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Adrian Benson and Catherine Hicks
Dillon Eustace

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Law and Practice

Contributed by:
Adrian Benson and Catherine Hicks
Dillon Eustace** **see p.16

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1. Trends

1.1 M&A Market

After a number of strong years for the M&A market in Ireland, 2019 saw a drop in the number of mergers and acquisitions taking place. The Irish Competition and Consumer Protection Commission (CCPC) stated in their Report, which was published in January 2020, that the total number of notified mergers for the year was 47. This marks a 52% reduction from 2018 and the lowest number of mergers notified to the CCPC since 2014.

This reduction in notifications can partially be explained by the fact that the new financial thresholds for mandatory CCPC filings, which came into effect on 1 January 2019, increased the required threshold from EUR50 million to EUR60 million in respect of aggregate Irish Turnover (the sum of the turnover of all undertakings involved) and from EUR3 million to EUR10 million in respect of individual Irish turnover (by at least two of the undertakings involved). While this increase would explain the reduction in notifications, the CCPC had stated, at the start of 2019, that it would likely only result in a reduction of 40%. This, coupled with the fact that Ireland's GDP grew by 6.3% in 2019, could indicate the M&A market in Ireland is starting to plateau after a number of years of constant growth.

The COVID-19 pandemic has operated as a shock to the mergers landscape and, while the full impact remains to be determined, at the very least it will result in a substantial reduction in the number of mergers in 2020.

1.2 Key Trends

One of the current key trends in Ireland is for public company acquisitions to be recommended by the board of the target. This means that a scheme of arrangement is the favoured transaction structure. This structure has the advantage of having a well-established, clear framework and will result in the bidder acquiring 100% of the shares of the target on completion.

The Finance Act 2019 introduced a significant change to the stamp duty due on schemes of arrangement, resulting in the same rate being payable as in deals involving general offers (having been previously exempt from stamp duty); see in **3.2 Significant Changes to Takeover Law**. It remains to be seen whether schemes of arrangement will continue to be the favoured method of acquisition in Ireland following this change. While the changes will result in increased cost associated with schemes of arrangement, as stamp duty cost arises in any event in the case of a general offer, it may be the case that the scheme of arrangement continues to be favoured.

1.3 Key Industries

Over the past 12 months, there have been a number of high profile public company M&A transactions which have seen certain industries take the forefront. Praxair Inc and Linde AG used an Irish holding company for their merger to form the largest industrial gases business in the world.

In their annual report, the CCPC stated that the most active sectors in 2019 were: real estate; healthcare; information, technology and communications; motor retail; and media. They also noted a reduction in activity in the financial services sector.

2. Overview of Regulatory Field

2.1 Acquiring a Company

Public Companies

The two principal ways in which a takeover of a public company generally takes place in Ireland are by general offer or scheme of arrangement. Historically general offers have been the structure used most frequently to acquire all of the shares of a company, however, more recently, schemes of arrangement have been used including an increased preference by US companies who have redomiciled to Ireland by way of inversion transactions.

A general offer in Ireland will most likely take the form of a recommended offer. This is an offer in which, following negotiation, the buyer and the target make a joint announcement under Rule 2.5 of the Irish Takeover Rules (the "Rules"). This will contain a clear statement of intent of the buyer. Before this statement is made, the buyer's financial adviser must be satisfied that they have sufficient financial resources to follow through with the proposed offer and are required to confirm accordingly. Once a Rule 2.5 announcement has been made, the buyer is obliged to proceed to make the offer.

A bidder can compulsorily acquire the remaining shares of its target if its tender offer meets the relevant threshold of acceptance in terms of percentage of shares. In a "directive company offer" the threshold is set at 90% (in the context of a company listed on a regulated market in the EEA). In a "non-directive company offer" the threshold is 80% (this relates to a private company or a company listed on other markets).

Alternatively a scheme of arrangement can be used in order to successfully acquire 100% of the shares of the target. This has become more popular recently, partly due to the fact that the shareholder approval threshold of 75% is slightly lower than that required for a general offer. However, as a scheme will generally require the board's co-operation, it will not be appropriate in a hostile takeover situation. Also the Finance Act 2019 has added

a 1% stamp duty charge to any acquisition that involves the use of a scheme of arrangement.

This may lead to some bidders reconsidering its use into the future. In addition the COVID-19 pandemic has resulted in major delays in Court proceedings which delays may also impact the decision as to what takeover mechanism may be preferable.

A scheme will require the approval of the Irish High Court and generally take about six to ten weeks between the first and final court hearing. Once the scheme has been sanctioned by the High Court it becomes binding on the target and on all of its shareholders. Pursuant to the scheme, the buyer acquires 100% of the ownership of the target through an Irish Court approved re-organisation of the target. It will usually involve a cancellation of all of its shares and the issuing of new shares to the bidder, in the place of the old shares. The reserve created by the cancellation is capitalised and applied in paying up new shares, this results in the bidder acquiring 100% of the target.

In order for a scheme to be implemented, three High Court hearings are necessary to set the dates for the shareholders meetings, set the dates for the final sanction meeting and, finally, to sanction the scheme.

Private Companies

The primary means of acquiring private companies in Ireland are by share purchase or asset purchase. Share purchases are more common as they are generally more tax efficient for sellers due to there being no VAT payable on the purchase of shares and a stamp duty rate of 1% on the value of the shares. However, there is some risk involved in share purchases for buyers as they run the risk of inheriting some potentially unwanted liabilities.

Asset purchases have some advantages, including the ability to pick and choose assets, allowing the buyer to mainly leave liabilities behind and that the primary sale documentation is more straightforward. However, the possibility of higher stamp duty and VAT applying will generally mean that parties will veer away from using this method.

The Companies Act 2014 (the "2014 Act") also introduced a method for private companies to merge in Ireland. These mergers may occur by means of a Summary Approval Procedure (SAP) or by way of a special resolution, which must be confirmed by a court order. The 2014 Act allows three ways in which a merger may take place: acquisition; absorption; or the formation of a new company. For a merger to take place under the 2014 Act, neither party may be a public limited company and at least one party must be a private company limited by shares in Ireland.

2.2 Primary Regulators

The Irish Takeover Panel (the "Panel") is the primary regulator for public takeovers. It was established by the Irish Takeover Panel Act 1997 (the "Takeover Act") and the European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations 2006 (the "Takeover Regulations"), which implemented the EU Takeover Directive into Irish law.

The Rules, made by the Panel, apply to public companies incorporated in Ireland whose shares are, or have in the last five years been, traded on Euronext Dublin, the London Stock Exchange, the New York Stock Exchange (NYSE), NASDAQ or any regulated market in the EEA. The Rules are in place in order to ensure that takeovers comply with the seven general principles set out in the schedule of the 1997 Act, such as the board of an offeree being required to act in the interests of the company as a whole and not deny the holders of securities the opportunity to decide on the merits of the offer, and a requirement that an offeror must announce an offer only after ensuring that they can fulfil, in full, any cash consideration, if offered, and after taking all reasonable measures to secure the implementation of any other type of consideration.

In addition to the Rules, there are also the Substantial Acquisition Rules (SARs), which govern substantial acquisitions of share capital in public limited companies (PLCs) and essentially restrict the speed that a person may increase their holding of voting shares between 15% and 30%.

The Rules also provide an orderly framework within which takeovers are conducted.

The CCPC is the primary enforcer of the Irish merger control regime. In the cases of media mergers it shares its responsibility with the Minister for Communications, Energy and Natural Resources. Parties to a merger are required to notify the CCPC if: the parties involved have an aggregate Irish turnover of at least EUR60 million; and at least two of the parties have an Irish turnover of at least EUR10 million. These financial thresholds were increased from EUR50 million and EUR3 million respectively on 1 January 2019.

Also, depending on the industry involved in the merger, a transaction may require the involvement of other regulators such as the Central Bank of Ireland in the case of certain regulated entities.

2.3 Restrictions on Foreign Investments

Foreign investment is generally encouraged by the Government in Ireland and the tax regime is considered extremely favourable. Authorisation from regulatory bodies is required in certain sectors, and under the Treaty on the Functioning of the Euro-

pean Union (TFEU), Regulation 881/2002 (as amended) and other "restrictive measures" implemented by the EU, measures can be put in place to restrict trade between Ireland and certain restricted countries. Any EU regulation in relation to the restriction of trade with certain countries can be given effect in domestic legislation by the Minister of Finance.

2.4 Antitrust Regulations

The primary antitrust regulation in Ireland is found in the Competition Act 2002 ("2002 Act"), as amended by the Competition and Consumer Protection Act 2014. Section 2 of the 2002 Act is based on Article 101 of the TFEU and provides that all agreements, decisions and concerted practices between undertakings, "which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State are prohibited and void".

The CCPC is Ireland's national competition authority. However, it does not have the power to bind an infringement decision against an undertaking or person. It must go to court to establish the infringement and, following an investigation, it can bring summary criminal enforcement proceedings in the District Court or instigate civil enforcement proceedings in the Circuit Court or High Court.

As mentioned in **2.2 Primary Regulators**, the CCPC increased the financial thresholds for mandatory notifications. This increase in the thresholds has seen a 52% decrease in the number of deals notified in 2019. However, media mergers were not affected by this change in thresholds as they are required to notify the CCPC regardless of their turnover size.

The CCPC's approval procedure is divided into two phases. In Phase I the CCPC has 30 working days to clear a transaction, or to commence Phase II. The timeline runs from the date of notification, or if the CCPC makes a "request for information" during Phase I, then the time starts when a response is submitted. Phase I's investigation period may be extended to 45 working days where proposals are made by notifying parties to overcome competition concerns.

During Phase II, the CCPC has 120 working days to either clear or block the transaction. This can be extended to 135 working days where proposals are made by the parties to overcome competition concerns.

2.5 Labour Law Regulations

The European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (as amended) (TUPE) apply to an asset transfer and will, generally, result in the employees of the target company transferring to the acquirer. Where TUPE applies, both parties must inform their respective employee representatives affected by the transfer of certain information. This is required to be done where reasonably practicable no later than 30 days before the transfer is carried out and in any event in good time before the transfer and must contain information including the date of and reasons for the transfer, implications of the transfer for employees and any measures envisaged in relation to the employees. Regarding the latter, employee representatives must be consulted no later than 30 days before the transfer is carried out.

Generally, during an asset sale employees will automatically transfer and any dismissals are prohibited under TUPE and will be automatically considered unfair dismissals, whether taking place before or after the transfer. However, a transfer related redundancy may be permitted for economic, technical or organisational reasons that involve changes in the workforce (ETO defence). Employee consent to the transfer is not required. The employees have the right to transfer with the business by operation of law, however, they are not obliged to do so. If they refuse to transfer, it will not defeat the operation of the transfer and they will be deemed to have resigned.

In the case of a share sale there is no statutory information or consultation obligations unless the employees have requested such information under the Employees (Provision of Information and Consultation) Act 2006. Under a share sale there is no change of employer and the employee's terms continue as unimpacted by the sale and the employee will not have additional protection against dismissal. If a dismissal is made, the usual protections against dismissals apply.

2.6 National Security Review

There is no national security review of acquisitions in Ireland.

3. Recent Legal Developments

3.1 Significant Court Decisions or Legal Developments

Last year, Section 61 of the Finance Act 2019 introduced a new charging section to the stamp duty legislation which saw schemes of arrangement become stampable as if they were a conveyance or transfer of shares. This now means that any scheme of arrangement will give rise to a stamp duty charge of 1%, where previously no stamp duty was paid on it. The stamp duty due on an acquisition implemented by way of a scheme of arrangement is now the same as an acquisition brought about through use of a general offer. This could have a significant effect on the amount of schemes of arrangement used in Ireland in the coming years.

On 30 March 2020 the European Union (Shareholders' Rights) Regulations 2020 were implemented into Irish law. The purpose of the regulations is to give effect to provisions of Directive EU 2017/828 of the European Parliament and of the Council of 17 May 2017. The key provisions are as follows:

- companies listed on regulated markets now have the right to identify and obtain details of their shareholders through intermediaries;
- shareholders now also have a right to vote on their directors' remuneration policy at least once every four years and the remuneration policy must be publicly disclosed on the company's website;
- material related party transactions must be publicly announced and they must be approved by the shareholders or the board; and
- institutional investors and asset managers must develop and publicly disclose a policy on shareholder engagement; proxy advisers also have to disclose certain key information and are subject to a code of conduct.

The global outbreak of COVID-19 is also very likely to have a large impact on the number of M&A transactions that will occur in Ireland and beyond, however, at the time of writing it is unclear exactly how great of an effect. Nevertheless, it seems likely there could be a significant downturn in the number of deals over the next year.

3.2 Significant Changes to Takeover Law

In June 2019, the CCPC published an update on the draft simplified merger notification procedure guidelines with the view that they will lead to shorter review periods for relevant transactions. In circumstances where the procedure applies the parties would not have to answer all of the questions put forward on the CCPC merger notification form. The CCPC expect that the simplified merger procedure will be introduced by the end of 2020.

The CCPC has also begun to emphasise procedural irregularities and in April 2019 two undertakings were the first to plead guilty to "gun-jumping", where they did not notify the CCPC about their deal. Subsequently, later in 2019, a proposed acquisition by DMG Media Limited, a wholly owned subsidiary of Daily Mail and General Trust Plc, of JPIMedia Publications Limited was made void by the CCPC due to "gun-jumping". The transaction had been notified as a media merger on 29 November 2019, however, on 10 January 2020, the CCPC issued a statement setting out that: "By implementing the acquisition before receiving clearance from the CCPC, Daily Mail and General Trust Plc and JPIMedia Limited have infringed Section 19(1) of the Competition Act. Consequently, as provided for by Section 19(2) of the Competition Act this acquisition is void. The CCPC will continue to assess the notified transaction in accordance with the Competition Act".

4. Stakebuilding

4.1 Principal Stakebuilding Strategies

There are a number of legal constraints in relation to stakebuilding in a target prior to announcing a bid, these include extensive disclosure obligations, implications for the price and consideration of the offer and restrictions on the pace of stake building. Despite these constraints, bidders do still engage in stake building for strategic reasons, as it can increase their chance of success when the offer is announced.

These legal constraints on stake builders are implemented through the Rules and the SARs, which are a separate set of rules which are issued and administered by the Panel. See **4.2 Material Shareholding Disclosure Threshold**.

Under the Rules, dealings of any kind in the target company's securities are prohibited by any person who is privy to confidential price-sensitive information concerning the offer until the announcement is made. Also during the offer period the Rules implement restrictions on the bidder from selling target shares until an announcement stating that a sale may occur is made, or, if the Panel gives consent.

The Rules also state that the minimum price payable under an offer is the highest price paid by the bidder, or its concert parties, in the three months prior to the offer period commencing. The time period can also be extended to 12 months if the Panel feel it to be necessary.

Stake builders must also be mindful not to acquire control of 30% or more of the issued share capital of a listed company as this will create a situation in which they are obliged to make a general offer for the company. This requirement will also be triggered if a party, who holds between 30% and 50% of the voting rights in a target, acquires additional securities having at least 0.05% of the voting rights within any period of 12 months. The offer will have to be in cash and the price paid must be the highest price paid by the buyer or any member of the concert party in the 12 months prior to the mandatory offer being triggered.

Stake building is also prohibited if it constitutes insider dealing, market abuse or market manipulation under the applicable laws and regulations.

4.2 Material Shareholding Disclosure Threshold

Up until an announcement is made by the bidder of their intention to make an offer under the Rules, the SARs will apply to

them. The SARs will restrict the speed and stealth in which a stake in a publicly quoted Irish company can be acquired.

Under the SARs, the bidder must notify the Panel, Euronext Dublin and the target when they make an acquisition of voting rights in the target which when aggregated with its existing holding exceeds 15% of the target's voting rights, or, if they already hold between 15% and 30%, then any acquisition that increases their percentage holding. If this is the case, notification must be made by noon on the following business day. An acquisition (or a series of acquisitions within a seven day period) which would represent 10% or more of the target's voting capital and which would result in a holding of between 15% and 30% is prohibited unless certain exemptions are made. The likely exemption is where the acquisition is from a single holder. There is no restriction to the level and speed for any acquisition which involves less than 15% of the target under SARs.

After the announcement of a bid and during the offer period the Rules also require heightened and accelerated disclosure of dealings in order to increase market transparency. The Rules require all dealings in relevant securities by the bidder or the target to be disclosed. Also any person with more than 1% interest, or who acquires more than 1% interest, in the securities of the target must publicly disclose all dealings during this period. Following these disclosures, public announcements are required to be made by a Regulatory Information Service by 3.30pm the next business day.

In addition, under the EU's Transparency Directive, stakeholders must notify companies listed on Euronext Dublin once the percentage of voting rights that they have acquired exceeds or falls below 3%, and every 1% thereafter. The 2014 Act also introduced the same obligations in relation to PLCs. In a situation where an obligation exists under both the Transparency Directive and the 2014 Act, the bidder only has to comply with the Transparency Directive.

4.3 Hurdles to Stakebuilding

It is possible, but rare, for a target company to introduce higher reporting thresholds than those required by the Rules, the 2014 Act or the Transparency Regulations. The 2014 Act also allows a target to require a person to reveal the extent of their interest in the target at any time. If a shareholder does not comply with the company's request for disclosure, then the company will be entitled to restrict the shareholder's voting rights that are attached to the relevant shares.

The most significant hurdles to stakebuilding in Ireland are the disclosure requirements and the restrictions on the timing of security acquisitions previously mentioned. Stakebuilding is also prohibited where it would constitute insider trading.

4.4 Dealings in Derivatives

Dealing in derivatives is permitted, but is subject to the restrictions and disclosure obligations similar to other securities prior to, and during, an offer period.

4.5 Filing/Reporting Obligations

Under the Rules, the filing and reporting obligations for derivatives are subject to similar disclosure obligation as for other securities. Additionally, in the context of competition laws, dealings in derivatives that allow the exercise of voting rights will be treated as securities.

4.6 Transparency

Stakebuilders are not under an obligation to make the purpose of their acquisitions or their intentions regarding the company known prior to making an offer, except in a situation where the target company is the subject of rumour and speculation or there is untoward movement in the share price.

After announcing an offer the bidder is required, under the Rules, to send an offer document to the shareholders of the target company. This document will contain information regarding the bidder's plans and the effect of the implementation of the offer for the target company, its place of business and its employees.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal

The disclosure of a deal is principally regulated by the Rules and the SARs. Rule 2.1 of the Rules stipulates that strict confidentiality must be kept during discussions that may lead to a bid. Buyers are also required to only disclose their intentions to a restricted circle of people and their respective legal and financial advisors.

Once the offer has been made then the responsibility for making an announcement moves to the target. The target must monitor the market for any anomalous movement in its share price and/or for rumour or speculation and, under Rule 2.4, they are obliged to make an announcement immediately if they find that either of these situations have occurred. It is advisable that a conservative approach is taken as regulators will have the benefit of hindsight when reviewing the case.

5.2 Market Practice on Timing

The market practice on the timing of the disclosure of an offer will follow the requirements set out in the Rules. The Panel will oversee that the Rules have been followed accordingly.

5.3 Scope of Due Diligence

In the case of a recommended offer the scope of due diligence has the potential to be extremely wide and potentially cover the entirety of the target's business. The exercise will consist of a review of any publicly available information and also the responses by the target to certain queries brought forward by the bidder.

The information which will be available during a hostile takeover is much more limited in scope. Generally in these circumstances the only information afforded to the bidder is limited to documentation available from public sources and any information which the target is required to give under the Rules. Rule 20.2 requires that the target company is obliged to provide any information specifically requested by a bidder if the same or substantially the same information was previously given to another bidder. A target company is required to disclose insider information if it can no longer guarantee its confidentiality.

5.4 Standstills or Exclusivity

It is quite likely that a target will require a potential bidder to enter into a non-disclosure agreement to protect any sensitive information. As part of this agreement, a bidder will generally look for a period of exclusivity to prevent the target from talking to any other potential bidders for a defined period of time. This is mainly done to allow the bidder to have adequate time to properly assess the target before making a decision.

A non-disclosure agreement may also contain a standstill agreement that will preclude the bidder from undertaking offers for shares in the target without informing them in advance. It will also protect the target from having its management and employees potentially targeted.

5.5 Definitive Agreements

Generally, the offer document will contain detailed terms and conditions of the offer. These terms and conditions usually comprise of: a section summarising the offer and encouraging the target shareholders to accept; in the case of a recommended offer, a letter from the chairman of the target endorsing the offer; and, finally, a letter from the bidder's financial advisor formally making the offer, including the principal offer terms, the rationale for making the offer, information on the bidder and target, tax implications and the procedure for acceptance. In the "back-end" of the document there will be detailed terms of the offer and any other information required by the Rules.

In the case of a scheme of arrangement, the primary document for the agreement will be a scheme circular and forms of proxy, rather than the usual offer document and forms of acceptance. The scheme circular will have a few terms and conditions which are required by statute, these include: a section explaining the scheme; the scheme of arrangement itself; and notice convening the two separate shareholders' meetings of the target and bidder companies. It will also include detailed content requirements under the Rules for both parties.

6. Structuring

6.1 Length of Process for Acquisition/Sale

There is a very definite timetable set out in the Rules for the conduct of takeover bids. The timetable is put in place in order to prevent a target entity from being subject to an excessive period of time during which they are unsure of their future. It also gives the bidder sufficient time to make an offer and persuade target company shareholders of their merit.

The timetable will not be triggered until the Rule 2.5 announcement, containing the material terms of the offer, is made. From this point the timetable will include the following deadlines:

- the offer document must be posted to shareholders within 28 days of the announcement (includes the form(s) of acceptance);
- the earliest possible closing date of an offer cannot be less than 21 days after the offer document is posted;
- the condition setting out the minimum acceptance level that will satisfy the offer (this is called the acceptance condition and is usually set at 80% or 90%) must be satisfied within 60 days of posting the offer document;
- all conditions, including regulatory conditions, must be satisfied within 21 days of the acceptance condition being satisfied (any exemption to this must be given Panel consent first);
- acceptances may be withdrawn after the date which is 21 days after the first closing date if the offer is not unconditional as to acceptances by that date; and
- the consideration must be posted within 14 days of the offer becoming wholly unconditional.

The timetable can be varied in certain circumstances, especially if the target company is US-listed due to the fact that US securities law and engagement with the US Securities and Exchange Commission require a longer timeframe. However, Panel consent is required for this to happen. The timetable may also be delayed where the bidder (with Panel consent) imposes pre-conditions which must be satisfied (or waived) before they will commit to proceed. These pre-conditions are normally limited to Irish or European Commission merger clearance or another official authorisation or regulatory clearance that cannot be obtained within the given timeframe. The Panel may also allow other pre-conditions if required for sound reasons and if they are sufficiently objective.

The timetable for a scheme of arrangement will primarily be determined by the target company but the details must be agreed between them and the Panel before it commences. In a scheme, the shareholders vote on it at a meeting convened by the High Court. If it is accepted, it must also be approved by the High Court. As a result, the timetable is reliant on the court's availability and so there must be more flexibility. Generally, the process would be expected to take approximately 90 days.

6.2 Mandatory Offer Threshold

The Rules require a bidder to make a mandatory offer for the remaining securities if: they acquire a holding of 30% or more of the voting rights of the target; their holding of less than 30% of the voting rights increases to more than 30%; or their holding of 30% or more, but less than 50%, of the voting rights increases by more than 0.05% of the aggregate percentage voting rights in that company in any 12 month period.

The bid must be in cash, or include full cash alternative, and it must be equivalent to the highest price paid by the bidder, or any person acting in concert with it, for any shares in the last 12 months.

Mandatory offers are quite rare and generally avoided. Shareholders who are close to the threshold will take extreme care as to not accidentally trigger the rule.

6.3 Consideration

Cash is the most common form of consideration in public takeovers in Ireland, however, consideration can take the form of any combination of cash and/or securities. Under Rules 24.2 to 24.4 of the Rules when an offer includes securities, the offer document must have additional financial and other information on that company and dealings in its securities. A valuation report must be provided if the offer is through a scheme of arrangement.

6.4 Common Conditions for a Takeover Offer

While the Rules require certain conditions to be attached to an offer, for example, the acceptance condition to an offer cannot be lower than 50% plus one share of the target – Rule 10.1 - any condition to an offer which involves an element of subjectivity will be met with great reluctance by the Panel. Further, Rule 13.1 states that an offer cannot be made subject to any condition where the satisfaction depends solely on the subjective judgement of the buyer.

The notes of the Rules allow for the Panel to consider granting consent to certain pre-conditions in limited circumstances, specifically when they relate to a decision by the European Commission not to initiate proceedings in respect of the offer or another material official authorisation or regulatory clearance relating to the offer.

In order to be able to invoke a condition the buyer must show that the circumstances which give rise to the right to invoke are of material significance to them and they must satisfy the Panel, following consultation, that it would be reasonable to allow the bid to lapse (Rule 13.2). In practice, the Panel will be quite reluctant to come to such a conclusion.

6.5 Minimum Acceptance Conditions

During a tender offer, the minimum acceptance condition will be set at 90% for a company listed on a regulated market in the EEA or 80% for an Irish public company listed on secondary markets, such as the London Stock Exchange's AIM Market, Euronext Dublin's Euronext Growth Market, on NASDAQ or the NYSE. If these thresholds are met then the bidder can use the "squeeze-out" mechanism in order to obtain 100% of the shares of the company.

If the bidder has shares which carry more than 50% of the voting rights of the target, the Rules allow for the minimum acceptance threshold to be reduced to 50%.

In the case of a scheme of arrangement, the minimum acceptance condition will be set at 75%.

6.6 Requirement to Obtain Financing

It is not possible for an offer for a public company to be made in Ireland if it is conditional on the bidder obtaining financing; a firm intention to make an offer (a Rule 2.5 announcement) can only be made once the bidder's financial advisor is satisfied they have sufficient financial resources available to satisfy full acceptance of the proposed offer.

If it is found that the bidder does not have sufficient resources to fund the offer and the financial advisor's confirmation proves to be inaccurate, the financial advisor may be required to discharge the consideration due themselves. In order for this to occur, the Panel will have to be satisfied that the advisor had not acted responsibly and did not take all reasonable steps to assure itself that the consideration would continue to be available at all relevant times.

Private M&A deals have the ability to include any conditions that are agreed upon by the parties (once they are legal), so can include financial conditions.

6.7 Types of Deal Security Measures

While break fees will, generally, be the most sought after security measure by a bidder, in the event of a deal falling through, these arrangements are specifically prohibited by the Rules

when agreed without the consent of the Panel. The Notes to the Rules state that consent to any break fees will only be forthcoming for the reimbursement of a buyer's specific quantifiable third-party costs. This will be subject to an upper limit of 1% of the value of the offer (Rule 21.2).

In addition to this limitation, the Listing Rules state that a break fee of 1% or more of the value of the listed company will make that transaction a Class 1 transaction. This will result in the listed company needing to: announce the transaction; issue a circular to shareholders; and seek their consent to the proposed break fee.

6.8 Additional Governance Rights

It is rare in Ireland for a bidder to seek to acquire less than 100% ownership of a target entity. Where the bidder owns less than 50% of the target company's voting rights their ability to secure additional governance rights is very limited. A bidder may obtain the control of a company by acquiring 50% of the shares which would then enable them to replace the directors and appoint their own nominees. It would also be the shareholding required to pass an ordinary resolution.

Any additional rights that are not provided by statute would have to be built into the constitution of the target company and this can only be amended by passing a special resolution (which has a 75% threshold to carry). A special resolution would also be required to disapply future pre-emption rights on stock insurances for cash and approve certain other capital restructurings.

6.9 Voting by Proxy

Shareholders are permitted under the 2014 Act to appoint a proxy for general meetings. This gives the proxy the same right as the shareholder to attend, speak and vote on a show of hands and on a poll.

6.10 Squeeze-Out Mechanisms

A squeeze-out mechanism is a statutory procedure which can be used by a bidder to gain 100% control of the target once it has met the relevant acceptance thresholds. The thresholds will differ depending on which market the target entity is listed on.

If the target entity is listed on a regulated market in any EU or EEA member state then its squeeze-out mechanism is dealt with in Regulation 23 of the Takeover Regulations. Under these regulations the bidder must receive a level of 90% acceptances in value and voting rights of the shares subject of a takeover bid. The bidder has three months from the closing date of the offer to give notice to dissenting shareholders and, from that time, shareholders have 21 days to apply to the High Court. If an application is made to the Courts then the compulsory acquisition will be delayed until the outcome of the application. There is no time limit in which the application must be dealt with.

If the target entity is listed on Euronext Dublin's Euronext Growth Market, the London Stock Exchange's AIM Market, NASDAQ or the NYSE, then the relevant acceptance threshold is set at 80% and is to be obtained within four months of the publication of the offer. If the bidder already holds 20% or more of the target's shares then it must receive acceptances from at least 50% in number of the holders of the target shares which are subject to the offer. A dissenting shareholder will have one calendar month to make an application to the High Court from the time that notice has been served by the bidder. Once again, there is no time limit in which the application must be dealt with.

Applications made by shareholders are quite rare as they can be very costly and the Courts have shown a reluctance to interfere once a relevant acceptance threshold has been reached.

6.11 Irrevocable Commitments

Irrevocable commitments are usually sought from the target entity's key shareholders and shareholding directors by the bidder in the case of recommended offers. They will generally seek that the shareholders accept the offer within a certain period of time of it being made. They may also include a commitment from the directors to exercise their powers in a manner so as to not potentially frustrate the bid.

There will generally be some negotiation around the commitments on whether they will be "hard", ie, binding even in the event of a higher bid, or "soft", ie, no longer binding if there is a higher competing bid.

Any irrevocable commitment will be subject to general requirements that the target directors comply with the Rules and that they act in accordance with their fiduciary duties. As a result, it is likely that directors will only accept the conditions of the commitment if they have the right to switch their recommendation to any higher bid which comes through. If a commitment is found to have breached the Rules, it will not be enforceable.

7. Disclosure

7.1 Making a Bid Public

When a party intends to make an offer, they must approach the target and disclose their intention to the board of directors before making a public announcement. In the event of a hostile takeover, the prior notice may consist of a phone call or letter to the directors immediately before the announcement concerning the offer is made.

Once the bidder's intention is known by the target's board, they must make a public announcement ("Rule 2.5 Announcement"). However, the bidder may not make the announcement until their financial advisor is satisfied that they are, and will continue to be, able to implement the offer. Once the announcement is made, the bidder is committed to making an offer. During a recommended bid situation, the Rule 2.5 Announcement will generally be made by both the bidder and target together and include the target board's recommendation.

The Announcement must contain, among other matters:

- the terms of the offer;
- the identity of the bidder and, if applicable, of the ultimate controlling interests in the bidder;
- details of all relevant securities of the target in which the bidder is interested;
- details of all relevant securities of the target in respect of which irrevocable commitments or letters have been received;
- all conditions to which the offer is subject to;
- specific details of certain arrangements between the bidder and securities holders; and
- cash confirmation by the bidder's financial adviser stating that they have the resources available to satisfy full acceptance of the offer.

There are also a number of other situations, other than immediately after a firm's intention to make an offer has been notified to the target board, under which the Rules state an announcement must be made:

- immediately after an obligation to make a mandatory offer arises;
- where, following an approach, the target is the subject of rumour and speculation or there is untoward movement in the share price;
- where, before an approach is made, the target is the subject of rumour and speculation or there is untoward movement in its share price and there are reasonable grounds for believing that the bidder's actions or intentions are the cause; or
- when negotiations or discussions are about to be extended beyond a restricted number of people.

The Rule 2.5 Announcement must be: published on a Regulatory Information Service; posted to the target's shareholders; sent to the Panel; and distributed to two national newspapers and two newswire services. If the target's shares are traded on Euronext Dublin, a copy of the announcement should be sent to the Companies Announcement Office, who will publish it on www.ise.ie. Prior notification or approval of the Announcement are not required, however, if the conditions of the offer may require obtaining certain regulatory consents.

7.2 Type of Disclosure Required

The content required to be disclosed during a takeover will greatly vary according to the nature of the transaction, eg, its size, whether it is hostile or recommended, whether there are competing bidders, or the form of consideration used. If the deal is recommended then the bidder and target will collaborate to produce a single document, however, in a hostile situation, the parties will prepare separate and quite often multiple documents.

The Rules stipulate two fundamental requirements for the documents that are produced: that they provide sufficient information to enable target shareholders to reach an informed decision on the merits of the offer; and that they are prepared with the highest standard of care and accuracy. The responsibility for ensuring that these requirements are followed falls on the directors of both the target and the bidder, this is evidenced in the "responsibility statement" in the documents which states that the board of directors accept responsibility for the information (which includes opinions) contained in the document and that, to the best of their knowledge, the information is accurate and does not omit anything important. A specific responsibility is also placed on the financial advisors to ensure that the directors of their client are aware of these responsibilities.

Tender Offer

In a tender offer, the offer document is the formal legal document by which the offer is made. It must contain the detailed terms and conditions of the offer as well as the information set out in the firm bid announcement. It is generally divided into a "front end" and a "back end". The "front end" will comprise of:

- a section summarising the offer;
- in a recommended offer, a letter from the chairman of the target recommending the offer; and
- a letter from the financial advisor of the target formally making the offer. This will include the principal offer terms, the rationale behind the offer, information on the bidder and target, tax implications and the procedure for acceptance.

The "back end" will include the detailed terms of the offer and information required under the Rules. A bidder may not include any statement in the offer document which may mislead shareholders and the market, or which may create inaccuracy. The document is also required to satisfy the same standards of accuracy, completeness and fair presentation as required in a prospectus.

The Rules will also require the target board to circulate its views on the offer to the shareholders along with the advice provided by its financial advisors. In a hostile bid this will be set out in a separate defence circular to be posted within 14 days of the offer documents. In a recommended bid situation it will form part of the offer document itself.

Scheme of Arrangement
In a scheme of arrangement the principal documents which will be sent to the target company will be a scheme circular and the form of proxy. A scheme is not contractual process and so it does not need the usual offer and acceptance found in a general offer. The scheme circular is required by statue to include:

- a section explaining the scheme;
- the scheme of arrangement itself; and
- notice convening the two separate shareholders' meetings.

Other than these requirements the scheme circular will look similar to the recommended offer document, excluding the offer mechanics, and will include the detailed content requirements under the Rules for both the bidder and target.

When a bidder includes shares or other securities as part of the consideration offered to target shareholders then the Prospectus Regulations can be relevant and may require a prospectus to be issued. The Regulations will require a prospectus to be issued where there is either an offer of transferable securities to the public in Ireland or an application for transferable securities to be admitted to trading on a regulated market in Ireland.

Prospectus
The prospectus must contain the necessary information which will enable an investor to make an informed decision on the assets and liabilities and the financial position of the bidder. The Central Bank of Ireland is the supervisory authority and their Prospectus Rules must also be complied with in relation to content requirements. They include:

- a description of the business;
- audited financial information for the latest three financial years;
- an operating and financial review; and
- confirmation that the issuer has sufficient working capital for its requirements for the next 12 months.

Following the new Prospectus Directive which was applied across the EU from 21 July 2019 the Irish Prospectus regime has changed. As a result of these changes, the exemption to having to produce a prospectus for the issue of shares resulting from the conversion or exchange of other securities is now subject to a cap of 20%, and so the new securities must represent less than 20% of the number of shares of the same class already admitted to trading.

7.3 Producing Financial Statements

If an offer includes non-cash assets or securities as consideration, then the Rules provide that the following financial statements be provided as part of the offer documentation by the bidder:

- turnover, net profit or loss before and after tax, the charge for tax, extraordinary items, minority interests, the amount absorbed by dividends and earnings and dividends per share for the last three years;
- a statement of the assets and liabilities, as shown in the last published audited accounts;
- a cash-flow statement; and
- all known material changes in the financial or trading position of the bidder subsequent to the last published audited accounts or a statement that there are no known material changes.

If an offer includes cash as consideration then bidders are required, at a minimum, to produce:

- turnover and profit or loss before taxation for the last two financial years; and
- a statement of the net assets of the bidder shown in the latest published audited accounts.

Except when the consent of the Panel is given, both parties must make their audited consolidated accounts for the last two financial years available for inspection at an address in Dublin. They must also publish the accounts on a website, the address of which is to be provided in the offer document.

7.4 Transaction Documents

From the time the offer document is published, the bidder must make a copy of the offer document available for inspection at an address in Dublin and on a website.

The target has a similar obligation to make a copy of their target response circular available for inspection and to publish it on a website from the time that it was originally issued.

Additionally, the following documents must also be made available on the websites of the parties:

- every report, letter, valuation or other document which is referred to in any document issued by the bidder or target other than the service contracts of the directors or any material contracts which are not entered into in relation to the offer;

- all material contracts entered into by the bidder in connection with the offer, documents evidencing an irrevocable commitment and documents relating to the financial arrangements of the bidder; and
- where there has been an asset valuation, the valuation certificate and associated report together with the consent of the valuer to publish.

8. Duties of Directors

8.1 Principal Directors' Duties

Directors of Irish companies must act in accordance with the fiduciary duties imposed on them by the Rules, the 2014 Act, other relevant legislation and at common law. Under the Rules and its general principles, directors must act only in their capacity as members of the board of directors and must not have regard to their personal interests. The Rules also prohibit the board of directors from taking any action which may frustrate the making or implementation of an offer in respect of the company, or deprive the shareholders of the opportunity of considering the merits of such an offer, whether that be during the course of the offer or at any time earlier if they had reason to believe that an offer was imminent. A responsibility is also placed on the director early in the process to obtain competent independent advice from a financial advisor.

A director is also required to acknowledge the legal duties and obligations imposed on them in the 2014 Act, other legislation and at common law upon their appointment. The eight primary fiduciary duties of a director listed in the Act are:

- a director shall 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 their powers only for the purposes allowed by law;
- a director shall not use the company's property, information or opportunities for their 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 a general meeting;
- a director shall not agree to restrict the director's power to exercise an independent judgment 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 the director's duties to the company and to the director's other (including personal) interests, unless the 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 which the director has or may be reasonably expected to have; 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).

These duties are owed to the company, not to individual shareholders, and any breaches of these duties can result in criminal or civil liability on the part of the director, so most directors will be cautious as to not breach them.

In a hostile bid situation these duties mean that any resistance to the bid must be carried out in good faith by the director with the interests of the company in mind. Also, in a competing bids situation, duties will apply to the decision to engage with a potential bidder, their degree of engagement and whether they recommend the offer to shareholders.

8.2 Special or Ad Hoc Committees

It is common for a board of directors to establish a committee in relation to business combinations, especially in situations where there is a conflict of interest with certain directors as they are prevented from being eligible for involvement in the consideration of the offer and from making an announcement or statement in relation to an offer, unless the full nature of the conflict is prominently and clearly disclosed. This allows the board to establish a body to conduct and consider the bid separately from the interested directors.

Whilst the board may delegate actions to a committee of the directors, all board members remain responsible for the delegated function and must ensure that proper arrangements are in place so that they can monitor the conduct of the bid.

8.3 Business Judgement Rule

There is no specific law in Ireland that is the equivalent of the "business judgement rule" under which the board of directors' decision is protected unless it can be shown that they breach their duty of care or duty of loyalty. However, when reviewing the decisions that were made by the directors, the Courts will presume they were made in good faith and in the honest belief that the action taken was in the best interests of the company. This presumption will be maintained by the Courts unless it is proven that a director breached a specific fiduciary duty.

Directors will not be found personally liable for a breach of a fiduciary duty if it is found they acted honestly and reasonably and the court believes that, in the circumstances, the director ought to be excused.

8.4 Independent Outside Advice

When a body is part of a business combination, the Rules require both the bidder and the target to obtain competent independent advice. This will usually involve seeking outside legal advisors, tax and financial advisors, accountants and public relations advisors.

The target board is required to obtain advice on every offer and revised offer and must despatch a circular to its shareholders setting out the independent advice received, as well as their considered views and opinions.

A bidder is only permitted to make a firm intention to make an offer (a Rule 2.5 announcement) after they and their financial advisor are satisfied that the bidder is in a position to implement the offer and will continue to be able to implement it for the duration of the bid.

8.5 Conflicts of Interest

While the Rules prevent directors who are affected by a conflict of interest from being part of the formulation of independent advice, there has been no case law in Ireland in the context of such conflicts which has been subject to judicial scrutiny.

9. Defensive Measures

9.1 Hostile Tender Offers

Hostile tender offers are permitted in Ireland, however they are not common. They are limited by the fact that the directors of the target company do not have to grant access to due diligence information to the bidder. The most recent high profile hostile offer in Ireland was International Paper's bids for Smurfit Kappa in 2018 and 2019, however, these bids proved to be unsuccessful.

9.2 Directors' Use of Defensive Measures

Defensive measures used by directors in the case of a hostile offer are very limited as, as mentioned in **8.1 Principal Directors' Duties**, a director of a target company is not permitted to take any action which may frustrate an offer or deprive the shareholders of the opportunity of considering the merits of an offer, either during the course of an offer or at an earlier time, where the target company's board has reason to believe that the making of an offer is imminent unless given specific authorisation from the Panel and/or the shareholders. A target director will also be prevented from taking any of the following actions:

- allotting or issuing any authorised but unissued shares;
- issuing or granting an option in respect of any unissued shares;
- creating or issuing any security conferring rights of conversion into or subscription of shares;
- selling, disposing of or acquiring any assets of a material amount; or
- entering into any contract other than in the ordinary course of business.

As noted in **9.1 Hostile Tender Offers**, directors do not have to grant access due diligence information to the bidder, however, the principle of equality of information means that in a competitive situation, any information which has been made available to another bidder must be made available to the hostile bidder if they request it (Rule 20.2).

9.3 Common Defensive Measures

As previously mentioned, defensive measures are not absolutely prohibited, however, they are limited in use. Action is permitted if approval is given by either the shareholders or the Panel. Irish law does not expressly authorise nor prohibit a target company from using a shareholder rights plan as a defensive measure.

9.4 Directors' Duties

A director will be bound by the fiduciary duties from section 228 of the 2014 Act, listed in **8.1 Principal Directors' Duties**, when enacting defensive measures. They must also ensure that they are in compliance with the company's constitution and act in good faith and in the best interests of the company. Any defensive measures should only be employed with the approval of the shareholders.

9.5 Directors' Ability to "Just Say No"

Under the Rules, the directors of a target company are obliged to acquire independent legal advice whenever an offer, or a revised offer, is received. Once this advice is obtained, the directors must despatch a circular to the shareholders setting out the substance and source of the advice, as well as their own recommendation.

A director could "just say no" and prevent a business combination if they have complied with the Rules and their fiduciary duties and have determined that an approach is not in the best interests of the company. However, a shareholder could bring future litigation if the directors have taken action without first consulting and receiving permission from the shareholders.

10. Litigation

10.1 Frequency of Litigation

Litigation in relation to M&A deals in Ireland is rare, however, if it is to occur it is more likely to happen in a hostile takeover rather than in a recommended offer.

10.2 Stage of Deal

While litigation can be initiated at any stage of a deal, it is still rare that it would happen in relation to an M&A transaction and there are no recent examples to be found in Ireland.

A person can question a decision by the Panel in relation to the Rules or any derogation from or waiver of a rule through an application to the High Court for judicial review. A person can also appeal a matter to the High Court where they have been advised or censured by the Panel. The court can either decide to confirm the Panel's decision or annul it.

11. Activism

11.1 Shareholder Activism

While shareholder activism is an important force in US and European markets, it has traditionally not played a large role in Ireland. However, shareholders are not prohibited from engaging in activism once they act in accordance with the rules and standards set out in the 2014 Act, the Rules, their relevant listing rules, the UK Corporate Governance Code, the Irish Corporate Governance Annex, the Transparency Regulations and Regulations 596/2014 (Market Abuse Regulations).

There has been a recent increase in interest from activist investors in Ireland, especially from the US, and so it will likely become an important area in the coming years.

11.2 Aims of Activists

While it is not an important force in Ireland, there have been some efforts by activist shareholders to create value through spin-offs, divestitures and share buy-backs. Orange Capital LLC's attempt to persuade C&C Group plc to divest itself of its US interests is a high profile example of one of these efforts. It is reported that Orange Capital had approached C&C privately with the proposal before bringing it into the public domain.

11.3 Interference with Completion

There are no examples of activists seeking to interfere with the completion of announced transactions in Ireland other than by exercising their shareholder rights. This may be achieved by shareholders who have at least a 5% holding in the company's share capital as they have the power to compel the directors to convene a general meeting where a resolution may be passed which may interfere with the completion of a transaction.

Dillon Eustace is one of Ireland's leading law firms, with international offices in Cayman, New York and Tokyo. The firm's core practice areas are asset management and investment funds, banking and capital markets, corporate and M&A, employment, financial services, insurance, litigation and dispute resolution, real estate and taxation. Dillon Eustace has developed a dynamic team of lawyers representing international and domestic asset managers, investment fund promoters, insurers, banks, corporates, financial institutions, TPAs and custodians, prime brokers, government and supranational bodies as well as newspapers, aviation and maritime industry participants and real estate developers and investors.

Authors

Adrian Benson is a partner in the firm's corporate and M&A group and has extensive experience in mergers and acquisitions, company law and corporate governance, company re-organisations, venture capital, cross-border mergers and private equity investments. He has represented public and private corporations, private equity houses, venture capital investors, family-owned businesses and entrepreneurs transacting in a variety of industries and sectors, including the financial services, technology, food and beverage, media and entertainment and life sciences sectors. Adrian's practice also includes Irish inward investment projects and other cross-border transactions.

Catherine Hicks is a member of the Dillon Eustace corporate M&A team, she specialises in corporate and mergers and acquisitions. She advises on corporate and commercial matters for both domestic and international clients. Catherine's experience includes advising clients on public and private mergers and acquisitions, corporate re-organisations, shareholders' agreements and joint ventures, private equity, employee share schemes and corporate governance.

Dillon Eustace

33 Sir John Rogerson's Quay
Dublin 2
D02 XK09
Ireland

Tel: +353 1 667 0022
Fax: +353 1 667 0042
Email: enquiries@dilloneustace.ie
Web: www.dilloneustace.com