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Hayes Solicitors has extensive expertise across a wide range of transactional and advisory work. The firm's corporate team advises leading multinational and Irish businesses, statutory and public sector bodies, professional bodies and sports associations, banks and financial institutions, public and private corporations, private equity and sophisticated private investors, entrepreneurs, business and investment partnerships, charities, start-ups, small traders and new business ventures. The full range of corporate legal services offered by the firm encompasses M&A, disposals, fundraisings, transactional support, corporate reorganisations and business transfers, outsourcing and restructurings, joint ventures, partnerships, shareholder agreements, regulatory advice, company formations and related company secretarial support, corporate governance and a broad range of corporate law advisory matters. Corporate restructuring work includes advising organisations that are increasing or decreasing their workforce, or reassigning roles and responsibilities to meet new challenges or opportunities. Hayes has significant experience in advising on business transfers and divestments, rationalisation and outsourcing arrangements.

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1. Trends

1.1 M&A Market

2018 was a very active year for M&A transactions in Ireland. The activity levels vary in different reports, but all reflect increases. In January 2019 the Competition and Consumer Protection Commission (CCPC) reported a 36% increase in the number of mergers notified to it for approval in 2018 compared with 2017. Mergermarket also reported a slight increase in the number of deals (163 deals for 2018, compared with 151 in 2017) and a strong increase in deal values (EUR76 billion for 2018, compared with EUR16.2 billion in 2017). Other reports suggest a 5% increase in activity from 2017 to 268 deals in 2018.

Ireland continued to experience the impact of headline global deals (in 2018, the merger of Praxair and Linde to form a new Irish USD90 billion holding company, the Takeda Pharmaceutical purchase of Dublin-headquartered Squire for EUR54 billion, Servier's USD2.4 billion purchase of Shire's oncology business, and Orix acquiring a stake in Avolon for USD2.2 billion) supplemented by proactive deal activity in the Irish economy.

Overall deal activity in 2018 was strong, reflecting the continued robust growth of the Irish economy as one of the fastest-growing economies in the EU again for 2018. An encouraging factor for further investment in Ireland is the strong growth in Irish domestic spending and economic activity. Given the potential impact of Brexit and tariffs on international trade, it is very encouraging to see the consistency and growth in the volume of deals and that while most of those deals are at values ranging from EUR5 million to 250 million, the number of larger-value private deals increased in 2018.

1.2 Key Trends

Irish, US and UK trade and private equity buyers led the way on inbound deals and outbound activity by Irish buyers showed a significant increase in value compared with 2017. It is difficult to gauge the impact of Brexit and international tariffs on market activity. Undoubtedly these uncertainties have had an impact but the continued growth of the Irish economy attracted vigorous deal activity in 2018 across all sectors. Anecdotal evidence suggests that deal prices remained strong for quality businesses, favouring sellers.

While public M&A continues to be important because of the scale of deals, public M&A activity was not as active in 2018 and private M&A was the most important driver of deal activity.

Most private deals are structured as share sales, although asset sales and mergers are also used. Consideration used is mainly cash but share consideration and loan stock are also used. Deferred consideration is also a common feature. Completion accounts and locked box price adjustment mechanisms are commonly used. Warranty and indemnity insurance is also becoming more common.

Private equity continues to play a very strong part and partial rather than full acquisitions, a feature of deal activity in 2017, continued into 2018.

Pitchbook also reported strong growth in venture capital deals (EUR553 million in 2018 as compared with EUR100 million in 2017 but EUR632 million in 2016). This reflects the increased availability, broader choice and more sophisticated forms of debt and equity funding in Ireland in 2018.

1.3 Key Industries

Given the scale of the Shire transactions, it is no surprise that deal values are highest in pharmaceuticals, energy, agri-food/food services, financial services, property and technology/telecoms. Activity in 2018 was greatest in the financial services, technology/telecoms, energy, food/food services, property and professional/technical sectors.

This activity reflects the strong sectors of the Irish economy, but in 2018 M&A activity was strong across all sectors.

2. Overview of Regulatory Field

2.1 Acquiring a Company

The primary techniques used to acquire an Irish public company are:

- takeover offers (tender offers); and
- schemes of arrangement.

Merger techniques could also be used but are not yet popular for public company acquisitions in Ireland.

Under a takeover offer a bidder makes a general offer to shareholders of the target company to acquire their shares. The offer must be conditional on the bidder acquiring shares holding more than 50% of the voting rights in the company. Irish company law entitles a bidder to acquire compulsorily the remaining shares if its tender offer achieves acceptance of at least a threshold percentage. The threshold for companies listed on regulated markets in the EEA is 90% and the percentage for private companies and for companies listed on other markets is 80%. Takeover offers are most frequently used for competitive or hostile acquisitions.

Acquisition by a scheme of arrangement involves the target company putting an acquisition proposal (which has been negotiated in advance with the bidder) to its shareholders to seek their approval. The proposal can be a transfer scheme, under which the target company's shares are transferred to the bidder in exchange for payment of the acquisition consideration, or a cancellation scheme, under which the target company's shares are cancelled in exchange for payment of the deal consideration.

Under both proposals a successful scheme results in the bidder becoming the owner of 100% of the target company's shares. A successful scheme requires the approval of a majority of the shareholders of each class of shares affected, representing not less than 75% in value of the relevant shares, who vote in person or by proxy at a class or shareholder meeting. Implementation of a scheme also requires the approval by order of the High Court of Ireland and registration of the order in the Irish Companies Registration Office. The High Court hearing to approve the scheme represents an opportunity for dissenting shareholders to challenge the scheme. Schemes are most frequently used in 'friendly' acquisitions.

The primary technique for the acquisition of a privately owned company is to buy its issued shares, usually under a written purchase agreement between the buyer and seller, following a due diligence and negotiation process. Asset purchases are less common because a stamp duty tax of 6% of the purchase value applies as compared with 1% of the value of the purchase price for shares. Auction processes using vendor due diligence reports, indicative offers, bidding on the basis of pro forma or negotiated purchase documents are less common but occasionally are used for highly sought-after companies.

It is also possible to use merger structures:

- for an Irish company to merge with another Irish company under the Irish Companies Act 2014; or
- for an Irish company to merge with another company incorporated:
  - (a) in the EU under the Cross-Border Mergers Directive; or
  - (b) in an EEA country that has implemented the Cross-Border Merger Directive.

Irish Companies Act mergers have been used mainly for intra-group mergers and cross-border mergers are generally used for high-value private transactions.

2.2 Primary Regulators

The primary regulator of public company M&A activity in Ireland is the Irish Takeover Panel. The Irish Takeover Panel

is established under the Irish Takeover Panel Act 1997, as amended and the Panel administers and enforces the Takeover Rules.

The Takeover Rules apply to M&A transactions involving an Irish incorporated company that has voting shares admitted to trading (or which had voting shares admitted to trading in the previous five years) on Irish markets regulated by the Irish stock exchange or on the London stock exchange (including the AIM), the New York stock exchange, on Nasdaq or on regulated markets in the EEA and to non-Irish incorporated targets which have voting shares admitted to trading on Irish markets regulated by the Irish stock exchange.

The Takeover Rules aim to ensure that takeovers comply with specified general principles and provide an orderly framework and timelines for the conduct of takeovers. The general principles require, for example, that shareholders of the target entity be given equivalent treatment and sufficient time and information to reach a properly informed decision on a takeover offer. The more detailed provisions of the Takeover Rules regulate disclosure and confidentiality, mandatory bids, share-dealing restrictions, the provision of information to competing bidders, permitted deal conditions, the information required to be included in an offer and scheme documents and prohibit defensive actions to frustrate a bid.

The approval of the Central Bank of Ireland is required for the acquisition or disposal of prescribed qualifying holdings (10%, 20%, 33% and 50%) in the capital or voting rights in Irish regulated credit institutions, insurance/assurance and reinsurance undertakings and other investment undertakings that are regulated by the Central Bank.

Media mergers are subject to approval by the Irish Minister for Communications, Climate Action and Environment where two or more undertakings involved carry on media business, one of which has a commercial activity in Ireland or sales of at least EUR2 million in Ireland and the business falls within the prescribed definition of media business. The Minister's review focuses on the impact of the potential merger on media plurality in Ireland and is a review stage that follows after a media merger has received Irish antitrust approval.

Business combinations that exceed specified thresholds (see **6. Structuring**, below) require notification to the Competition and Consumer Protection Commission for antitrust approval, based on a review of the impact of the proposed business combination on competition in affected markets in Ireland.

2.3 Restrictions on Foreign Investments

The Irish Government encourages foreign investment in Ireland and, as a general principle, there are no restrictions on foreign investment. The most significant exception to this is the requirement that Irish airlines must be at least 50% owned by EU residents.

2.4 Antitrust Regulations

The Competition and Consumer Protection Commission (CCPC) is the antitrust regulator that is responsible for the approval of business combinations in Ireland.

From 1 January 2019, notification to the CCPC is required for media mergers or where:

- aggregate turnover in Ireland in the most recent financial year of the undertakings involved was not less than EUR60 million; and
- turnover in Ireland in the most recent financial year of each of two or more of the undertakings involved is not less than EUR10 million.

Before 1 January 2019, the financial turnover thresholds were for:

- EUR50 million; and
- EUR3 million.

The changes followed a consultation process in 2017 and recognised the need to align the Irish antitrust thresholds to comparable antitrust regimes for similarly sized economies.

Notification to the CCPC can also be made on a voluntary basis (where a mandatory notification is not required) by parties to a business combination, eg, if concerns arise that the combination may have an adverse effect on competition in a relevant market in Ireland.

The CCPC investigation of a notified business combination is considered in two phases. In a Phase I investigation the CCPC has 30 working days from the 'appropriate date' – the date of submission of a complete notification (with compliance with all relevant information required by the CCPC) – to approve the combination or refer it to a Phase II investigation. A Phase I investigation is extended to a 45-working day review period where the parties offer remedy proposals to address potential antitrust concerns. If approval or referral to a Phase II investigation is not done within the relevant timeframe, approval is deemed given.

In a Phase II investigation the CCPC has 120 working days from the initial 'appropriate date' to approve (with or without conditions) or to prohibit the business combination.

Business combinations in Ireland that are of sufficient scale to give rise to a EU Community dimension may be subject to review under the European Merger Regulation.

2.5 Labour Law Regulations
Share acquisitions do not generally affect the employment status of target company employees, although a change of control can accelerate share incentive plan entitlements. Proper due diligence on a target company's employment contracts, pensions and incentive plans and compliance with any required visa or permits obligations is a key element of pre-acquisition diligence. Irish labour laws usually apply to protect all employees working in Ireland, regardless of their nationality. Employers in Ireland are required to provide employees with a written statement of specified terms and conditions of employment within two months of commencement of employment.

Issues that are noteworthy for detailed diligence include the prescribed funding standard for defined benefit pension schemes and the need for additional assets to be held as a risk reserve; the equality of treatment in employment conditions afforded to temporary agency workers; the increase in the age at which a State pension becomes available (now 66 but increasing to 67 in 2021 and to 68 in 2028) and the resulting potential for claims of age-based unfair dismissals claims, the increased application of parental leave and the impact of protected disclosures on the potential to dismiss employees.

Irish labour laws which acquirers should generally be concerned about include:

- Minimum Notice and Terms of Employment Acts 1973-2005;
- Terms of Employment (Information) Acts 1994-2014;
- Unfair Dismissals Acts 1977-2015;
- Employment Equality Acts 1998-2015;
- Payment of Wages Act 1991;
- National Minimum Wage Act 2000;
- Maternity Protection Acts 1994-2004;
- Organisation of Working Time Act 1997;
- Redundancy Payments Acts 1967-2014;
- Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007;
- Protection of Employment Acts 1977-2015;
- Protection of Employees Acts 2001 (Part-Time Work), 2003 (Fixed Term Workers) and 2012 (Temporary Agency Work);
- Protection of Young Person (Employment) Act 1996;
- Safety, Health and Welfare at Work Act 2005; and
- Protected Disclosures Act 2014.

Where an acquirer buys a business or assets, the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 will usually apply with the effect that notification to, and consultation with, employees working in the business affected is required in good time - at least 30 days in advance of the transfer. On transfer of the target business the rights and obligations of the target business under affected contracts of employment (other than certain pension schemes rights) at the transfer date are transferred to the acquirer. Usually, reciprocal indemnities are negotiated in asset and business acquisition agreements to allocate risk and responsibility between the acquirer and seller by reference to the transfer date.

2.6 National Security Review
There is no applicable explicit national security review of general acquisitions in Ireland but Ireland adheres to the EU's 'restrictive measure' sanctions introduced at EU level or by binding resolutions of the Security Council of the United Nations. Restrictive measures may apply to countries, non-state entities and individuals.

3. Recent Legal Developments

3.1 Significant Court Decisions or Legal Developments
While there have not been any significant court decisions, the following legal developments in the last three years relating to the economy and M&A are noteworthy:

- Brexit remains the most likely significant legal development to affect M&As in Ireland, although it remains impossible even as of February 2019 to determine its effect until greater clarity is given to the terms of the UK's exit from the EU;
- the application of revised thresholds for the mandatory notification of business combinations to the CCPC with effect from 1 January 2019 is a sensible revision to align Irish standards more closely with the antitrust regimes of comparable economies; and
- the increase in stamp duty tax on business and asset sales from 2% to 6% of the purchase value in October 2017 means that most acquisitions are likely to be structured as share purchases, which attract stamp duty tax at a rate of 1% of the purchase value.

3.2 Significant Changes to Takeover Law
There are no significant changes to Irish takeover law expected or under consultation in the coming twelve months, but some changes are emerging through the system. The CCPC has engaged in a consultation on the possible simplification of the merger control process. The consultation that concluded in December 2018 asks whether deals that clearly do not raise competition concerns should be subject to a shorter and simplified procedure than is used for all notifications currently.

The Irish Law Reform Commission issued its Report on Regulatory Powers and Corporate Offences in October 2018.

The Report makes recommendations on corporate offences that would clarify the circumstances in which a body corporate could be held criminally liable for systemic failures by its senior executives and to address egregiously reckless risk-taking by treating conscious (subjective) recklessness by a person as fraud, eg, in the offence of false accounting.

One change from 2017 is worth noting because of its impact on public M&As: the Irish Takeover Panel's Practice Statement on implementation agreements and related conditions to a public offer. The Takeover Panel noted that the Takeover Rules do not prohibit conditions in relation to the termination or failure to perform the terms of an implementation agreement, unless such conditions depend solely on subjective judgements of the directors of the party that the conditions benefit or the condition is within their control. The Takeover Panel made it clear that implementation agreement termination events should be expressly included as terms of the offer and stated in compliance with the Takeover Rules. The Takeover Panel also emphasised that the invocation of a condition to an offer (including an implementation agreement termination event) is subject to the Takeover Panel's consent and will be tested against the 'material significance' and 'reasonableness' tests prescribed by the Takeover Rules.

In addition, the Companies (Accounting) Act 2017 made changes to address certain anomalies under the Companies Act, and the transposition of EU Directive 2013/34 and the Companies (Amendment) Act 2017 extends the period during which certain Irish companies that have securities listed on US stock exchanges can continue to use US GAAP (generally accepted accounting principles) in the preparation of their financial statements.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies

A range of different disclosure obligations, implications for the price and consideration of the offer and restrictions on the pace of stakebuilding make it less customary for a bidder to build a stake prior to launching an offer.

The Irish Takeover Rules on disclosure and the Irish Takeover Panel Act 1997 Substantial Acquisition Rules (SARs) (which apply up to the time of announcement of a firm intention to make an offer) restrict the speed at which a bidder is permitted to increase a holding of a publicly quoted company's voting shares or rights over voting shares to an aggregate of between 15% and 30%. Shares in a target entity may be purchased outside an offer process, but a bidder may not do so before an announcement if the company has supplied the bidder with confidential information. The Irish Companies Act 2014 requires disclosure to the target company and to the relevant exchange (and the SARs also require disclosure to the Takeover Panel), of share purchases prior to and during an offer period that give the acquirer an interest in 3% or more in the voting shares of the target company, or results in that interest changing through a percentage level.

The Takeover Rules prohibit a bidder from:

- making an acquisition that results in it holding 30% or more of the voting rights in a company; or
- where it holds more than 30% but less than 50% of the voting rights, increasing that holding by more than 0.05% within any period of twelve months unless the acquisition is from a single shareholder, or precedes the announcement of a firm intention to make a recommended offer and is conditional on the making of the announcement, or follows the announcement of a firm intention to make a recommended offer and satisfies a pre-condition to the making of the offer.

The Takeover Rules require that an offer must not be made at a price per share that is less than the highest price per share paid by the bidder during the three-month period prior to the commencement of the offer period. The Takeover Panel may extend that period to twelve months in certain circumstances, if the Takeover Panel determines it to be more appropriate in the circumstances.

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

4.2 Material Shareholding Disclosure Threshold

During an offer period, the bidder and its concert parties must aggregate and publicly disclose any acquisition of company shares or derivatives (including cash-settled contracts for differences). Any persons interested in 1% or more of the target entity's securities are also required to disclose their dealings publicly during the offer period. Public announcements are required by the Irish Takeover Rules to be made to an approved Regulatory Information Service by 3.30pm on the business day following the dealing. The Irish Companies Act and Transparency Regulations also require public disclosure to the target company and to the relevant stock exchange, as noted earlier.

4.3 Hurdles to Stakebuilding

It is possible but not customary to introduce higher reporting thresholds than those required by the Irish Takeover Rules, the Irish Companies Act and the Transparency Regulations. The Irish Companies Act permits a company to require the disclosure of the beneficial ownership of its shares and it is customary for such rights to be included in the constitutions of Irish companies. Typically, a failure to comply with a com-

pany's disclosure notice will entitle the company to restrict the exercise of shareholder voting rights attaching to the relevant shares. In addition, the fourth Anti-Money Laundering Directive 2015/849 requires Irish companies to have adequate, accurate and current information on its beneficial ownership register. Dealing in a target company's shares is prohibited if it would constitute insider trading. The insider-trading risk, disclosure requirements and restrictions on the timing of securities acquisitions are significant hurdles to stakebuilding in Ireland.

4.4 Dealings in Derivatives
Dealings in derivatives are permitted on a basis similar to dealings in other securities prior to and during an offer period and restricted on a similar basis.

4.5 Filing/Reporting Obligations
The filing and reporting obligations under the Takeover Rules for dealing in a target company's derivatives are subject to similar disclosure obligations as for other securities. Dealings in derivatives that entitle the exercise of voting rights will be treated as securities for the purposes of competition laws.

4.6 Transparency
Aside from particular relationships (shareholder-officers) or circumstances (a Takeover Panel 'put-up or shut-up' determination or bespoke requirements under a target company's constitution or bylaws) shareholders do not have to make known the purpose of their acquisition and their intention regarding control of a target prior to making an offer, except for potential bidders in the context of a leak or following anomalous price movement in the company's share price.

The Takeover Rules also regulate the communications by and restrict the making of misleading statements by bidders, target companies and their concert parties during the course of an offer. The Takeover Rules require also that the announcement of a firm intention to make an offer and the subsequent offer/scheme document must contain specified information of a bidder's strategic plans for and the effects of implementation of the offer for a company, for its facilities/places of business and employees.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal
For public M&As, the Takeover Rules generally require that strict confidentiality must be maintained until a firm intention to make an offer is announced and all discussions concerning the offer must be limited to a select group of people. If, prior to an announcement, however, there is rumour or speculation or an anomalous movement in the price of the target company's shares, the Takeover Panel may require that a holding announcement be made to the market that an offer is being considered or negotiations are taking place. The bidder will be required to make this announcement if the speculation has arisen before the bidder has made its approach to the company's board or its advisers. If the approach has been made, responsibility for making the announcement lies with the target entity. Subject to this, disclosure is usually regulated in an implementation agreement between the bidder and the target entity.

For private M&As, a bidder or seller that is itself a public company may be required to disclose its acquisition commitment, depending on the scale of the deal and the listing rules of the markets on which its securities trade.

5.2 Market Practice on Timing
Market practice on timing of disclosure for public M&As follows the requirements of the Takeover Rules. Typically, a non-disclosure agreement will require confidentiality prior to the issue of agreed form announcements and, for private M&As involving a public company, the entry into a binding sale agreement or conditional agreements where regulatory approvals are required.

5.3 Scope of Due Diligence
In the case of a recommended bid, the scope of the due diligence exercise will usually involve a review of:

- the publicly available information for the target company; and
- responses to the enquiries raised (as in a private deal but more typically at a higher level and often on a confirmatory basis).

The scope of those enquiries may cover the entire range of the target entity's business. In a hostile bid, a bidder will be limited to a review of the publicly available information and any information that the target may be required to provide under the Takeover Rules and the level of due diligence will usually therefore be limited.

There is no maximum time period for the due diligence exercise but if a target company objects to the length of time proposed, the Takeover Panel may impose a deadline after taking representations from both parties.

5.4 Standstills or Exclusivity
A bidder will usually look for a period of exclusivity restricting the company from engaging with other potential bidders for a certain period of time to give the bidder an opportunity to assess the target entity properly before making its bid. However, the non-disclosure agreement that a target entity will usually require to protect the confidentiality of information disclosed may contain a standstill agreement preventing the bidder from building up shares in the target company and from approaching the entity's management and employees. Standstills are heavily negotiated but the stakebuilding

restrictions and disclosure requirement present hurdles for a bidder that wishes to build a stake in the company.

5.5 Definitive Agreements

Implementation or transaction agreements are now commonly used in the context of tender offers as well as schemes of arrangement. The offer or scheme document in a public M&A takeover must set out the detailed terms and conditions of the offer, which must comply with the requirements of the Takeover Rules. The Takeover Panel issued a Practice Statement in 2017 requiring that the terms of terminating an implementation agreement should be expressly included as conditions of the offer, and should comply with the requirements of the Takeover Rules.

The offer/scheme document is required to contain details of the terms and conditions of the offer. In a public offer structured as a tender offer, target company shareholders are typically asked to respond to the offer using a form of acceptance that is enclosed with the offer document. Where the offer is structured as a scheme of arrangement, the shareholders will vote to accept or reject the proposed transaction at the relevant shareholder and scheme meetings.

6. Structuring

6.1 Length of Process for Acquisition/Sale

Takeover Offer

The Takeover Rules contain a detailed timetable for the conduct of a bid to acquire a publicly listed company.

The duration of the initial phase of negotiation of the terms of a bid is not prescribed. Once the bidder has made a firm announcement containing the material terms of the offer, the bidder then has 28 days within which to post its formal offer to the target company's shareholders. The first closing date of an offer cannot be less than 21 days after the offer document is posted. The acceptance condition (being the level of shareholder acceptance that will satisfy the bidder's offer – usually set at 80% or 90%) must be satisfied within 60 days of the firm announcement. Once an offer is unconditional as to acceptances, it must remain open for at least 14 days after the date on which it would otherwise have expired. All other conditions of the offer must be satisfied within 21 days.

If the target company is US-listed, US securities law and engagement with the US Securities and Exchange Commission require a longer timeframe and it is usual to apply to the Takeover Panel to seek and obtain an extension to the 28-day period to post the offer or scheme document.

Once an offer is unconditional and the relevant statutory squeeze-out threshold is satisfied, the process for acquiring 100% of the target company can be completed in an additional 30 days.

Scheme of Arrangement

The timetable for a scheme of arrangement must be agreed with the Takeover Panel and ultimately needs to factor in the amount of time it takes to obtain shareholder and court approval (subject to the availability of court hearing dates for example). Aside from exceptional factors (eg, substantive regulatory approvals and court vacations) the process would be expected to take approximately 90 days.

6.2 Mandatory Offer Threshold

A bidder must (unless the Takeover Panel waives the obligation) make a mandatory offer (for cash consideration or with a full cash alternative) for the remaining securities in a company if it (or any person acting in concert with it) acquires shares resulting in:

- a holding of 30% or more of the voting rights of the company; or
- its holding of 30% or more, but less than 50%, of the voting rights in the target company increasing by more than 0.05% of the aggregate percentage voting rights in the entity in any twelve- month period.

6.3 Consideration

Cash is the most common form of consideration but consideration in the form of securities, loan notes or warrants or any combination of these may also be offered. The use of non-cash consideration or alternatives requires greater complexity and may require the satisfaction of prospectus requirements by the bidder and restrict the making of the offer in certain jurisdictions.

6.4 Common Conditions for a Takeover Offer

If a bidder intends to include one or more pre-conditions in an offer announcement, the Takeover Panel must be consulted in advance. Except with the consent of the Takeover Panel, or in the case of anti-trust conditions, an offer may not be made subject to any conditions that depend solely on the subjective judgement of the bidder, or that are solely within the bidder's control. A bidder cannot invoke a condition to lapse an offer unless the circumstances are of material significance (in the context of the offer) to the bidder, and the Takeover Panel, satisfied that in the circumstances it would be reasonable to do so, consents to the condition being invoked. The Takeover Panel's 2017 Practice Statement reiterates the need for a bidder to satisfy the 'material significance' and 'reasonableness' tests before it will be permitted to invoke a condition to its offer.

It is common for the offer to be subject to a large number of wide-ranging conditions with few or no materiality qualifications. The Takeover Panel now requires that the offer should include as express conditions of the offer an acceptance condition that complies with the requirements of the Takeover Rules and, more recently, must include expressly the terms for termination of the implementation agreement.

6.5 Minimum Acceptance Conditions

In Ireland, the minimum acceptance condition in order to rely on compulsory acquisition rights is set at 90% for companies fully listed on a regulated market in a EEA member state and 80% for ESM/AIM/NASDAQ/NYSE-listed companies – as these are the thresholds that the bidder will need to meet if it wishes to rely on a squeeze-out mechanism to acquire 100% control of the target entity.

The Takeover Rules provide that any bid must be conditional on the bidder acquiring shares carrying more than 50% of the voting rights in the target company and a bidder will usually reserve its right to reduce its own acceptance condition if it wishes, subject to meeting this 50%+ threshold.

6.6 Requirement to Obtain Financing

In Ireland, financing conditions are not permitted in acquisitions of public companies. A bidder can only announce a firm intention to make an offer once it and its financial advisers are satisfied that the bidder is able, and will continue at all times to be able, to implement the offer. Any required funding must be fully and unconditionally committed to, prior to the announcement, and the offer document must include a 'cash confirmation' commitment. If the cash confirmation commitment proves to be inaccurate, the Takeover Panel may direct the person who made the statement to provide the necessary resources, unless the Takeover Panel is satisfied that the person acted reasonably and responsibly in making the statement. Generally, sufficient third-party funding commitments and arrangements will be in place prior to the offer announcement to meet the cash confirmation commitment.

Private M&A deals may include any conditions that may be agreed by the purchaser and seller (provided they are legal), including financing conditions.

6.7 Types of Deal Security Measures

Break-up fees may be, and are often, sought by a bidder but they require the prior approval of the Takeover Panel, including in particular that the triggers for payment of the break-up fee are acceptable to the Takeover Panel. If approved by the Takeover Panel, the fees will usually be limited to specific quantifiable third-party costs up to a maximum limit of 1% of the value of the offer. Also, the target company's board and financial advisers must confirm that they consider the break fee to be in the best interests of the company's shareholders.

Match rights and non-solicitation provisions also feature in M&As deals, but present potential fiduciary duty challenges and will be subject to justification, based on the deal circumstances.

6.8 Additional Governance Rights

It is unusual for a bidder to seek to acquire less than 100% ownership of a target entity. Occasionally it may reduce the acceptance conditions to less than 100%, but for the acceptance condition to be satisfied, the bidder must obtain control of the company by acquiring a minimum of more than 50% of the target entity's voting shares. This will enable the bidder to replace the directors and appoint the bidder's nominees and is the shareholding needed under company law to pass an ordinary resolution (if all shareholders were to vote). A threshold of 75% would allow the bidder to pass special resolutions that are required to carry out certain specific actions such as amendments of the company's constitution and approval of certain restructurings and dealings, which are generally restricted under Irish company law.

Other factors that need to be borne in mind are the threshold for de-listing the target company from the market on which its securities are listed and the threshold for a compulsory purchase of the shares of minority shareholders. A shareholding of less than 80% or 90% (as explained in **6.10 Squeeze-out Mechanisms**, below) will prevent the completion of a compulsory squeeze-out of minority shareholders and may restrict the availability of deal funding needed to close the offer. Any additional governance rights for the bidder, outside of those provided by statute to shareholders of the above-sized shareholdings, would have to be specifically written into the company's constitution. They would need to be considered very carefully in context, as they may raise minority shareholders' oppression rights or have implications under the Takeover Rules (which continue to apply for five years after delisting).

6.9 Voting by Proxy

Shareholders may cast their votes in person or, where they are unable to attend a shareholders' meeting, by proxy. A shareholder's proxy has the same right as the shareholder to speak at the meeting and to vote on a show of hands and on a poll.

6.10 Squeeze-out Mechanisms

Squeeze-out mechanisms to purchase compulsorily the shares of dissenting shareholders are available to a bidder who wishes to gain 100% control of a company. The acceptances threshold that the bidder must reach before exercising these rights depends on the market on which the target company is listed. For a target entity subject to the European Communities (Takeover Bids) Regulations 2006, the bidder can squeeze out the minority shareholders where it has received 90% acceptances both in value and voting rights of those shares that are the subject of the offer. For all other target entities, the bidder can squeeze out the minority where it has received 80% acceptances in value within four months of the offer being published. In the case of both types of entity, a dissenting shareholder may bring an application to the Irish High Court for relief within 21 days and one month respectively.

6.11 Irrevocable Commitments

It is common to obtain irrevocable commitments to accept the offer by principal shareholders of the target company and from any of the target company's board of directors, who hold shares in it. Subject to obtaining the panel's consent, a bidder will usually approach institutional shareholders on a confidential basis. This precludes them from trading in the target company's securities. The bidder's approach seeks an irrevocable commitment before making its announcement of a firm intention to make a bid. There is usually some negotiation around whether these commitments will be 'hard' (ie, binding in the event of a higher competing bid) or 'soft' (ie, the commitment falls away if there is a higher competing bid or higher than an agreed range above the bidder's proposed offer price).

7. Disclosure

7.1 Making a Bid Public

Before a bid may be made public, the bidder must approach the target company and disclose its intention to make a bid. Where the bid is hostile, verbal communication of the bidder's intention immediately prior to the public announcement will be sufficient.

Following disclosure of the bidder's intention to make an offer, either to the target entity's board or to their advisers, the bidder must make a public announcement. Such announcement must contain certain information specified by the Takeover Rules including the identity of the bidder, the identity of the bidder's ultimate controller (where applicable) and details of the shares, if any, the bidder owns in the target company. In addition, the announcement must also contain the conditions to which the offer is subject.

It is important to note that, once a firm intention to make a bid is announced (a Rule 2.5 Announcement), the bidder is committed to making an offer and must be able to implement the bid throughout the offer period. This means that where the consideration is cash or includes a cash element, the offer document must include a cash confirmation or certain funds confirmation that the bidder has sufficient resources available to satisfy full acceptance of the offer.

The Rule 2.5 Announcement must be published on a Regulatory Information Service, posted to the target company's shareholders, sent to the Takeover Panel at the time it is made and distributed to two national newspapers and two newswire services. Where the target company's shares are traded on the Irish stock exchange, now trading as Euronext Dublin, a copy of the announcement must be sent also to the Companies Announcement Office where it will be published on www.ise.ie.

In addition, the Irish Takeover Rules provide that an announcement must be made:

- when, following an approach by an offeror to the offeree, the offeree is the subject of rumour and speculation or there is an anomalous movement in its share price;
- when, before an approach has been made by an offeror to the offeree, the offeree 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 own actions or intentions; or
- when negotiations or discussions concerning a possible offer are about to be extended to include more than a very restricted number of people, following consultation with the Takeover Panel prior to any such extension and as to when the obligation is triggered.

Where the offer is a recommended one, the bidder and target company make a joint announcement. In addition to the criteria set out above, this announcement will also include the target board's recommendation.

7.2 Type of Disclosure Required

In addition to the Rule 2.5 Announcement, the offer or scheme document and the response circular, usually issued separately only if the bid is hostile, where a bidder includes shares (or other securities) as consideration to be issued to shareholders, compliance with Irish prospectus law requirements are mandatory.

In the absence of exemptions, the Irish Prospectus Regulations require a prospectus to be issued where there is an offer of transferable securities to the public in Ireland or an application for transferable securities to be admitted to trading on a regulated market in Ireland.

A prospectus must contain the necessary information to enable an investor to make an informed assessment of the assets and liabilities, the financial position, the profits and losses and the prospects of the bidder/securities issuer and the rights attaching to the consideration securities/shares. The Central Bank of Ireland is the relevant supervisory authority that approves prospectus documents for issue in Ireland and it has issued Prospectus Rules that set out the detailed content requirements. These requirements include a description of the business, audited financial information for the latest three financial years, an operating and financial review and a confirmation that the issuer has sufficient working capital for its requirements for the next twelve months.

The Irish Prospectus regime is changing to reflect the new Prospectus Directive, which applies across the EU from 21 July 2019 (although some limited provisions have been in force since 21 July 2017 and 21 July 2018). Irish implementing Regulations, amending the existing Irish Prospectus

Regulations, became law on 3 August 2018. Certain existing exemptions have been revised and the exemption for the issue of shares resulting from the conversion or exchange of other securities is now subject to a cap of 20% – the new securities must represent less than 20% of the number of shares of the same class already admitted to trading.

For an Irish listed bidder, further information in compliance with the listing rules of the relevant stock exchange may need to be disclosed to the issuers' shareholders (ie, key terms of the offer for smaller transactions and a combined working capital statement and pro forma statement of net assets for larger transactions) and their approval may be required, depending on the size of the share issue.

7.3 Producing Financial Statements

Where non-cash assets or securities are offered as consideration, the Irish Takeover Rules provide that the following financial statements of the bidder shall be provided as part of the offer document (or incorporated by reference):

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

Where cash is offered as consideration, bidders are required, at a minimum, to produce the following financial statements:

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

The Irish Takeover Rules provide that the audited consolidated accounts, for the previous two financial years, of both parties to the potential transaction, must be available for inspection in an address located in Dublin unless another address is permitted by the Takeover Panel. In addition, the accounts are to be published on a website, the address of which is to be provided in the offer document.

The bidder's financial statements must be disclosed in the form in which they have been prepared (GAAP or IFRS).

7.4 Transaction Documents

Except with the consent of the Takeover Panel, the following transaction documents must be available for inspection and disclosed in full via the parties' websites:

- the offer document and every revised offer document;
- the target company's board circular and the response circular of the target board concerning every revised offer;
- every report, letter, valuation or other document, any part of which is exhibited or referred to in any document issued by or on behalf of the bidder or the target company, as appropriate, other than the service contracts of the directors and any material contracts that are not entered into in connection with the offer;
- all material contracts entered into by the bidder in connection with the offer, documents evidencing an irrevocable commitment and documents relating to the financing arrangements of the bidder (although the Takeover Panel will usually consent to the redaction of certain aspects of the commercial terms); and
- if an asset valuation has been made, the valuation certificate and associated report or schedule containing details of the aggregate valuation, together with the consent of the valuer to publish.

All documents, announcements, press releases, certain advertisements and all statements despatched or published by a bidder or target company during an offer period must be published on a website as soon as possible and by no later than 12 noon on the following business day.

8. Duties of Directors

8.1 Principal Directors' Duties

When appointed, each director of an Irish company has a duty to ensure that the company complies with the Companies Act 2014. Each director must also acknowledge his or her own duties and obligations under the Companies Act, other legislation and common law. One of the reforms introduced by the Companies Act was the codification of the fiduciary duties owed by a director of an Irish company. Prior to the enactment of the 2014 Act, the director's duties were defined by case law. The codification of the director's duties has provided a certain degree of clarity, but because the duties reflect standards adopted by Irish courts, the applicable case law remains relevant in interpreting the codified duties.

The Companies Act sets out the eight primary fiduciary duties of directors. He or she must:

- act in good faith in what the director considers to be the interests of the company;
- act honestly and responsibly in relation to the conduct of the affairs of the company;
- act in accordance with the company's constitution and exercise his or her powers only for the purposes allowed by law;
- 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 a general meeting;
- not agree to restrict the director's power to exercise an independent judgment unless this is expressly permitted by the company's constitution, or approved by the company's members in general meeting;
- 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;
- exercise the care, skill and diligence that would be exercised in the same circumstances by a reasonable person having both the knowledge and experience that may reasonably be expected of a person in the same position as the director, and the knowledge and experience which the director has or may be reasonably expected to have; and
- have regard to members' interests (in addition to the duty to have regard to the interests of the company's employees in general).

In the context of a business combination, the fiduciary duties of directors require that any steps to be taken to resist a hostile bid must be taken in good faith in what the directors consider to be the interests of the company. Similarly, in a competitive situation, directors' duties will apply to the decision of engaging with a potential bidder, the degree of engagement and whether to recommend an offer to shareholders.

The Takeover Rules impose constraints on unfairly preferring one bid and also on taking any action that may result in the frustration of an offer or would deny shareholders the opportunity to decide on the merits of an offer. An early responsibility will be for the directors to obtain competent independent advice from a financial adviser. Directors are required to act honestly and responsibly and to exercise reasonable care, skill and diligence at all times.

These duties are owed primarily to the company rather than to individual shareholders. While a director's fiduciary duties include that a director shall take into account the interests of the company's members and employees, such interests remain subordinate to those of the company.

Directors may owe a duty to the company's creditors where a company is insolvent or there is a significant risk that the company will become insolvent.

8.2 Special or Ad Hoc Committees

As noted earlier, one of the fiduciary duties owed by a director is to avoid any conflict between his or her duties to a company and to the director's other (including personal) interests. The Takeover Rules also prohibit a target company's director with a conflict of interest from making an announcement or statement in relation to an offer, unless the full nature of the conflict of interest is disclosed prominently and clearly. It is common for boards to establish a special or ad hoc committee – in part to deal with actual or potential conflicts of interest but also for expediting the process, subject to clear terms of delegation of board authority.

However, it should be noted that Irish law provides that, even where delegation takes place, all directors remain responsible for the delegated function and retain a residual duty of supervision and control.

8.3 Business Judgement Rule

Irish law recognises the business judgement rule's presumption to defer to directors' business judgements where made in good faith and in the honest belief that the action taken was in the best interests of the company. This presumption may be rebutted upon proof of a breach of a fiduciary duty, but Irish courts are slow to interfere in the decision-making process of directors in the absence of a breach of a fiduciary duty.

Personal liability will not be imposed on a director who has breached a fiduciary duty where the director has acted honestly and reasonably and where the court believes that, in the circumstances, the director ought fairly to be excused.

8.4 Independent Outside Advice

When a company is a party to a business combination, the Takeover Rules require the bidder and target company boards to obtain competent independent advice. This usually involves engaging outside legal, tax and financial advisers, accountants and public relations advisers. The Takeover Rules also regulate the ability of categories of certain persons to give independent advice.

8.5 Conflicts of Interest

Case law on conflicts of interests in the context of business combinations has not been the subject of judicial scrutiny in Ireland.

9. Defensive Measures

9.1 Hostile Tender Offers

While a hostile tender offer is permitted in Ireland, they are not common. There have been some high-profile unsuccessful hostile offers. Hostile offers suffer from a limited ability to undertake due diligence and potential defensive measures to the extent permitted by the Takeover Rules.

9.2 Directors' Use of Defensive Measures

The permitted defensive measures available to target companies in Ireland are limited by the rule against frustrating action under the Irish Takeover Rules. This prevents the

target company's directors from taking steps which may frustrate a potential offer or deprive the shareholders of the opportunity of considering the merits of an offer either during the course of an offer or at an earlier time where the target company's board has reason to believe that the making of an offer is imminent (unless with the approval of the target company's shareholders or the consent of the Takeover Panel). In addition, any action that the directors may take will be subject to scrutiny in the context of their duty to act in the best interests of the target company. Where any action is contemplated which may be construed as a defensive measure, it is usual to engage with the Takeover Panel to review it in advance.

9.3 Common Defensive Measures

As discussed previously, the frustrating rule limits the defensive measures an Irish director can implement. While traditionally Irish companies have not adopted defensive measures, the frustrating action prohibition is not absolute; action can be taken with shareholder approval or in certain cases with the approval of the Takeover Panel.

Irish law does not otherwise expressly prohibit defensive measures, but adoption of these measures will require compliance with the directors' fiduciary duties, the provisions of the company's constitution, Irish company law and with the Takeover Rules. There have been examples of proactive acquisitions and reciprocal bids by Irish entities, but shareholders' rights plans and enhanced shareholder class voting rights have not been actively used as defensive measures.

9.4 Directors' Duties

As well as complying with the target company's constitution and Irish company law, if adopting defensive measures directors will continue to be bound by their fiduciary duties, as set out in the Companies Act 2014, section 228 and listed above. A board should only employ defensive measures when acting in good faith, in the best interests of the company and with the approval of shareholders.

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9.5 Directors' Ability to 'Just Say No'

As noted at **8.4 Independent Outside Advice**, above, the Irish Takeover Rules provide that a director must obtain independent advice on every offer and such advice coupled with the recommendation of the directors should be presented to the shareholders. In addition, the Takeover Rules promote the principle that shareholders should be afforded the information to reach a properly informed decision on an offer.

If directors comply with the Takeover Rules and their fiduciary duties and determine that an approach is not in the best interests of the target company, having considered the approach and the options available, the directors could 'just say no'. However, this may present a future risk of litigation by activist shareholders, in particular if the directors take action that prevent a business combination without first consulting and receiving permission from the shareholders of the target company.

10. Litigation

10.1 Frequency of Litigation

Litigation in relation to M&A deals is rare in Ireland.

10.2 Stage of Deal

There has not been any shareholder litigation in the context of public M&A deals in Ireland. The Takeover Panel's ruling was challenged by a bidder a number of years ago but the challenge was unsuccessful.

11. Activism

11.1 Shareholder Activism

While Irish company law provides a basis for shareholder activism, such activism is an emerging rather than an important force. The key focus to date has been to challenge or abstain on executive and board remuneration and director appointments.

11.2 Aims of Activists

Although activism is not an important force in Ireland, there have been efforts by activist shareholders in a small number of companies to encourage divestitures, spin-offs and share buy-backs.

11.3 Interference with Completion

There have not been any examples of activists seeking to interfere in announced transactions in Ireland other than by exercising their shareholder rights.