying at least a majority of the votes and can therefore remove the incumbent board. However, it would be very unusual for a target board to refuse to resign once control passes to a bidder.

7.4 How can the bidder get 100% control?

See question 2.1, above.

8 Target Defences

8.1 Does the board of the target have to publicise discussions?

A target board in receipt of a confidential approach regarding a potential offer is entitled to reject it without any disclosure to shareholders. The circumstances in which an announcement may be required are set out at questions 4.2 and 4.3, above.

In the event an offer is made, the Rules require that the target board obtain competent independent financial advice on such offer (and any revision to such offer). The target board is then required to send to its shareholders a circular setting out the substance and source of such advice, together with its considered views.

8.2 What can the target do to resist change of control?

Any steps taken by the target have to be considered in the context of the fiduciary duties under Irish law of the target's directors, and frustrating action provisions of the Rules.

The fiduciary duties of the target's directors prescribe that any steps taken to resist a hostile bid require, among other matters, to be taken in good faith in what the directors consider to be the interests of the company. Additionally, such directors are required to act honestly and responsibly and to exercise reasonable care, skill and diligence at all times.

Under the Rules, subject to certain exceptions, the target is prohibited, following an approach or at any earlier time at which the target board has reason to believe that the making of an offer is, or may be, imminent, from taking any action (other than seeking alternative offers) which may result in frustration of an offer or possible offer, or the target shareholders being denied the opportunity to decide on the merits of such offer or possible offer. This means specifically that there must be, among other things: no issue of shares; no creation of security; no sale or acquisition of material assets or operations; no entry into contracts outside the ordinary course of business; and no change of executive compensation. The prohibition is not absolute: frustrating action can be taken with shareholder approval given at a general meeting or, in certain cases, by the Panel. Accordingly, while a board may seek to defend itself using a recapitalisation or a sale or acquisition of material assets or operations, this is subject to obtaining shareholder backing for the board's proposal.

Separately, Irish law does not otherwise expressly prohibit anti-takeover measures, such as shareholder rights' plans (e.g., pursuant to which an unsolicited buyer's shareholding in the target might be diluted upon the occurrence of a triggering event such as the acquisition of a certain shareholding percentage). The ability of the target board to adopt and effect a shareholder rights' plan is subject to compliance by the directors with their fiduciary duties, the terms of the target's constitution, and the Rules. It would not be possible to adopt a shareholder rights' plan after an approach had been made without target shareholder approval. However, some Irish companies have adopted such plans at a time when their directors had no reason to believe that the making of an offer was, or would have been, imminent. Such construct is designed to get around the frustrating actions prohibition in the Rules. The validity of these plans has not been tested with the Panel or in the Irish courts.

Other options are to seek a "white knight" or to engage quickly and effectively in the communication/investor relations battle with the bidder.

8.3 Is it a fair fight?

The Rules (reflecting the General Principles on which they are based) are set up in a manner such that it is ultimately the shareholders who will decide whether an offer is successful or not. Each side is afforded the framework to put its case to the shareholders and they can then decide whether to accept the offer or back their own board and reject it; in that regard, it is difficult to categorise the fight as being unfair.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

The most significant influences are price and the recommendation of the target board, which, more often than not, go hand-in-hand.

9.2 What happens if it fails?

If a bidder is unsuccessful, 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, subject to certain exceptions. The exceptions include making a new bid, with Panel consent, which is (i) recommended, or (ii) follows the announcement by a third party of a firm intention to make an offer, and making a fresh bid following the receipt of clearance from a competition/anti-trust authority in circumstances where the earlier bid had lapsed due to such clearance not being received within the permitted Rules timetable.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in your jurisdiction.

In 2017, the Panel, noting that it has become customary for bidder and target companies to enter into implementation agreements, 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 Panel noted that the Rules do not prohibit parties to an offer agreeing contractual arrangements regulating the conduct of the offer. The 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 Panel also noted that the 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 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 compliant with the Rules. The Panel further emphasised that the invocation of a condition to an offer, including any such condition, is subject to the consent of the Panel and falls to be assessed against the "material significance" and "reasonableness" tests prescribed by the Rules (see question 7.1, above). The 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 Panel under the 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.

Acknowledgment

The authors would like to thank Susan Carroll and Patrick Kelly for their input and assistance in the preparation of this chapter. Susan is an Associate in Matheson's Corporate M&A Group, based in Dublin; Patrick is a Trainee Solicitor in the Dublin office.

Fergus A. Bolster
Matheson
70 Sir John Rogerson's Quay
Dublin 2
Ireland

Tel: +353 1 232 2000
Email: fergus.bolster@matheson.com
URL: www.matheson.com

Fergus Bolster is a partner in the firm's Corporate M&A Group, where he focuses primarily on mergers and acquisitions, corporate reorganisations (including corporate redomiciliation and demerger transactions), financing transactions, securities law and corporate governance matters.

Fergus has represented public and private corporations, institutional, private equity and venture investors, State bodies and investment banks, transacting in a variety of industries and sectors, including, in particular, technology, energy and media. He has extensive experience advising US and other international clients on cross-border acquisitions of Irish companies, both public and private (hostile and recommended), migrations and capital markets transactions (undertaken domestically and by Irish companies listed on US and other foreign exchanges).

Fergus counsels corporate clients on a broad range of governance and business-related matters, including directors' duties and responsibilities, disclosure obligations and compliance matters. This advice is often provided to boards and individual directors in situations where the satisfaction of their fiduciary duties is subject to public scrutiny.

Brian McCloskey
Matheson
70 Sir John Rogerson's Quay
Dublin 2
Ireland

Tel: +353 1 232 2000
Email: brian.mccloskey@matheson.com
URL: www.matheson.com

Brian McCloskey is a partner in the firm's Corporate M&A Group, advising clients on a range of transactional matters including private company M&A, private equity, equity fundraisings, reorganisations, joint ventures and refinancings. Having previously worked in a large international law firm in London, Brian has particular expertise in cross-border M&A and has worked on some of the largest cross-border transactions involving Irish target companies in recent years.

Brian acts for clients across the full investment spectrum including target companies, venture and growth capital providers, private equity sponsors and management teams. In addition to his transactional practice, he advises clients on general commercial matters and business-related issues, including providing strategic investment advice. He regularly works with Irish companies undertaking transactions outside of Ireland.

Brian works with clients across a range of industries, including, in particular, technology, manufacturing and food and beverage.

Matheson

Matheson's Corporate Department is one of the leading practices in Ireland. Our lawyers are consistently chosen to advise on the most significant corporate transactions involving Irish and international companies.

We advise on the full range of domestic and international corporate transactions, including mergers and acquisitions (both public and private), joint ventures, corporate restructurings, private equity, IPOs and other equity capital markets transactions.

Our International Business team provides a full range of Irish corporate law advice and services to overseas clients doing business in and through Ireland. This team has a particular focus on inward investment, cross-border re-organisations and integration projects.

- We have advised bidders on more cross-border deals involving Ireland than any other law firm in the last 10 years (*Mergermarket*, September 2017).
- Ireland's M&A Legal Adviser of the Year (*Mergermarket*, December 2017).

Current titles in the ICLG series include:

- Alternative Investment Funds
- Anti-Money Laundering
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Investment Funds
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com