TAKEOVERS OF PUBLIC COMPANIES IN IRELAND

A LEGAL GUIDE

MATHESON ORMSBY PRENTICE

Dublin
London
Palo Alto

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1. INTRODUCTION

The aim of this publication is to provide a guide to takeovers of Irish public companies. With the likelihood of continued public merger and acquisition activity in this jurisdiction, particularly in the context of public to private transactions, this guide should be a useful reference for the business community and indeed professional advisers, both domestic and overseas.

In a step by step manner, this guide sets out each of the principal protections, restrictions and regulations applying to the relevant parties involved in public merger and acquisition activity in Ireland.

This Guide should be particularly useful in the context of a developing regulatory environment in Ireland. In 2001 we saw the introduction of the new Takeover Rules and this year brought the introduction of the Competition Act, 2002. The application of these new rules and regulations is considered in more detail later in this guide.

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Established in 1825, Matheson Ormsby Prentice is one of Ireland's largest corporate law firms. The firm is based in Dublin, Ireland and has additional offices in London and Palo Alto, California.

In 2002 the firm won the prestigious award of "European Law Firm of the Year", organised by the international legal publisher, Legal Business.

The firm provides a comprehensive range of legal services to its global client base, which includes governments, government agencies, supranational organisations and many of the world's leading corporations, commercial and investment banks and other financial institutions. MOP regards efficiency, responsiveness and a commercial approach to problem solving as vital to the provision of legal advice to its sophisticated international client base.

The firm's personnel have assisted and advised the Irish government and government departments on the drafting of important legislative provisions and have acted as legal advisers in some of Ireland's largest domestic transactions. In addition, MOP personnel have extensive experience in advising clients based in North and South America, Europe, Africa, Asia and Australia on inward investment and other commercial and financial services transactions. This has enabled MOP to develop a full understanding of, and an ability to pro-actively address, client issues and concerns while conducting activities in Ireland and throughout the European Union.

MOP's corporate focus is reflected in the division of the firm into five principal departments – corporate and commercial; banking and financial services; taxation; commercial property; and commercial litigation and dispute resolution. In addition, specialist working groups comprising representatives from each of these departments co-operate to ensure the timely delivery and implementation of integrated advice and effective business solutions to our clients.

In recent years, MOP has experienced significant expansion across all principal practice areas. Those areas which have experienced especially strong growth include taxation, information technology, banking and financial services and project finance. MOP has significantly the largest tax practice amongst Irish law firms and is consistently ranked as the leading Irish tax law firm by various international journals.

If you require further information beyond the scope of this guide, please contact your usual liaison partner at MOP, or myself.

Stanley G Watson

Partner

December 2002

This guide is intended only as an outline of the main legal considerations and does not purport to comprehensively deal with all of the legal issues arising from mergers, takeovers, stake building or other dealings with an Irish public company. It should not be used as a substitute for professional advice in any proposed transaction.

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2 IRISH STATUTES AND REGULATIONS

2.1 THE IRISH TAKEOVER PANEL ACT AND RULES

Introduction

The Irish Takeover Panel Act, 1997 Takeover Rules, 2001 ("Rules") which came into operation on 1 July 2001 provide the framework in Ireland governing takeovers and mergers of public companies.

The Rules have been published by the Irish Takeover Panel ("Panel") under the powers granted to the Panel by the Irish Takeover Panel Act, 1997 (the "Act") to ensure that takeovers and other "relevant transactions" are conducted in accordance with certain principles ("General Principles") set out in the Act which include:

- that all shareholders of the same class in the target are treated equally by an offeror;
- that an offer (and an announcement of that proposed offer) can only be made if the offeror and its advisers are satisfied that the offeror will be in a position to implement the offer if it is accepted;
- that all information must be made available during the course of an offer equally to all target shareholders;
- that information provided should be accurate and adequate and be furnished to the target shareholders in a timely fashion to allow them to make an informed decision about any offer;
- that the parties to a takeover (which is a very widely defined concept discussed below) must prevent the creation of a false market in any of the securities of the offeror or the target and must refrain from any conduct which could mislead shareholders or the market;
- that directors in the target must not take frustrating action or prevent shareholders from considering the merits of an offer without shareholder approval;
- that the directors of the target must carefully consider before entering into

any commitment with an offeror (or any other person) which would restrict their freedom to advise shareholders of the target in the future;

- that the directors of the offeror and target owe a duty to the offeror and target companies and to their respective shareholders to act in disregard of their personal interests;
- that minority shareholders must not be oppressed and rights of control must be exercised in good faith;
- that where an acquisition of securities is contemplated as a result of which an offeror may incur an obligation to make a mandatory offer it must, before making such acquisition, ensure that it can and will continue to be able to implement such mandatory offer;
- that the target company should not be disrupted in the conduct of its business beyond a reasonable time period by an offer; and
- that a substantial acquisition of securities must take place at an acceptable speed and subject to adequate and timely disclosure.

Application of the Act and Rules

The Act and Rules apply to all Irish companies whose securities are traded on the Irish Stock Exchange and also to companies whose securities were traded on the Irish Stock Exchange within the five years prior to the relevant transaction. The Minister for Enterprise, Trade and Employment may extend the application of the Act and Rules to any public limited company. The Minister utilised this power in the Irish Takeover Panel Act, 1997 (Relevant Company) Regulations, 2001 to include Irish companies authorised to trade on the London Stock Exchange, the New York Stock Exchange, Nasdaq, Easdaq (now renamed Nasdaq Europe) and the Neuer Markt and to companies whose securities were traded on one of these exchanges within the five years prior to the relevant transaction.

Powers of the Panel

One of the main reasons why the Panel was established on a statutory footing was that statutory enforcement provisions were deemed to be necessary. The Panel has power under the Act (either of its own volition or on the application of any "interested person") to issue rulings and to give directions to ensure that the General Principles and the Rules are complied with. Section 9 (3) of the Act sets out a non-exhaustive list of such directions. It may also grant derogations from or waive any Rules in appropriate circumstances. If the Panel considers that a ruling or direction has not been or is unlikely to be complied with, it may apply to the High Court for an enforcement order.

The Act also empowers the Panel to enquire into the conduct of any person where it has reasonable grounds for believing that the General Principles or the Rules may be or have been contravened. The Panel may require any party to a relevant transaction or the Stock Exchange to furnish any information it may reasonably require for the performance of its functions.

Persons with Responsibilities under the Rules

The responsibilities imposed by the Rules are directly applicable to those persons who are defined in the Act as 'parties to a takeover or other relevant transaction'. These include the offeror and target companies, their directors, persons acting in concert with the offeror, shareholders of the target, and their advisers.

Notably, financial advisers are obliged to ensure that their clients fully understand and observe the requirements of the Rules.

The Panel also has authority to specify additional parties as coming within the definition of "parties to a relevant transaction".

In this context, it is worth noting that an "offeror" is widely defined as "a person who makes, or intends, or is required to make an offer, or does any act in contemplation of making an offer".

2.2 THE SUBSTANTIAL ACQUISITION RULES

The Rules are supplemented by the Irish Takeover Panel Act, 1997 Substantial Acquisition Rules, 2001 ("SARs") which are also issued by the Panel. The SARs impose restrictions on the speed of the acquisition of significant interests. The SARs and stake-building activities in particular are considered in more detail in Section 12 of this guide.

2.3 THE LISTING RULES

The listing rules issued by the Irish Stock Exchange ("Listing Rules") impose various continuing obligations on companies listed on the Irish Stock Exchange that are relevant in the context of this guide. The following in particular are relevant:

Disclosure

The Listing Rules supplement the disclosure requirements in the Rules and the Companies Acts and are designed to ensure that companies disclose relevant information which is not public knowledge and which may lead to substantial movements in share price.

Offeror Shareholder Approval

The Listing Rules also oblige companies listed on the Irish Stock Exchange to seek shareholder approval in respect of major transactions. The requirement to seek shareholder approval is triggered by the size of the transaction in comparison to the size of the listed company.

The Listing Rules are considered in more detail in Section 11 of this guide.

2.4 THE COMPANIES ACTS, 1963 TO 2001

The Companies Acts, 1963 to 2001 ("Companies Acts") govern all Irish companies and as would be expected, they contain many provisions which are relevant in the context of mergers, takeovers and stake-building. These include:

- Sections 201 to 203 of the Companies Act, 1963 which regulate schemes of arrangement and reconstructions (see Section 4.2 of this guide);
- Section 204 of the Companies Act, 1963 which contains provisions giving an offeror the power to compulsorily acquire shares held by dissenting shareholders where an offer has been approved by holders of at least 80% in value of the shares in a target company (see Section 14.2 of this guide);
- Section 60 of the Companies Act, 1963, as amended, which prohibits companies from giving financial assistance for the purpose of, or in connection with, the acquisition of their own shares. A target company's assets cannot, therefore, be used as security for indebtedness incurred by the offeror in connection with the offer and the target cannot guarantee the repayment of such indebtedness. Depending on the structure of the transaction and the financial position of the relevant company, there may be steps which can be taken (known as the "whitewash" procedure) during or following an offer which may, in certain circumstances, avoid this prohibition. The whitewash procedure is, except in extremely limited circumstances, only available to private companies;
- Part IV of the Companies Act 1990 which contains requirements relating to the disclosure of interests in shares (See section 13.1 of this guide); and
- Part V of the Companies Act 1990 which prohibits insider dealing. Insider dealing is considered in more detail in Section 12.8 of this guide.

2.5 THE MERGERS AND TAKE-OVERS (CONTROL) ACTS, 1978-1996

The Mergers and Takeovers (Control) Acts, 1978 to 1996 ("Mergers Acts") will continue to apply to offers for public companies until 31 December 2002. On 1 January 2003, the provisions of the Competition Act, 2002 in respect of mergers will come into force. The Mergers Acts empower the Minister to permit takeover and mergers, subject them to conditions or prohibit them absolutely.

A merger or takeover is deemed to exist for the purposes of the Mergers Acts where two or more "enterprises", at least one of which carries on business in Ireland, come under "common control".

For the purposes of the Mergers Acts, an "enterprise" is widely defined and includes most forms of business combinations. The concept of "control" is also broadly defined and the acquisition by one enterprise of shares carrying 25% or more of the voting rights in another enterprise would trigger the notification provisions of the Mergers Acts. Asset acquisitions are also subject to notification under the Mergers Acts.

The Mergers Acts only apply to mergers and acquisitions where the worldwide gross assets of each of two or more of the enterprises involved is not less than €12.7 million or their turnover is not less than €25.4 million.

Where the Minister has jurisdiction pursuant to the Mergers Acts, title to the relevant shares and/or assets will not pass to an offeror until clearance has been obtained or the time limit during which the Minister must act has expired. In addition, it is a criminal offence for a person in control of an enterprise to fail to notify the Minister of a merger within the periods specified in the Mergers Acts.

Section 3 of this guide deals with these issues in greater detail.

2.6 THE COMPETITION ACT, 2002

The Competition Act, 2002 (the "Competition Act") has a two-fold impact on takeovers. Part 3 of the Competition Act contains a new merger control regime and will come into force on 1 January 2003. In addition, the Competition Act prohibits agreements which prevent, restrict or distort competition or which constitute an abuse of a dominant position in Ireland or a substantial part thereof. This part of the Competition Act came into force on 1 July 2002. Thus the Competition Authority has the authority to review a merger under the Competition Acts notwithstanding that the merger may have been notified to and approved by the Minister under the Mergers Acts. A notice setting out the Competition Authority's view on the application of the Competition Act to mergers has been issued by the Competition Authority. This may be available to a particular merger or takeover.

These issues are considered in more detail in Section 3 of this guide.

2.7 THE INVESTMENT INTERMEDIARIES ACT, 1995

The Investment Intermediaries Act, 1995 creates an offence for any person in Ireland, who is not authorised or otherwise exempted, to act as an investment business firm.

An "investment business firm" is defined as any person who provides one or more investment business services or investment advice to third parties on a professional basis. "Investment business services" is broadly defined and includes dealing in investments, receiving, transmitting or executing orders in relation to one or more investment instruments otherwise than for its own account, dealing in one or more investment instruments for its own account, managing investments and other rights in respect of issues of one or more investment instruments or the placing of such issues or both.

There are a number of categories of persons exempted under the Investment Intermediaries Act, 1995, including (i) stockbrokers authorised under the Irish Stock Exchange Act, 1995; (ii) EU Credit Institutions, provided they do not exceed the terms of their authorisation under the EC Banking Directives as implemented in the EU member state where the credit institution is authorised; and (iii) a person authorised by a competent authority in another EU member state for the purposes of the EC Investment Services Directive.

2.8 REGULATED INDUSTRIES

Takeovers and acquisitions of shares in certain industries are subject to additional regulations which are worth briefly noting:

Banks and Credit Institutions

Prior clearance from the Irish Central Bank is required for an acquisition of more than 10% of a bank or other credit institution. Any person holding 10% or more in a credit institution must also notify the Central Bank of every proposal to increase the size of the holding such that it would reach or exceed 20%, 33% or 50% of the shares or of voting rights attached thereto, or in the case of person that is a body corporate if the person proposes to acquire any shares or interest in a credit institution which would make that institution its subsidiary.

In addition, where the holder of a licence proposes to participate in an acquiring transaction and it controls, or would control as a consequence of the proposed transaction, whether alone or with a subsidiary or associated company, not less than 20% of the total assets in Ireland of all holders of such licences, then the Central Bank must obtain the prior consent of the Minister.

The Minister's consent is also required where a person proposes to participate in an acquiring transaction which involves the acquisition of shares or other interest in a holder of a licence which controls, whether alone or with any subsidiary or associated company, not less than 20% of the total assets in the State of all holders of licences.

Additional specific rules have also been introduced with respect to building societies which have converted into banks.

Insurance Companies

An acquisition (i) of 10% or a larger holding or (ii) which results in a holding exceeding or falling below 20%, 33% or 50%, of an Irish-regulated insurance undertaking must be notified to the Minister who has power to oppose the application on the grounds that he or she is not satisfied as to the suitability of the proposed purchaser.

International Financial Service Companies

Acquisitions and disposals of shares in International Financial Services companies require the approval of the Department of Finance.

Investment Firms

An acquisition or disposal of 10% or more of the voting rights or capital of an investment business firm regulated under the Investment Intermediaries Act, 1995 will require the prior approval of the Central Bank. Any increase (or decrease) in a holding of voting rights or capital above (or below) 20%, 33% or 50% also requires prior Central Bank approval.

Others

Acquisitions of controlling interests in enterprises within sectors which require governmental licenses such as telecommunications and pharmaceuticals may also require consent depending on the terms of the relevant licence.

2.9 COMMON LAW/FIDUCIARY DUTIES

The Irish legal system is a common law system and consequently a significant body of law is not contained in statutes or statutory instruments but is found in past judicial decisions.

Probably the most important common law principle in the context of this guide is that directors of Irish companies have a fiduciary duty to act in the best interests of the company of which they are directors and not to use their powers improperly. “Directors” for this purpose includes “shadow directors” and “de facto directors”. A shadow director is a person who has not formally been appointed but in accordance with whose instructions the directors are accustomed to act and notwithstanding the lack of a formal appointment such person is deemed to be a director of the company. A “de facto director” is someone who acts as a director of the company although he has not been formerly appointed as a director. The distinction between a de facto director and a shadow director seems to be that a de facto director is someone who claims to be a director even though not formally appointed as such, whereas a shadow director is someone who claims not to be a director.

Directors must be conscious of their fiduciary duties throughout any transaction. This restricts their freedom when considering whether to recommend or contest an offer, enter into a lock-out or break fee arrangement or contemplate taking any actions frustrating an offer as discussed in Section 9 below. Directors’ duties are also enshrined in the General Principles of the Takeover Rules (see Section 2.1 above). Payments by way of bonus or otherwise to directors would also need to be examined to ensure that they are consistent with the directors’ fiduciary duties.

3 MERGER CONTROL & COMPETITION LAW

3.1 THE MERGERS ACTS – APPLICABLE UP TO 31 DECEMBER 2002

The Mergers Acts currently govern merger control in Ireland and will continue in force until 31 December 2002. As briefly mentioned in Section 2, a merger for the purposes of the Mergers Acts is deemed to occur where "two or more enterprises, at least one of which carries on business in the State, come under common control."

Enterprise Carrying on Business in Ireland

At least one of the enterprises concerned must carry on business in Ireland. Consequently, the Mergers Acts may apply if an Irish company is acquired by or acquires a company incorporated outside Ireland.

Most Irish law firms take the view that the Mergers Acts apply when control of an Irish enterprise may pass as a result of the acquisition of its foreign holding company.

Control

The concept of control is widely defined and generally an acquisition of 25% or more of the share capital of a company will trigger an obligation to make a notification under the Mergers Acts. The Mergers Acts also apply to asset sales.

Thresholds

A transaction will not trigger the provisions of the Mergers Acts unless each of two or more of the enterprises involved have a gross asset value of at least €12.7 million, or the turnover of each of two enterprises is at least €25.4 million. These thresholds are calculated on a world-wide basis and are not limited to assets/turnover in Ireland only. Exceptionally, the Minister may by order, rule that the Mergers Acts apply to any merger or takeover of a particular class irrespective of the thresholds. This occurred in 1979 when the thresholds were removed in relation to mergers involving newspaper companies.

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Notification Obligation/Procedure

Where a transaction fulfils the criteria for the application of the Mergers Acts, it must be notified to the Minister. Each of the parties to the merger has one month from there being an offer which is capable of acceptance in which to notify the Minister. The Minister may, within the month following notification, request supplementary information from the parties.

After receipt of all relevant information, the Minister may either inform the parties that he or she does not intend to prohibit the acquisition (or allow the acquisition subject to conditions), or, within a thirty-day period, refer the matter to the Competition Authority for investigation. Factors which may be considered in deciding whether to make a referral include issues relating to competition, the danger of discontinuance of supplies, employment and consumer welfare.

If the Minister refers the proposed merger to the Competition Authority, it must investigate and report back to the Minister. The Competition Authority must be given at least 30 days to report. The Competition Authority takes into account the consequences of the proposed takeover in relation to a wide range of scheduled criteria, including:

- continuity of supplies or services;
- level of employment;
- regional development;
- rationalisation of operations in the interests of greater efficiency;
- research and development;
- increased production;
- access to markets;
- shareholders and partners;
- employees; and
- consumers.

The Competition Authority should state its opinion as to whether or not the proposed merger or takeover "would be likely to prevent or restrict competition or restrain trade in any goods or services and would be likely to operate against the common good". The Minister, on receiving the Competition Authority's Report, may either prohibit the proposed merger or attach specified conditions to it, if the common good so warrants. An affected enterprise may appeal any order to the High Court within one month of the Minister's decision.

Failure to Notify

Failure to notify the Minister will result in the transaction being deemed void (i.e. title to the relevant shares and/or assets will not pass to the Purchaser) and criminal penalties may attach to officers who knowingly permit the contravention.

3.2 THE COMPETITION ACT

The Competition Act establishes a new regime to control business mergers, which is largely modelled on Council Regulation 4064/89/EEC (the "Merger Regulation") (see below for further details on the Merger Regulation). It also deals with anti-competitive agreements and abuses of dominance. The provisions on merger control will not take effect until 1 January 2003, while the remainder of the Act came into force on 1 July 2002.

Merger Control Provisions – Applicable from 1 January 2003

Notification of mergers to the Competition Authority

Under the new Competition Act, qualifying mergers must be notified to the Competition Authority, rather than the Minister, as is currently the case. The definition of a merger now reflects the Merger Regulation definition, i.e. the acquisition of control over another undertaking regardless of how such control is acquired and specifically includes structural joint ventures.

A merger will need to be notified to the Competition Authority when the worldwide turnover of each of two or more of the undertakings involved in the merger (not including the vendor) is more than €40 million, two or more of the undertakings involved carry on business in any part of the island of Ireland (i.e. including Northern Ireland) and the turnover in Ireland (i.e. the State) of any one of those undertakings is more than €40 million. This is a substantial increase on the current turnover threshold amount (IR£20 million) and sees the abolition of the current gross assets test (IR£10 million). The Minister will continue to have the power to disapply the threshold for special classes of merger and it is expected this power will be exercised in relation to media mergers.

Notifications must be made to the Competition Authority within one month of the making of a public bid. Failure to notify will continue to be a criminal offence. The merger may not be put into effect until the Competition Authority has made its determination. Parties may voluntarily notify a merger to the Competition Authority even if the €40 million threshold is not met. Approval by the Competition Authority grants the merger agreement immunity from attack under the competition provisions of the Competition Act (see below).

Examination by the Competition Authority

The Competition Act provides for an initial "first phase" examination of a merger or acquisition by the Competition Authority which must make a decision within one month of notification to either allow the merger or acquisition to proceed, or to initiate a full ("second phase") investigation. Provisions are made for increased transparency around the mergers process, and the Competition Authority will publish notice of receipt of a notification and invite submissions by the parties and any interested third parties such as suppliers, competitors, consumers, etc.

The substantive test which will be used by the Competition Authority to determine whether to approve the merger is a pure competition test, i.e. whether or not it would result in a “substantial lessening of competition” in markets for the goods or services in question in Ireland. No public interest or common good criteria will be applied by the Competition Authority (unlike at present where concerns relating to employment, regional development, etc. may influence the final outcome). The adoption of the “substantial lessening of competition” test marks a departure from the EC merger regime, whose substantive test is whether or not the merger would result in the “creation or strengthening of a dominant position”, a somewhat more difficult test to apply. The European Commission itself announced last year that it too is considering adopting the “substantial lessening of competition” test.

The Competition Authority will have the power to receive and negotiate undertakings or commitments from the parties in order to reduce the impact on competition of an otherwise “difficult” merger. It will also have the power to impose conditions on its approval and enforce them in court.

Media Mergers

The Minister will retain the power to overrule the Competition Authority on public interest grounds in the case of media mergers. The public interest criteria include the strength and competitiveness of media business indigenous to the State, plurality of ownership and titles, diversity of views in Irish society, the maintenance of cultural diversity and the position in the media generally of any of the undertakings involved.

Appeals

A special appeals process is contained in the Competition Act where a party to a notification disagrees with the determination of the Competition Authority. An appeal must be made to the High Court within one month of the determination of the Competition Authority (unless the merger is a media one in which case additional time is allowed) and the court must determine the appeal within two months insofar as is practicable. This is in recognition of the fact that mergers are time-sensitive.

Anti-competitive Agreements and Abuse of dominance – applicable from 1 July 2002

The Competition Act also prohibits agreements which prevent, restrict or distort competition or which constitute an abuse of a dominant position in the State or a substantial part thereof.

The Competition Authority has held that it has authority to review a merger notwithstanding that the merger has been notified and approved under the Mergers Acts. However, the Competition Authority has issued a notice with the aim of assisting enterprises in ascertaining whether an agreement relating to the merger or takeover would be anti-competitive. The notice will apply until 31 December 2002. The notice is relevant to all mergers and sales of business without limitation as to size. However, the notice cannot be availed of with respect to an acquisition which involves:

- the creation or strengthening of a dominant position; or,
- excessive post-acquisition non-competition restraints; or,
- is in respect of a market in which the actual level of competition is already weak.

Detailed guidelines are utilised in determining whether a transaction falls within one of these three exceptions.

As of 1 January 2003, the new provisions on merger control will take effect. These allow undertakings which do not meet the financial thresholds set out in the Competition Act to voluntarily notify a merger. Approval under a voluntary notification (as indeed under a mandatory one) grants the parties immunity from actions by the Competition Authority declaring that the merger agreement prevents, restricts or distorts competition or constitutes an abuse of a dominant position.

3.3 EC MERGER CONTROL

Under the Merger Regulation mergers must be pre-notified to the European Commission (the "Commission") if they satisfy certain worldwide and European Community-wide turnover criteria (i.e. if they have a "Community dimension").

The Merger Regulation will apply if:

- the combined world-wide turnover of all the undertakings concerned exceeds €5 billion; and,
- each of at least two of the undertakings concerned has a Community-wide turnover which exceeds €250 million provided that it is not the case that more than two-thirds of the Community-wide turnover of each undertaking concerned is achieved in the same single Member State.

Alternative thresholds in Article 1(3) extend the scope of application of the Merger Regulation to concentrations with lower world-wide turnover, provided they have a strong presence in the European Union. Thus, the Merger Regulation may also apply where:

- the combined world-wide turnover of all the undertakings concerned exceeds €2.5 billion; and,
- each of at least two undertakings concerned has a Community-wide turnover exceeding €100 million; and,
- in each of at least three Member States, the combined turnover of all the undertakings concerned exceeds €100 million; and,
- in each of the three Member States included for the purpose of (iii) above the individual turnover of at least two undertakings exceeds €25 million;

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unless

each of the undertakings concerned achieves more than two-thirds of its Community-wide turnover in the same single Member State.

The Commission has one month from notification within which to decide whether the proposed merger should be investigated. If the Commission decides to investigate, it must complete its investigations within a further four months. A merger will be blocked by the Commission if it decides that it will result in the creation or strengthening of a dominant position in a particular market in the European Union (or a substantial part of it) as a result of which effective competition would be significantly impeded.

3.4 RELATIONSHIP WITH THE RULES

As is briefly discussed in Section 6.2 below, the Rules require that an offer will lapse if either:

- under the Mergers Act regime, it is referred to the Competition Authority prior to the first closing date or the date when the offer becomes unconditional as to acceptances, whichever is the later; or
- under the Merger Regulation the Commission initiates proceedings under Article 6(1)(c) or refers the case to the domestic authorities.

It is a common condition of any offer that no reference, initiation of proceedings or referrals be made in order to avoid the risk that merger control authorities might subsequently require divestment. Such a condition is permitted by Rule 12(c). It is to be expected that the Rules will be amended to reflect the new mergers regime introduced by the Competition Act once this takes effect on 1 January 2003.

4 METHODS OF ACQUIRING CONTROL

This Section considers the following methods of acquiring shares in Irish public companies:

- General Offers;
- Schemes of Arrangement;
- Reverse Takeovers; and
- Mergers using a new Company.

4.1 GENERAL OFFERS

The most common method of acquiring control of an Irish public company is by making a successful general offer to acquire all the shares of that company.

The structure of a general offer depends on whether or not the target board recommends acceptance of the offer or whether the offer is contested. We deal with recommended and contested offers in turn below.

An example of a timetable/timeline for general offers is set out in the appendix to this guide.

Recommended Offers

In the case of a recommended offer, following initial negotiations, the offeror and target board will usually announce the transaction to the market by making a joint announcement. This announcement details the proposed terms of the offer, sets out the business rationale for the takeover and the target board's recommendation.

The conditions to which offers are subject are normally quite lengthy and are discussed in greater detail in Section 6.2 of this guide.

During the course of a recommended offer the offeror may wish to increase the chances of the offer being accepted by obtaining irrevocable undertakings to accept the proposed offer from major shareholders and also from those of the target's directors who are also shareholders in the target. Because of the importance of irrevocable undertakings they are discussed separately in section 12.9 of this guide in the context of stake-building.

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The consideration for the acquisition commonly takes the form of a cash payment, the issuing of shares or debentures in the offeror, or a combination of both. The decision as to the type of consideration to be utilised is usually a commercial and financial decision. It may depend on whether the offeror has sufficient cash resources, existing gearing levels, the effect on earnings per share and tax consequences for target shareholders. If a mandatory offer is required the offer must be in cash or accompanied by a cash alternative (see Section 5.4 below). A voluntary offer must also, in certain circumstances, be in cash or be accompanied in certain circumstances by a cash alternative (See Section 6.1 below).

Cash may also be provided as an alternative to the issue of shares by means of a "cash underwriting". In such a case the consideration offered may comprise securities but target shareholders who accept that offer can elect to have those securities allotted to financial institutions (who are referred to as the "underwriters") in exchange for cash. Such arrangements are effected pursuant to an agreement entered into immediately before the offer is announced between the offeror and the lead underwriter (who immediately "sub-underwrites") which fixes the price at which the underwriters acquire the relevant securities. The advantage of this type of arrangement is that from the point of view of the offeror, the consideration for the offer comprises securities (i.e. no cash has to be paid by the offeror), while the target company shareholders have the benefit of a choice between securities or cash.

The legal offer to purchase the shares is contained in an "offer document" which is circulated to all shareholders of the target company. Section 8 of this guide discusses the requirements of and the information to be included in an offer document.

The offer document will also normally contain a letter from the chairman of the target company, explaining what is proposed and recommending that shareholders accept the offer. If the consideration comprises shares or other securities of the offeror which are to be listed on the Irish Stock Exchange, the offer document will normally be accompanied by a further document comprising "listing particulars" and containing further information about the offeror and the target.

Rule 31.1 requires that an offer shall initially be open for acceptance until not earlier than 1.00 pm on the 21st day following the date of posting of the offer document.

Contested Offers

A contested offer may be preceded by unsuccessful talks with the target. Alternatively, the offeror may seek to surprise the target by announcing its offer without a prior approach to the board of the target. Rule 1 requires a person intending to make an offer to disclose that intention to the target board and its advisers before making any announcement concerning the offer. In practice, however, in the case of contested offers, this Rule is frequently complied with by means of a telephone call a few minutes before the offer is publicly announced.

Under Rule 20.2 the target is obliged to promptly provide any information specifically requested by an offeror if the same or substantially the same information has previously been made available to another offeror, provided that (unless the Panel directs otherwise) the existence of the other offeror (though not necessarily its identity) has been the subject of an announcement and the relevant offer period has not ended. In an amendment introduced by the Rules in July 2001, in the event that the target board is not satisfied that the offeror has sufficient available resources to implement the offer, it can apply to the Panel seeking deferment with this requirement until the offeror complies with any conditions imposed by the Panel. Rule 1.1(c) of the 1997 Rules which allowed the target to require the offeror to satisfy it that it has sufficient resources to implement the offer has been deleted.

As in the case of a contested offer, the initial announcement of the offer will be followed by the posting of an offer document to the target's shareholders. The target board will subsequently circulate its defence document setting out its views on the offer. Certain information required by the Rules must also be included in any defence document.

The offeror and the target board will then seek to persuade shareholders to accept or reject the offer, as appropriate.

The directors of the target in particular need to be aware of their fiduciary duties (see Section 2.9 above) in any contested offer situation.

If the offeror declares its offer unconditional as to acceptances, the target board may at that time change its position and recommend the offer to those shareholders who have not accepted the offer. The subsequent steps will then be similar to those required in the case of a recommended offer.

4.2 SCHEMES OF ARRANGEMENT UNDER SECTION 201

Introduction

A second method of obtaining control of an undertaking is through a scheme of arrangement pursuant to Section 201 of the Companies Act, 1963. There has been a reluctance to utilise this method in Ireland primarily because recourse must be had to the courts but also because its advantages over a Section 204 compulsory acquisition procedure are not as clear cut as in the United Kingdom. There are essentially two structures in which a section 201 scheme of arrangement is used in connection with takeovers. These are: (i) a reduction scheme and (ii) a transfer scheme.

A reduction scheme involves the cancellation of all of the existing issued shares of the target company and the issue of new shares to the offeror in consideration of the offeror making a payment or issuing securities to the

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former shareholders of the target. This is known as a reduction scheme because the issued share capital is reduced before being increased again. A reduction scheme can take longer to implement than a transfer scheme but there may be stamp duty advantages. A transfer scheme simply involves the existing target shareholders transferring their shares to the offeror in consideration of a cash payment or the issue of securities.

Shareholder and Creditor Approval

The Court may direct that creditors and shareholders meetings (as appropriate i.e. depending on who proposes the scheme) be convened to consider the proposed scheme.

Where meetings must be held and the company has more than one class of shares, meetings of each class of its shareholders must be held. Care must be taken in determining whether a separate class meeting must be held for shareholders who have differing interests from other shareholders even though they hold the same class of shares as those other shareholders.

Section 201(3) requires the approval of a majority in number representing three-fourths in value of the members or class of members or creditors or class of creditors as the case may be, present and voting either in person or by proxy. If such approval is obtained the resolution agreeing to the scheme of arrangement will be binding if sanctioned by the High Court.

Court Approval

The approval of the High Court is required for any arrangement or scheme under section 201. The court has a discretion in deciding whether or not to approve any scheme of arrangement.

Where a court sanctions the scheme, it will become effective and binding on all shareholders whether or not they voted in favour of it.

Advantages and Disadvantages

The main advantage of a scheme of arrangement is that, broadly speaking, only 75% support is required in order to acquire 100% of the shares in the target. This is to be contrasted with a straightforward offer where the agreement of 80% of the target's shareholders is required before the compulsory acquisition mechanism provided for in section 204 (see Section 14.2) can be triggered. This advantage is accentuated in the UK, where the corresponding compulsory acquisition mechanism requires the agreement of 90% of the target's shareholders.

A second advantage to a scheme of arrangement is that the offeror and target have more control over timing than would normally be the case in a general offer because they control the details of the scheme presented to the court and the timing of the application.

It should be noted that the threshold for consent is 75% of those members of the target present and voting (whether in person or by proxy) as opposed to a percentage of all shareholders.

There are however a number of disadvantages with schemes of arrangement. The main drawback of this method is that the delay in the change of control may allow a rival offeror to intervene. In addition a scheme of arrangement is not practicable unless it is recommended by the target board. Even if a scheme is recommended it will usually be unattractive if a third party makes a competing offer. The reasons for this include:

- inflexibility: schemes are "all or nothing" in nature;
- it is more difficult to revise a scheme of arrangement than a general offer and so it may be more difficult to compete effectively with a third party;
- the offeror will not be able to strengthen its position by means of market purchases or the obtaining of irrevocable undertakings; and
- depending on the terms of any option/warrant instrument or share option schemes, warrant and/or option holders may not be bound by schemes of arrangement.

Regulation Under the Takeover Rules

While the Takeover Rules deal primarily with the general offer scenario, Rule 41 which has been introduced in the new Rules, governs schemes of arrangement. It requires that the Takeover Panel be immediately notified of the proposed scheme and furnished with copies of the takeover scheme and every explanatory statement sent to members or creditors not later than the tenth business day before the proposed court hearing. All other documents supplied to the court must be furnished to the Panel no later than the fourth business day before the court hearing. Under Rule 41(c), the Panel has the power to seek leave to be heard by the court in the proceedings.

4.3 REVERSE TAKEOVER OFFER

Where a company ("B") wishes to acquire control of a desired offeree ("A"), an alternative or an indirect method of acquiring control would be for B to organise for A to make an offer for B. This is known as a reverse takeover. A reverse takeover is used where the offeror ("B") wishes to acquire control of a smaller company ("A"). As A is a smaller company, in order for it to acquire control of the larger company it will have to offer the shareholders in B a greater number of its own shares as consideration for every share in B. A share for share offer is arranged by A (at the instigation of the board or controllers of B) for all the outstanding shares of B.

The outcome of this share for share exchange is that the original shareholders of B will end up as the majority shareholders in the enlarged share capital of A. This procedure has particular attractions, for example, where the offeror is an

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unlisted company and the target is a listed company which may have a well established name and reputation.

A reverse takeover may also be the preferred method of proceeding where the offeror would be prohibited from acquiring the shares of the target. This was the rationale behind the structure of the merger of Irish Life and Irish Permanent in 1999 where a provision in the Building Societies Act 1989 prohibited the acquisition of 15% or more of the securities of Irish Permanent for five years following its conversion to a public limited company.

Rule 40 was introduced in the new Rules in July 2001 to deal specifically with reverse takeovers. All such reverse takeovers must be notified to the Panel who can specify requirements with respect to the transactions. In addition Rule 3.2(a)(ii) requires the target board to obtain competent, independent advice before announcing its proposals in connection with a reverse takeover. Compliance provisions with respect to the circular which must be issued have also been introduced.

The Listing Rules provide that on the announcement of a reverse takeover the Irish Stock Exchange will suspend the listing of the securities of the company making the offer. The company must prepare a Class 1 Circular to obtain shareholder approval for the transaction (see Section 11).

4.4 MERGERS USING A NEW COMPANY

It may be desirable for tax, cosmetic or other reasons when two companies wish to merge that a new company should be formed which then acquires both the existing companies. Such a "merger" does not give rise to any special regulatory concerns but, since both existing companies are being taken over, there may be other issues which will need to be addressed and both companies will have to be subject to a due diligence exercise to review the impact of the takeover. There is no concept under Irish law of a legal merger in its strictest legal sense of two companies into one company such as exists in the United States of America.

The new company may acquire either the shares or undertakings of the existing companies by way of simultaneous and inter-conditional general offers or schemes of arrangement in consideration for an issue of shares in the new company.

There has been a general reluctance to use this procedure as it leaves both companies vulnerable to hostile bids.

5 MANDATORY OFFERS

5.1 PERSON ACQUIRING MORE THAN 30% OF VOTING RIGHTS

Rule 9 provides that, unless the Panel agrees otherwise, where a person (or persons acting in concert – see the glossary for an explanation of this term) acquires shares in a company which when aggregated with shares already held by that person (or persons) carry more than 30% of the voting rights attaching to all of the issued shares of the company, the person must extend such offer (i) to all holders of each class of equity shares and (ii) to all holders of each class of voting non-equity shares.

The purpose of Rule 9 is to ensure equality between all shareholders by requiring that all shareholders have an opportunity to dispose of their shares at the highest price paid by the new "controller". It also gives all shareholders an opportunity to exit a company which has come under the control of a new person.

5.2 PERSON HOLDING 30 – 50% OF VOTING RIGHTS ACQUIRING 0.05% WITHIN 12 MONTHS

A mandatory offer is also triggered under Rule 9.1 if a person (or persons acting in concert) holding between 30% and 50% or more of the voting rights in a target acquires additional securities carrying at least 0.05% of the voting rights in that company in any 12 month period. This threshold percentage had, prior to July 2001, been 1%. The provision does not apply to persons holding greater than 50% of the voting rights of the company.

Care must be taken that a purchaser and seller of shares are not considered to be "persons acting in concert" particularly if a target shareholder sells part only of his holding of shares and the part he retains when aggregated with the purchaser's holding would exceed the 30% threshold. Such situations are likely to be scrutinised by the Panel. If the seller and the purchaser were deemed to be persons acting in concert then their individual shareholdings would be aggregated to determine whether the mandatory offer provisions are triggered.

5.3 CONDITIONALITY

Rules 9.2, 9.3 and 12(a)(i) require that a mandatory offer may only be conditional on:

- acceptances of the offer being received in respect of such number of shares as, when aggregated with the shares already held or agreed to be acquired by it before or during the offer period by the offeror and any persons acting in concert with it, confer more than 50% of the voting rights in the company on the offeror and any persons acting in concert with it (i.e. a minimum acceptance condition);
- a condition to the effect that the offer will lapse upon the initiation of proceedings by the European Commission or a reference by it to the

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Competition Authority (see Section 3 of this guide above); and

- appropriate clearance under the Mergers Acts.

Save in exceptional circumstances, all other conditions are prohibited (Rule 9.2(b)(ii)).

5.4 CONSIDERATION

Rule 9.4 provides that, unless the Panel agrees otherwise, mandatory offers must, in respect of each class of share capital involved, be in cash or accompanied by a cash alternative. The price offer per share must not be less than the highest price paid by the offeror (or any concert party) for shares of that class within the relevant period i.e. beginning twelve months prior to the commencement of the offer period and ending on the expiry of the offer period.

Where securities have been acquired for non cash consideration, Rule 9.4 (b) provides that the offer must nevertheless be in cash or accompanied by a cash alternative of at least equal value. Where the offeror (and persons acting in concert) have made acquisitions of securities in the target company in exchange for other securities, the Panel may require in addition to making a cash offer that such securities be offered as part of the mandatory offer as an alternative to cash. The Panel may also direct that an offer be made at a price it determines to be fair where neither the offeror or any concert parties have acquired shares of a class which is the subject of the offer.

5.5 CONFIRMATION AS TO SUFFICIENT RESOURCES

General Principle 10 states that:

"Where an acquisition of securities is contemplated as a result of which a person may incur an obligation to make an offer, he or she must before making the acquisition, ensure that he or she can and will continue to be able to implement such an offer."

In pursuance of General Principle 10 the initial announcement of the offer under Rule 9 must contain confirmation by the offeror's financial adviser that resources are available to the offeror sufficient to satisfy full acceptance of the offer (Rule 2.5(d)). Conditional confirmations are not sufficient. Such confirmations are taken very seriously by financial advisers. If such a confirmation proves to be inaccurate, the Panel may direct the relevant financial adviser to provide the necessary resources unless the Panel is satisfied that it acted responsibly and took all reasonable steps to assure itself that the cash was available and would continue to be available at all relevant times.

Rule 9.2 prohibits an acquisition of shares which would otherwise give rise to an obligation to make a mandatory bid unless the offeror and its financial advisers are satisfied that it is and will continue to be able to implement the offer.

5.6 EXEMPTIONS

As previously noted the Panel has power to issue dispensations or derogations from an obligation to make a mandatory bid. The guidance notes on Rule 9 list several situations in which dispensations or derogations are likely to be granted including:

- where new securities are issued as consideration for an acquisition or a cash subscription and such issue would otherwise trigger a mandatory offer, the Panel may waive the obligation where it is approved by independent shareholders at a shareholders meeting (known as a "Whitewash procedure");
- where a lender, as a result of enforcing the security of a loan, exceeds the relevant threshold (provided that the security was not given at a time when the lender had reason to believe that enforcement was likely);
- where a company is in such a serious financial position that the only way it can be saved is by a rescue operation involving the issue of new shares or the acquisition of existing shares which would otherwise trigger a mandatory offer;
- where a person incurs an obligation to make a mandatory offer as a result of an inadvertent mistake provided the mistake is remedied by a sale of sufficient shares within a limited period to an unconnected third party;
- where a mandatory offer would otherwise be triggered as a result of the enfranchisement of non-voting shares, unless the shares have been purchased at a time when the purchaser had reason to believe that enfranchisement would take place;
- in exceptional circumstances, where the independent shareholders approve the transfer of existing securities from one shareholder to another; and,
- gifts and inheritances.

The Panel will take into account if the holders of 50% of the voting rights state that they would not accept an offer, or a single person already held 50% of the voting rights.

6 THE TERMS OF VOLUNTARY OFFERS

6.1 REQUIREMENTS AS TO THE TERMS OF OFFERS

The rules governing the terms of voluntary offers are rooted in General Principle 1 which requires that all shareholders of the same class in a target company be treated equally.

There are some important exceptions to the requirement of equality of treatment, in particular in relation to overseas shareholders. The Panel recognises that the making of an offer to overseas shareholders may necessitate compliance with onerous overseas regulatory requirements. For example, the making of a securities exchange offer to persons in the United States of America would normally necessitate compliance with the filing requirements of the U.S. Securities Act, 1933 and the tender offer rules of the U.S. Securities Exchange Act, 1934. In many cases, this might involve the expenditure of resources out of all proportion to the value of the offer. Consequently, the Panel usually permits overseas shareholders to be treated differently from Irish shareholders. As a result most offer documents relating to Irish companies are not mailed to addresses in the United States of America and persons accepting securities exchange offers are obliged to warrant that they are not US persons, failing which they receive cash consideration in lieu of the securities being offered. The question of whether this impacts on the Section 204 (acquisition procedure from dissenting shareholders) is a difficult issue which must be addressed by the advisers.

The principle of equality of treatment manifests itself in a number of the following restrictions and requirements contained in the Rules which, except where stated, apply to both mandatory and voluntary offers.

Minimum Offer Value

Rule 6.1 provides that, save with the consent of the Panel if, in the case of a voluntary offer, the value of the consideration per share must not be less than that agreed in respect of shares of that class in the target acquired by the offeror (or any person acting in concert with it) within the three-month period prior to the commencement of the offer period (see the Glossary for an explanation of this term) and ending at the time of the announcement of the offeror’s firm intention to make the offer. The Panel has the discretion to extend the period from 3 months to 12 months in any particular case. Such discretion will not usually be exercised unless shares have been purchased from directors or other closely connected persons.

Requirement of Cash or Cash Equivalent Consideration (Rule 11)

Rule 11(a) requires an offeror to make a cash or cash alternative offer matching the highest price which it may previously have paid for shares in the target company in a number of circumstances.

Firstly, if the offeror (or any person acting in concert with it) has, in the 12 months prior to the commencement of the offer period, purchased securities carrying in aggregate 10% or more in nominal value of any class which is the subject of the offer, then any offer for that class of share must be in cash or accompanied by a cash alternative at not less than the highest price paid by the offeror or concert party for those shares in the relevant period. The Panel has the discretion to remove the 10% threshold and apply the rule to any acquisition irrespective of the percentage acquired. The Panel would usually consider exercising this discretion where the offeror or concert parties have purchased shares from directors or other persons closely connected with the offeror or target company.

In addition, the Rule 11 requirement of a cash offer at the highest price paid is triggered where the offeror or concert parties acquire any shares of a class which is the subject of the offer during the offer period. The previous Rules had limited the triggering acquisitions to cash acquisitions. The Panel will consider derogations from the Rule 11(a) requirement in certain circumstances in the case of a non-cash acquisition.

The new Rules have introduced a requirement whereby the cash alternative offer must be open for acceptance for a minimum period of 14 days from the posting of the offer document.

Comparable Offers (Rule 14)

Except with the Panel's consent, where the target has more than one class of equity share capital, an offeror cannot make an offer for a class of shares carrying voting rights unless a comparable offer is made for every other class of equity share capital (including non-voting shares). There is an obligation to consult with the Panel in such cases. Guidance is given as to what constitutes a comparable offer.

Appropriate Offers for Convertible Securities and Options (Rule 15)

When an offer is made for equity share capital, and the target has outstanding convertible securities, options or other subscription rights, the offeror must make an appropriate offer to the holders of such convertible securities. The offeror must post the offer document to the holders of the convertible securities at the same time as or after consultation with the Panel as soon as possible after the offer document is posted. The target board must obtain independent legal advice on the offer for the holders for the convertible securities.

Prohibition on Special Deals (Rule 16)

Except with the Panel's consent, during an offer period or when an offer is "reasonably in contemplation" no special deal can be reached i.e. no arrangement can be made with any shareholder(s) or intending shareholder(s) which has favourable conditions attached which are not being extended to all shareholders.

The prohibition on such 'special deals' has been widely interpreted and includes:

- a promise to make good to a vendor of shares any excess of the price of any subsequent successful offer over the sale price;
- an irrevocable commitment to accept an offer combined with an option to put the shares if the offer fails;
- potentially the sale of assets of the target, which are of no interest to the offeror, to a shareholder in the target; and
- a finder's fee being paid to a shareholder in the target.

The Panel has indicated that it will permit the last two examples in certain well specified circumstances.

The Panel should be consulted where it is proposed that management will retain a financial interest in the target.

6.2 CONDITIONALITY

The Rules also impose various requirements relating to the terms and conditions which may be attached to offers including:

Acceptance Condition (Rule 10)

Except with the Panel's consent, it must be a condition of every voluntary offer for more than 50% of the voting shares in the target that such offer will not become unconditional unless the offeror has acquired or agreed to acquire shares in the target carrying over 50% of the voting rights attributable to (a) the equity share capital alone and (b) the equity share capital and non-equity share capital combined. Consent to omit this condition will only be given by the Panel in exceptional cases.

Offerors may of course increase (but not decrease) the 50% threshold. In practice, it is not unusual to choose to make offers conditional on obtaining acceptances from shareholders holding at least 80% of the shares to which the offer relates. This enables the offeror to compulsorily acquire the shares of those shareholders who do not accept the offer (see Section 14.2 below).

Rule 10.6 sets out the procedure whereby an offer is deemed to become unconditional as a result of sufficient acceptances being obtained.

The Mergers Acts (Rule 12)

The Mergers Acts are dealt with in Section 3 of this guide. Pursuant to Rule 12, any offer to which the Mergers Acts apply must be subject to a condition in respect thereof.

"Concentrations with a Community Dimension"

Similarly, an offer which would give rise to a "concentration with a Community dimension" may come within the scope of the Merger Regulation (as discussed above in Section 3). Where this occurs, it must be a term of the offer that it will lapse if the European Commission either initiates proceedings under Article 6(1)(c) of the Merger Regulation or makes a referral to the competent domestic authority under Article 9(1) (Rule 12(b)) (see Section 3.3 above).

Subjective Conditions (Rule 13)

Offers must not normally be subject to conditions which depend solely on subjective judgements by the directors of the offeror (Rule 13). A limited degree of subjectivity is, in practice, accepted by the Panel (Note on Rule 13) and there are also some well-established exceptions to Rule 13.

Rule 13.2 which was introduced in the new Rules in July 2001, requires that an offeror obtain the consent of the Panel before an offer can lapse on the grounds that a condition "involving a criterion of materiality, substance or significance" has not been satisfied.

7 ANNOUNCEMENT OF OFFERS

7.1 OBLIGATION TO MAKE AN ANNOUNCEMENT

The Panel can direct a party to make an announcement where it considers it appropriate. In addition Rule 2.2 requires an announcement concerning an offer or a possible offer to be made in the following circumstances (unless the Panel consents otherwise):

- immediately after a firm intention to make an offer, (the making of which is not or has ceased to be subject to any precondition other than a pre-condition relating to the receipt of irrevocable undertakings to accept the offer), is notified to the target board, irrespective of the attitude of the target board;
- immediately after a transaction in respect of which an obligation to make a mandatory offer arises (see Section 5 above);
- when, following an approach by the offeror to the target, the target is the subject of rumour and speculation or there is an anomalous movement in its share price (see below);
- when, before an approach has been made by the offeror, the target is the subject of rumour and speculation or there is an "anomalous" movement in its share price and there are reasonable grounds for concluding that the cause of the rumour, speculation or price movement is the offeror's actions or intentions;
- when negotiations or discussions relating to an offer are about to be extended to include more than a very restricted number of people;
- when a purchaser is being sought for a holding, or aggregate holding, of securities carrying 30% or more of the voting rights of a company or when the board of a company is seeking potential offerors, and (i) the company is the subject of rumour and speculation, or (ii) there is an anomalous movement in its share price, or (iii) the number of potential purchasers approached is about to be increased to include more than a very restricted number of people; or
- when, after an announcement has been made to the effect that discussions as to an offer or approach are taking place and such discussions are terminated or the offeror decides not to proceed with the offer.

In addition, if the target is the subject of rumour and speculation or there is an anomalous movement in its share price, the person with responsibility for making an announcement (see 7.2 below) must consult the Panel immediately if that person considers that the circumstances do not require an immediate announcement.

The Panel has provided that the determination of when share price movements are "anomalous" cannot be reduced to defined terms but that any person in possession of relevant information and who is in doubt as to whether a share price movement is anomalous should consult the Panel.

7.2 RESPONSIBILITY FOR MAKING THE ANNOUNCEMENT

Before the target board is approached, the offeror has the responsibility for making any required announcement. Accordingly, the offeror should monitor the market to ascertain whether there has been any speculation or rumour concerning the target or any anomalous price movement in its shares. Once the offeror has approached the target board, primary responsibility for making the appropriate announcements lies with the target board (Rule 2.3(b)).

7.3 THE FORM & CONTENT OF AN ANNOUNCEMENT (RULE 2)

An announcement, whether required by the Rules or made voluntarily, may take one of a number of forms. Frequently, before a firm intention to make an offer is announced, a brief announcement will be issued by the target stating that it is conducting talks with a potential offeror. Alternatively, a potential offeror may announce that it is considering making an offer without actually committing itself to doing so, although for obvious reasons such announcements are rarely made voluntarily. A third possibility is the announcement of an offer subject to pre-conditions, although Rule 2.3(d) requires the Panel's consent for an offer to be announced subject to preconditions. Fourthly, the announcement may state a firm intention to make an offer which is not subject to pre-conditions.

Until a firm intention to make an offer has been notified, a brief announcement that talks are taking place will usually suffice for the purposes of Rule 2. The offeror need not be identified in such an announcement. Where a firm intention to make an offer is announced the offeror and its financial adviser must be satisfied as to the capacity of the offeror to implement the offer and pursuant to Rule 2.5 the announcement must (principally) contain:

- the terms of the offer;
- the identity of the offeror and, if applicable, of the ultimate controlling interests in the offeror;
- details of any existing holding of securities in the target;
    - owned or controlled by the offeror;
    - owned or controlled by a person acting in concert with the offeror (see section 12.7 below);
    - in respect of which the offeror has received an irrevocable commitment to accept the offer including the circumstances, if any, in which it will cease to be binding;
    - in respect of which the offeror or any concert party holds an option to purchase;
- details of options to subscribe for new securities in the target held by the offeror or any concert party;

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- details of any outstanding derivative referenced to any securities of the target entered into by the offeror or any concert party;
- all conditions to which the offer or the making of it is subject;
- details of any indemnity or option arrangement relating to the relevant securities in the target; and
- a statement that holders of 1% or more of any class of relevant securities of the offeror or target company may have to disclose any dealings in their shares during the offer period under Rule 8.3.

A responsibility statement in the usual form (see 8.1 below) should be furnished with the announcement. In addition, if a company's shares are listed on another stock exchange in addition to the Irish Stock Exchange, it will obviously be necessary to comply with the regulations of that other exchange in relation to announcements.

7.4 CONSEQUENCES OF AN OFFER ANNOUNCEMENT

An announcement which raises the possibility that an offer will be made results in the target being in an "offer period". In an offer period, the dealing disclosure requirements of Rule 8 apply (see Section 13 below) and certain other restrictions and requirements become relevant. The target board is obliged to notify its shareholders of the announcement as soon as practicable.

Following the announcement of a firm intention to make an offer, unless the Panel agrees otherwise, the offeror will generally be obliged to proceed with the offer unless it is subject to permissible conditions which have not been fulfilled or unless a higher offer has already been posted by a second offeror.

Announcements falling short of stating a firm intention do not result in the potential offeror being compelled to proceed with an offer, although the Panel will expect to be kept informed of developments and, in due course, will require one or more announcements updating the position. The Panel may require that the potential offeror either announces a firm intention to make an offer or announces that it does not intend to do so.

7.5 STATEMENTS OF INTENTION NOT TO MAKE AN OFFER

Care must be taken in responding to press speculation about the possibility of a general offer being made for a particular company. A denial of an intention to make an offer by the potential offeror may restrict the freedom of action of the potential offeror as Rule 2.8 provides that if a person says that he does not intend to make an offer for a particular company he will generally be prohibited from doing so for a 12 month period without the Panel's consent.

The Panel, in considering whether a person who has announced that he does not intend to make an offer will be permitted to make such offer, will take into account whether the original statement was made with due care, after proper consideration of all relevant circumstances and has not misled the shareholders or the market. This means that the Panel will normally only permit a change of intention and the making of an offer once a "significant amount of time has elapsed or a material change of circumstances has occurred sufficient to justify the person changing his intention" (Note 2 on Rule 2.8).

8 DOCUMENTS AND INFORMATION

8.1 THE OFFER DOCUMENT

An offer document must be posted to the target shareholders (except with the consent of the Panel) within 28 days of the announcement of a firm intention to make an offer (Rule 30.2) (and cannot be posted prior to the announcement of a firm intention to make an offer).

The contents of the document will be determined in part by the need to persuade shareholders to accept the offer, in part by the requirements of the Rules and the Listing Rules, and in part by convention.

Rule 23 requires that shareholders be given sufficient information and advice to enable them to reach a properly informed decision as to an offer and such information and advice must be despatched to the shareholders early enough for them to make a decision in good time. In addition, Rule 19.1 provides that each document or advertisement issued, or statement made, during the course of an offer must, as in the case of a prospectus, satisfy the highest standards of accuracy and completeness and the information must be fairly presented.

Responsibility Statement

Rule 19.2 requires that the directors of the offeror take personal responsibility for the contents of the offer document (and, indeed, for any other document or advertisement issued in connection with the offer). Except with the consent of the Panel, an offer document must include a responsibility statement stating that "to the best of their (being the directors) knowledge and belief (having taken all reasonable care to ensure that such is the case) the information contained in the document or advertisement is in accordance with the facts and, where appropriate, that it does not omit anything likely to affect the import of such information". "Information" includes statements of opinion. Other persons, such as the directors of the holding company where the offeror is a subsidiary, may also be required save with the consent of the Panel to join in the giving of the responsibility statement. This extension of the requirement for responsibility statements was adopted in the new Rules of July 2001. Where the Panel consents to the exclusion by a director from the responsibility statement requirement, the document concerned must disclose this and the reasons for it.

The purpose of the requirement that documents contain responsibility statements is to give shareholders a legal right to claim compensation from the directors if they fail to take reasonable care to ensure that the relevant document is complete and accurate and, as a result, shareholders suffer loss. In addition, if inaccuracies or material omissions are discovered during the course of an offer, details of these will be required to be announced, and the Panel may require that a correcting circular be published drawing attention to the defects in the previous document. There is also the possibility of criminal proceedings being commenced on the ground that the relevant directors and others have conspired to defraud shareholders. For this reason documents are normally subject to a verification process.

Verification

The verification process, involves each and every statement in an offer document for which the directors have responsibility being checked in order to limit the potential liability of the directors of the issuing company.

Offer Document Contents

Rule 24, which was revised in July 2001, contains detailed requirements relating to the contents of offer documents, which must include the following:

- a statement of the offeror's intentions concerning the continuation of the target's business, any proposed major changes to be introduced, the longterm justification for the offer and its intentions as regards the employment levels (Rule 24.1);
- details of the securities for which the offer is made (including whether they are to be transferred with or without dividend) (Rule 24.2(b)(iii));
- clear instructions for accepting the offer (Rule 24.2(b)(v));
- the total consideration offered (Rule 24.2(b)(iv));
- the market price of the securities that are the subject of the offer, and of the securities offered (in the case of a securities exchange offer) over the six months immediately prior to the date of the offer document (Rule 24.2(b)(vi));
- detailed current and historical financial and accounting information about the target company. The Rules contain detailed requirements relating to profit forecasts and asset valuations (Rules 28 and 29). In particular, profit forecasts (including those made prior to an offer but remaining relevant) must be supported by auditors' and financial advisers' reports, and asset valuations must be made by independent valuers;
- current and historical financial and accounting information about the offeror. The level of detail required depends on whether the offer is a

securities exchange offer or a cash offer. The extensive financial information required in the event of a securities exchange is set out in Rule 24.2(a)(i), while the simpler requirements in the case of a cash offer are found in Rule 24.2(a)(ii);

- a description of how the offer is to be financed and the source of the finance (Rule 24.2(d));
- where the offer is for cash or includes a cash element, confirmation by an appropriate third party, such as the offeror's financial adviser, that sufficient resources are available to the offeror to satisfy full acceptance of the offer (Rule 24.7). Conditional confirmations are not sufficient;
- a statement as to whether the securities acquired under the offer will be transferred to another person in accordance with any agreement or understanding (Rule 24.8);
- details of the securities of the target company which are held or controlled by the offeror, its directors and associates, or any person acting in concert with it, any person who has given an irrevocable commitment/undertaking to accept the offer or any person with whom it has an indemnity arrangement (Rule 24.3(a)(i) to (v));
- details of any transactions by the offeror or persons connected with it in the securities concerned in the twelve months prior to the offer (Rule 24.3(c)); and
- except with the consent of the Panel, particulars of any agreement or understanding, which is connected with or dependent on the offer and was concluded between the offeror and any of its associates and current or former directors or members of the target, in the previous twelve months (Rule 24.5) (i.e. special arrangements).

Furthermore, the offer document must contain a number of statements designed to fully inform members of the target company. These include statements to the effect that:

- they should consult an independent financial adviser (Rule 24.2(b)(i)); and,
- shareholders are entitled to their full compensation according to the terms of the offer; the offeror has no right to set-off any claims it may have against them (Rule 24.11).

There are also a number of additional requirements which apply only in the case of a securities exchange offer.

Finally, certain items are not compulsory, but if included, must be presented in a particular way. Thus, if the document compares the offer price to previous market values, there are particular comparisons which must be made (Rule 24.2(e)). In addition if the document contains a recommendation from an adviser, it must include a statement that the adviser consents to the opinion being used in this context (Rule 24.2(f)).

The requirements described above apply equally to the principal circular issued to the shareholders of the target company in connection with a scheme of arrangement. In addition, Section 202(1) of the Companies Act, 1963 requires that a notice convening a meeting of a class of shareholders be accompanied by a statement explaining the effects of the arrangement. In particular, it must state any material interests of the company's directors and the effect on those interests of the arrangement, in so far as it is different from the effect on the like interests of other persons.

8.2 THE TARGET'S RESPONSE

Rule 30.3 requires the target board, unless the Panel consents otherwise, to advise shareholders of its views on the offer in a circular posted within 14 days of the publication of the offer document. In the case of offers which are unanimously recommended by the target board, the circular is often dispatched to shareholders together with the offer document.

8.3 SUBSEQUENT DOCUMENTS

In the case of a recommended offer, the offer document (incorporating the response of the target company's board) is normally the only document sent to shareholders, apart from compulsory acquisition notices sent to dissenting minority shareholders if relevant (see Section 14.2 below).

In the case of a contested offer, the offeror and the target company's board normally send a number of circulars to the shareholders attempting to persuade them to accept or reject the offer. Each circular must comply with the basic legal requirements as to accuracy and fairness of presentation. In addition, they must contain a directors' responsibility statement (Rule 19.2) and either details of any material changes in information previously published by or on behalf of the relevant party during the offer period or a statement that there have been no such changes (Rule 27.1).

8.4 RELEASE OF INFORMATION

In general, both the offeror and the target are encouraged by the Panel to release as much information as possible in order to enable shareholders to reach a properly informed decision on the merits of the offer. The release of new information is, however, subject to certain important constraints.

General Principle 2, as supplemented by Rule 20.1, provides that information should be made available equally to all of the target shareholders as nearly as possible at the same time and in the same manner. In practice this means that new information released by either party during the course of an offer should be released either in a circular posted to all shareholders or a formal press release made available to the press and simultaneously supplied to the Company Announcements Office. Material new information may not therefore be released in the course of discussions with individual shareholders or in the course of press conferences or other discussions with journalists, which are strictly regulated by Rule 20.1(b).

More generally, parties to an offer are obliged to use every endeavour to prevent the creation of a false market in the securities of an offeror or the target company (General Principle 5). They are also required to take care not to issue statements which may mislead shareholders or the market or create uncertainty (Rule 19.3).

8.5 MATERIAL CHANGES

Rules 24.14 and 25.7 require the offeror and target to immediately announce the details of any change of material information previously published by them. In addition, the Panel may require the issue of a circular to shareholders giving details of any such change.

Similarly, Rule 27.1 requires that any document sent to shareholders by either an offeror or target shall contain details of any material change to information previously published by it. In particular, changes to material contracts, holdings of securities, directors' emoluments and service contracts, special arrangements or arrangements which may induce a person to deal in the shares, or the ultimate owner of the shares, must be disclosed. It must also be stated if no changes are made.

8.6 FURTHER ANNOUNCEMENTS

The announcement of acceptance levels is closely regulated. Obligations to make announcements in the prescribed form to the Stock Exchange and the Panel arise:

- by 8 a.m. on the business day following the day on which an offer is due to expire, or becomes unconditional as to acceptances, or is revised or extended (Rule 17.1); and
- by 8 a.m. on the business day following the day on which an offer becomes unconditional in all respects (Rule 17.3).

Failure to make an announcement pursuant to Rule 17.1 within the stipulated time frame is significant and may result in the Panel requesting the Stock Exchange to suspend temporarily quotation of the target's or offeror's shares until the appropriate announcement is made. If an offeror having announced the offer to be unconditional as to acceptances fails by 3.30 pm on the relevant day to make an announcement in accordance with Rule 17.1, each acceptor may withdraw his or her acceptance.

Rule 17.1 requires the offeror to make an announcement as to the total number of:

- shares in the target for which acceptances have been received;
- shares in the target held before the offer period; and
- shares in the target acquired or agreed to be acquired during the offer period.

9 HOSTILE TAKEOVER DEFENCE

9.1 LEGAL CONSTRAINTS ON THE TARGET COMPANY'S MANAGEMENT

The actions open to a target company's board in defending a contested offer are limited.

The Prohibition on Frustrating Action

General Principle 6 provides that when an offer has been made or is imminent, the directors of the target must refrain from conducting the target's activities or affairs in a manner which might frustrate the offer, or deprive the shareholders of the opportunity to consider the merits of the offer, except on the authority of the shareholders in a general meeting.

Rule 21.1 elaborates on the general prohibition against frustrating action and expressly prohibits, inter alia:

- the allotment, issue or grant of any shares or of any options in respect of unissued shares or convertible securities;
- any material acquisitions or disposals of assets or other material operations;
- entering into a contract other than in the ordinary course of business; and
- taking any action as respects the conduct of its affairs the effect of which would or would be likely to frustrate the making or implementation of an offer.

The restrictions in Rule 21.1 are triggered as soon as the target company board has reason to believe that an offer may be imminent. Such actions are permitted only with the consent of the Panel or with the approval of the target shareholders in general meeting.

Break/Inducement Fees

A new Rule 21.2 was introduced in July 2001, which expressly prohibits arrangements for break/inducement fees to be agreed without the consent of the Panel. The Panel has stated in the notes to this Rule that its consent, if granted, would normally be limited to specific quantifiable third party costs subject to a cap of 1% of the value of the offer and to receiving confirmation in writing from the target's board and its financial adviser that they consider the break/inducement fee to be in the best interests of the target's shareholders. An analysis of whether such break/inducement fees would constitute unlawful financial assistance would have to be undertaken by both the target's and offeree's solicitors where such an arrangement was proposed.

Restrictions on the Use of Directors' Powers

The directors of the target company are also constrained by a number of limits on the purposes to which they can employ their powers. Primarily, the extent to which they can act to thwart a bid is limited by the fiduciary duties they owe to the company. Their fiduciary duties and the General Principles require directors to act in disregard of their personal interests when advising and furnishing information in relation to the offer and to act bona fide in the interests of the company.

Section 205 of the Companies Act 1963

Section 205 of the Companies Act 1963 provides a remedy for minority shareholders who claim they are being oppressed and it can, in certain relatively limited circumstances, be used to limit the ability of directors to adopt certain defensive measures.

9.2 SPECIFIC DEFENCE TACTICS

Persuading Shareholders to Refuse the Offer

The Rules do not prevent the directors of a company persuading shareholders to reject the offer but they regulate the manner in which they may do so. A target company board must present the facts about the demerits of the offer fairly and accurately. It can only make statements that satisfy the same standards of care as a prospectus. It must also inform the shareholders of the independent advice it obtains. When a board rejects an offer on the basis of inadequacy, it must support its stance with detailed information about its valuation and the advice supplied by its financial adviser. If contemplating the release of favourable information about the company or the announcement of an increased dividend, the directors must remember to comply with the obligations to prevent the creation of a false market in the shares of both the offeree and offeror.

Tactical Release of New Information

The Rules do not permit a target to announce trading results, profit or dividend forecasts, asset valuations or proposals for dividend payments after the 39th day following the posting of the initial offer document (Rule 31.9). This restriction may be relaxed with the consent of the Panel although this would have an impact on when the offer must become unconditional as to acceptances pursuant to Rule 31.6 and consequently the latest time for revisions (see Section 10 below). As mentioned in Section 8.1 above, in relation to forecasts, Rules 28 and 29 set strict standards of care for the preparation of statements containing forecasts and valuations of assets in connection with offer.

Appeal to a Legal or Administrative Authority

In the United States of America, litigation is a common defence, particularly if there has been a substantive violation by the offeror of the anti-trust laws or securities regulations which would justify an injunction restraining the offeror from proceeding with its offer. In Ireland a decision of the Panel may be subject to judicial review. It is, however, rare for a target company to appeal to the courts. The courts, aware of the need for speed and flexibility in the takeover process as well as certainty as to its outcome, are wary of giving scope to tactical litigation.

Obstacles to Obtaining Control

As noted in Section 9.1, once a target company board has reason to believe that an offer may be imminent, it is prohibited under Rule 21 from issuing shares or convertible securities. However, prior to that point in time it is not unusual for a board to review the structure of its capital to deter a potential hostile offer. There are two main types of device generally utilised:

- the issuance of additional shares; and,
- the restructuring of voting rights.

Such measures generally require the approval of the company in general meeting and possibly also the consent of class meetings.

Purchase of the Target Company's Shares

Another defensive tactic is the open market purchase of shares in the target company by directors and third parties. This has two main effects. Firstly, it demonstrates that the directors have faith in the target company and secondly, it reduces the number of shares held by willing sellers and thus creates an obstacle to the offeror obtaining control. The main practical problem with this defence mechanism is the difficulty of buying enough shares to defeat the takeover attempt. There is also a risk that a third party who assists the directors by purchasing shares is motivated by the possibility of making its own bid, although in the case of a white knight, this bid would be more favourably regarded than that of a hostile bidder. As well as these practical difficulties, any person adopting this approach must be aware of a number of legal provisions, including:

- Sections 53 to 66 of the Companies Act, 1990, which requires disclosure by directors, shadow directors and company secretaries of their interests in shares and debentures of the company;
- The Listing Rules of the Stock Exchange, which also require notification of dealings in a listed company's shares by its directors or persons connected to them;
- Part V of the Companies Act, 1990 which contains the Irish prohibition on insider trading, and forbids dealings in the shares of a company by persons connected with it who are in possession of unpublished price-sensitive information (see Section 12.8 below);
- Section 60 of the Companies Act, 1963 prohibits a company giving financial assistance for the purchase of its shares (see Section 2.4 above); and
- Rule 9 of the Rules, which could impose the mandatory offer requirement on those engaging in a pre-emptive acquisition of the company's shares (see Section 5 above).

White Knights

When faced with an unwelcome offer the board of the target may attempt to procure another offer from a third party (often called a "White Knight"). Such a competing offer may be announced at any time. If, however, there are rumours about a possible offer at a critical time, the Panel may require that the third party clarify its intentions within a very short period (Rule 2.2). If the third party fails to do so, it will be prohibited from making an offer.

If a second offer is announced in competition with the existing one, the offeror may, with the consent of the Panel, extend the timetable so as to coincide with that of the later offer. This affects the calculation of the 39th day, the deadline for revision of the offer under Rule 32.1, and the final closing date, which are all calculated thereafter by reference to the making of the second offer. The time from which accepting shareholders may withdraw their acceptances of the first offer under Rule 34 is, however, not altered.

Rule 20.2 on the equality of information restricts the ability of the target board to pass information exclusively to a White Knight. It provides that the target shall promptly provide any information to an offeror if and to the extent that the same or substantially the same information has been made available to another offeror. However, this Rule only applies where the existence of the other offeror has been announced and the information to be passed on is information which has been 'specifically requested by an offeror'. In addition, the target company's board may apply to the Panel for a dispensation from this rule where it is concerned that an offeror would not have sufficient funds to implement the offer.

Increasing the Costs to the Offeror

Shareholders' rights plans (or "poison pills") are widely used and operate as a successful defensive mechanism in the United States of America. They are designed to increase the cost of a takeover to such an extent that the offeror is discouraged from proceeding. The device functions by either allowing the existing shareholders to dilute the company's equity by purchasing shares at low cost or compelling the offeror to pay a very high price. In contrast, however, to the position in the United States of America, Irish companies have been reluctant to employ the poison pill mechanism mainly due to their comparatively heavy regulation under the Act and Rules. After the bid is announced, the Panel's prohibition on frustrating action expressly forbids the granting of any options over unissued shares of the target company without shareholder approval. Before the bid, on the other hand, a poison pill would have to be justified as being for a proper corporate objective and the directors must be careful not to breach their fiduciary duties, which require them to act in good faith in the interests of the company. Shareholder approval will generally be required for the use of a poison pill.

10 EXTENSIONS AND REVISIONS OF OFFERS

10.1 EXTENSIONS

Subject to certain exceptions, offerors are free to extend their offers (i.e. extend the period during which the offer will remain open for acceptance) at any time. The principal restrictions on this right of extension are as follows:

Final Day Rule (60th Day)

In order to ensure that an offer may not be prolonged excessively, Rule 31.6 provides that, except with the consent of the Panel, an offer may not become or be declared "unconditional as to acceptances" after the 60th day after the posting of the offer document (or an earlier date beyond which the offeror has stated that the offer will not be accepted). Consequently, an offer which remains conditional as to acceptances cannot in practice be extended beyond the 60th day and will lapse unless the Panel consents otherwise. In order to inform shareholders as to the position with respect to the offer, the offeror must make an announcement on the 60th day (or if applicable, any relevant earlier date) as to whether the offer is unconditional as to acceptances or has lapsed. The current position on the count of acceptances should also be made clear.

"No Extension" Statements

Generally, an offeror is not obliged to extend its offer if a condition for its acceptance has not been fulfilled by the closing date (Rule 31.3). In some cases, the offeror or its directors or advisers, may make a statement indicating that the offer will not be extended beyond a specified date. If this is done, then the offeror will normally be bound by the statement (Rule 31.5).

However, Rule 31.5(b) provides that, if a competitive situation subsequently arises, the offeror may choose not to be bound by its statement, provided:

- it has reserved the right to do so (Rule 31.5(d));
- notice to this effect is given as soon as possible (at least within 4 business days) and shareholders are informed in writing at the earliest opportunity; and
- any target shareholder who accepted the offer on or after the date of the "no extension" statement is permitted to withdraw his acceptance within 8 days of the posting of the notice.

10.2 REVISIONS

As in the case of extensions, offerors are normally free to revise their offers at any time subject to certain limitations:

46th Day

If revised, an offer must be kept open for at least 14 days following the date on

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which the revised offer document is posted to shareholders in order to give the target shareholders sufficient time to consider the revised offer (Rule 32.1). This means that no revised offer document may be posted in the 14 days ending on the last day the offer is able to become "unconditional as to acceptances".

The strict position is modified in a competitive situation, where each offeror must consult the Panel before the last day on which its offer may be revised. If it considers it appropriate, the Panel may prescribe a procedure for the announcement of the offerors' final revisions (Rule 32.1(c)).

"No Increase" Statements

If the offeror or any of its directors, officials or advisers makes any statement in relation to the value or type of consideration, then the offeror will normally be bound by that statement and will not be permitted to act in a manner contrary to it (Rule 32.2). The principle behind this restriction is to increase certainty. The Panel has the power to waive this restriction.

However, if a competitive situation arises, the offeror may be allowed to increase the offer notwithstanding a "no increase statement" if:

- it has reserved the right to do so (Rule 32.2(d));
- notice to this effect is given as soon as possible (at least within 4 business days) and shareholders are informed in writing at the earliest opportunity; and
- any target shareholder who accepted the offer on or after the date of a "no increase statement" is permitted to withdraw their acceptance within 8 days of posting of the notice (Rule 32.2(b)).

Alternative Offers

Alternative offers, such as cash alternatives in share exchange offers, may in general be withdrawn without closing the principal offer. There are, however, complex restrictions on the ability of the offeror to do this. In general, the Rules relating to extensions described in Section 10.1 above apply (Rule 33.1) but there are several important exceptions to this, in particular relating to certain underwritten cash alternatives (Rule 33.2). If an offer becomes or is declared unconditional as to acceptances, all subsisting alternative offers must remain open for acceptances for at least 14 days (Rule 33.1(c)). However, if the value of a cash underwritten alternative provided by a third party at the time of the announcement of the alternative offer is more than half the maximum value of the offer, the offeror is not obliged to keep the alternative offer open if it has given written notice to the target shareholders that it reserves the right to close or extend it on a stated date (which should not be less than 14 days from the date on which such notice is given). In addition such a notice cannot be given during the period between the announcement of a competing offer and the end of the resulting competitive situation.

11 OBLIGATIONS OF AN OFFEROR UNDER THE LISTING RULES

Chapters 9 to 16 of the Listing Rules contain the principal continuing obligations imposed by the Irish Stock Exchange on all companies listed on it. The main obligations on such companies which are relevant in the context of mergers and acquisitions are (i) disclosure obligations and (ii) obligations in respect of major transactions.

11.1 DISCLOSURE

Developments in the Company's Sphere of Activity

Paragraph 9.1 of the Listing Rules imposes an obligation on a listed company to disclose non-public information in respect of "major new developments in its sphere of activity" which may lead to substantial movements in its share price.

There are a number of exemptions from this general obligation which prevent a proposed takeover having to be disclosed during the negotiation process. In particular, Paragraphs 9.4 and 9.5 have the effect that information may be given in confidence to the company's advisers and persons with whom the company is negotiating or intends to negotiate any commercial, financial or investment transaction, including prospective placees and underwriters, provided that the company is satisfied that recipients understand the confidential nature of the information and the resultant dealing restrictions until the information is made available to the public.

Share Transfers

Acquisitions or disposals of major interests in shares in a company listed on the Irish Stock Exchange must be notified by such company to the Company Announcements Office. This disclosure expressly includes:

- information obtained by the company concerning acquisitions which has been or ought to have been disclosed to the company pursuant to sections 67 to 79 of the Companies Act 1990 (See Section 13.1 of this guide);
- information obtained under Section 81 of the Companies Act 1990 (See Section 13.2 of this guide); and,
- particulars of any interests of any person, other than a director, in 3% or more of any class of shares carrying voting rights, if such interests have been notified to the company.

11.2 MAJOR TRANSACTIONS – SHAREHOLDERS APPROVAL/NOTIFICATION

Chapters 10 and 11 of the Listing Rules contain requirements relating to major transactions, principal acquisitions and disposals involving companies listed on the Irish Stock Exchange.

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A transaction is classified by assessing its size relative to the size of the listed company proposing to make the transaction. The following ratios must be reviewed:

- **Assets** – the gross assets acquired or disposed of divided by the gross assets of the listed company;
- **Profits** – the profits after deducting all charges other than tax and extraordinary items attributable to the assets acquired or disposed of divided by the profits of the listed company;
- **Turnover** – the turnover attributable to the assets acquired or disposed of divided by the turnover of the listed company;
- **Consideration to market capitalisation** – the consideration divided by the aggregate market value of all of the ordinary shares of the listed company;
- **Gross capital** – the gross capital of the business being acquired divided by the gross capital of the listed company.

Industry specific tests may also be relevant. The Irish Stock Exchange has the discretion to disregard any of the above calculations and substitute other relevant indicators where appropriate.

The different classifications are:

Class 1 Transaction (Paragraphs 10.37 & 10.38)

A "Class 1" transaction is a transaction where any of the above percentage ratios are 25% or more. Such a transaction must be announced as soon as the terms are agreed. An explanatory circular must be sent to shareholders who are required to give their prior approval in a general meeting. The Irish Stock Exchange must approve the circular prior to its publication. The Listing Rules provide detailed requirements in relation to the information which must be contained in both the notification and the circular to shareholders. Obviously it may be difficult to find the necessary information in the case of a takeover which is not recommended by the board of the target. In such circumstances the offeror may publish its own working capital and indebtedness statements and statements on the combined basis must be given in a circular published within 28 days after the offer is declared wholly unconditional.

The circular must contain information required by paragraphs 10.38 and 10.40 – 10.43 of the Listing Rules which includes the information given in the relevant notification, details of the effect of the transaction on the earnings or assets and liabilities of the group, a directors' responsibility statement, an expert's consent statement, directors' interests in shares and transactions, material contracts, litigation, group prospects and specified financial information including a working capital and indebtedness statement.

Class 2 Transaction

A "Class 2" transaction is a transaction where any percentage ratio is 5% or more but each is less than 25%. Such a transaction must be notified but a circular does not have to be sent to shareholders. The requirements as to the contents of and notification is set out in paragraph 10.3.

Class 3 Transaction

A "Class 3" transaction is a transaction where all percentage ratios are less than 5%. An announcement to the Companies Announcement Office is necessary where all or part of the consideration for an acquisition is the issue of securities for which a listing is sought. In addition, if the company releases any details to the public, they must also be notified to the Company Announcements Office.

Reverse Takeover

A reverse takeover is an acquisition by a listed company of a business, an unlisted company or assets where any percentage ratio is 100% or more or which would result in a fundamental change in the business or in a change in board or voting control of the listed company.

Upon the announcement of a reverse takeover which has been agreed or is in contemplation, the company's listing will be suspended, and the company must prepare a "Class 1" circular, obtain the prior approval of shareholders and, if the company wishes to be listed following completion of the transaction, prepare listing particulars as though the company were a new applicant (save for certain exceptions).

12 STAKE-BUILDING

12.1 INTRODUCTION

There are a number of reasons why a potential offeror may wish to purchase shares in a target company in the market prior to the announcement of a general offer, including the following:

- these shares may act as a “launch pad” for the subsequent offer;
- the potential offeror may wish to secure some specific objective such as to require that a general meeting of the target be convened or to block a resolution being put to the target’s shareholders; or,
- such shares may act as a hedge against an offer so that if a third party makes a successful competing offer the original offeror may sell its stake at a profit to that third party.

General Principle 12 states that:

“a substantial acquisition of securities (whether such acquisition is to be effected by one transaction or a series of transactions) shall take place only at an acceptable speed and shall be subject to adequate and timely disclosure”.

Whatever the reason for acquiring shares in the market prior to the announcement of a general offer, stake-building is, pursuant to General Principle 12, subject to a number of restrictions and regulations as provided for in the SARs and in the Rules.

The SARs do not apply to any person acquiring securities which, when aggregated with the securities already held by him or persons acting in concert with him, would result in him carrying 30% or more of the voting rights of the target. Such a person is subject to Rule 5 and will if appropriate be obliged to make a mandatory offer under Rule 9.

12.2 TIMING RESTRICTIONS

SARs 3 and 4 provide that a person may not, in any period of seven days, acquire securities (or rights over securities) in a company carrying 10% or more of its voting rights if, following the acquisition, that person would hold securities (or rights over securities) carrying 15% or more, but less than 30%, of the voting rights in the company (a "substantial acquisition").

SAR 5 provides that the restriction set out above does not apply to:

- a substantial acquisition from a single shareholder if it is the only acquisition of the company's shares made by that person in any seven day period;
- a substantial acquisition if it is made pursuant to a tender offer in accordance with SAR 7;
- a substantial acquisition which immediately precedes the announcement of a firm intention to make an offer in respect of the company where such offer will be recommended by the board and where the acquisition is conditional upon the announcement of the offer; or
- a substantial acquisition which immediately follows an announcement of a firm intention to make an offer provided that the making of the offer is not at the time of the acquisition subject to a pre-condition.

12.3 THE 30% CEILING

In addition to the restrictions contained in the SARs, the provisions of the Rules must also be considered. Rule 5 prohibits a person or persons acting in concert who already has or have an interest in voting securities in the target company from increasing its or their aggregate interest to 30% or more of the voting rights in that company. This applies to the acquisition of either voting securities or rights over voting securities. In other words, Rule 5 imposes an absolute cap of 30% on any stake building activity.

Exceptions to the 30% Ceiling

Rule 5.2 provides a number of exceptions to the 30% restriction (although the mandatory offer provisions of Rule 9 continue to operate):

- an acquisition from a single holder of securities if it is the only acquisition of such voting securities by such person within any seven day period, subject to certain disclosure requirements. This exception will not apply if the person making the acquisition has announced a firm intention to make an offer and such offer has not lapsed; or
- an acquisition occurring immediately prior to the announcement of a firm intention to make an offer in respect of the company, provided that the offer will be recommended or is made with the agreement of the target's board, and provided the acquisition is conditional upon the announcement of the offer; or
- an acquisition by a person who has just announced a firm intention to make an offer, provided that the acquisition satisfies a pre-condition of the offer and the offer is to be recommended by or the acquisition is made with the agreement of the target's board; or

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- an acquisition by a person who has announced a firm intention to make an offer, provided that at the time of the relevant acquisition, the making of the offer is not subject to a pre-condition; and

  (1) the acquisition is made with the agreement of the target's board; or

  (2) the offer or any competing offer has been publicly recommended by the target board, even if such recommendation is subsequently withdrawn; or

  (3) the first closing date of either that or a competing offer has passed and it is not awaiting regulatory clearance; or

  (4) that offer is unconditional in all respects

- if an acquisition is made by way of acceptance of an offer made in accordance with the Rules.

12.4 MARKET MANIPULATION

The Act and the Rules aim to prevent manipulation of the market. General Principle 5 states that it is the duty of all parties to a takeover (including advisers) to prevent the creation of a false market in any of the securities of the offeror or offeree and to refrain from any statement or conduct which could mislead shareholders or the market. Similarly, Rule 4.2 prohibits, during an offer period, the sale of any securities in a target company by an offeror, potential offeror or concert parties, without the consent of the Panel.

The Companies (Amendment) Act, 1999 introduced the concept of price stabilisation to Irish law. Paragraph 3 of the Schedule to the Act confers on stabilising managers, the power to purchase securities with a view to maintaining their market price. However, paragraph 2 expressly excludes the application of the stabilisation rules to issues of or offers for securities made in connection with a takeover offer.

12.5 RESTRICTIONS RESULTING FROM STAKE-BUILDING

The purchase of shares in a company may subsequently restrict the freedom of action of the purchaser or persons acting in concert with the purchaser. In particular:

- it may give rise to an obligation to make a mandatory offer for the target (see Section 5 above);
- it may result in additional requirements in respect of the value or form of consideration which is offered to shareholders under a subsequent general offer (see Section 6.1 above);
- it may prejudice the chances of success of a subsequent scheme of arrangement (see Section 4.3 above);
- it may make it more difficult for the acquirer subsequently to obtain sufficient shares pursuant to a general offer to enable it compulsorily to

acquire the dissenting minority pursuant to Section 204 of the Companies Act, 1963 (see Section 14.2 below); and,

- it may give rise to competition law concerns (see Section 3.4 above).

12.6 PURCHASES AFTER THE ANNOUNCEMENT OF AN OFFER

Unlike in the United States of America, an offeror is permitted to purchase shares after the announcement of an offer. However, since such acquisitions may require the offeror to revise the value or form of consideration in its offer under Rules 6.1 and 11 (see Section 6 above), or make a mandatory offer under Rule 9.1 (see Section 5 above), it cannot purchase shares in the target when it is unable to revise the offer. This may be the case either where the offeror has stated that it will not revise the offer (see 10.2.2 above) or it is prohibited from revising its offer under Rule 32.1 due to the imminence of the final closing date (see 10.2.1 above). Otherwise, the restriction that is most frequently relevant to the acquisition of the target's securities by the offeror during the offer period is the 30% ceiling prescribed by Rule 5 (see 12.3 above).

Parties other than the offeror, who are privy to confidential price-sensitive information about the offer are prohibited from dealing in the target's shares during the offer period under Rule 4.1 (see 12.8 below).

The restrictions on purchases of shares following the closing of an offer are considered in 14.3 below.

12.7 PARTIES ACTING IN CONCERT

The concept of "acting in concert" was introduced to reduce the risk of evasion of the various restrictions set out above, by groups of people co-ordinating their stake-building activities. When parties are deemed to be acting in concert, holdings of, and purchases and sales by, any one of the parties acting in concert are attributed to all the other such parties for the purposes of determining what purchases and sales are to be permitted and what their consequences are to be. For example, Rule 5 states that, for the purpose of determining a person's buying freedom, shares held by any persons "acting in concert" with that person are to be aggregated with his own holding. Section 1(3) of the Act defines "acting in concert" as follows:

"two or more persons shall be deemed to be acting in concert as respects a takeover or other relevant transaction if, pursuant to an agreement or understanding (whether formal or informal) between them, they actively co-operate in the acquisition by any one or more of them of securities in the relevant company concerned or in the doing, or in the procuring of the doing, of any act that results in an increase in the proportion of such securities held by any one or more of them."

The Irish definition, unlike that found in the UK equivalent, the City Code on Takeovers and Mergers, does not require that, in order to be "acting in concert" the effect of the co-operation be to obtain or consolidate control. In addition to the above definition, the Rules state that certain persons are presumed to be acting in concert unless the contrary is proved. These include:

- a company, its holding company, its subsidiaries, subsidiaries of its holding company, associated companies of each of them and companies of which such companies are associated companies (all of which are presumed to be acting in concert with each other);
- a company (and each of the companies within the ambit of the first bullet point above) with its directors, together with their close relatives and related trusts;
- a company (and each of the companies within the ambit of the first bullet point above) with the trustees of its pension fund;
- a fund manager and persons controlling, controlled by or under the same control as such fund manager with clients whose investments it manages on a discretionary basis;
- a company with its professional advisers and persons controlling, controlled by or under the same control as such advisers (subject to certain exceptions in respect of market makers and the members of a partnership who do not act for the company); and,
- in certain circumstances, during or prior to an offer, or when the company is in the course of redeeming or purchasing its own securities, or whilst the directors propose that the company so purchase or redeem, the directors of a company are presumed to be acting in concert with one another, their families and trustees.

SAR 5 recognises broadly similar concepts. There are, however, technical differences between the various provisions, which may result in certain shareholdings and dealings being aggregated for some purposes but not for others. In this regard the provisions of the Companies Act, 1990, the Rules and the SARs must be carefully reviewed in each circumstance.

The issue of determining who is and who is not a person acting in concert is extremely important and as will be seen from the above is not a simple analysis. It should be reviewed in detail at the outset of any proposed transaction.

The concept of concert parties is crucial in terms of Rule 9 whereby a mandatory offer for all shares in a target is triggered where certain shareholdings are acquired by a person or persons acting in concert with them (see Section 5 above).

In addition the terms of the offer itself can be effected by the actions of a concert party. For example the minimum offer provisions in Rule 6.1 (see Section 6.1 above) extend to acquisitions of shares by concert parties within the three month period prior to commencement of the offer period as does the Rule 11 requirement of cash or cash equivalent consideration (see Section 6.1 above). Additional disclosure requirements will also apply to concert parties.

12.8 INSIDER DEALING

Stake-building may also be totally prohibited if it constitutes, or is prohibited by regulations designed to combat, insider dealing. Insider dealing restrictions are principally contained in Part V of the Companies Act 1990 ("1990 Act") and supplemented by the Rules (Rule 4).

Part V of the Companies Act, 1990

Part V of the 1990 Act prohibits insider dealing. The primary offence envisaged by Part V is that of dealing in securities by a person connected with a company (an officer for example) who, by reason of his connection with the company at that time or within the six months preceding the dealing, is in possession of information that is not generally available but, if it were, would be likely materially to affect the price of the securities of the company. This includes all off-market dealings in listed securities.

The insider can also be a person connected with another company, where the information relates to a transaction, whether actual or contemplated, involving the two companies (Section 108(2) of the 1990 Act). A further class of person who is prohibited from dealing is a "tippee" or those informed of the price sensitive information by the primary insider and is aware or ought reasonably to be aware that their informant would be prohibited from dealing (Section 108(3)). In addition, an insider may not cause or procure any other person to deal in those securities or communicate price-sensitive information to others who would be likely to deal on that basis (Section 108(4) and Section 108(5)).

The Irish Association of Investment Managers has stated that in its view, in general, unpublished price-sensitive information is information which companies are required to announce through the Company Announcements Office, and which would have an impact of 5% on the price of the company's securities.

Section 108(6) of the 1990 Act prohibits a company from dealing in securities at a time when any of its officers is an insider and would be precluded from dealing. However, this prohibition is not absolute. Firstly, the company may so deal if the decision is taken by some one other than the insider and express recognition is made of "Chinese Walls", provided they meet the double criteria of formality and effectiveness. Secondly, where the price-sensitive information consists only of the fact that the company, whose officer is aware of it, proposes to deal in the securities of another company, the possession of this information does not preclude dealing.

A potential offeror who has had talks with the target's management and has come into possession of confidential price-sensitive information is subject to the insider dealing regime. Thus, for example, if he has been shown confidential management figures, he is prohibited from buying securities of the target other than by the proposed general offer.

Insider dealing gives rise to a range of severe penalties, both civil and criminal. As regards civil liability, the insider is liable to compensate any other party to the transaction who was not in possession of the relevant information and who has suffered a loss (Section 109(1)(a) of the 1990 Act) and account to the company for any profit (Section 109(1)(b) of the 1990 Act). A conviction for unlawful dealing gives rise both to a 12-month restriction on dealing (Section 112 of the 1990 Act) and criminal sanctions.

Insider Dealing and the Takeover Rules

The insider dealing rules are reinforced in the context of a takeover offer by Rule 4.1 of the Takeover Rules. This prohibits any person other than the offeror, who is privy to confidential price-sensitive information concerning an offer or contemplated offer, from dealing in the securities of the target company or recommending others to do so. Rule 4.2 also restricts dealing in shares.

12.9 IRREVOCABLE UNDERTAKINGS

In some cases, instead of buying securities in the target company directly, it may be more attractive for an offeror to increase its chances of the offer being successful by obtaining undertakings to accept the offer from major shareholders or, in the case of a recommended offer, from directors who are also shareholders. Irrevocable undertakings are used in the context of stake-building for a number of significant reasons:

- An offeror who buys the shares directly will be left with the shareholding if its bid fails;
- The selling shareholder will not benefit from any revised or increased offer (whereas most irrevocable undertakings (known as “soft irrevocables”) allow him/her to accept a higher bid);
- Provided that an irrevocable undertaking is appropriately drafted, the shares to which it relates can be counted towards the 80% which an offeror needs to acquire under a takeover offer in order to compulsorily acquire the remaining 20% (Section 204 of the Companies Act 1963);
- If the offeror buys the shares, and as a result obtains more than 30% of the shares in the target, he will be required to make a mandatory offer under Rule 9 (See Section 5 below). By contrast, if the offeror receives an irrevocable undertaking, the shares covered by that irrevocable undertaking may not be counted towards the 30% level for Rule 9 purposes provided that they do not give the offeror any control of the voting rights;
- If more than 10% of the shares have been bought by the offeror for cash in the previous 12 months and the offeror then makes a share offer the offeror may be required to include a cash alternative in that offer.

However, irrevocable undertakings cannot be used to avoid the requirements relating to stake-building outlined in this section. Irrevocable undertakings are covered by the SARs and by Rule 5, both of which restrict the timing of stake building. In addition, an offeror who is given an irrevocable undertaking will as a result have a notifiable interest in shares for the purposes of the 1990 Act. The donor and donee of the undertaking may be deemed to be "acting in concert", as defined in the Act. Insider dealing issues will also need to be considered in detail. By acquiring irrevocable undertakings, one cannot avoid disclosure under the Companies Act or the Rules unless one falls below the threshold limits set for disclosure.

13 DISCLOSURE REQUIREMENTS

Each of the Companies Act, 1990, the SARs, the Rules and the Listing Rules include provisions in relation to the disclosure of information in connection with the acquisition and/or disposal of shares and interests in shares.

13.1 DISCLOSURE REQUIRED BY THE COMPANIES ACT, 1990

Part IV of the Companies Act, 1990 provides, inter alia, that anyone who acquires or disposes of any shares in a public company which results in such person's interest in that company going above or below 5% of the voting shares in that company must, within five days, notify the company in writing of the amount of his holding and certain information relating to it. A justifiable interest in shares is widely defined and particular care must be taken in this area, particularly in the context of irrevocable undertakings.

Similar disclosures have to be made whenever a person's interest was above the notification threshold of 5% before the transaction, but is altered by a whole percentage figure as a result (either upwards or downwards) of the transaction. Thus, for example, a person who holds 7.3% of a particular class of shares may increase his holding to 7.9% without further disclosure but an increase to 8% will require disclosure.

The Companies Act, 1990 also imposes disclosure requirements on directors, shadow directors and their families in respect of their interests in shares or debentures in a company.

Section 91 of the Companies Act, 1990 obliges a person who acquires or ceases to have an "interest in shares" in a company listed on the Irish Stock Exchange within five days to notify the Irish Stock Exchange of his interest in the shares following the acquisition or cessation, as the case may be, where, following the acquisition or disposal, the percentage level of his interest in the entire share capital of that company exceeds or falls below either 10%, 25%, 50% or 75%.

13.2 COMPANY'S ABILITY TO REQUIRE DISCLOSURES

Section 81 of the Companies Act, 1990 gives Irish public companies the right, by written notice, to require any person, whom the company knows or believes on reasonable grounds to have, or have had within the previous three years, an interest in its voting shares, to confirm that fact and give details of any relevant interest. A reply is required within such reasonable time as may be specified in the notice, which may sometimes be a matter of 48 hours or even less. A failure to reply may constitute a criminal offence or result in restrictions on the exercise of voting rights and on the transfer of the shares in question.

13.3 DISCLOSURE UNDER THE SUBSTANTIAL ACQUISITION RULES

SAR 6 supplements the provisions of the Companies Act, 1990 and requires disclosure of share acquisitions which result in the acquirer holding 15% or more of the voting rights in a company. In the case of a person who already holds shares or rights over shares carrying between 15 and 30% of the voting rights of the company, acquisitions which increase his/its relevant holding beyond a whole percentage figure must also be disclosed. Disclosure has to be made to the Company, the Irish Stock Exchange and to the Panel.

The most important difference between SAR 6 and its equivalent in the Companies Act, 1990 is that SAR 6 requires disclosure not later than 12 noon on the business day following the date of the acquisition. As noted above the Companies Act, 1990 requires disclosure within five days.

13.4 TAKEOVER RULES – DISCLOSURE DURING AN OFFER PERIOD

The disclosure requirements imposed by the SARs do not apply to an acquisition by a person who has announced a firm intention to make an offer for a company, the posting of which is not, at the time of the acquisition subject to a pre-condition. This does not, however, result in a relaxation of the disclosure requirements because Rule 8 of the Takeover Rules applies from the time of the first public announcement of an offer or possible offer until the end of the offer period.

Rule 8.1 requires public disclosure of all dealings in securities of the target by the offeror, or an offeree or an associate within the offer period. Dealings by anyone owning or controlling 1% or more of any relevant class of security must also be disclosed (Rule 8.3).

Rule 8.8 imposes an obligation on stockbrokers, banks and others who deal in securities on behalf of clients during an offer period to ensure, as far as practicable, that those clients are aware of such disclosure obligations.

13.5 LISTING RULES

The obligations under Paragraph 9 of the Listing Rules to disclose substantial developments in the company's sphere of activity and major acquisitions or disposals of its shares are outlined at Section 11.1 above.

14 FINAL STAGES OF THE OFFER

14.1 OTHER TIME LIMITS

There are a number of additional time limits not previously discussed which are important:

Withdrawal Rights

A shareholder who accepts an offer is entitled to withdraw his acceptance from the date which is 21 days after the first closing date of the initial offer, if the offer has not by that date become unconditional as to acceptances (Rule 34). This entitlement to withdraw is exercisable until the earlier of the time (a) the offer becomes unconditional as to acceptances or (b) the final time for lodgement of acceptances (which can be taken into account for the purposes of determining whether the offer may become unconditional as to acceptances is reached). This is generally on the 60th day after the offer document has been posted. This facility allows shareholders who originally decided to accept the offer to retain their shares if an offer does not prove successful.

Fulfilment of Conditions

Except with the consent of the Panel, all conditions (other than the acceptance condition) must be fulfilled within 21 days of the first closing date or of the date the offer becomes unconditional as to acceptances, whichever is the later (Rule 31.7). If this does not occur the offer will lapse.

Settlement of Consideration

Except with the consent of the Panel, where an offer becomes or is declared unconditional, the consideration due to acceptors must be posted within 14 days after (i) the first closing date for acceptance of the offer or (ii) the date on which the offer becomes or is declared unconditional in all respects or (iii) the date of receipt of the completed acceptance, whichever is the later (Rule 31.8).

Contested Bid

The new Rules provide that in a competitive situation, an offeror whose offer has been despatched earlier may with the consent of the Panel extend the timetable for its offer to provide for the harmonisation of some of the major dates (i.e. 39th Day/60th Day deadlines) so that they coincide with those of the later offer (Rule 31.4).

14.2 ACQUISITIONS FROM NON-ACCEPTING SHAREHOLDERS (SECTION 204)

This is a complicated area and will need to be considered at the outset of any planned offer. From the offeror's perspective this procedure has the advantage of allowing the entire shareholding to be acquired in circumstances where there are a small number of missing or apathetic shareholders.

Section 204(1) of the Companies Act, 1963 provides that where an offer for all of the target shares has been approved in respect of 80% in value of the "affected shares" within four months of publication of the terms of the offer, the offeror is entitled to compulsorily acquire the remaining shares in the target. Shares beneficially held by the offeror are excluded from the 80% threshold calculation. In addition, Section 204(2) provides that if at the date of the publication of the terms of the offer the offeror is the beneficial owner of shares in the target to a value greater than 20% of the aggregate value of those shares and the "shares affected", section 204(1) will not apply unless the assenting shareholders constitute not less than 75% in number of the holders of those shares.

Shareholders upon whom compulsory acquisition notices are served have the right to object to the acquisition of their shares by applying to the court within one month of the date on which the relevant notice was given. In such cases, the court may order that the offeror shall not be entitled and bound to acquire the relevant shares or specify terms of acquisition different from those of the offer (although in practice this latter remedy is rarely exercised). In practice, however, this rarely ever happens. Section 204(4) also entitles minority shareholders to demand to be bought out in such circumstances.

14.3 RESTRICTIONS ON FURTHER PURCHASES FOLLOWING OFFERS

Except with the consent of the Panel, an offeror has announced a firm intention to make an offer or has posted an offer (not being a partial offer) and that offer has been withdrawn or has lapsed, neither the offeror nor any person who acted in concert with the offeror in connection with that offer, nor any person who is subsequently acting in concert with any of them, may within 12 months of the date on which the offer was withdrawn or lapsed make another offer for the same target company (Rule 35.1(a)). These restrictions also apply to persons who make announcements concerning a target company which although not amounting to a firm intention to make an offer (not being a partial offer), raises or confirms the possibility that such an offer may be made by the offeror and then a firm intention to make or not to make an offer is not announced within what the Panel deems to be a reasonable period.

Rule 35.1(a) also prohibits acquiring any shares in the target company which would give rise to an obligation to make a mandatory offer at a time when the relevant offer would be prohibited by that Rule. Thus the buying freedom of an unsuccessful offeror is restricted for 12 months from the time its offer closed. Under Rule 35.2, except with the Panel's consent, an offeror is prohibited for a period of six months from the closure of the offer from making a second offer to, or acquiring any shares from, any shareholders of the target company on better terms than those made available under the first offer. Dispensations may be available from this rule where, for example, the target company recommends the new offer.

15 TAXATION CONSIDERATIONS

15.1 INTRODUCTION

From a taxation perspective, the main issues which arise in relation to the takeover of an Irish company are usually:

- whether to provide shareholders in the target company with a choice of either crystallising or rolling over any potential capital gain;
- whether it will be possible to structure the acquisition so that the offeror will obtain a tax deduction for the costs of acquisition; and
- whether it will be possible to reduce any associated tax charges such as stamp duty and capital duty.

15.2 CAPITAL GAINS

The decision by an offeror to offer cash and/or shares and/or debentures in a takeover situation will generally be a commercial (rather than tax) decision based primarily on the offeror's ability to pay cash and/or issue more shares and/or raise new debt bearing in mind the relevant market conditions. However, the decision can have an important impact on the capital gains tax position of the target company shareholders. Where an offeror offers cash only, then a shareholder who receives cash will have to examine their personal tax position as the receipt of cash may give rise to a charge to capital gains tax.

Where an offeror offers to issue shares and/or debentures to the shareholders of the target company in exchange for their shares in the target company then, once the exchange is structured in the correct manner, the exchange will not be treated as involving any disposal of the original shares or any acquisition of a new holding. Instead, the original shares and the new holding will be treated as the same asset acquired as the original shares were acquired.

15.3 COSTS OF ACQUISITIONS

An offeror will, so far as is possible, want to structure any offer in such a way that the costs of acquisition will be deductible for tax purposes. This process will involve, inter alia, deciding whether it will be necessary to incorporate a special purpose Irish plc, deciding whether to use an offshore offeror, deciding where to incorporate such an offeror and to base its central management and control, examining withholding tax issues and thin capitalisation issues, and looking at the ability to match reliefs and profits and/or the ability to obtain an interest deduction.

15.4 ASSOCIATED TAX CHARGES

Any stock transfer form which transfers ownership of shares in an Irish incorporated company will, in general, be liable to a charge to Irish stamp duty at the rate of 1% of the consideration paid for the transfer. However, relief from the charge to Irish stamp duty may be available in a takeover situation once the takeover is structured as a “reconstruction or amalgamation” and the detailed provisions set out in the relevant legislation are satisfied. This relief will not be available where the consideration offered for the acquisition includes an element of cash which amounts to more than 10% of the total consideration.

Where an Irish company offers to issue shares to the shareholders of a target company in return for their shares in that target company then the issue of shares by the offeror may give rise to a charge to Irish capital duty at the rate of 1% of the value of the target company. Relief from such a charge may be available if the takeover is structured as a “reconstruction or amalgamation” and the detailed provisions set out in the relevant legislation are satisfied.

GLOSSARY/DEFINITIONS

acceptance condition
a condition attaching to an offer relating to the number of shares which the offeror is seeking (see Section 6.2 above);

Act
the Irish Takeover Panel Act, 1997;

acting in concert
see "persons acting in concert" below;

"Companies Acts"
Companies Acts, 1963 to 2001

"Competition Act"
the Competition Act, 2002

concentrations with a Community dimension ("CCDs")
proposed acquisitions which qualify for investigation by the European Commission under the EC Merger Regulation

consideration
the money or securities which the offeror is offering the target's shareholders in return for their shares in the target

day 21
the first closing deadline, until which the offer must initially remain open for acceptance, which normally falls at 1.00pm on the 21st day after the posting of the original offer document

day 39
the last day for the release of trading results or other information by the target which normally falls on the 39th day after the posting of the original offer document

day 46
the last day on which notice of a revised offer may be posted to target shareholders which is normally the 46th day after the posting of the original offer document

day 60
the final closing date, or the last day on which an offer may become or be declared unconditional as to acceptances, which is normally the 60th day after the posting of the offer document

defence document
the document setting out the views of the target board and its financial advisers in a hostile offer situation required by the Rules to be sent to shareholders of the target

first closing date

the date specified in the original offer document as being the date on which the offer will cease to be open for acceptance (unless it is extended), which must not be earlier than the 21st day after the posting of the original offer document

general offer

an offer to acquire all the shares, or all the equity shares, of a target (see 4.1 above)

General Principles

the general principles set out in the Act (see 2.1 above)

insider dealing

dealing in securities while in possession of unpublished price-sensitive information which is specific to the relevant company (see 12.8 above)

irrevocable undertakings

binding undertakings given by shareholders in the target to accept a takeover offer (see 12.9 above)

Listing Rules

rules issued by the Irish Stock Exchange pursuant to the European Communities (Irish Stock Exchange) Regulations 1984

mandatory offer

an offer which must be made by virtue of Rule 9 (see Section 5 above)

Merger Regulation

Council Regulation EEC 4064\89 on the control of concentrations between undertakings as amended by Council Regulation EC 1310\97

Mergers Acts

the Mergers and Takeovers (Control) Acts, 1978 to 1996

Minister

the Minister for Enterprise, Trade and Employment

offeror

a person or company making a takeover offer

offer document

the document sent to target shareholders containing details of a takeover offer

offer period

the period from the time when an announcement is made of a proposed or possible offer (with or without terms) until the first closing date or, if this is later, the date when such offer becomes or is declared unconditional as to acceptances or lapses

Panel
the Irish Takeover Panel

persons acting in concert
Section 1(3) of the Act provides that "two or more persons shall be deemed to be acting in concert as respects a takeover or other relevant transaction if, pursuant to an agreement or understanding (whether formal or informal) between them, they actively co-operate in the acquisition by any one or more of them of securities in the relevant company concerned or in doing, or the procuring of the doing, of any act that results in an increase in the proportion of such securities held by any one or more of them". Rule 3.3 sets out a list of persons who are presumed to be acting in concert.

responsibility statement
a mandatory statement that the offeror's directors take personal responsibility for the contents of documents issued in connection with the offer (see 8.1 above)

rights over shares
rights acquired by a person by virtue of an agreement to purchase shares or an option to acquire shares or an irrevocable undertaking. This is relevant for purposes of the SARs and Rule 5

Rules
the Irish Takeover Panel Act, 1997 (Takeover) Rules, 2001 (see 2.1 above)

SARs
the Irish Takeover Panel Act, 1997 (Substantial Acquisition) Rules, 2001 (see Section 12)

scheme of arrangement
an arrangement pursuant to Section 201 of the Companies Acts, 1963 whereby the rights of a company's creditors or members, or some class of them, are altered, and which may be a means of effecting a takeover (see 4.2 above)

target
the company which is the subject of the general offer, scheme of arrangement or substantial acquisition of shares

takeover offer
an offer to acquire the voting shares of a target with a view to obtaining control of it

Takeover Panel
see Panel above

Takeover Rules
see Rules above

unconditional as to acceptances

an offer which is not subject to an acceptance condition, or the acceptance condition of which has been fulfilled, is said to be "unconditional as to acceptances"

white knight

a third party willing to make a competing offer which would be preferred by the target's board to the existing offer (see 9.2 above).

APPENDIX

TYPICAL TIMETABLE FOR AN OFFER

The following is a typical timetable for a recommended and hostile offer. It assumes that there are no merger control or other similar problems.

DATE	EVENT
During the weeks prior to announcement	Market purchases of target shares (see Section 12 above) Terms of offer determined
Day of announcement ("A")	7.30 am: Target and its advisers informed of the offer (Hostile only) 8.00am: Offer announced (see Section 7) 10.00am: Target served with formal request for a copy of its register of members (Hostile only) 12.00 Noon: Target board announces its rejection of the offer (Hostile only)
Up to 28 days after A ("D")	Offer document posted (see Section 8.1)
Up to 14 days after D	Defence document posted (Hostile only) (see Section 8.2)
D + 21	First closing date
D + 22	7.30 am: Offeror announces the level of acceptances and that the offer is being extended for, normally, 14 days 8.30 am: Offeror commences attempt to buy target shares in the market
D + 35	Second closing date
D + 36	7.30 am: Offeror announces the level of acceptances (little changed from first closing date) and purchases and that the offer is being extended for, perhaps, a further 10 days or so
D + 39	Last day for target board to release new information (see Section 9.2)

D +42	Last day for fulfilment of other conditions (if the offer is unconditional as to acceptances on Day 21). Rights of withdrawal of acceptances become exercisable if the offer is not unconditional as to acceptances (see 14.1 above)
D + 46	Latest date for the posting of revised offers (see Section 10.2)
D + 60	Last day for the offer to become unconditional as to acceptances (see Section 10.1)
	Offeror announces whether it has received sufficient acceptances to declare its offer unconditional as to acceptances. If not, offer lapses; if so, offer normally declared wholly unconditional and extended indefinitely
D + 81	Day by which conditions (other than the acceptance condition noted at D+60) must have been fulfilled or waived
D + 102	Latest time for the posting of consideration to shareholders assuming the offer becomes wholly unconditional on D + 81
D + 4 months	Last possible day on which acceptances of the offer can be counted for the purpose of satisfying the 80% requirement of Section 204 of the Companies Act, 1963. Compulsory acquisition notices given immediately it is possible to do so (See Section 14.2 above)
D + 60 days + 1 year	First day on which the offeror can make another contested offer if its first offer failed (See Section 14.3 above)

NOTES

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