The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Ireland: Mergers & Acquisitions

This country-specific Q&A gives an overview of mergers and acquisition law, the transaction environment and process as well as any special situations that may occur in Ireland.

It also covers market sectors, regulatory authorities, due diligence, deal protection, public disclosure, governing law, director duties and key influencing factors influencing M&A activity over the next two years.

This Q&A is part of the global guide to Mergers & Acquisitions. For a full list of jurisdictional Mergers & Acquisitions Q&As visit http://www.inhouselawyer.co.uk/index.php/practice-areas/mergers-acquisitions/

Country Author: Arthur Cox

The Legal 500

Geoff Moore, Partner

geoff.moore@arthurcox.com

The Legal 500

Christopher McLaughlin, Partner

chris.mclaughlin@arthurcox.com

The Legal 500

Brian Doherty, Associate

brian.doherty@arthurcox.com

1. **What are the key rules/laws relevant to M&A and who are the key regulatory authorities?**

   The primary laws that govern M&A transactions include:

   - The Irish Takeover Panel Act 1997, the Irish Takeover Panel Act 1997 Takeover

Rules 2013 (the Rules), the Substantial Acquisition Rules (SARs) and the European Communities (Takeover Bids) Regulations (Takeover Regulations) , together regulate the M&A activity relating to public companies. The provisions of the Act, Rules and Takeover Regulations are enforced by the Irish Takeover Panel (Panel).

- The Companies Act 2014 (Companies Act) governs various aspects of both private and public M&A activity.
- The Competition Acts 2002 to 2014 require certain M&A transactions be reported to the Competition and Consumer Protection Commission for approval.
- The European Union (Market Abuse) Regulations 2016 imposes obligations on companies which securities are listed on regulated markets.
- The Irish Listing Rules (Listing Rules) apply if the company is listed on the Irish Stock Exchange.

2. What is the current state of the market?

Public M&A activity has been strong in recent years and activity remained steady in 2017. While there were fewer US inversion related deals than in most recent years, there were a reasonable number of major public company deals, including the acquisition of Fyffes plc by Sumitomo Corporation for €751 million (February 2017), the acquisition of Innocoll Holdings plc by Gurnet Point Capital for $209 million and the acquisition of Nexvet Biopharma plc by Zoetis for $85 million (both July 2017). There have also been a number of significant private M&A deals.

3. Which market sectors have been particularly active recently?

The food and healthcare/pharmaceuticals sectors have been most active in terms of public M&A activity in the past year where we have seen a number of significant acquisitions by foreign acquirers while the technology, agri-food and healthcare/pharmaceuticals sectors have been particularly active recently in terms of general M&A activity in Ireland.

4. What do you believe will be the three most significant factors influencing M&A activity over the next 2 years?

Brexit: With Brexit currently scheduled for March 2019, the next two years will be particularly significant in the Irish M&A market. While uncertainty remains, a number of UK-headquartered companies have indicated they will look to move to Ireland to continue to avail of the EU single market and other European/US-based companies that were looking at M&A activity in the UK may now choose to structure through Ireland as a preferred option.

US Tax Reform: Following new US Treasury Rules in 2016 to restrict inversions the US recently signed into law the Tax Cuts and Jobs Act, which introduced enhanced inversion deterrence to US companies seeking to migrate abroad. This new framework may reduce the number of US/Irish inversion deals while companies adopt a 'wait and see' approach.

Interest rates: With US federal interest rates on the rise and the ECB aiming to increase rates from 2019, buyer appetite for M&A may be accelerated given the potential increased cost of debt financing and impact on overall deal value. The market may see a number of deals completed over the next year while interest rates remain at lower levels.

5. What are the key means of effecting the acquisition of a publicly traded company?

Public company takeovers/acquisitions in Ireland are most frequently effected by scheme of arrangement under the Companies Act. This well-established framework has the advantage of acquiring 100% of the shares in the target on completion, including from any minority dissenting shareholders. A scheme of arrangement can also be structured so that stamp duty is not payable.

A tender offer which is made by a buyer to the target’s shareholders is more commonly used in hostile or competitive situations. As part of this structure, provided certain minimum acceptance conditions are met, a buyer can use a statutory “squeeze-out” procedure to compulsorily acquire the shares of dissenting shareholders either under the Companies Act or the Takeover Board’s Directive.

Under the European Communities (Cross-Border Mergers) Regulations 2008 (as amended) it is possible to acquire an Irish publicly traded company by way of a legal merger (where the merger involves at least one Irish company and at least one EEA company).

A reverse takeover under the Rules may also be used to acquire control of publicly listed Irish companies.

6. What information relating to a target company will be publicly available and to what extent is a target company obliged to disclose diligence related information to a potential acquirer?

The Companies Act, Rules, Listing Rules, Transparency (Directive 2004/109/EC) Regulations 2007 (as amended) (Transparency Regulations) and MAR determine the information that must be put in the public domain. In addition, there may be additional disclosure requirements where the target is also listed on a foreign exchange (e.g. NYSE or Nasdaq).

A number of public filings must be made to the Companies Registration Office pursuant to the Companies Act (e.g. Constitution, annual returns and financial statements). In addition, certain registers must be maintained by companies and made available for inspection by the public.

There is no general legal obligation on a target company to disclose due diligence information. However, in the case of a target subject to the Rules, where there is a competing bidder, the target must, if specifically requested by a bidder, give the same information as it provided to the competing bidder, subject to certain limitations.

7. To what level of detail is due diligence customarily undertaken?

Due diligence carried out by a bidder in a public takeover will usually be more limited than in a private deal. In both recommended and hostile bids, due diligence includes a review of publicly available documentation.

On a recommended bid, the bidder will undertake due diligence itself, using publicly available information, before approaching the target. If the target is prepared to support the offer, the bidder will usually follow up its own detailed investigations by presenting the target with a list of matters on which it requires further information before it will proceed with the offer.

In a hostile bid, the bidder will have the same aims but will be limited to information which is available to it through the public domain and the level of due diligence will usually therefore be very limited.

8. What are the key decision-making organs of a target company and what approval rights do shareholders have?

The key decision-making body of a company is its board of directors. Although the board typically delegates day-to-day operations to management, it is nonetheless ultimately responsible for the management of the company, and it is expected to supervise managers and exercise oversight in order to fulfil its fiduciary duties. This authority translates to the M&A context where the board is the primary initial decision-maker of the target with respect to a potential transaction.

A takeover offer must be accepted by shareholders representing more than 50% of the voting rights in the target, although a higher threshold will usually be specified by a bidder. A scheme of arrangement requires the approval of a majority in number representing at least 75% in value of the shareholders or class of shareholders present and voting at the relevant shareholder meeting, together with the approval of the High Court.

9. What are the duties of the directors and controlling shareholders of a target company?

In the case of a public deal, the first responsibility of target directors in any offer is to obtain competent independent advice from a financial adviser. Directors must ensure that they observe their fiduciary duties to the company and act honestly and in good faith in the best interests of the company. These duties and other obligations will apply to the target's directors in deciding whether to engage with a potential bidder, and ultimately in deciding whether to recommend, or not recommend, an offer or transaction to the shareholders. Controlling shareholders are not subject to any specific duties.

Do employees/other stakeholders have any specific approval, consultation or other rights?

There are no other specific approval or consultation rights. In the case of a public deal, the target's board must give its opinion on the effects of the implementation of the offer and the bidder's strategic plans on employment. The target's board is also required to append to its response document any opinion received from its employees' representatives. This is not, however, a prior consultation obligation.

11. To what degree is conditionality an accepted market feature on acquisitions?

In the case of a public deals, the Panel must be consulted in advance if it is proposed to include any pre-condition to an offer. Except with the consent of the Panel, a pre-condition can only be included if it relates to any regulatory clearance where the Panel is satisfied is likely to prove impossible to obtain within the Rules timetable.

Except with the consent of the Panel, or in the case of competition clearance conditions, an offer may not be made subject to any conditions the satisfaction of which depends solely on the subjective judgement of the bidder, or which is solely within its control. A bidder cannot invoke a condition to lapse an offer unless the circumstances are of material significance to the bidder in the context of the offer and the Panel, being satisfied that in the 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, an acceptance condition or a condition which is required in order to implement the transaction, such as bidder shareholder approval. In Ireland, no financing condition is permitted.

Private deals can be subject to whichever conditions are agreed between the parties, including a financing condition.

12. What steps can an acquirer of a target company take to secure

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deal exclusivity?

It is not permissible to "tie-up" deals in respect of publicly listed companies in Ireland.

13. What other deal protection and costs coverage mechanisms are most frequently used by acquirers?

Break/inducement fees are possible with the approval of the Panel (at a maximum level of 1% of deal consideration). Confirmation in writing from the target board and its financial adviser must be provided to the Panel confirming that they consider the break/inducement fee to be in the best interests of the company.

The Rules contain no restriction on a target entering an agreement not to shop the company or its assets (i.e. an exclusive period of negotiation). A target could require a standstill period in return for confidential information (i.e. the period during which the bidder may not seek to acquire the target otherwise than on a recommended basis), which tends to be in the range of 12 to 24 months. A target will still be able to respond to an unsolicited approach; it is not possible to prevent this.

14. Which forms of consideration are most commonly used?

The main forms of consideration are cash and/or securities in the bidder. Warrants and/or loan notes may also be offered.

15. At what ownership levels by an acquirer is public disclosure required (whether acquiring a target company as a whole or a minority stake)?

Rule 8 of the Rules imposes disclosure obligations on dealings in relevant securities are effected during an offer period. All dealings in the target's shares by an acquiror (with more than a 1% interest, or which acquires more than a 1% interest) must be aggregated and disclosed publicly. Public announcements must be made in writing to an approved Regulatory Information Service by 3.30pm on the business day following the transaction. The Companies Act and the Transparency Regulations require public disclosure to the relevant exchange in the case of regulated companies.

16. **At what stage of negotiation is public disclosure required or customary?**

Secrecy must be maintained until an offer announcement is made. An announcement is required in certain circumstances, including where discussions need to be extended beyond a very restricted number of people or where, following an approach to the target, the target becomes the subject of rumour and speculation and/or where there is anomalous movement in its share price. The responsibility for the announcement is with the bidder, unless it has approached the target, in which case, the target is primarily responsible.

17. **Is there any maximum time period for negotiations or due diligence?**

There is no maximum time period for negotiations or due diligence, however, a target can object if it deems the period too long and the Panel can accept representations from both parties and impose a deadline.

18. **Are there any circumstances where a minimum price may be set for the shares in a target company?**

The offer price in a voluntary offer cannot be less than the price paid by the bidder (or any person acting in concert with it) for shares in the target during either:

- The three-month period before the commencement of the offer period.
- If the Panel thinks more appropriate in the circumstances and so directs, the 12-month period before the commencement of the offer period.

In addition, where a bidder (or any person acting in concert with it) acquires any shares in a target at a higher price than the offer price during the offer period, the bidder must increase the offer price accordingly.

19. **Is it possible for target companies to provide financial assistance?**

A target is prohibited from providing financial assistance while it remains a public company. Once it is re-registered as a private company, it may provide financial assistance. This will be particularly relevant where there is deal financing and a financial assistance whitewash is required.

20. Which governing law is customarily used on acquisitions?

The parties can choose the governing law for the transaction documents. The laws of Ireland would typically govern the Rule 2.5 announcement, the offer document, the transaction agreement, irrevocable undertakings etc. However, it is possible for documents to be governed by the laws of other jurisdictions.

21. What public-facing documentation must a buyer produce in connection with the acquisition of a listed company?

The main documentation produced in the course of a bid includes the following: (i) a holding or leak announcement; (ii) Rule 2.5 announcement (announcing a firm intention to make an offer); (iii) announcement response (usually in response to a hostile bid); (iv) main offer document; (v) target's defence document (in response to offer document in a hostile bid).

With a scheme of arrangement, the documentation is largely the same with the exception of a circular to target shareholders and a notice convening meetings of shareholders instead of an offer document.

22. What formalities are required in order to document a transfer of shares, including any local transfer taxes or duties?

Transfers on sale of shares in an Irish incorporated company are typically effected by a share transfer form and are subject to stamp duty at a rate of 1%. Stamp duty is payable by the purchaser. This should not be relevant in a scheme of arrangement.

23. Are hostile acquisitions a common feature?

Hostile bids are rare. Given that schemes of arrangement are proposed by the target to its shareholders, hostile bids cannot typically be effected by a scheme in practice. Hostile bids then usually take the form of a public offer, however, a bidder will be limited in the amount of diligence it can carry out.

24. What protections do directors of a target company have against a hostile approach?

The practical options open to a target to resist a change of control are largely limited by the rule against frustrating action, which prevents the target's directors from taking steps to frustrate an offer either during the course of an offer or at any earlier time where the board has reason to believe that the making of an offer is imminent unless approved by shareholders or with the consent of the Panel. As Companies that are liable to predatory action in the form of a bid would need to plan ahead and prepare for the eventuality of a bid being made (e.g. it should be possible to adopt a poison pill, provided it is adopted prior any offer being imminent although they are untested in practice).

25. Are there circumstances where a buyer may have to make a mandatory or compulsory offer for a target company?

A bidder must make a mandatory offer in cash, or with a cash alternative, where it (or its concert parties) acquires shares resulting in:

(i) A holding of 30%+ of the voting rights in target; or

(ii) An increase in its voting rights by more than 0.05% in the target in any 12-month period where it holds 30% to 50% of the voting rights (unless bidder is a single holder with over 50% of the voting rights).

26. If an acquirer does not obtain full control of a target company, what rights do minority shareholders enjoy?

In certain circumstances, minority shareholders can require their shares to be compulsorily acquired. It is also possible for a minority shareholder to apply for an order that the acquirer is not entitled to acquire its shares. Where a minority shareholder alleges that the affairs of the company are being conducted, or that the powers of the directors of the company are being exercised in a manner oppressive to it, it may be possible to bring an action under the Companies Act.

27. Is a mechanism available to compulsorily acquire minority stakes?

A bidder can effect a compulsory purchase or squeeze-out of the minority shareholders in the target. Where the target is a Takeover Regulations company, 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 subject of the offer.

Where the target is a non-Takeover Regulations company, the bidder can effect a squeeze-out where it has received 80% acceptances in value within four months of the terms of the offer being published.