International
Comparative
Legal Guides

Practical cross-border insights into mergers and acquisitions

Mergers & Acquisitions 2022

16th Edition

Contributing Editors:

Lorenzo Corte & Scott C. Hopkins
Skadden, Arps, Slate, Meagher & Flom LLP

ICLG.com

Expert Analysis Chapters

Q&A Chapters

Q&A Chapters Continued

Ireland

Inez Cullen

John Given

Philip Lee LLP

1.1 What regulates M&A?

There are a number of Irish and EU laws, rules and regulations that govern mergers and acquisitions ("**M&A**") in Ireland.

The primary laws and regulations governing M&A transactions involving public companies include:

(1) the Companies Act 2014, as amended (the "**Companies Act**"), which governs private and public M&A activity, and provides the legislative basis for schemes of arrangement;

(2) the Irish Takeover Panel Act 1997 (as amended) (the "**1997 Act**"), the European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations 2006, as amended (the "**Regulations**"), the Irish Takeover Panel Act 1997, Substantial Acquisition Rules, 2007 (the "**SARs**"), and the Irish Takeover Panel Act 1997, Takeover Rules 2013 (the "**Rules**");

(3) the Competition Acts 2002 to 2017 (the "**Competition Acts**"), which require certain takeovers to be notified to and approved by the Competition and Consumer Protection Commission (the "**CCPC**") and Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of mergers (the "**EC Merger Regulation**"), which governs joint ventures and acquisitions with an EU dimension;

(4) 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 (the "**MAR Regulations**"), which impose obligations on companies whose securities are listed on regulated markets and regulate insider dealing and market manipulation;

(5) the Transparency (Directive 2004/109/EC) Regulations 2007, as amended (the "**Transparency Regulations**"), the Central Bank of Ireland guidance on the Irish transparency rules in November 2018 (the "**Transparency Rules**"), and the Central Bank (Investment Market Conduct) Rules (SI No. 366 of 2019), which contain certain disclosure requirements that must be complied with in any acquisition of shares in an Irish listed public limited company in order to ensure the transparency of information being provided by issuers on a regulated market by requiring specific disclosures for public companies;

(6) the listing rules of the relevant stock exchange or market the relevant company is listed on, which contain requirements concerning the content of information to be given to shareholders. Companies whose shares are listed on Euronext Dublin must comply with the Euronext Dublin rule book. Irish companies listed on markets outside Ireland, such as the New York Stock Exchange, NASDAQ and the London Stock Exchange are subject to additional rules applicable to those markets; and

(7) the memorandum and articles of association of the company, which provide the principal objects and internal regulations the company is bound by.

The 1997 Act, the Regulations and the Rules apply to transactions involving companies registered in Ireland whose shares are, or have in the previous five years been, admitted to trading on Euronext Dublin operated by Irish Stock Exchange plc (or another Irish market such as the Global Exchange Market or Euronext Growth), the London Stock Exchange (including AIM), the New York Stock Exchange and NASDAQ.

The Rules, of which there are 41, have been made principally to ensure that takeovers (including takeover bids as defined in the Regulations) and other relevant transactions comply with the principles set out in the Schedule to the 1997 Act. The Rules are based on seven general principles set out in the 1997 Act (the "**General Principles**") and include mandatory bid rules, share-dealing restrictions, confidentiality and disclosure obligations, restrictions on frustrating actions, and provisions relating to the conduct of takeovers. The Rules also provide an orderly framework within which takeovers are conducted. They are not concerned with the financial or commercial advantages or disadvantages of a takeover, which are matters for the companies concerned and their shareholders. Nor are the Rules concerned with issues such as competition and mergers policies, which are regulated under different legislation.

The Irish Takeover Panel (the "**Panel**") was established by the 1997 Act as the statutory body for monitoring and supervising takeovers in Ireland. The Panel administers and enforces the Rules and has statutory powers to make rulings and give directions in the event of non-compliance with the Rules and the General Principles. The Panel operates on a day-to-day basis through its members, which comprise bodies professionally involved in the securities markets and in the field of takeovers. The Panel is also designated as the competent authority for the purposes of Article 4(1) of the Regulations.

The Regulations and the Rules also apply to change of control transactions (which involve the acquisition of shares carrying 30% or more of voting rights of a target company) ("**Change of Control Transactions**").

1.2 Are there different rules for different types of company?

In multi-jurisdictional Change of Control Transactions (as described above), the regulation of the transaction will be shared between the relevant countries and not all of the Rules will apply.

The Companies Act provides for domestic mergers of Irish companies to be approved through a summary approval procedure or a shareholder special resolution confirmed by a court order.

In addition, there may be certain restrictions on acquiring companies that operate in certain sensitive sectors, such as defence, transport, financial services, energy, broadcasting/publications, telecommunications, pharmaceutical, insurance undertakings and companies that have large contracts with the public sector.

1.3 Are there special rules for foreign buyers?

Generally, there are no restrictions for foreign buyers in Ireland; however, there are some exceptions, for example, Irish airlines are subject to foreign control restrictions and must be at least 50% owned by EU residents. Certain types of investment and other industries are also subject to approval and/or regulation under Irish law.

Article 215 of the Treaty on the Functioning of the European Union and Regulation (EC) 881/2002 (as amended) contain specific restrictive measures directed against certain persons and entities associated with the ISIL (Da'esh) and Al-Qaida organisations and do impose certain restrictions in relation to trade between Ireland and a list of restricted countries.

In July 2020, the Irish Government agreed to draft legislation that will give effect to an EU regulation to screen foreign direct investment ("**FDI**") coming into Ireland. The Investment Screening Bill 2020 will give full effect to EU Regulation 2019/452.

Once enacted, the Investment Screening Bill 2020 will empower the Minister for Enterprise, Trade and Employment to respond to threats to Ireland's security and public order posed by particular types of foreign investment, and to prevent or mitigate such threats. Under the proposed legislation, the Minister will be able to assess, investigate, authorise, condition, prohibit or unwind foreign investments from outside of the EU, based on a range of security and public order criteria.

1.4 Are there any special sector-related rules?

There are some sector-specific rules, for example, the acquisition of a stake in an insurance or reinsurance undertaking or a credit institution may be subject to prior approval from the Central Bank of Ireland; media mergers are subject to the approval of the CCPC and the Irish Minister for Communications, Climate Action and Environment.

1.5 What are the principal sources of liability?

The Panel has significant enforcement powers when it comes to supervising and regulating takeover transactions and parties. If a party to a takeover bid breaches the Rules, or a direction or ruling made by the Panel, the Panel may take enforcement action against that party. The Panel is also empowered to apply to the High Court of Ireland for a court order if parties do not or are unlikely to comply with its rulings or directions.

Civil and criminal liability may arise under the MAR Regulations for insider dealing activity or market abuse in connection with a takeover, or under the Competition Acts for a breach of competition law.

Personal liability would also arise for a bidder or its directors where misrepresentations are found to be contained in an offer document.

2.1 What alternative means of acquisition are there?

There are three principal means of acquiring an Irish public company: a takeover offer; a scheme of arrangement; and a cross-border or domestic merger.

A public takeover offer for a company's shares can be for cash, loan notes, warrants or shares in the bidder, or any combination of these. As regards takeover offers, the bidder can offer target shareholders the acquisition of their shares; it is a condition of the offer that the bidder will acquire, or agree to acquire, shares of more than 50% of the voting rights of the target. Where the bidder has acquired 90% of the target shares, any remaining shareholders may also be obligated to transfer their shares on the terms of said offer, if required by the bidder (for companies listed on a regulated market in the EEA). Dissenting shareholders have the right to apply to the High Court of Ireland for relief.

A scheme of arrangement is another method for acquiring an Irish company. This is a statutory procedure provided under the Companies Act, involving the target company proposing the acquisition (in the form of a transfer scheme or a cancellation scheme) by a bidder for 100% of the target to its members.

The procedure for a scheme to be approved is:

- the scheme must be approved by shareholders representing not less than 75% of the shareholding present and voting at a general meeting, in person or by proxy – in the case of more than one class of shareholders, the same majority requirements apply to each class (legislation relating to the COVID-19 pandemic permits the virtual holding of general meetings for an interim period, which is currently up to 30 April 2022);
- the scheme also needs to be approved by the High Court of Ireland – a dissenting shareholder may appear at the hearing to make submissions in respect of their objections; and
- if approved by general meeting and the High Court, the scheme will be binding on all shareholders.

Additionally, a takeover may be effected either as:

(1) a cross-border merger where the transaction involves a merger of an Irish incorporated entity with at least one other EEA company is governed by the European Communities (Cross-Border Mergers) Regulations 2008 (the "**Cross-Border Mergers' Regulations**"), which require the agreement of target shareholders accounting for 75% of the votes cast at a general meeting. The Irish High Court must review and approve both inbound and outbound mergers involving Irish companies; or

(2) a domestic merger pursuant to Part 9 of the Companies Act, which encourages business combinations between Irish companies and is based on the Cross-Border Mergers Regulations.

A cross-border merger may be effected by way of:

(i) acquisition – a company acquires the assets and liabilities or one or more companies, which are then dissolved. The acquiring company issues shares to the shareholders of the dissolved company in consideration;

(ii) absorption – a parent company absorbs the assets and liabilities of its subsidiary, which is then dissolved; or

(iii) formation – a new company is formed to acquire the assets and liabilities of one or more companies, which are then dissolved. The acquiring company issues shares to the shareholders of the dissolved companies in consideration.

Each transaction type requires common draft terms of the merger between the companies, an explanatory report of the directors for the shareholders, an advertisement of the proposed merger and High Court approval.

2.2 What advisers do the parties need?

In addition to legal advice, the parties will generally engage financial advisers, tax advisers, accountants and, in certain cases, public relations advisers. If there are multi-jurisdictional issues, such as contracts governed by foreign law or foreign property, parties may need specific advisors in each of the relevant jurisdictions.

The Rules provide that where the target board of a public company is in receipt of an offer, it must obtain competent independent financial advice on every offer and revised offer. It must then send a circular containing this information, together with its considered views on the offer to the shareholders.

The Rules further state that 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 its financial adviser confirms it has sufficient resources to satisfy acceptance of the offer where cash is, or is an element of, the consideration.

2.3 How long does it take?

Where a person intends to make an offer, they must first disclose that intention to the board of directors of the target (often in writing) or to the target's advisers before making any announcement. The length of time it will take from initial approach to the date of announcement of a firm intention to make an offer will depend on when the parties reach agreement.

Where the bid is a hostile offer, the target may apply to the Panel to impose a time limit on the bidder to either announce a firm intention to make an offer or that it does not intend to do so (which is known as a "put-up or shut-up" direction).

The Rules set out a firm timetable for the conduct of takeover bids. The timetable is triggered by an announcement of a firm intention to make an offer, which contains the material terms of the offer. The bidder then has 28 days within which to post its formal offer document to shareholders (the "offer document") and the rest of the Rules timetable then follows from this date. The acceptance condition of the offer must be satisfied within 60 days, following which all other conditions must be satisfied within 21 days, and then the offer will be declared unconditional. The process for completing a statutory squeeze-out can be completed in an additional 30 days (subject to objections filed with the High Court of Ireland).

A scheme of arrangement should be possible to conclude within three months, subject to regulatory or other issues. The scheme proposal document must be posted to shareholders within 28 days of the announcement of a firm intention to make an offer, unless the Panel consents otherwise. A transaction cannot practically proceed by way of a scheme of arrangement without support from the target board. The Irish High Court's timetable must also be taken into consideration, and the timetable is influenced by the requirement for court hearings. Subject to the requisite shareholder approval and sanction of the High Court, the scheme will be binding on all shareholders.

2.4 What are the main hurdles?

Primarily, any prospective bidder will need to obtain the required level of shareholder approval and board approval.

Bidders may also need to consider, allow time for, and obtain any applicable regulatory approvals.

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

Where the bidder acquires target shares other than through a formal offer, the Rules provide that an offer must be made at a price per share price that is not less than the highest price per target share paid by the bidder:

(i) during the three-month period prior to the commencement of the offer period; and

(ii) during the 12-month period prior to the commencement of the offer period where the bidder has acquired 10% or more of the target's shares or the bidder acquires any shares during the offer period (and the offer is in cash or includes a cash alternative).

If a bidder: acquires a holding of more than 30% of voting rights of a target; or increases its holding of more than 30% but less than 50% of the voting rights of a target by more than 0.05% in any 12-month period, it will be required to make a mandatory offer for the remaining securities in a target (a "mandatory offer").

Any mandatory bid must be for cash or include a full cash alternative. The price offered must be equivalent to the highest price paid for any shares in the target in the previous 12 months. The Panel may waive the mandatory offer requirements in certain circumstances.

All target shareholders of the same class must be afforded equivalent treatment, and special deals with some target shareholders are prohibited.

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

Under the Rule 2.5 Announcement, a bidder may only announce its intention to make an offer when it and its advisers are satisfied, after careful and responsible consideration that they are in a position to implement the offer.

Where the consideration is cash or includes a cash element, the offer document must include a "cash confirmation" made by the bidder's financial adviser (a "certain funds" confirmation) that the bidder has sufficient resources available to satisfy full acceptance of the offer. If the confirmation proves to be inaccurate, the Panel may direct that the person who gave the confirmation provide the necessary resources.

If consideration is in the form of transferable securities, the bidder must publish either a prospectus or other document, which must be approved by:

(a) the Central Bank of Ireland; or

(b) the designated competent authority of another EEA Member State and passported into Ireland.

Where non-cash consideration is offered, the Rules also impose enhanced disclosure obligations in terms of the content of the offer document.

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

General Principle number 1 of the 1997 Act specifically requires that all shareholders of the same class must be afforded equivalent treatment, subject to limited exceptions. Special deals with only some target shareholders are prohibited.

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

A comparable offer must be made for each other class of target equity share capital, whether or not the other classes confer voting rights, unless the Panel consents otherwise.

2.9 Are there any limits on agreeing terms with employees?

Any incentivisation arrangements or proposals with management of the target who have an interest in target shares must be disclosed in the offer document, in respect of which an independent financial adviser to the target is required to state publicly as to whether the arrangements or proposals are fair and reasonable. The Panel may also require that such arrangements or proposals be made subject to a vote of independent target shareholders.

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

General Principle number 3 of the 1997 provides that the board of an offeree must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the offer.

As per the Rules, the bidder and the target are both obliged to make any announcement of a firm intention to make an offer, readily and promptly available to their respective employees or the representatives of said employees.

Under the Rules, the board of an offeree must provide its opinion on the effects of the implementation of the offer on the employment of the company. The employees can also provide their view on a proposed offer. While this offers an opportunity for employees to have their views heard, it does not ensure that such opinions will be factored into the ultimate decision.

Therefore, while there is no requirement to obtain separate approval from employees, their representatives, pension trustees or other stakeholders in respect of an offer, their views may be considered.

2.11 What documentation is needed?

The number, type and content of documents produced in a takeover will vary according to the nature of the transaction, in particular, its size, the form of consideration, whether it is hostile or recommended and whether there are competing bidders.

The main documentation involved in takeover offer is:

(i) an announcement containing the bidder's firm intention to make an offer, which commits a bidder to make an offer (setting out the terms and conditions of the offer);
(ii) an offer document (containing the detailed terms and conditions of the offer, in addition to the information set out in the firm bid announcement);
(iii) defence documents – in a hostile bid, the target may wish to produce a defence document setting out the board's views on the terms of the bid. Such document must be issued within 14 days of the posting of the offer document and any further defence documents to issue must be circulated within 39 days after the posting of the initial offer document;
(iv) a form of acceptance; and
(v) a response circular from the target board addressed to the target shareholders (setting out the target board's opinion on the offer and the substance and source of the competent independent financial advice it has obtained).

The documentation for a scheme of arrangement is similar in terms of content; however, instead of an offer document, a circular is required to be provided to target shareholders and instead of a form of acceptance, there is a notice convening meetings of shareholders with proxy forms.

If the consideration includes transferable securities, a prospectus (or equivalent document) will be required. Court, competition/anti-trust, or regulatory filings may also need to be made.

2.12 Are there any special disclosure requirements?

During an offer period, the Rules require heightened and accelerated disclosure of dealings to increase market transparency. The bidder and the target are obliged to disclose all dealings in relevant securities, irrespective of size.

Assets may not be valued by or on behalf of a bidder or a target during an offer period unless this is supported by the opinion of an independent valuer.

The offer document must set out the formal terms and conditions of the offer and include additional specific disclosures (including financial and other information).

All documents, announcements, press releases, advertisements and statements issued by or on behalf of a bidder or target are required to satisfy the same standards of accuracy as a prospectus and must be published on a website as soon as possible following dispatch or publication (and by no later than 12:00 noon on the following business day).

In preparation for profit forecasts or statements (including the estimated financial effects of a takeover) issued by the target following an approach being made, the target must first obtain and publish reports from accountants and financial advisers.

2.13 What are the key costs?

Usually, the main costs involved are the professional fees of the advisers to the bidder and target, printing and posting costs, charges of the Panel (applicable to the value of an offer), and stamp duty at 1% (save in respect of a scheme of arrangement).

Funds borrowed to finance the consideration of a transaction must be committed and available on a "certain funds" basis facilitated by banks prior to the bidder announcing its firm intention to make an offer, which can charge significant commitment fees.

2.14 What consents are needed?

The main consents usually required are competition and other regulatory approvals, and the sanction from the High Court if it is a scheme of arrangement or cross-border merger. Shareholder approvals may also be required in respect of both the bidder and the target.

2.15 What levels of approval or acceptance are needed?

The acceptance condition for a takeover offer must result in the bidder acquiring at least 50% of the voting rights in the target. Usually this is set at either 80% or 90% acceptance in line with the statutory "squeeze-out" procedure.

Schemes of arrangement require the approval of the Irish High Court and the approval of a majority in number of the target company's shareholders representing 75% in value of the shareholders voting at the meeting.

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

A bidder may only announce a firm intention to make an offer when it and its financial adviser are satisfied that the bidder is able, and will continue at all relevant times to be able, to implement the offer. Where the consideration for the offer is cash or includes a cash element, the offer document must include a "cash confirmation" (which is usually made by the bidder's financial adviser and is also known as a "certain funds" confirmation) that the bidder has sufficient resources available to satisfy full acceptance of the offer. In giving this confirmation, the financial adviser would be expected to carry out due diligence on the bidder and the offer structure.

3.1 Is there a choice?

Yes, a bidder can choose between launching a friendly or hostile bid.

3.2 Are there rules about an approach to the target?

In accordance with the Rules, absolute secrecy must be maintained by the bidder, the target and their respective advisers prior to an announcement concerning an offer or possible offer until a bid is announced, and negotiations or discussions concerning the offer must be restricted to a very limited number of people.

Where a person intends to make an offer, it must first disclose that intention to the board of directors of the target or to the target's advisers before making any announcement concerning the offer (usually in writing to the chairman or chief executive of the target).

Where there is rumour or speculation following an approach or an anomalous movement in the price of the target's shares, the bidder or target may be required to issue a holding announcement that an offer is being considered or that talks are in progress.

In the event of a hostile takeover, prior notice may consist of a telephone call or a letter to the target's board of directors or advisers immediately before the announcement of the bid.

3.3 How relevant is the target board?

As mentioned previously, following an offer, the target board will send the target shareholders a circular outlining its considered views on the offer together with financial advice it has received thereon. A recommended offer can have a significant influence on the level of target shareholder support achieved and the outcome of the transaction.

In a scheme of arrangement, the target board of directors has more control than in a takeover offer and therefore the transaction cannot practically proceed without support from the target board.

In a hostile bid, the target board is unlikely to engage in negotiations or grant access to due diligence information (however, this would only be possible where the hostile approach was the only approach made). The board may also 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.

3.4 Does the choice affect process?

Although there has been some commentary otherwise, it is generally considered is that it is not possible to use a scheme for a hostile offer, as the target board's co-operation is required to implement it.

Where a bid is recommended, the offer document will generally be a joint document that includes the target board's views as to the offer. If it is hostile, the views of the target's board will be contained in a separate document issued within 14 days of the offer document. In a hostile bid, the target cannot release new defence information after the 39th day following the date on which the offer document is posted.

A hostile transaction will usually begin as a takeover offer; however, a recommendation can be obtained after the launch of an offer, in which case it would be possible, with Panel consent, to switch from a takeover offer to a scheme of arrangement.

4.1 What information is available to a buyer?

The level of information available to a buyer is largely dependent on the level of due diligence carried out; it can cover the entire corporate, financial and tax position of the target company and its business. However, this can be impeded by time and cost restraints and whether the bid is friendly or hostile.

Hostile bids are subject to significantly less due diligence and the bidder would largely have to rely on publicly available information.

The Rules require a target board to provide information to a *bona fide* bidder if the same information has previously been made available to another bidder. Unless information has previously been given to another bidder or the target co-operates otherwise, the only information available to the bidder will be publicly available information.

4.2 Is negotiation confidential and is access restricted?

The Rules require that absolute secrecy must be maintained until a bid is announced, which applies to both hostile and recommended bids. Negotiations or discussions concerning the offer must be restricted to a very limited number of people. Negotiations may be conducted confidentially; however, if, following an approach to the target, there is rumour or speculation or an anomalous movement in the price of the target's shares, the bidder or target may be required by the Panel to issue a holding announcement that an offer is being considered or that talks are in progress.

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

The obligation to make announcements arises:

(i) immediately after a firm intention to make an offer has been notified to the target board of directors, regardless of the attitude of that board of directors;

(ii) immediately after an obligation to make a mandatory offer arises;

(iii) where, following an approach, the target is the subject of rumour and speculation or there is untoward movement in its share price;

(iv) when, before an approach is made to the target, it 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 behind such movement;

(v) when negotiations or discussions are about to be extended beyond a restricted number of people; or

(vi) where the discussions are terminated or the bidder decides not to proceed with the offer.

Announcements can be brief, with the exception of the announcement of a firm intention to make an offer.

A bidder may only announce a firm intention to make an offer when it and its financial adviser are satisfied that the bidder is able and will continue at all relevant times to be able, to implement the offer. 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, including, for example, regulatory clearances.

4.4 What if the information is wrong or changes?

If the information provided to it by the target is wrong or changes and if this is 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 this discovery is made after it has announced a firm intention to make an offer, the bidder will only be able to pull out of the offer if it has included appropriate conditions in the offer.

Whilst bidders are entitled to claim compensation from the target or target board members, this is dependent on the provisions for access to information and will likely be denied.

If there is any material change in any information published either by the bidder or target, or on their behalf, they will be required announce such relevant details without delay.

5.1 Can shares be bought outside the offer process?

Shares can be acquired in the target outside the offer process, subject to restrictions. Stakebuilding can have a significant impact on the conduct of the bid and an effect on the terms that must be offered.

The SARs also regulate the speed and stealth with which a stake in an Irish company can be acquired. 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 (or rights over) voting shares in a target to an aggregate of 15–30%, unless such shares are acquired from a single holder. This provides the company with information on stakebuilding.

A potential bidder may not buy shares before an announcement if the target has provided it with confidential information to the bidder (insider dealing).

5.2 Can derivatives be bought outside the offer process?

Yes, subject to restrictions.

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

During an offer period, the Rules require that a bidder publicly disclose any acquisition of target securities or derivatives referenced to such securities, and other parties with interests in excess of 1% of the target's securities are also required to publicly disclose their dealings.

The Companies Act requires disclosure to the company prior to and during the offer period of any acquisition that gives a person an interest of 3% or more in the voting shares of the company or changing through a whole percentage level.

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

5.4 What are the limitations and consequences?

Where a person acquires or increases their holding to 30% or more of voting rights of a target or increases it by more than 0.05% in 12 months where it is already over 30% (subject to exceptions), he/she will be required to make a mandatory offer for the remaining securities in the target.

6.1 Are break fees available?

Break fees are subject to the Rules, which prohibit a target from agreeing to compensate the bidder for the costs of the transaction, if the payment is contingent on the offer lapsing, except with the consent of the Panel. The offer document must contain details of any breach fee agreed to.

The Panel will usually only consent to break-fee arrangements in respect of specific quantifiable loss (up to 1% of the value of the offer). The target board and its financial adviser must confirm in writing to the Panel that they consider the proposed arrangement to be in the best interests of the target shareholders.

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

Yes, subject to the Takeover Rules and the directors complying with their fiduciary duties.

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

The target cannot agree to issue shares or sell material assets without shareholder approval at a general meeting following an approach or at any earlier time at which the target board has reason to believe that an offer is imminent, as such would be considered frustrating actions.

6.4 What commitments are available to tie up a deal?

It has become customary for bidder and target companies to enter into an implementation agreement at the time of the announcement of a firm intention to make a recommended offer. The Panel has emphasised, however, that the invocation of a condition to an offer is subject to the consent of the Panel and falls to be assessed against the "material significance" and "reasonableness" tests prescribed by the Rules. It is also common in a recommended transaction for a bidder to obtain irrevocable commitments or letters of intent to accept the offer from the directors and some shareholders.

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

The approval of the CCPC and other regulatory approvals are often included as conditions, as well as third-party consents.

Bidders commonly include conditions in the terms of their offer; however, the practical effect of these conditions is limited by the Rules, which restrict subjective conditions in offers and provide that, other than with the Panel's consent, offer conditions must not normally comprise any conditions that must be satisfied solely by subjective judgments of the directors of the bidder or the target, or where such satisfaction is within their control.

As per the Rules, except in circumstances concerning rights that are of material significance to the bidder in the context of the offer and where the Panel considers it reasonable, bidders are not permitted to invoke conditions that may cause an offer to lapse, be withdrawn or be prevented from proceeding.

In order for a condition to satisfy the "material significance" test, it must satisfy the Panel that it would incur material adverse commercial consequences if it were not permitted to invoke a condition. In respect of the "reasonableness" test, the Panel must consider that it is reasonable in the circumstances to invoke the condition.

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

An implementation agreement in a negotiated transaction will generally include covenants requiring a target company to operate its business in the ordinary course between announcement and the offer being declared unconditional (or lapsing), including that it will not take actions outside of the ordinary course without the prior consent of the bidder.

7.3 When does control pass to the bidder?

In the case of a takeover offer, control will pass to the bidder when the offer is declared unconditional in all respects. In the case of a scheme of arrangement, control will pass to the bidder when the scheme has been approved by the High Court of Ireland.

7.4 How can the bidder get 100% control?

See the response to question 2.1 above.

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

The Rules prohibit the board of directors of a target from taking any action that would, or might, frustrate the making or implementation of an offer, or deprive the shareholders of the opportunity of considering the merits of such an offer, at any time during the course of the offer or at any earlier time at which the board has reason to believe that the making of the offer is or may be imminent. Frustrating action can, however, be taken with shareholder approval at a general meeting (e.g., recapitalisation or a sale or acquisition of material assets) or by the Panel where relevant.

If a company feels that it is a target for a potential bid, it should plan ahead and establish a special committee of the board of directors responsible for preparing to defend any hostile bid and assemble a team of advisers.

The target should also collect information and defence documentation to show shareholders that any proposal is not in the best interests of the company, or that the offered price is not satisfactory. The target should also engage with important institutional investors who control significant stakes in the issued share capital of the company.

Once a hostile approach has been made, the board of directors could consider not granting access to due diligence information to the bidder.

8.2 Is it a fair fight?

Each director must ensure that he/she observes the Rules and his/her fiduciary duties to the company and that he/she acts honestly and *bona fide* in the best interests of the company when considering or recommending an offer for a takeover.

Shareholders are enabled by the Rules to ultimately decide whether an offer is successful or not by accepting the offer or backing their own board and reject it.

Irish law also does not prohibit other anti-takeover measures, such as shareholder rights' plans, which, for example, could dilute an unsolicited buyer's shareholding in the target upon the occurrence of certain trigger events.

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

The biggest influences on the success of an acquisition are the price and the support of board of the target company. A positive recommendation from the board is likely to increase shareholder support.

9.2 What happens if it fails?

Subject to certain exceptions, where has a bid failed, a bidder may not: announce or make a new offer; or, following a receipt of clearance from the relevant competition and anti-trust authorities, make a fresh bid.

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

The interim period of the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 (the "**2020 Act**") has been extended to 30 April 2022. This period can be further extended from time to time and at the request of the Minister for Enterprise, Trade and Employment, having consulted with the Minister for Health, if they are satisfied that such an extension is in the public interest. The 2020 Act makes temporary amendments to the Companies Act 2014 and the Industrial and Provident Societies Act 1893 to address issues arising as a result of COVID-19 to ensure companies can continue to operate in compliance with the relevant provisions of the Companies Act.

The 2020 Act ensures that companies and industrial and provident societies in Ireland can hold their annual general meetings and extraordinary general meetings online.

It provides that documents to be signed under seal by a company can now be executed in counterparts and are to then be regarded as a single document. It also provides for additional breathing space for struggling businesses by increasing the period of examinership to 150 days and increasing the threshold at which a company is deemed unable to pay its debts to €50,000.

The Companies (Corporate Enforcement Authority) Act 2021 was signed into law on 22 December 2021. It is expected that a commencement order will be made in early 2022. The act provides certain technical amendments to the Companies Act, such as:

- clarification as to the uses to which a company's share premium account may be put;
- clarification for group reorganisations, whereby a company transferring its undertaking to another company in consideration for a share issue to the transferring company's shareholders is lawful where it has distributable reserves that are at least equal to the value of the undertaking transferred;
- where a company acquires its own shares through a merger or division, those shares can be treated as treasury shares and may be cancelled or re-issued;
- a reduction of capital effected in accordance with the Companies Act is not to be a distribution under the Companies Act; and
- the acquisition by an unlimited company of its own shares will not require the use of distributable reserves.

The Irish Government has announced that it will enact legislation to enable the Irish Government to screen FDI in Ireland. In July 2020, the Government agreed to draft legislation that will give effect to an EU regulation to screen FDI coming into Ireland. The Investment Screening Bill 2020 will give full effect to EU Regulation 2019/452. The draft Irish legislation has not yet been published. It was hoped that the legislation would be ready in 2021, but it is now hopeful that this will enter into force in 2022.

It is currently anticipated that:

- the Irish legislation will not be retrospective in effect – it would be unusual for Ireland to cause such a difficulty for FDI; and
- the Irish regime will be robust and rigorous but will not interfere unreasonably or unnecessarily with legitimate and proper FDI.

Once enacted, the Investment Screening Bill 2020 will also empower the Minister for Enterprise, Trade and Employment to respond to threats to Ireland's security and public order posed by particular types of foreign investment, and to prevent or mitigate such threats. Under the proposed legislation, the Minister will be able to assess, investigate, authorise, condition, prohibit or unwind foreign investments from outside of the EU, based on a range of security and public order criteria.

Inez Cullen is a Partner in Philip Lee's corporate department. She focuses on advising domestic and international clients doing business in or through Ireland. Inez has wide-ranging transactional experience across various sectors. She has represented clients on domestic and cross-border M&A, joint ventures, fundraisings, AIM admissions and placings, Takeover Code issues, start-up investments, corporate recovery/insolvency, restructuring projects, development finance transactions, corporate governance, commercial contracts, and general public and private corporate transactions for Irish and international clients. Inez is a qualified Irish and UK lawyer. Her knowledge together with practical experience enables her to represent companies, directors, shareholders, debtors and creditors alike with a strong focus on commercial realism, flexibility and attention to detail.

Philip Lee LLP
Connaught House, One Burlington Road
Dublin 4
D04 C5Y6
Ireland

Tel: +353 1 237 3700
Email: icullen@philiplee.ie
URL: www.philiplee.ie

John Given is a Senior Partner in Philip Lee's corporate department, specialising in high-level corporate advisory and transactional work. Prior to joining the firm in 2019, John gained experience across multiple sectors and in various roles, including as Co-founder, Executive and Non-Executive Director, Chairman and General Counsel of a number of public and private companies, and as a senior Corporate Partner and Head of M&A with another leading Irish law firm; that firm was ranked as the number 1 Irish M&A firm for 10 consecutive years during his tenure. In his legal practice, John's focus is on providing pragmatic, strategic and innovative advice to leading Irish and international companies across a range of industry sectors. John has acted as lead external Counsel to many of Ireland's largest companies, including two of the top-three companies on the Irish Stock Exchange (now EuroNext Dublin), as well as acting as external corporate/M&A Counsel to a number of the world's leading companies on their Irish interests. Deals on which John has acted have ranked as some of the biggest and most complex in Irish corporate history and have received many accolades, including *Finance Dublin* magazine's prestigious "Deal of the Year" multiple times. John has been awarded the accolade of "Best M&A Lawyer" for Ireland by the European CEO Legal Awards.

Philip Lee LLP
Connaught House, One Burlington Road
Dublin 4
D04 C5Y6
Ireland

Tel: +353 1 237 3700
Email: jgiven@philiplee.ie
URL: www.philiplee.ie

Philip Lee (recently named as Corporate Law Firm of the Year in the Irish Law Awards) has a leading corporate transactions practice, advising clients ranging from high potential early-stage ventures to market-leading global multinationals. Led by Andreas McConnell, John Given and Bernard McEvoy, our team has extensive experience across the broadest scope of corporate transactions, including in the areas of corporate restructuring, M&A, cross-border mergers, joint ventures, private equity and venture capital, corporate finance and capital markets transactions.

In addition to our transactional expertise, we pride ourselves on having a team of market-leading deep domain experts, who have direct experience of both working in the industry (including in senior leadership positions) and as legal advisers. All leading publications rank the firm across multiple disciplines, highlighting how our transaction teams can combine an accessible and collegiate approach with a breadth of technical expertise. We are routinely engaged by leading Irish and multinational companies, as well as state entities, to advise them on the most complex, important and often novel matters.

www.philiplee.ie

PHILIPLEE

ICLG.com

Current titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Finance & Leasing
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Consumer Protection
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Tax
Cybersecurity
Data Protection
Derivatives
Designs
Digital Business
Digital Health
Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Environmental, Social & Governance Law
Family Law
Fintech
Foreign Direct Investment Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law
Oil & Gas Regulation
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Renewable Energy
Restructuring & Insolvency
Sanctions
Securitisation
Shipping Law
Technology Sourcing
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms

The International Comparative Legal Guides are published by: glg global legal group