Mergers & Acquisitions

Contributing editor
Alan M Klein

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GETTING THE DEAL THROUGH

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Mergers & Acquisitions 2017

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Ireland

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1 Types of transaction

How may businesses combine?

Businesses may combine by:
- a private purchase of shares in a target company, which is typically documented by means of a share purchase agreement;
- a private purchase of a target's underlying assets and, if applicable, liabilities, which is typically documented by means of an asset and business transfer agreement;
- an offer by a bidder to acquire shares in a target that is an Irish incorporated listed public limited company; or
- a scheme of arrangement under the Companies Act 2014 (the Companies Act). This is a statutory procedure which binds all shareholders of the target if it is: (i) approved by a majority in number representing at least 75 per cent in value of the target shareholders voting in person or by proxy at the shareholder meeting; (ii) sanctioned by the High Court of Ireland; and (iii) registered with the Irish Companies Registration Office.

A purchaser may pay in cash, securities or a combination of both.

Irish companies may also combine with other European Economic Area (EEA) companies pursuant to the European Communities (Cross-Border Mergers) Regulations 2008, as amended (the Cross-Border Merger Regulations); or with certain other Irish companies pursuant to the domestic statutory merger regime under the Companies Act.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

Together with the law of contract, the following are the main laws and regulations governing the legal basis for business combinations:
- The Companies Act governs various aspects of mergers and acquisitions, both public and private.
- The Irish Takeover Panel Act 1997, Takeover Rules 2013 (the Irish Takeover Rules) provide the main regulatory framework for the conduct of takeovers of Irish incorporated listed public companies. The Irish Takeover Rules are a principles-based regime based on seven underlying general principles. The spirit, as well as the strict reading, of the Irish Takeover Rules and general principles must be adhered to. The Irish Takeover Rules are not concerned with the financial or commercial advantages or disadvantages of a takeover or other relevant transactions.
- The Irish Takeover Rules establish timelines within which offers must be conducted and declared unconditional in all respects. There is greater flexibility around the timeline applied to takeovers carried out by way of scheme of arrangement than by way of offer.
- The Irish Takeover Rules are administered by the Irish Takeover Panel, which operates principally to ensure fair and equal treatment of all target company shareholders in relation to takeovers (whether structured by way of offer or scheme of arrangement) and certain other relevant transactions. The Irish Takeover Panel is the designated competent authority under the European Communities (Takeover Bids (Directive 2004/25/EC)).
- The Substantial Acquisition Rules (SARs) are a separate set of rules issued and administered by the Irish Takeover Panel. The SARs apply to public limited companies and provide the means by which acquisitions of shares in public limited companies may be made. The main aim of the SARs is to give target companies adequate warning of stake building. Subject to limited exceptions, a person may not, in any period of seven days, acquire shares (or rights over shares) in a target company which carry 10 per cent or more of its voting rights, if, following such acquisition, that person would hold shares or rights over shares carrying 15 per cent or more, but less than 30 per cent, of the voting rights in the target company.
- The Competition Acts 2002 to 2014 (the Competition Act) govern various aspects of the Irish merger control regime. The Competition Act established the Competition and Consumer Protection Commission (the CCPC), which is primarily responsible for the enforcement of the Irish merger control regime. The CCPC shares responsibility for media mergers with the Minister for Communications, Climate Action and Environment (the Minister for Communications). The Irish courts have jurisdiction to adjudicate on any allegation of breach of the Competition Act and on any appeal against a merger decision by the CCPC.
- The Cross-Border Mergers Regulations apply where the transaction involves a merger of an Irish incorporated entity with at least one other EEA company.
- Companies whose shares are listed on the main market of the Irish Stock Exchange (ISE) must comply, where applicable, with the requirements of various European Directives (and implementing measures in Ireland) including:
- the Prospectus (Directive 2003/71/EC) Regulations 2005;
- the Transparency Rules which set out procedural and administrative requirements and guidance in respect of the Transparency (Directive 2004/109/EC) Regulations 2007 (as amended) (the Transparency Rules);
- the EU Market Abuse Regulation (EU 596/2014)(MAR) which took effect in July 2016 and has direct effect in all EU member states and the Irish (Market Abuse) Regulation 2016 (the Market Abuse Regulation), which transposed the EU Market Abuse Directive on criminal sanctions for market abuse (Directive 2014/57/EU) and elements of MAR, and Market Abuse Rules published by the Central Bank of Ireland (Market Abuse Rules). MAR and the Market Abuse Rules impose significant obligations on issuers and strengthen the rules in relation to insider trading and market manipulation;
- the Markets in Financial Instruments Directive (Directive 2004/39/EC), and its implementing measure in Ireland, the Markets in Financial Instruments and Miscellaneous Provisions Act 2007 (as amended); and
- the European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations 2006 (the Takeover Bids Regulations).

Companies whose shares are listed on the Main Market of the ISE need to comply with the Irish Listing Rules, whereas companies whose shares are listed on the Enterprise Securities Market of the ISE (ESM) need to comply with the ESM Rules.

Companies whose shares are listed on the ESM must comply with, where applicable, the requirements of various European Directives (and implementing measures in Ireland), including MAR and the Market Abuse Rules.

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Compliance with certain regulations, rules and statutory provisions is monitored by the Irish regulator, the Central Bank of Ireland (the Central Bank).

Depending on the industry, additional regulators may be involved in a business combination (for example, the Minister for Communications in respect of media mergers).

3 Governing law

What law typically governs the transaction agreements?

Transaction agreements are typically governed by Irish law. However, it would not be unusual for English law and (occasionally) US law to apply to share purchase agreements.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

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

Certain documents relating to public offers governed by the Irish Takeover Rules require the Irish Takeover Panel's approval. The Irish Takeover Panel Act 1997 gives the Irish Takeover Panel the power to impose charges for the purpose of defraying expenses incurred by it in performing its functions.

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

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

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

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

On 3 July 2016, the Market Abuse Regulation came into effect in Ireland replacing and repealing the framework that was in place since 2005. The Market Abuse Regulation extends the application of the market abuse and inside information regime beyond issuers with shares admitted to trading on regulated markets, such as the Main Market of the ISE, to include issuers of securities traded on multilateral trading facilities such as the ESM. The Market Abuse Regulation requires companies with traded securities within the scope of the regulation to disclose inside information directly concerning them to the public as soon as possible. An issuer may delay an announcement pertaining to inside information so as not to prejudice its 'legitimate interests', provided that certain conditions are met (including that the information can be kept confidential and that delayed disclosure would not be likely to mislead the market). Where an issuer chooses to delay its disclosure of inside information so as not to prejudice its legitimate interests, the issuer will be required to inform its regulator in writing, and immediately after the information is disclosed to the public, of its decision to delay the announcement. The Market Abuse Regulation also requires an issuer to provide its regulator with a written explanation of how the conditions for the delay were satisfied.

A prospectus, to the extent required, must contain all information necessary to enable investors to make an informed assessment of the assets and liabilities, the financial position, the profits and losses, and the prospects of the issuer, as well as the rights attaching to the securities in question. In addition to this overriding requirement, there are detailed rules as to content, including a description of the business, audited financial information for the latest three financial years, an operating and financial review of that period and a confirmation that the issuer has sufficient working capital for its present requirements (the next 12 months). There is an exemption from the requirement to produce a prospectus in connection with securities offered in connection with a takeover or merger. However, a document containing information equivalent to that in a prospectus will generally still be required. One disadvantage of an 'equivalent' document is that, unlike a prospectus, it cannot be passported into other EU jurisdictions.

The preparation of a circular will be required for certain categories of information to be provided by a listed company to its shareholders. The Irish Listing Rules and the ESM Rules set out the content and approval requirements for circulars to shareholders, and also the circumstances in which they must be prepared.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Up to the time of announcement of a firm intention by a bidder to make an offer under the Irish Takeover Rules, the SARs apply to a person acquiring shares. The SARs restrict the speed with which a person may increase a holding of shares in the target. Rule 6 of the SARs states that, subject to limited exceptions, an acquirer is obliged to disclose to the target and the Irish Takeover Panel any acquisition of voting rights in a target which when aggregated with its existing holding exceeds 15 per cent of the target's voting rights, or if the acquirer already holds between 15 and 30 per cent of the voting rights of the target, any acquisition that increases their percentage holding. Where any such notification obligation arises, it is to be discharged no later than 12 noon on the day following the relevant acquisition. SARs 3 and 4 also provide restrictions on timing of acquisitions. They provide that a person may not, in any period of seven days, acquire shares (or rights over shares) in the target carrying 10 per cent or more of its voting rights if, following the acquisition, that person would hold shares (or rights over shares) carrying 15 per cent or more, but less than 30 per cent, of the voting rights in the target. Stake-building will also be totally prohibited if it constitutes insider dealing.

Dealings in the securities of a target company that is in an offer period under the Irish Takeover Rules (and in certain circumstances dealings in the securities of a bidder) may trigger a disclosure requirement. A person with more than a 1 per cent interest, or who acquires more than a 1 per cent interest in the securities of such a target company or, in certain circumstances the bidder, must publicly disclose all such dealings during the offer period.

The Transparency Rules require a stakeholder to notify a listed company once the percentage of voting rights acquired by that stakeholder reaches, exceeds or falls below 3 per cent; and then each 1 per cent thereafter.

The Companies Act introduced a statutory disclosure regime (replacing the regime existing under previous legislation) requiring notification within a prescribed time frame where there is a change in the percentage of shares held by a person in a public limited company resulting in:

- an increase from below to above the 3 per cent threshold;
- a decrease from above to below the 3 per cent threshold; or
- where the 3 per cent threshold is exceeded both before and after the transaction, but the percentage level, in whole numbers, changes (fractions of a percentage being rounded down).

The European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016 (the 2016 Regulations) came into operation on 15 November 2016. The 2016 Regulations require Irish companies to gather and maintain information on individuals

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described as their 'ultimate beneficial owner'. The 2016 Regulations do not apply to certain listed companies. Broadly speaking, a shareholding or ownership interest (direct or indirect) above 25 per cent is indicative of beneficial ownership. It is expected that legislation to be introduced in 2017 will require beneficial ownership information to be submitted to a publicly accessible central register.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

Each director of an Irish incorporated company has a duty to ensure that the company complies with the Companies Act. Upon their appointment, a director is required to acknowledge that, as a director, he or she has legal duties and obligations imposed by the Companies Act, other statutes and at common law.

Directors of all public limited companies (excluding certain investment companies), and private limited companies whose balance sheet total and amount of turnover exceed €12.5 million and €25 million respectively for the relevant year, are required to include in their statutory directors' report for each financial year commencing on, or after, 1 June 2015, a statement:

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

The Companies Act contains a non-exhaustive list of fiduciary duties owed by a director to a company. The relevant provisions essentially codify the duties that apply to directors under common law and equity, as well as amending and restating the applicable statutory obligations under existing company legislation.

The eight primary fiduciary duties set out in the Companies Act are as follows:

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

If a company is insolvent, even if not yet in liquidation, the directors must have regard to the interests of the company's creditors. A company is considered to be insolvent if it is unable or is deemed to be unable to pay its debts as they fall due. Directors must not ignore the interests of creditors if there is a significant risk that the company will become insolvent. Where a company's situation is such that any creditor could cause it to be wound up on the ground of insolvency, the company ceases to be the beneficial owner of its assets. The directors have a duty to the creditors to preserve the assets or at least not to dissipate them in such circumstances.

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

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

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

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

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

For companies listed on the Main Market of the ISE, the Irish Listing Rules provide that acquisitions of a certain size (broadly, at least 25 per cent of the size of the bidder), or with parties connected to the company (for example, a director or substantial shareholder), must be approved by a general meeting of the company's shareholders.

The constitutional documents of a company may confer a right of approval on the shareholders (or a class of them). If the transaction is to be funded wholly or in part through shares, shareholder approval may be required to authorise directors to allot new shares, or to disapply pre-emption rights. Shareholder approval may also be required if the transaction involves a director or a substantial shareholder.

Rule 21 of the Irish Takeover Rules (which applies to companies listed on the ISE, the London Stock Exchange, NASDAQ and NYSE) prohibits a target board from taking any of the following actions (except pursuant to a contract previously entered into) without shareholder approval or the consent of the Irish Takeover Panel or both, either in the course of an offer, or if the target board has reason to believe that a bona fide offer may be imminent:

- the issue of any share;
- the grant of share options;
- the creation or issue of any convertible securities;
- the sale, disposal or acquisition of material assets of a material amount;
- the entry into of contracts otherwise than in the ordinary course of business; or
- any other action, other than seeking alternative bids, which may result in frustration of an offer or shareholders being denied the opportunity to consider it.

A scheme of arrangement must be approved by the shareholders of the target and sanctioned by the Irish High Court. A scheme will require the approval of a majority in number representing at least 75 per cent

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in value of the target shareholders voting in person or by proxy at the shareholder meeting to consider the scheme of arrangement.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

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

- the offer must first be disclosed to the board of the target company or its advisers;
- all target shareholders of the same class must be treated equally;
- there are a range of restrictions and obligations on persons dealing with target stock;
- a target board is prohibited from taking certain actions (except pursuant to a contract previously entered into) without shareholder approval or the consent of the Irish Takeover Panel or both, either in the course of an offer, or if the target board has reason to believe that a bona fide offer may be imminent; and
- with limited exceptions, information given by a target to one bidder must be made available to all bidders. A second or subsequent bidder will have to request specific information; it is not entitled, by asking in general terms, to receive all information supplied to the first bidder.

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

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

Break fees are permissible under the Irish Takeover Rules. However, Rule 21.2 expressly prohibits arrangements for break or inducement fees from being agreed without the consent of the Irish Takeover Panel. The consent of the Irish Takeover Panel, if granted, will normally be limited to specific quantifiable third-party costs subject to a cap of 1 per cent of the value of the offer and to receiving confirmation in writing from the target board and its financial adviser that they consider the break or inducement fee to be in the best interests of the target shareholders.

The offer document is required to contain details of any break fee agreed to by the target company.

The target may enter into an exclusivity agreement, however, this is subject to the Irish Takeover Rules (the shareholders cannot be denied the opportunity to decide on the merits of an offer) and to the directors' fiduciary duties. The directors of the target company may also agree to non-solicitation requirements and may sign irrevocable undertakings to accept the offer.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

In addition to the Irish merger control regime, several industries are subject to additional regulations, such as financial institutions, insurance undertakings, pharmaceutical companies, airlines and telecommunications operators.

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

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Although it is common for bidders in a public offer to include wide-ranging conditions in the terms of an offer, the practical effect of these is limited by the Irish Takeover Rules and the Irish Takeover Panel's approach to the application of the rules. Save with the consent of the Irish Takeover Panel, or in the case of Competition Act or European Merger Regulation conditions, an offer may not be made subject to any condition the satisfaction of which depends solely on subjective judgements of the bidder, or which is within its control. A bidder may not invoke a condition to lapse an offer unless the circumstances giving rise to the right to invoke are of material significance to the bidder in the context of the offer and the Irish Takeover Panel, being satisfied that in the prevailing circumstances it would be reasonable to do so, consents to the condition being invoked. In practice it is very difficult for a bidder to invoke a condition, other than a material regulatory condition, acceptance condition or a condition that is required in order to implement the transaction (such as bidder shareholder approval).

Preconditions may be included whereby the offer does not have to be made (namely, the offer document does not have to be posted) unless each precondition is satisfied. The Irish Takeover Panel must be consulted in advance in order to employ the use of preconditions. Preconditions may only be used where they relate to material official authorisations or regulatory clearances, and the Irish Takeover Panel is satisfied that it is likely to prove impossible to obtain the authorisation or clearance within the offer timetable.

In a private acquisition, the parties may contractually agree that certain conditions, including the availability of financing to the purchaser, are conditions to completion of the transaction.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

In financing a transaction, consideration offered by a bidder may take the form of any combination of cash or securities or both. The securities offered may be securities of the bidder or of another company.

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

A bidder may only announce a firm intention to make an offer under the Irish Takeover Rules (a Rule 2.5 announcement) when it and its financial adviser are satisfied, after careful and responsible consideration, that the bidder is in a position to implement the offer. Where the offer is a cash offer or there is a cash alternative, the Rule 2.5 announcement must include a confirmation from the bidder's financial adviser (or another appropriate person) that cash resources are available sufficient to satisfy full acceptance of the offer. Any required debt and equity funding for the offer must be fully and, save with respect to conditions relating to closing of the offer, unconditionally committed prior to the Rule 2.5 announcement. If the confirmation proves to be inaccurate, the Irish Takeover Panel may direct the person who gave the confirmation to provide the necessary resources unless the Irish Takeover Panel is satisfied that the person acted responsibly and took all reasonable steps to ensure the cash was available. A bidder that makes a Rule 2.5 announcement is bound to proceed with a formal offer. The Rule 2.5 announcement must contain all the terms and conditions of the offer; these terms cannot subsequently be altered without the Irish Takeover Panel's consent.

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An offer document issued under the Irish Takeover Rules must include a description of how the offer is being financed and the source of finance (including the repayment terms and names of lenders).

Subject to limited exceptions set out in the Companies Act, an Irish company may not give any financial assistance, directly or indirectly, for the purpose of an acquisition made or to be made by any person of any shares in the company, or, where the company is a subsidiary, in its holding company. Financial assistance includes the provision of guarantees, security, indemnities and loans. The giving of financial assistance may be validated by the carrying out of a summary approval procedure, which requires a directors' declaration of solvency and approval of at least 75 per cent of the shareholders of the company. The summary approval procedure is not available to public limited companies.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

When an offer is made in order to gain 100 per cent control of the target, the buyer may use a statutory procedure to compulsorily acquire the shares of dissenting shareholders (a squeeze-out procedure).

Under Regulation 23 of the Takeover Bids Regulations, the relevant threshold for triggering the squeeze out procedure where the target is fully listed on a regulated market in any European Union or EEA member state (such as the main markets of the ISE or the London Stock Exchange) is the acquisition of 90 per cent of the issued share capital. A bidder has three months from the last closing date of the offer in which to give notice to dissenting shareholders that it wishes to exercise its rights under Regulation 23. Once a notice has been served, a dissenting shareholder has 21 days to apply to the Irish High Court for relief.

The relevant threshold for triggering the squeeze out procedure where the target is listed on ESM, the AIM Market of the London Stock Exchange, NASDAQ or NYSE, is set out in the Companies Act. A bidder must receive 80 per cent acceptances in value within four months of the publication of the offer in order to trigger the squeeze out procedure. If the bidder already holds 20 per cent or more of the shares in the target, it must receive acceptances from shareholders holding 80 per cent in value of the remaining target shares and receive acceptances from at least 50 per cent in number of the holders of the target shares which are the subject of the offer. Once a notice has been served, a dissenting shareholder has one calendar month to apply to the Irish High Court for relief.

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

15 Cross-border transactions

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

Directive 2005/56/EC (implemented in Ireland by the Cross-Border Mergers Regulations) facilitates cross-borders transactions in Ireland.

A cross-border merger may be effected in one of three ways:

- acquisition – a company acquires the assets and liabilities of one or more companies which are dissolved without going into liquidation. The acquiring company issues shares to the members of the dissolved companies in consideration of the transaction;
- absorption – a parent company absorbs the assets and liabilities of a wholly owned subsidiary, which is dissolved without going into liquidation; and
- formation of a new company – a newly incorporated company acquires the assets and liabilities of one or more companies, which are dissolved without going into liquidation. The acquiring company issues shares to the members of the dissolved companies in consideration of the transaction.

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

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

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

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

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

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

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

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

The Assessment of Acquisitions in the Financial Sector Regulations apply to transactions involving the acquisition, directly or indirectly, of a 'qualifying holding' in a target entity. They also apply to the direct or indirect increase in a 'qualifying holding', whereby the resulting holding would reach, or exceed, 20, 33 or 50 per cent of the capital of, or voting rights in, a target entity, or a target entity would become the proposed acquirer's subsidiary.

A qualifying holding means 10 per cent or more of the capital of, or voting rights in, a target entity or a holding that makes it possible to exercise a 'significant influence' over the management of a target entity.

The Assessment of Acquisitions in the Financial Sector Regulations also apply on the disposal of a qualifying holding or a holding which results in the disposer's interest in the target entity falling below the thresholds above or results in the target entity ceasing to be a subsidiary of the disposer.

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

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

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

The Central Bank may set a maximum period within which the proposed acquisition is to be completed or may impose additional conditions or requirements to be met in respect of a proposed acquisition. If it decides to oppose an acquisition, it must, within two working days of the decision being made and before the end of the assessment period, inform the proposed acquirer in writing and outline the reasons for its decision. This decision may be appealed to the Irish High Court.

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

17 Sector-specific rules

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

There is a special regime for media mergers contained in the Competition Act to protect the plurality of the media and to ensure the 'diversity of ownership and diversity of content'.

The Competition Act provides for additional steps 'where two or more undertakings involved carry on a media business in Ireland or one or more of the undertakings involved carry on a media business in Ireland and one or more undertakings carry on a media business elsewhere'. The term 'media business' is defined in the Competition Act and has been expanded to include online news sources and online broadcast of certain audiovisual material.

To carry on a media business in Ireland requires an undertaking to have either a physical presence in Ireland and make sales to customers located in Ireland or to have made sales in Ireland of at least €2 million in the most recent financial year.

In addition to the requirement to notify the national competition authority, the CCPC, the Competition Act requires a separate notification to the Minister for Communications who has an additional responsibility for consideration of media mergers. The Minister has 30 working days, commencing 10 days after the determination of the CCPC, to consider the media merger. If the Minister is concerned that the merger is contrary to the public interest in protecting the plurality of the media, the Minister will request that the Broadcasting Authority of Ireland (the BAI) carry out a 'Phase II' examination. Within 80 working days of receipt of the request, the BAI must prepare a report for the Minister for Communications outlining its view on the merger with regard to media plurality and recommending whether the merger should be put into effect (with or without conditions). An advisory panel may be set up to assist the BAI in its review. The Minister for Communications will make the ultimate decision, taking into account the BAI report and, if applicable, the view of the advisory panel. The Minister for Communication's final determination must be made within 20 working days of receipt of the BAI report.

18 Tax issues

What are the basic tax issues involved in business combinations?

The most significant tax issue relevant to purchasers in the context of asset or share acquisitions is stamp duty. Stamp duty is payable by the purchaser and is payable on the higher of the consideration and the market value of the shares or assets being acquired. The rate of stamp duty payable on transfers of shares is 1 per cent and on the transfer of non-residential property is 2 per cent. The 2 per cent rate generally applies to transfers of property that is non-residential property, however, certain exemptions and reliefs can apply. For example, the transfer of intellectual property and loan capital is broadly exempt from Irish stamp duty. In addition, relief is available for intra-group transfers or reorganisations.

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

The most significant tax issue for vendors is capital gains tax. Capital gains tax is generally payable by the vendor on gains arising on the disposal of assets (including shares) at a rate of 33 per cent. Irish tax-resident individuals and companies are subject to capital gains tax on gains arising on the disposal of worldwide assets. The above mentioned self-assessment regime also applies to capital gains tax. For disposals made between 1 January and 30 November, capital gains tax must be paid by 15 December in the same tax year and for disposals made between 1 December and 31 December, capital gains tax must be paid by 31 January in the following tax year. A tax return disclosing information regarding the disposal must be made to the Irish Revenue Commissioners by 31 October in the year following the year in which the disposal was made.

Another tax issue which can arise in the context of certain asset or share sales is withholding tax. Withholding tax can apply to the sale of Irish 'specified assets', which broadly means Irish land or buildings, shares deriving their value from Irish land or buildings and goodwill of a trade carried on in Ireland. In these circumstances, the purchaser must withhold 15 per cent of the gross purchase consideration and remit it to the Irish Revenue Commissioners. However, this withholding obligation can be avoided if the seller of the shares obtains a tax clearance certificate prior to the consideration being paid or delivered to the seller. The Irish Revenue Commissioners will issue a clearance certificate (called a CG50A) if the seller is resident in Ireland, no capital gains tax is payable in respect of the sale or the capital gains tax liability has been paid.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

In the context of an asset sale, the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (the Transfer Regulations) apply in circumstances where there is a transfer of an undertaking, business or part of an undertaking or business from one employer to another employer as a result of a legal transfer or merger. The Transfer Regulations can also apply to an assignment or forfeiture of a lease, the outsourcing or insourcing of a service, and a change in service provider. Where the Transfer Regulations apply, the employees of the target company will transfer to the buyer on the same terms and conditions of employment (with the exception of certain pension rights), with their continuity of service intact.

A lapse in time between the transferor ceasing business and the transferee resuming the business does not necessarily prevent there being a transfer of the business for the purposes of the Transfer Regulations. In assessing whether or not the Transfer Regulations apply, consideration must be given to the type of business concerned, whether there has been a transfer of assets, whether any employees have been transferred, whether customers have transferred and to what extent the activity carried on pre- and post-transfer is similar.

The Transfer Regulations impose information, and in certain circumstances, consultation, obligations on both the transferor and the transferee, which must take place where reasonably practicable, not later than 30 days before the transfer is carried out, and otherwise in good time before the transfer is carried out. In practice, employee representatives of the affected employees must be informed of the reasons for the transfer, the legal, economic and social implications of the transfer for the employees, and also of any measures that are envisaged in relation to the employees. Where there are no employee representatives, the relevant employers must put in place a procedure whereby representatives can be appointed from the employees themselves. Therefore, time to appoint employee representatives should be factored into the timing of any transaction.

The transferee (buyer) will require considerable information from the transferor in order to enable it to adequately match the transferring employees' terms and conditions and incorporate them into

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Update and trends

After a successful year for M&A transactions in Ireland during 2015, deal making slowed in 2016, amid macroeconomic and political uncertainty.

However, an increase in M&A activity in the Irish market is expected for 2017. This increase is expected to be driven by the following factors:

- financial buyout transactions returning to volumes recorded in 2014 and 2015;
- further acquisitions of Irish technology companies by international investors; and
- resurgence in M&A activity by internationally focused Irish companies who were particularly active in 2014 and 2015.

According to published sources, the top three sectors expected to see the biggest increase in global M&A activity in 2017 are: Fintech, Digital Health/Biotech and the Internet of Things. A number of key multinational companies in these sectors operate out of and through Ireland.

In 2016, Ireland's economic growth (4–5 per cent) was one of the highest recorded in the European Union. The European Commission forecasts that Ireland will remain one of the fastest growing economies in Europe in 2017, predicting a growth rate of 3.6 per cent GDP. Along with positive growth forecasts, Ireland also has a number of strong performing sectors that are expected to continue to attract dealmakers both internationally and domestically such as TMT, PMB, Industrials and Financial Services.

Ireland is also one of the most targeted countries for US investment, valued at approximately US$434 billion. In the first nine months of 2016, US investment in Ireland rose by 6.8 per cent from the same period in 2015, to in excess of €31 billion.

The Companies Act became operative on 1 June 2015. It consolidated the existing Irish Companies Acts and many of the related statutory instruments into one single statue while concurrently introducing significant reforms to Irish company law. The Companies Act runs to over 1400 sections and is the largest substantive statute in the history of the Irish state. The Companies Act introduced many key innovations, including new domestic procedures to merge and divide private companies for the first time, and a simplified form of private company limited by shares.

The transitional period under the Companies Act expired on 30 November 2016 meaning that private limited companies that had not undergone a prescribed conversion process by that date automatically defaulted to the new model company type on 1 December 2016. The Companies Act is in the process of being amended by the Companies (Accounting) Bill 2016 (Accounting Bill), which is expected to be signed into law in early 2017. The main purpose of the Accounting Bill is to transpose EU Accounting Directive 2013/34/EU into Irish law; it also introduces a new concept of 'micro company' into Irish law with relaxed accounting and disclosure obligations.

The European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016 came into operation on 15 November 2016 meaning that most Irish companies must gather and maintain information on individuals described as their ultimate beneficial owner. Ireland acted early to implement these measures mandated by the Directive 2015/849/EU on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (Fourth EU Anti-Money Laundering Directive). Each EU member state must establish a national beneficial ownership register. It is likely that, when the remaining provisions of the Fourth EU Anti-Money Laundering Directive are transposed into Irish law later in 2017, the national beneficial ownership register will be publicly accessible.

Three related pieces of legislation came into force on 17 June 2016, reforming the law on the conduct of audits and the regulation of auditors: the EU Audit Regulation (Regulation (EU) No 537/2014) applicable only to 'public-interest entities', EU Audit Directive (Directive 2014/56/EU) applicable to all statutory audits and the Irish Audit Regulations (European Union (Statutory Audits) (Directive 2006/43/EC, as amended by Directive 2014/56/EU and Regulation (EU) No. 537/2014) Regulations 2016), some parts applicable to public-interest entities only and some parts of general application. The new measures impact public-interest entities most by reforming the auditor selection and appointment process, curtailing non-audit services that the auditor can provide and introducing mandatory auditor rotation for those entities. The General Scheme of the Companies (Statutory Audits) Bill 2017 was published in February 2017. When enacted, this statute will further transpose the EU statutory audits legislation above and will repeal the Irish implementing regulations, moving the relevant provisions to a new Part of the Companies Act.

its workforce. Under the Employees (Provision of Information and Consultation) Act 2006, a transferor is required to notify a transferee of all the rights and obligations arising from a contract of employment existing on the date of transfer which will be transferred to the transferee, on receipt of a written notice from the transferee to the transferor setting out what information the transferee believes may be in the possession of the transferor and requesting same.

Furthermore, where the Transfer Regulations apply, it is not permissible for the new employer (the transferee) to vary the terms and conditions of the transferred employees where the reason for the variation is the transfer itself. The Transfer Regulations also prohibit the dismissal of an employee where the grounds for the dismissal are the transfer itself, unless the employee is dismissed for 'economic, technical or organisational reasons which entail changes in the workforce'. However, this defence is generally only available to the transferee. This makes it difficult for employers to implement changes before the sale of their business to make the business more attractive to prospective purchasers.

Unlike an acquisition of assets, a public or private acquisition of shares will not generally trigger a duty to inform and consult employee representatives or the automatic transfer of contracts of employment under the Transfer Regulations. Employees will remain employed by the target company and such a transaction will not generally affect the terms of employment of the employees of the target company. In certain circumstances, employees will have negotiated a change of control clause in their contract that may grant additional rights (for example, the right to resign without giving the statutory notice period or the right to be paid a severance sum). In addition, there may be broader obligations to inform and consult with trade unions or other employee representatives bodies (including any works councils that may exist) about a proposed takeover, perhaps under the terms of any separate information and consultation agreement, collective agreement, agreement with a works council or with any other employee representative body. In any event, best practice would be to keep employees informed of the transaction so as to avoid employee relations issues.

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

Under the Cross-Border Mergers Regulations, an employee's rights and obligations arising from his contract of employment will transfer to the successor company. The Cross-Border Merger Regulations also specifically protect 'employee participation rights' if a system for such employee participation currently exists in any of the merging companies.

In a public offer governed by the Irish Takeover Rules, a bidder is obliged in its offer document to state its strategic plans for the target company and their likely repercussions on employment and on the locations of the target's places of business, together with its intentions with regard to safeguarding the employment of the employees and management of the target and of its subsidiaries (including any material change in the conditions of employment).

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

The board of the target company is required to state in its response circular its opinion on: the effects of implementation of the bid on all the target's interests including, specifically, employment; the bidder's strategic plans for the target and their likely repercussions on employment and on the locations of the target's places of business, as set out in the offer document; and the board's reasons for forming its opinion.

The response circular, to the extent that it is not incorporated in the offer document, must be made available to the target's employee representatives or, where there are no such representatives, to the employees themselves. Provided it is received in good time before the dispatch of the circular, the target board must append to the response circular any opinion that it receives from the target company's employee representatives on the effects of the offer on employment.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Any buyer of a target company (or assets of a target company) that is in receivership or liquidation will need to satisfy itself that the receiver or liquidator (as appropriate) has been validly appointed.

An advantage of structuring an acquisition involving an insolvent target company is that a buyer can 'pick and choose' assets it wishes to acquire, by means of an asset purchase, and can ensure that it will only inherit the liabilities it has decided to take over. The buyer will need to ensure that it receives good title to the assets, free from any third party interests. The buyer should also consider provisions in Irish insolvency law that may allow a court (on the application of a receiver or liquidator) to set aside transactions at an undervalue and preferences granted to creditors within certain periods before the onset of insolvency.

In a share purchase involving a company in liquidation, the buyer should ensure that it has performed detailed due diligence of the target to be aware of any potential liabilities and consider deferring parts of the consideration in the event of certain liabilities arising. This is particularly important as a receiver or liquidator will be reluctant to give any warranties and if any are provided they are likely to be limited in nature.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

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

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

The primary legislation governing corruption and bribery are as follows:

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

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

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

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

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

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

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

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Depending on the nature of the transaction, a successor entity can be held liable for a prior offence committed by the target entity of bribery of foreign officials. For instance, where the transaction is by way of a share purchase, the successor entity will be liable. If the transaction is structured by way of asset purchase the successor entity can avoid taking on any liabilities of the target entity, such as potential or existing legal actions arising from an alleged breach of bribery laws.

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

Under the Prevention of Corruption Act, a person or business guilty of either a corruption offence or the discrete offence of corruption in office, is liable on summary conviction to a minor fine or imprisonment for a term not exceeding 12 months. A person convicted on indictment is liable to an unlimited fine or imprisonment for a term not exceeding 10 years or both.

On summary conviction for an offence under the Public Bodies Act, a person or business may be liable to a minor fine or imprisonment for up to 12 months, or both. On indictment, an individual may be liable to a substantial fine or imprisonment for up to seven years, or both.

There are restrictions on tendering for public contracts at both Irish and EU level following a conviction for an offence under anti-bribery or anti-corruption law. Where a breach of Irish bribery law is committed by a company in connection with a project funded by the World Bank and other international financial institutions, such companies may be debarred from bidding on contracts funded by the World Bank, International Monetary Fund and other international financial institutions, and publicly named.

The Criminal Justice (Corruption) Bill has been on the Irish legislative agenda for a number of years, having been first published in 2012. It has not yet been brought into law. The draft scheme proposes to repeal numerous pieces of anti-corruption legislation in Ireland and replace them with one consolidated piece of legislation. Some features which will be of interest to businesses considering combinations include the following:

- Companies will also be liable for corruption offences of their employees, agents, subsidiaries, officers, secretaries, managers and directors, where there is an intention by those persons to obtain or retain business for the company. This will make it easier for companies to be prosecuted for corruption.
- It will be a defence for a company to be able to show that it took all reasonable steps and exercised all due diligence to avoid the commission of the offence.

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