

Irish Takeover Panel

Proposals to amend the Takeover Rules as they apply to Schemes of Arrangement

27 February, 2008

1. Introduction

In this consultation paper the Panel is proposing a number of amendments to the Takeover Rules (“Rules”) which relate primarily to takeovers of relevant companies effected by schemes of arrangement pursuant to section 201 of the Companies Act 1963 (“takeover schemes”).

Following an increase in recent years in the use of takeover schemes, the Panel amended the Rules in November 2005 for the purposes of setting out how the Rules are to be applied to such transactions. Since November 2005 the use of takeover schemes has increased and during 2007 the first instance arose of a takeover scheme being proposed in competition with an existing takeover scheme namely, the competing takeover schemes for Irish Continental Group plc (“ICG”). The ICG case has, in particular, highlighted the need to review the Rules as they apply to takeover schemes. It highlighted the inappropriateness of disapplying almost all of the timing Rules in takeover schemes, as is currently the case. Furthermore, following the ICG case the Panel is of the view that there should be a specific new Rule to address circumstances where an offeror switches from an offer to a takeover scheme or vice versa.

In summary, the proposed changes represent a more comprehensive application of the Rules to takeover schemes with the objective being to put the offeree shareholder considering a takeover scheme in a more analogous position to the offeree shareholder considering an offer. There are also a small number of proposed amendments to the Rules as they apply to offers.

Currently, the application of the Rules to takeover schemes is prescribed in Rule 41.2 which, in summary, provides that, subject to and in accordance with Appendix 4, the Rules shall apply mutatis mutandis to takeover schemes as they apply to offers. The general approach adopted in 2005 was to apply the Rules to takeover schemes without amending the Rules themselves, subject to a small number of exceptions. Appendix 4 sets out the basis upon which the application prescribed in Rule 41.2 applies. Section 1 of Appendix 4 specifies certain Rules which are expressly stated not to apply to takeover schemes while sections 2 and 3 adapt and replace certain definitions and Rules for the purposes of the application. The Rule amendments proposed in this paper will not affect the structure adopted in 2005.

The proposed amendments, which are set out in Annexe 1, involve amendments to Parts A and B of the Rules and significant changes to Appendix 4 which will incorporate, in a new section 4, certain new Rules which will apply only to takeover schemes. Where a Rule is being replaced in Appendix 4, it is also expressly disapplying in section 1 of Appendix 4. There are also certain new Notes being added to Part B of the Rules and to Appendix 4 (see Annexe 2).

The Panel notes that the Panel on Takeovers and Mergers in the UK amended its rules in January in relation to the application of the Code to takeover schemes. In undertaking its review of the Rules, the Panel has considered these Code amendments and it is proposed that a number of those amendments will also be adopted into the Rules.

In summary, the main amendments being proposed are as follows:

- (i) The definition of “offer period” as it applies to takeover schemes is being amended. Currently, it ceases at the date of the scheme meeting. The proposal is to extend this to the date on which the takeover scheme takes effect.
- (ii) Corresponding to an offeror’s obligation to post its offer document, the takeover scheme circular will be required to be posted within 28 days after the announcement of a firm intention to propose the takeover scheme.
- (iii) Except with Panel consent, a scheme meeting may not be convened for a date earlier than the 21st day after the date of despatch of the takeover scheme circular. This is analogous to the first closing date requirement in Rule 31.1 in respect of an offer and is to ensure that offeree shareholders have sufficient time to consider the terms of the takeover scheme.
- (iv) It is proposed to delete the replacement Rule 2.7 in section 3(4) in Appendix 4 and that Rule 2.7 (consequences of a firm announcement) of Part B of the Rules would also apply to takeover schemes. Thus, an acquirer that has announced a firm intention to propose a takeover scheme will, except with Panel consent, be required to proceed with it unless one of the events referred to in Rule 2.7 is relevant.
- (v) Currently, Rule 32 (revision of an offer) is disapplied in takeover schemes. Parts of this Rule are now being applied while Appendix 4 contains a replacement rule for Rule 32.1(a) which will prohibit a revision of a takeover scheme during the 14 days ending on the date of the scheme meeting or following that meeting. The date of the scheme meeting equates to the end of the 60 day period within which an offer must become unconditional or lapse. The proposed Rule change is analogous to the prohibition in Rule 32 that an offer may not be revised after day 46.
- (vi) A new Rule 41.3 is being introduced which will require, inter alia, that an offeror seek Panel consent for a switch from an offer to a takeover scheme or vice versa. Panel consent is being required in order to ensure that the switch is not detrimental to the interests of the offeree shareholders.
- (vii) A person who incurs a mandatory offer obligation will not be permitted to satisfy that obligation by way of a takeover scheme.

The proposed new Rules are set out in Annexe 1.

The Panel is inviting comments on this consultation paper. Any comments should reach the Panel by 19 March, 2008. Comments should be sent in writing to:

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Alternatively, comments may be sent by email to: takeoverpanel@eircom.net

2. Interpretation

2.1 Irrevocable commitments and letters of intent

Currently, the Rules do not define the terms “irrevocable undertaking to accept an offer” or “irrevocable commitment to accept an offer” although both terms are used in the Rules. Furthermore, there are no references in the Rules to letters of intent.

It is proposed that the terms “irrevocable commitments” and “letters of intent” be defined and that the definition should apply both in the context of an offer and a takeover scheme. A new provision would be added in Rule 2.1(b)(viii) of Part A of the Rules to provide the following:

“(viii) references to irrevocable commitments and letters of intent include, respectively, irrevocable commitments and letters of intent:

(1) to accept or not to accept (or to procure that any other person accept or not accept) an offer; or

(2) to vote (or to procure that any other person vote) in favour of or against a resolution of an offeror or the offeree (or of its shareholders) in the context of an offer, including a resolution to approve or to give effect to a takeover scheme.”

This non-exhaustive definition makes it clear that the irrevocable commitments and letters of intent apply not only to the acceptance or rejection of an offer but also in the case of a scheme to voting for or against a resolution to approve or give effect to a takeover scheme.

As a consequence of the new definition, the term “irrevocable commitment(s)” will replace the term “irrevocable undertaking(s)” throughout the Rules. This change will affect Rules 2.2(a) and (e), 2.3(d), 4.3(a) and 24.3(f).

It is also proposed that three other Rules which currently refer to irrevocable commitments or undertakings should also refer to letters of intent. Firstly, Rule 2.5(b)(iii) will require the announcement of a firm intention to make an offer to contain details of existing holdings of securities of the offeree in respect of which the offeror has received letters of intent as well as irrevocable commitments. Secondly, Rule 24.3(a)(iv), which requires the offer document to state the relevant securities of the offeror (in a securities exchange offer) and the offeree owned or controlled by persons who have irrevocably committed themselves to accept the offer, will also extend to persons who have given the offeror letters of intent. Thirdly, Rule 26 (b)(ix) will require the display by offerors and offerees of letters of intent as well as documents evidencing irrevocable commitments.

2.2 Scheme hearings and meetings

Pursuant to section 201 of the Companies Act 1963, a takeover scheme must be approved, at a shareholders’ meeting convened by order of the Court, by a majority in

number representing three-fourths in value of the members or class of members, as the case may be, present and voting either in person or by proxy at the meeting. In practice, the takeover scheme may also be conditional on resolutions to implement it being passed by the offeree's shareholders in general meeting. If the takeover scheme is approved at all of these meetings, an application is made to the Court to petition the sanctioning of the takeover scheme. Finally, the takeover scheme becomes effective upon delivery of the Court order to the registrar of companies and, if the scheme involves a reduction of capital, its being registered by the registrar.

The only meeting currently defined in the Rules is "scheme meeting" in Rule 41.3(e) which is defined as the meeting of the shareholders or class of shareholders of the acquiree summoned or to be summoned under section 201, to vote in respect of the takeover scheme. However, as a number of the changes being proposed refer to court sanction meetings and related general meetings the Panel believes that these terms should be defined in the Rules. It is therefore proposed to add the following definitions to Rule 41.4 (as so renumbered):

“(c) “court sanction hearing” means the hearing of the Court at which a petition to sanction a takeover scheme is presented;

“(d) “related general meeting” means, in relation to a takeover scheme, a general meeting of the acquiree convened to consider a resolution to approve or to give effect to the scheme;”

The definition of "scheme meeting" is also being amended so that in circumstances where there is more than one such meeting, it shall be construed as referring to each such meeting.

2.3 Course of the offer and offer period

Section 2(4) of Appendix 4 currently defines the term "course of the offer" for the purposes of a takeover scheme by amending the definition of that term in Rule 2.1 in Part A of the Rules in relation to takeover schemes. Paragraph (ii) of the definition as amended refers to the period ending at "the time at which the takeover scheme takes effect or lapses or is abandoned". As the Rules provide for the announcement of these key events, it is proposed to amend paragraph (ii) so that it refers to the time of the announcement. Section 2(4)(ii) will thus state:

“(ii) the time at which the acquiree announces that the scheme has taken effect or that it has lapsed or been withdrawn; and”.

A similar change is being proposed to the definition of "offer period". The definition of the term in Rule 2.1 of Part A as amended by section 2(7)(2) of Appendix 4 for the purposes of takeover schemes provides for the ending of the offer period inter alia at:

“the time at which the acquiree announces that the requisite majority of the shareholders or class of shareholders of the acquiree has voted in favour of the scheme resolution at the scheme meeting, or at which the scheme lapses or is abandoned, whichever first occurs;”.

In law, a takeover scheme only becomes binding and effective on the effective date, rather than the time when shareholder approval is obtained. Following the shareholders meetings, shareholders remain free to accept a competing offer or to petition the Court not to sanction the takeover scheme. Shareholders could influence the company's future after the scheme meeting. It is therefore proposed to substitute the following paragraph for section 2(7)(2):

“(2) the time at which the acquiree announces that the scheme has taken effect or that it has lapsed or been withdrawn;”.

2.4 Miscellaneous

Rule 41.2 provides that “subject to and in accordance with the provisions of Appendix 4”, the Rules, other than Rule 41 and the Appendix, shall apply mutatis mutandis to takeover schemes as they apply to takeover offers. A clarificatory amendment is proposed to Rule 41.2 by the insertion after “the provisions of Appendix 4” of “*and unless the context requires otherwise*”.

3. Timing issues

Although offers follow a specified timetable under the Rules, to date the Panel has not prescribed a specific timetable for takeover schemes. There is no specified date by which the takeover scheme circular must be posted to offeree shareholders. In addition, there is no prescribed minimum period between the posting of that circular and the date of the scheme meeting i.e. the equivalent of the first closing date in an offer. Having had regard to its experience in regulating takeover schemes, particularly since the introduction of the takeover scheme Rules in 2005, the Panel is proposing to introduce a timetable for certain key aspects of takeover schemes which will generally follow that of an offer. The Panel believes this is necessary in order to ensure an orderly process.

3.1 Posting the scheme circular

Section 1 of Appendix 4 currently disapplies Rule 30.2(a) which requires the offeror, subject to Rule 2.7, to despatch the offer document to offeree shareholders “within 28 days after the date of the announcement of a firm intention to make an offer”, save where the Panel consents otherwise.

It is proposed to introduce a new section 3(6) into Appendix 4 which will set out a replacement Rule 30.2(a) for takeover schemes. It will state as follows:

“(a) Except with the consent of the Panel and subject to Rule 2.7, the acquiree and the acquirer shall despatch the scheme circular to the shareholders of the acquiree within 28 days after the date of the announcement of a firm intention to propose a takeover scheme.”.

While the same 28 day period is prescribed for takeover schemes as currently applies to offers, it should be noted that the obligation to despatch the takeover scheme circular is imposed on both the acquiree and the acquirer.

3.2 Earliest date for scheme meeting

Currently, Rule 31.1 is disapplied in takeover schemes. That Rule provides that an offer shall initially be open for acceptance until not earlier than the 21st day following the date on which the offer document is dispatched. This requirement gives effect to General Principle 2 which provides inter alia that “the holders of the securities of an offeree must have sufficient time and information to enable them to reach a properly informed decision on the offer”. As General Principle 2 applies equally to takeover schemes, it is proposed to insert a new Rule in section 4 in Appendix 4 as follows:

“(2) *EARLIEST DATE FOR SCHEME MEETING*

Except with the consent of the Panel, the acquiree shall not convene the scheme meeting or any related general meeting for a date earlier than the 21st day following the date on which the scheme circular is despatched.”

3.3 Settlement of consideration

Rule 31.8 deals with the settlement of consideration. The first paragraph prescribes a time limit for the posting of the consideration following the offer becoming unconditional in all respects. It states that the consideration must be posted within 14 days after the later of the first closing date for acceptance, the date on which the offer becomes unconditional in all respects and the date of receipt of the acceptance concerned complete in all respects. The second paragraph imposes certain requirements on the offeror where cash forms part of the consideration. This Rule is currently disapplied in its entirety in takeover schemes.

Although in practice, consideration is likely to be posted within 14 days of a takeover scheme becoming effective, it is proposed that a specific requirement be included in the Rules to this effect. Thus, a new section 3(7) will be added to Appendix 4, replacing the first paragraph of Rule 31.8 with the following:

“Except with the consent of the Panel, if a takeover scheme takes effect the consideration due to the shareholders of the acquiree shall be posted within 14 days after the date on which the scheme took effect. This requirement shall be included in the terms of the scheme.”

The second paragraph of Rule 31.8 will no longer be disapplied in takeover schemes. The effect of this will be that the takeover scheme document will be required to state the currency in which cheques will be issued where cash forms part of the consideration and, if the cheques are not drawn on a bank in the State, the means of settlement of such cheques. Furthermore, except with the consent of the Panel, the cash consideration will have to be paid in euros.

3.4 Return of documents upon lapse of an offer or scheme

Upon the lapsing of an offer, Rule 31.10 imposes an obligation to return documents of title and other documents lodged with forms of acceptances. Such documents must be returned “within 14 days after the lapsing of the offer” and the offeror’s receiving agent is required to instruct the release of securities held in escrow. This Rule is

currently disapplied for the purposes of takeover schemes.

Two changes are being proposed. Firstly, in the context of offers, it is proposed that Rule 31.10 be amended to impose a requirement to return the documents “*as soon as practicable (and in any event within 14 days after the lapsing of the offer)*”. The Panel, like its UK counterpart, believes that the 14 day period is unnecessarily long and that the Rules should require documents to be returned as soon as practicable.

Secondly, it is proposed to introduce a similar provision in relation to takeover schemes. A new section 3(8) will be introduced in Appendix 4 which will replace Rule 31.10 with the following:

“31.10 RETURN OF DOCUMENTS OF TITLE

If a takeover scheme lapses or is withdrawn, or if a shareholder withdraws his election for a particular form of consideration, the acquirer shall ensure that all documents of title and other documents lodged with any form of election are returned as soon as practicable (and in any event within 14 days after the lapse or withdrawal), and the acquiree’s receiving agent shall immediately give instructions for the release of securities held in escrow.”

3.5 The announcement of changes to the expected timetable

Rule 31.2 currently deals with extensions of offers. It ensures that offeree shareholders receive all the relevant information as to closing dates etc.. As takeover schemes are not extended in the same way as offers, section 1 of Appendix 4 currently disapplies this Rule in takeover schemes.

However, a similar issue arises where the expected timetable of principal events which was set out in the takeover scheme circular is changed. This occurs where certain of the relevant meetings are adjourned. In such circumstances, it is essential that shareholders and the market in general are appraised of the progress of the takeover scheme and the important dates. It is thus proposed that an obligation should be imposed on the acquiror or acquiree (as appropriate) to inform shareholders promptly of any adjournment or proposed adjournment. Although announcing the adjournment or other timetable change will normally suffice, in certain circumstances an obligation to inform shareholders by post may also be required in order to ensure shareholders are adequately informed. For example, if a delay occurred in the posting of consideration, it may be necessary to require posting in addition to the normal Stock Exchange announcement. In such cases, it would be important that the Panel had discretion to determine whether posting was necessary.

It is proposed thus to add a new Rule in section 4 in Appendix 4 as follows:

“(3) CHANGES TO THE EXPECTED SCHEME TIMETABLE

(a) The acquiree shall promptly announce to the Stock Exchange and the Panel any adjournment of the scheme meeting or any related general meeting or the court sanction hearing and any decision by the board of the acquiree to propose such an adjournment. If either meeting or the hearing is adjourned to a specified date, the announcement shall include the relevant details. If either meeting or the hearing is adjourned without a date for the adjourned meeting

being specified at the same time, the acquiree shall promptly announce the new date when it has been set.

(b) The acquirer or the acquiree (as appropriate) shall promptly announce to the Stock Exchange and the Panel any other change to the expected timetable of events set out in the scheme circular.

(c) In all of the circumstances referred to above, the acquirer or the acquiree (as appropriate) shall consult the Panel as to whether notice of the adjournment or other change to the expected timetable should also be posted to the shareholders of the acquiree.”

4. Firm intention to propose a takeover scheme

Currently, section 3(4) of the Appendix replaces Rule 2.7 and sets out the consequences of the announcement of a firm intention to propose a takeover scheme. Where such an announcement is made pursuant to Rule 2.5, the acquirer is required, subject to the co-operation of the acquiree, to proceed with the scheme unless the Panel consented otherwise. The acquiree is required to consult with the Panel and comply with any requirements it might have before withdrawing from or abandoning the scheme. The Panel believes that the changes set out above in relation to the timing issues render this replacement Rule unnecessary. It is proposed therefore to delete this replacement Rule 2.7 and to apply instead Rule 2.7 of Part B . This means that where there has been an announcement of a firm intention to propose a scheme, the acquirer must, except with Panel consent, proceed with the scheme unless (a) the despatch of the scheme circular is subject to the prior satisfaction of a specific condition announced in compliance with Rule 2.3(d) which has not been satisfied or (b) a higher competing offer or scheme circular has been despatched.

5. Announcements following key events

Section 3(4) of Appendix 4 replaces Rule 17 for the purposes of a takeover scheme. It requires an announcement to be made in respect of the following:

- the Court order to convene a scheme meeting;
- the despatch by the acquiree of a scheme circular;
- various details pertaining to the scheme meeting;
- various details pertaining to the Court sanction hearing; and
- the takeover scheme becoming effective.

These announcements are important in informing offeree shareholders and the market as to the various stages of the process and whether the takeover scheme is continuing, has lapsed or has become effective. At present the relevant announcements must be made by 8.00 a.m. on the business day following these events. It is proposed to make a number of amendments to the existing provision in Appendix 4.

The first change relates to the timing of the announcements. Announcements should be made “at the earliest practicable time” after the relevant events and at the very latest by 8.00 a.m. on the next following business day. This acknowledges the fact that it may be possible to announce the relevant information earlier than 8.00 a.m. on the next following business day and that given the importance and potential price

sensitivity of the information, an announcement should be made at the earliest practicable time.

The second change is to include reference throughout the replacement Rule 17 to related general meetings as well as the takeover scheme meetings. The third change involves augmenting the information which must be provided in relation to such meetings. In the case of a related general meeting, details of the voting of each class of shareholders at this meeting is required. In the case of a takeover scheme meeting, the announcement must now expressly state whether the resolutions concerned were passed by the requisite majorities. In relation to the voting results, the announcement must set out the details in the context of each separate class of shares and shareholders rather than merely the totals as is the case at present. The Panel believes that this information provides a more accurate picture to a dissident shareholder or a potential offeror of the level of support for the takeover scheme in each particular class and may be useful thus in determining their future course of action.

Thus the new Rule 17 for takeover schemes will state as follows:

“RULE 17. ANNOUNCEMENTS FOLLOWING KEY EVENTS IN A TAKEOVER SCHEME

(a) At the earliest practicable time after the Court makes an order directing that a scheme meeting be convened and, in any event, by no later than 8.00 a.m. on the next following business day, the acquiree shall make an appropriate announcement to the Stock Exchange and the Panel, which announcement shall state the date, time and place of the scheme meeting and any related general meeting.

(b) At the earliest practicable time after the acquiree despatches a scheme circular to its shareholders or a class of its shareholders and, in any event, by no later than 8.00 a.m. on the next following business day, it shall make an appropriate announcement to the Stock Exchange and the Panel, which announcement shall state the fact that the scheme circular has been so despatched and the date, time and place of the scheme meeting and any related general meeting.

(c) At the earliest practicable time after the results of the scheme meeting and of any related general meeting are known and, in any event, by no later than 8.00 a.m. on the next following business day, the acquiree shall make an announcement to the Stock Exchange and the Panel stating whether the resolutions concerned were passed by the requisite majorities and giving details of the voting results in relation to the meetings, including:

(i) in the case of a related general meeting, if a poll was taken, the respective numbers of shares of each class which were voted for and against the resolutions concerned and the respective percentages of the shares of that class voted which those numbers represent; and

(ii) in the case of the scheme meeting:

(1) *the respective numbers of shareholders of each class who voted for and against the resolution to approve the scheme and the respective percentages of the voting shareholders of that class which those numbers represent;*

(2) *the respective numbers of shares of each class which were voted for and against that resolution and the respective percentages of the shares voted which those numbers represent; and*

(3) *the respective percentages of the issued shares of each class which the shares of that class voted for and against that resolution represent.*

(d) *At the earliest practicable time after the Court sanction hearing and, in any event, by no later than 8.00 a.m. on the next following business day, the acquiree shall make an announcement to the Stock Exchange and the Panel, which announcement shall state:*

(i) *whether the Court has sanctioned the takeover scheme;*

(ii) *if the Court has sanctioned the scheme, details of any modification of or addition made to the scheme and of any condition approved or imposed by the Court;*

(iii) *if the Court has sanctioned the scheme, a summary of any outstanding conditions, the date on which those conditions are expected to be satisfied, and the date on which the scheme is expected to take effect; and*

(iv) *if the Court has not sanctioned the scheme, the reasons therefor and the consequences for the scheme, including whether the scheme has lapsed.*

(e) *At the earliest practicable time after a takeover scheme takes effect and, in any event, by no later than 8.00 a.m. on the next following business day, the acquiree shall make an announcement to the Stock Exchange and the Panel, which announcement shall state the date on which the scheme took effect and the date on which it is expected that the acquiree will despatch to shareholders of the acquiree the consideration due to them under the scheme.”*

6. Holding statements

Rule 19.3 seeks to avoid the issue of misleading statements. The second sentence of Rule 19.3(a) deals with holding statements. It prohibits an offeror from making a statement to the effect that it may improve its offer unless it commits itself to doing so and specifies its improvement. It is proposed to amend Rule 19.3(a) by replacing this second sentence with the following:

“An offeror shall not make a statement to the effect that it may improve its offer, or that it may make a change to the structure, conditionality or the non-financial terms of its offer, unless it commits itself to doing so and specifies the improvement or change.”

This change will apply to both offers and takeover schemes. The purpose of this amendment is to make clear that the Rule applies to more than statements about increases in the value of an offer. Such other statements may also influence the shareholders’ decision making and create uncertainty and should not be made without a commitment to follow them through.

As the above change extends significantly the category of statement to which the Rule applies, it is proposed to add a new note on Rule 19.3 which will state as follows:

“1. Consulting the Panel

In the case of any doubt as to the application of this rule to a proposed statement, the party concerned and its advisers should consult the Panel.”

7. Revision

Rule 32 deals with the revision of offers. It is currently disapplied in the context of takeover schemes.

7.1 Latest date on which a takeover scheme may be revised

Rule 32.1(a) provides for the despatch of a revised offer document where an offer is revised. Any offer contained therein must then be kept open for 14 days following the date of despatch of the revised offer document. The purpose of this Rule is to allow shareholders sufficient time to assess any revised offer. A direct consequence of this minimum time requirement is anticipated in the Rule which prohibits the despatch of such a document during the 14 days ending on the final closing date and prohibits the offeror placing itself in a position which would require it to revise its offer during that period.

In order to allow shareholders in the acquiree sufficient time to assess a revised takeover scheme, it is proposed that a replacement Rule 32.1(a) in Appendix 4 will apply a deadline for the revision of a takeover scheme prior to the shareholder meetings. The shareholder meetings are viewed as analogous to Day 60 of an offer as this is considered to be the time by which the acquiree’s shareholders must make their investment decisions. The period of 14 days considered appropriate for an offer will also be required in a takeover scheme.

A new section 3(9) in Appendix 4 will thus replace Rule 32.1(a) for the purposes of takeover schemes. It will provide as follows:

“(a) If a takeover scheme is revised the acquiree and the acquirer shall despatch to the shareholders of the acquiree a revised scheme circular, drawn

up in accordance with Rules 24, 25 and 27. Except with the consent of the Panel, a revised scheme circular shall not be despatched either:

(i) during the 14 days ending on the date of the scheme meeting or any related general meeting (or on any later date to which any such meeting is adjourned); or

(ii) following the scheme meeting or any related general meeting;

nor shall an acquirer place itself in a position in which it would be required to revise the scheme during either of those periods.”

It should be noted that the section provides for Panel consent to a revision on shorter notice. This will allow for situations where, for example, such a revision is deemed to be in the best interests of the shareholders.

7.2 Latest date on which trading results, forecasts etc may be released

Rule 32.1(b) prohibits the offeror in a securities exchange offer from issuing a statement of trading results, a profit or dividend forecast, an asset valuation, an estimate of the anticipated financial effects of a takeover or a proposal for a dividend repayment which will or might have the effect of increasing the value of the offer, after the date on which it is precluded from revising its offer. The Panel believes that this prohibition should apply equally in the case of a takeover scheme where the value of the acquirer’s securities may be relevant. It therefore proposes to apply this Rule to takeover schemes.

7.3 Competitive situations

Rule 32.1(c) relates to the revision of an offer in a competitive situation. It requires the offeror to consult the Panel before the last day on which its offer may be revised and it provides for the prescription by the Panel of a procedure for the announcement of final revisions. It is proposed that this Rule be applied in takeover schemes as the involvement of the Panel may be necessary to ensure an orderly and fair process. However, in order to ensure that it is clear that this Rule applies in all competitive situations, it is proposed that section 3(10) of Appendix 4 state as follows:

“Rule 32.1(c) shall be deemed to apply mutatis mutandis where takeover schemes, or a scheme and an offer, are competing with each other.”

7.4 Mandatory offers

Note 2 on Rule 32.1 deals with the triggering of Rule 9 during a cash offer. It provides that if the mandatory offer does not involve a higher price than the existing cash offer, the change in the nature of the offer will not be viewed as a revision. As stated below, a person will not be allowed to satisfy a Rule 9 obligation by way of a takeover scheme. Where such a Rule 9 obligation arises during a takeover scheme, the takeover scheme would need to be withdrawn and a mandatory offer made. The text of this note would not thus apply. It is proposed that the following sentence be included at the end of the note:

“This note does not apply to takeover schemes.”

7.5 “No increase statements”

Rule 32.2 relates to “no increase statements” made by an offeror. Rule 32.2(a) provides that where such statements are made and not withdrawn immediately, the offeror may not subsequently, except with the consent of the Panel, amend the terms of its offer in any way if it has not specifically reserved the right to do so in the no increase statement. It is proposed that this Rule should now be applied in the same manner in a takeover scheme.

Two specific cases are referred to in paragraph (b) and (c) of Rule 32.2. Rule 32.2(b)(i) provides that if a competitive situation arises after a no increase statement is made, the offeror may revise its offer provided it makes an announcement to that effect as soon as possible and notifies shareholders of the offeree in writing at the earliest opportunity. It is proposed that this Rule should apply in a takeover scheme in the same manner as in an offer.

However, Rule 32.2(b)(ii) adds a second condition to the right to revise an offer in a competitive situation. It provides that shareholders who accepted the offer on or after the date of the no increase statement must be given a right to withdraw their acceptances during the eight days following the despatch of the offeror’s notification to shareholders. It is not proposed to apply this Rule in takeover schemes. As a takeover scheme does not involve an acceptance of an offer, the acquiree’s shareholders will not be “locked in” in the way that offeree shareholders are in an offer. Thus no right of withdrawal is required.

Rule 32.2(c) allows an offeror to choose not to be bound by a no increase statement if the increased or improved offer is recommended for acceptance by the offeree board. It is proposed that this Rule should also apply to a takeover scheme which has been recommended.

Rule 32.2(d) provides that the circumstances in which an offeror may choose not to be bound by a no increase statement set out in paragraphs (b) and (c) of that Rule apply only if the offeror has specifically reserved the right not to be bound in such circumstances at the time at which the statement was made. It is proposed that this Rule should apply equally in a takeover scheme.

Rule 32.4 provides that, subject to Panel consent, an offeror which increases or improves the consideration under its offer may introduce new conditions of the offer only to the extent necessary to implement such an increased or improved offer. It is proposed that this Rule apply in takeover schemes. (See section 9 below for its applicability in the context of a switch.)

Rule 32.5 requires the offeree board to send shareholders a response circular containing its opinion on a revised offer and attaching a separate opinion on the effects of the revised offer on employment from its employee representatives if that is received in good time. Rule 32.6 requires the revised offer document and response

circular to be made available to the representatives of employees or the employees themselves. In order to ensure that shareholders and employees are similarly informed in a takeover scheme, it is proposed that both Rules be applied to takeover scheme circulars.

8. Competitive situations

8.1 Timetable issues

Rule 31.4(a) permits, in the case of competing offers, the first offeror to adopt the timetable of the second offeror. The issue as to what timetable should apply in a competitive situation involving a takeover scheme is not as straightforward.

Rule 31.4(b) provides that where a takeover scheme is proposed in competition with an offer or vice versa, the relevant parties must consult with the Panel, which may make any appropriate rulings or directions to ensure shareholders will be afforded an opportunity to consider the respective merits of the offer and takeover scheme. The Rule enables the Panel to prescribe the appropriate timetable to ensure that purpose is achieved. While this Rule deals with offers competing with takeover schemes and vice versa, it does not expressly regulate competing takeover schemes. The Panel believes that it should be made clear that where there are competing takeover schemes offeree shareholders should be afforded similar protection.

It is proposed therefore that Rule 31.4(b) be amended as follows:

“(b) *Where:*

(i) during the offer period relative to an offer which has been the subject of an announcement pursuant to Rule 2.5, an announcement of a firm intention to propose a competing takeover scheme in respect of the same relevant company is made pursuant to that rule; or

(ii) during the offer period relative to a takeover scheme which has been the subject of an announcement pursuant to Rule 2.5, an announcement of a firm intention to make a competing offer, or to propose a competing takeover scheme, in respect of the same relevant company is made pursuant to that rule,

the board of the relevant company concerned, the offeror and the acquirer or acquirers (as the case may be) shall forthwith consult the Panel which may make such rulings and give such directions in relation to the timetables applicable to the offer and the scheme or schemes (as the case may be) as it considers appropriate, having regard to the General Principles, for the purpose of ensuring that the shareholders of the relevant company shall be afforded an opportunity to consider the respective merits of the offer and the takeover scheme or schemes (as the case may be).”

Where a competitive situation involves a takeover scheme, the Panel believes that it would not be appropriate to prescribe the date on which final revisions to the takeover scheme and offer or to the takeover schemes (as the case may be) must be announced. That date should be determined by the Panel under Rule 31.4(b) in accordance with the circumstances prevailing at the time. It is thus proposed to add a new Note on Rule 31.4(b) as follows:

“Competition involving takeover schemes

The posting of a takeover scheme circular does not establish a timetable under the Rules in the same way as the posting of an offer document as there are no dates in a takeover scheme which are directly equivalent to, for example, “Day 46” or “Day 60” of an offer. Under Rule 32.1(a), an offer may not be revised during the 14 days ending on the final closing date, i.e. Day 60, without the consent of the Panel. Under section 3(9) of Appendix 4, a takeover scheme may not be revised during the 14 days ending on the date of the scheme meeting or any related general meeting or following those meetings, without the consent of the Panel.

Where a competitive situation involves one or more takeover schemes, the Panel, having regard to all the relevant circumstances, will determine the appropriate date on which final revisions to the offer and the scheme or to the schemes, as the case may be, must be announced. Following the determination of that date, Rule 32.1(c) may then be relevant.”

8.2 Revisions

Rule 32.1(c) currently requires each offeror in a competitive situation to consult the Panel before the last day on which its offer may be revised in accordance with Rule 32.1(a). The Panel may then prescribe a procedure for the announcement of any final revisions. As this Rule will now be applied in takeover schemes, it is proposed to amend the Rule by including a reference to Rule 31.4(b) as it will be under the latter Rule that final revision dates in a competitive situation involving a takeover scheme will be determined, as referred to in section 8.1 above.

9. Switching

The Rules do not contain any specific rules to regulate a switch in the structure of a transaction from a takeover scheme to an offer or vice versa. Yet it is possible to envisage circumstances when such a change might be advantageous for the offeror or acquirer. For example, where the board of the acquiree withdraws its recommendation to a takeover scheme, the acquirer may wish to switch to an offer. Similarly, where it becomes clear that an offeror will not be able to secure sufficient acceptances to utilise the statutory compulsory purchase provisions, the offeror may wish to switch to a takeover scheme in order to increase its chances of acquiring 100% of the share capital. It is proposed to introduce a new Rule 41.3 (with the current Rule 41.3 being renumbered as Rule 41.4) in order to regulate such switches.

9.1 The right to switch

The Panel believes that a switch should be allowed notwithstanding that the offeror or acquirer has not reserved the right to do so at the outset. In most cases, a switch is likely to be proposed in order to make the proposed takeover more likely to succeed and may thus serve the interests of the offeree or acquiree shareholders. In such cases, it may be that the switch should be facilitated despite the failure of the offeror or acquirer to reserve a specific right to switch. However, the Panel believes that its consent should be required in connection with the switch in order to deal with circumstances where the switch may actually prejudice shareholders.

It is therefore proposed that Rule 41.3 (a) and (b) state as follows:

“(a) (i) An offeror that is proposing to switch from an offer to a takeover scheme may not for that purpose withdraw its offer without the consent of the Panel.

(ii) An acquirer that is proposing to switch from a takeover scheme to an offer may not for that purpose announce an offer without the consent of the Panel.

“(b) An offeror or acquirer shall not be prevented from making such a switch by reason only of its not having reserved the right to change the structure of its offer or scheme (as the case may be).”

In considering whether to give consent, the Panel’s primary concern will be to ensure that the switch will be in the interests of the offeree or acquiree shareholders. The views of that company’s board and its Rule 3 adviser would thus be particularly relevant to the Panel in making its decision. It is therefore proposed to add a new Note 4 on Rule 41.3 to this effect. It will state as follows:

“Panel consent to switches

In considering whether to consent to a proposed switch, the Panel will have regard primarily to the effect that the switch is likely to have on the interests of offeree or acquiree shareholders. The views of the offeree or acquiree board and its Rule 3 adviser as to the effect of the proposed switch on the interests of those shareholders will be a relevant factor in the Panel’s determination as to whether to grant its consent.”

9.2 No increase statements

As noted above, Rule 32.2 sets out the consequences of no increase statements. The Panel considered whether an offeror or acquirer which makes a no increase statement should be prohibited subsequently from switching, on the basis that Rule 32.2(a) provides that the terms of an offer may not be amended “in any way” following an unreserved no increase statement, even if the amendment would not result in an increase in the value of the offer or takeover scheme. The Panel concluded that as a switch affects merely the manner in which the offer or takeover scheme is to be

implemented, and not the value or the specie of the consideration *per se*, a switch should not normally be regarded as an amendment which would fall within the scope of that Rule. The offeror or acquirer need not therefore specifically reserve the right to switch when making a no increase statement. It is proposed to add a new Note 3 on Rule 41.3 to this effect. It will state as follows:

“Switches not precluded by no increase statement

A switch to or from a takeover scheme will not normally, of itself, be regarded as an amendment that would be precluded by an earlier no increase statement in relation to the value or type of consideration offered. Accordingly, it will not be necessary for an offeror or acquirer making such a statement to reserve specifically the right to switch from one structure to the other.”

9.3 Timing issues

The timetable applicable in a takeover scheme is different to that in an offer, and a switch from one to the other will clearly affect the timetable of the offeror or acquirer and, in the event of a competitive situation, of any competing offeror or acquirer. Determining the appropriate timetable in any given case will clearly depend on the circumstances of each case. Thus, the Panel believes that it would be important to retain flexibility to determine the timetable on a case by case basis. At the time it gives consent to a switch the Panel will therefore set out the timetable which will apply. Thus it is proposed to state in Rule 41.3(c):

“The Panel will determine the offer or scheme timetable that will apply following any switch in relation to which it has consented in accordance with paragraph (a).”

Note 1 on Rule 41.3 is being added to indicate the factors which the Panel may take into account when determining the timetable which should apply following a switch. It will state as follows:

“1. Determination of the scheme or offer timetable following a switch

Factors which the Panel may take into account when determining the scheme or offer timetable that will apply following a switch include:

- (a) the time required to enable shareholders in the offeree or acquiree to reach a properly informed decision;*
- (b) the time which has elapsed since the switching offeror’s or acquirer’s original announcement under Rule 2.5 and the extent to which it is reasonable for the offeree or acquiree board to be hindered in the conduct of its affairs;*
- (c) the views of the offeree or acquiree board and the switching offeror or acquirer; and*
- (d) the likely effect of the new offer timetable on any competing offeror or acquirer.”*

9.4 Announcement of a switch

Clearly the decision to switch structure will involve significant consequences for shareholders and thus it is proposed to require the announcement of the switch and to prescribe the details which must be included in the announcement. Consequently, it is proposed that Rule 41.3(d) will state as follows:

“(d) The offeror or acquirer shall announce a switch to the Stock Exchange and the Panel. The announcement shall include:

(i) details of all changes to the terms and conditions of the offer or scheme as a result of the switch;

(ii) details of any material changes to the other details originally announced pursuant to Rule 2.5(b);

(iii) an explanation of the scheme or offer timetable applicable following the switch (as determined by the Panel); and

(iv) an explanation of whether or not any irrevocable commitments or letters of intent procured by the offeror or acquirer or its associates will remain valid following the switch.”

9.5 New conditions

As noted in section 7.5 above, Rule 32.4 allows the offeror to introduce new conditions only to the extent necessary to implement an increased or improved offer. An inevitable consequence of a switch is that the conditionality of the transaction changes. An acceptance condition to an offer is different to the shareholder approval condition in a takeover scheme. The resolution put to a Court-convened shareholders' meeting requires the approval of a majority in number representing three-fourths in value of the relevant class of shareholders of the offeree present and voting either in person or by proxy. By contrast, the acceptance condition in a voluntary offer is generally set at either 80% or 90% (as appropriate) in order to utilise the relevant compulsory purchase provisions. A question arises then as to whether Rule 32.4 would impede a switch by restricting this change in conditionality.

In order to avoid any confusion, the Panel proposes that Rule 32.4 be amended in order to specifically refer to the introduction of new conditions to the extent necessary to implement a switch. The new Rule will state as follows:

“32.4 NEW CONDITIONS FOR INCREASED OR IMPROVED CONSIDERATION OR FOLLOWING SWITCHES

Subject to the prior consent of the Panel, and only to the extent necessary to implement an increase or improvement in the consideration under an offer or takeover scheme, or a switch from an offer to a takeover scheme or from a takeover scheme to an offer, the offeree or acquirer may introduce new conditions of the offer or scheme, as the case may be (including, inter alia, obtaining shareholders' approval or a quotation for new shares).”

9.6 Rule 35

Rule 35.1 prohibits an offeror or acquirer from announcing a new offer or takeover scheme in respect of the same relevant company within 12 months of the withdrawal or lapsing of its original offer or takeover scheme, except with the consent of the Panel. Where an offeror or acquirer proposes to make a switch under Rule 41.3, in addition to seeking Panel consent under that Rule, it will have to seek Panel consent under Rule 35.1 as the original transaction will have to lapse prior to the introduction of the new structure. Although two separate Rule consents are required, the decisions by the Panel as to whether to grant consent in each case will involve similar considerations. It is proposed that a Note to that effect be included on Rule 35.1 and on Rule 41.3.

“Note 1(c) on Rule 35.1

Every switch under Rule 41.3 is also likely to require the Panel’s consent under Rule 35.1. In deciding whether to grant consent to a switch under Rule 41.3, the Panel will also take into account any factors that may be relevant in the context of Rule 35.1. See Note 2 on Rule 41.3.”

and

“Note 2 on Rule 41.3.

Rule 35.1

When an offeror or acquirer seeks the consent of the Panel to a switch, it should at the same time request any appropriate consent under Rule 35.1.”

10. Alternative consideration and withdrawal rights

10.1 Minimum periods for electing for alternative consideration

Rule 33 regulates alternative offers. Such an offer is defined in Part A as:

“a right granted under an offer by the offeror, or by a third party at the request of an offeror, to acceptors of the offer to elect to receive, instead of the whole or part of the basic consideration available under the offer, a consideration different from that basic consideration”.

Rule 33 provides that alternative offers, like ordinary offers, must be kept open for at least 21 days. This allows shareholders sufficient time to make an informed decision. This Rule does not apply to takeover schemes as in a takeover scheme there will be no alternative offer.

However, in a takeover scheme acquiree shareholders may be given an opportunity to elect for alternative consideration. In such a case, the Panel believes that they too should be afforded sufficient time to assess the proposal and to make their elections. These elections should be capable of being made at least until the date of the shareholder meetings to approve the takeover scheme.

It is therefore proposed to set this out in a new Rule (4)(a) in section 4 of Appendix 4 as follows:

“(a) If a takeover scheme permits shareholders to elect to receive any alternative form of consideration, or to elect, subject to the election of others, to vary the proportion in which they receive different forms of consideration, the entitlement of shareholders to make such elections may not be closed off or withdrawn before the scheme meeting.”

Rule 11 (a) specifies three circumstances in which a cash offer or cash alternative offer should be made. Rule 11(e) provides that an obligation to make cash available under Rule 11(a) will be satisfied if an appropriate cash offer or cash alternative is open for acceptance at the relevant time, even if it closes for acceptance immediately afterwards. Rule 11(e) is currently disapplied in takeover schemes. It is proposed to introduce a new section 3(3) in Appendix 4 which will replace Rule 11(e) and will provide for the situation where a takeover scheme allows shareholders to elect to receive an alternative form of consideration.

“(e) In the case of a takeover scheme, the obligation to make cash available under paragraph (a) shall be satisfied if at the time at which the acquisition giving rise to such obligation was made, shareholders of the acquiree were entitled to elect for cash consideration at a price per share not less than that required by paragraph (a) (even if such right of election subsequently ceases to be available.”;

10.2 Withdrawal rights

Rule 34 deals with withdrawal rights for offeree shareholders. Shareholders who accept an offer are entitled to withdraw their acceptances if the offer has not become unconditional as to acceptances by the date which is 21 days after the first closing date. The Rule is currently disapplied in takeover schemes, on the basis that, since takeover schemes are not accepted, shareholders in the acquiree generally retain control of their shares until the takeover scheme becomes effective. No right of withdrawal is thus necessary.

However, the principle underlying the Rule may be said to be relevant where shareholders elect for alternative consideration under a takeover scheme. In practice, shareholders electing for alternative consideration are required to return their share certificates with the election form or, in the case of uncertified shares, to transfer their shares into an escrow account. The election is usually described to be irrevocable. Thereafter, electing shareholders will not be able to accept any competing offers or withdraw their elections. Furthermore, in the event that the takeover scheme timetable is extended, those shareholders will be locked in for a longer period than they had originally anticipated. The acquiree shareholder who elects for an alternative form of consideration is thus placed in a worse situation than a shareholder who does not make an election. The Panel believes that the acquiree shareholder should be entitled to withdraw an election from the outset of a takeover scheme up until a week prior to the date of the court sanction hearing. The period of one week is necessary to allow the acquiree’s receiving agent sufficient time to identify the number of shares relating to the main consideration and the number of shares in respect of which shareholders have elected to take the alternative consideration. Therefore, it is proposed to include

a new Rule (4)(b) in section 4 of Appendix 4 as follows:

“(b) A shareholder who has elected under a takeover scheme to receive a particular form of consideration in respect of any of his shares shall be entitled to withdraw his election, provided that such entitlement may be shut off not earlier than one week prior to the date on which the court sanction hearing is originally proposed to be held or, if for any reason the court sanction hearing is rearranged for a later date, not earlier than one week prior to that later date.”

10.3 Return of documents

If a shareholder withdraws an acceptance of an offer, Rule 34 does not currently provide for a time limit for the return of the documents of title or the release of securities held in escrow. The Panel believes that a new provision should be incorporated into Rule 34 introducing such a requirement for offers.

It is proposed that Rule 34(b) should state as follows:

“(b) If under any rule a shareholder withdraws his or her acceptance, the offeror shall ensure that all documents of title and other documents lodged with the form of acceptance are returned as soon as practicable (and in any event within 14 days after the receipt of the notice of withdrawal), and the offeror’s receiving agent shall immediately give instructions for the release of securities held in escrow.”

Although Rule 34 does not apply to takeover schemes, section 3(8) of Appendix 4 will apply a similar provision in relation to such transactions, as noted in section 3.4 above.

11. Mandatory offers

Section 8(3) of the Irish Takeover Panel Act 1997 requires the Panel to make rules in respect of the making of a mandatory offer. Where the obligation to make a bid is triggered, section 8(3) requires the making of an offer or offers to acquire all or a specified class or classes of the remaining securities in that company. This clearly precludes the satisfaction of the obligation by way of a takeover scheme. To reflect this in the Rules, it is proposed to include a new Rule in section 4 of Appendix 4 stating as follows:

“(1) MANDATORY OFFERS

An obligation to make an offer under Rule 9 or Rule 37 may not be satisfied by way of a scheme of arrangement.”

Because the mandatory offer cannot be satisfied by way of a takeover scheme, it

follows that an acquirer in a takeover scheme should be permitted to trigger an obligation to make a mandatory offer only if it has obtained the Panel's consent to switch the structure of its transaction to an offer. A Note on new Rule (1) in section 4 of Appendix 4 will thus state as follows:

“Triggering Rule 9

During the course of a takeover scheme, the acquirer or a person acting in concert with it may acquire an interest in shares that requires it to extend a mandatory offer under Rule 9 only if the acquirer has obtained the Panel's prior consent to switch from a scheme to an offer. (See Rule 41.3).

12. Appropriate offers under Rule 15 and comparable offers under Rule 14

Rule 15(a) provides that where the offeree has outstanding securities convertible into, or rights or options to subscribe for, shares of the class which is the subject of the offer (referred to collectively in the Rule as “convertible securities”), the offeror must make “an appropriate offer or proposal” to the holders of the convertible securities. This gives effect to General Principle 1 which provides for the equality of treatment of all security holders of the same class and for the protection of other holders of securities. It affords the holders of the convertible securities an opportunity to exit the company, in circumstances where other security holders have a similar entitlement.

While Rule 15(d) provides that the offer or proposal to the holders of convertible securities should not be made conditional on any level of acceptances, it permits it (in an offer only) to be proposed by way of a scheme of arrangement to be considered at a meeting of the holders of the convertible securities. In order to allow the holders of the convertible securities an exit opportunity, a practice has arisen in the UK whereby the scheme proposal is regarded as “appropriate” only if it is accompanied by a commitment that, in the event that the scheme failed to become effective by virtue of not being approved by the holders of the convertible securities or not being sanctioned by the Court, the offeror would make an offer to the holders of the convertible securities which would not be conditional on any particular level of acceptances. This is to ensure that holders of the convertible securities are not denied the exit opportunity envisaged under the Rule.

It is intended to introduce a similar requirement into Rule 15(d) by adding the following at the end of the paragraph:

“but only on the condition that, if the scheme is not approved at the meeting or is not sanctioned by the court, the offeror shall immediately make an appropriate offer or proposal to holders of convertible securities that is not conditional on any particular level of acceptances or approval”.

It is also proposed to permit in a takeover scheme the Rule 15 offer or proposal to be proposed by way of a scheme of arrangement to be considered at a meeting of the holders of the convertible securities.

Where an offer is made for an offeree which has more than one class of equity share capital, Rule 14.1 provides that, save where the Panel consents otherwise, the offeror must make a comparable offer for every other class of equity share capital, whether or not such other class confers voting rights. It also provides that the comparable offer for non-voting equity share capital may not be made conditional on receipt of “a particular level of acceptances” in respect of that class unless the offer for the voting equity share capital is also conditional on receipt of that particular level of acceptances of that comparable offer. Although Rule 14 also applies to takeover schemes, the reference to a “level of acceptances” is clearly only relevant to an offer. It is proposed to include a reference to shareholder approval in the Rule to make clear that a comparable offer for non-voting equity share capital should be conditional on shareholder approval only if the offer for the voting equity is conditional on the success of the offer for the non-voting equity share capital. It is thus proposed to amend Rule 14.1 by the insertion of “, *or on the approval of that class,*” after “acceptances in respect of that class”.

ANNEXE 1

IRISH TAKEOVER PANEL ACT, 1997, TAKEOVER (AMENDMENT) RULES, 200[8]

[as proposed]

1 CITATION, CONSTRUCTION AND COMMENCEMENT

- 1.1 These Rules may be cited as the Irish Takeover Panel Act, 1997, Takeover (Amendment) Rules, 200[8].
- 1.2 These Rules and the 2007 Rules shall be construed together as one and may be cited together as the Irish Takeover Panel Act, 1997, Takeover Rules, 2007 and 200[8].
- 1.3 These Rules shall come into operation on [] 200[8].
- 1.4 These Rules shall not apply to any transaction which is in being on the date on which these Rules come into operation.

2. INTERPRETATION

- (a) In these Rules, the “**2007 Rules**” means the Irish Takeover Panel Act, 1997, Takeover Rules, 2007.
- (b) Unless the context otherwise requires, a reference in these Rules (apart from the schedule) shall be construed as a reference to a rule of Part B of the 2007 Rules.

3. AMENDMENT OF PART A OF THE 2007 RULES

Rule 2.1 of Part A of the 2007 Rules is hereby amended by the substitution of “other than shares;” for “other than shares.” at the end of paragraph (b)(vii) and by the insertion after paragraph (b)(vii) of the following new paragraph (viii):

“(viii) references to irrevocable commitments and letters of intent include, respectively, irrevocable commitments and letters of intent:

- (1) to accept or not to accept (or to procure that any other person accept or not accept) an offer; or
- (2) to vote (or to procure that any other person vote) in favour of or against a resolution of an offeror or the offeree (or of its shareholders) in the context of an offer, including a resolution to approve or to give effect to a takeover scheme.”

4. AMENDMENT OF PART B OF THE 2007 RULES

4.1 **Rule 2.2** is hereby amended:

- (a) by the substitution in paragraph (a) of “irrevocable commitments” for “irrevocable undertakings to accept the offer”; and
- (b) by the deletion from paragraph (e) of “to accept a contemplated offer”.

- 4.2 **Rule 2.3** is hereby amended by the substitution in paragraph (d) of “irrevocable commitments” for “irrevocable undertakings to accept the offer”.
- 4.3 **Rule 2.5** is hereby amended by the substitution of “or a letter of intent” for “to accept the offer” in sub-paragraph (iii) of paragraph (b) and by the insertion of “, in the case of an irrevocable commitment,” after “including” in that sub-paragraph.
- 4.4 **Rule 4.3** is hereby amended by the deletion from paragraph (a) of “to accept or refrain from accepting an offer or contemplated offer”.
- 4.5 **Rule 14.1** is hereby amended by the insertion of “, or on the approval of that class,” after “acceptances in respect of that class”.
- 4.6 **Rule 15** is hereby amended by:
- (a) the substitution in paragraph (d) of “acceptances;” for “acceptances,”; and
 - (b) the addition at the end of that paragraph of the words “but only on the condition that, if the scheme is not approved at the meeting or is not sanctioned by the court, the offeror shall immediately make an appropriate offer or proposal to holders of convertible securities that is not conditional on any particular level of acceptances or approval”.
- 4.7 **Rule 19.3** is hereby amended by the substitution for the second sentence in paragraph (a) of the following sentence: “An offeror shall not make a statement to the effect that it may improve its offer, or that it may make a change to the structure, conditionality or the non-financial terms of its offer, unless it commits itself to doing so and specifies the improvement or change.”
- 4.8 **Rule 24.3** is hereby amended:
- (a) by the substitution in sub-paragraph (iv) of paragraph (a) of “provided irrevocable commitments or letters of intent,” for “irrevocably committed themselves to accept the offer,”; and
 - (b) by the deletion from paragraph (f) of “to accept an offer”.
- 4.9 **Rule 26** is hereby amended by the substitution in sub-paragraph (ix) of paragraph (b) of “or a letter of intent” for “to accept an offer”.
- 4.10 **Rule 31.4** is hereby amended by the substitution of the following paragraph for paragraph (b):
- “(b) Where:
- (i) during the offer period relative to an offer which has been the subject of an announcement pursuant to Rule 2.5, an announcement of a firm intention to propose a competing takeover scheme in respect of the same relevant company is made pursuant to that rule; or
 - (ii) during the offer period relative to a takeover scheme which has been the subject of an announcement pursuant to Rule 2.5, an announcement of a firm intention to make a competing offer, or to propose a competing takeover scheme, in respect of the same relevant company is made pursuant to that rule,

the board of the relevant company concerned, the offeror and the acquirer or acquirers (as the case may be) shall forthwith consult the Panel which may make such rulings and give such directions in relation to the timetables applicable to the offer and the

scheme or schemes (as the case may be) as it considers appropriate, having regard to the General Principles, for the purpose of ensuring that the shareholders of the relevant company shall be afforded an opportunity to consider the respective merits of the offer and the takeover scheme or schemes (as the case may be).”

4.11 **Rule 31.10** is hereby amended by the substitution of “as soon as practicable (and in any event within 14 days after the lapsing of the offer)” for “within 14 days after the lapsing of the offer”.

4.12 **Rule 32.1** is hereby amended by the insertion in paragraph (c) after “paragraph (a)” of “above or paragraph (b) of Rule 31.4”.

4.13 **Rule 32.4** is hereby amended by the substitution of the following rule for Rule 32.4:

**“32.4 NEW CONDITIONS FOR INCREASED OR IMPROVED
CONSIDERATION OR FOLLOWING SWITCHES**

Subject to the prior consent of the Panel, and only to the extent necessary to implement an increase or improvement in the consideration under an offer or takeover scheme, or a switch from an offer to a takeover scheme or from a takeover scheme to an offer, the offeree or acquirer may introduce new conditions of the offer or scheme, as the case may be (including, inter alia, obtaining shareholders’ approval or a quotation for new shares).”

4.14 **Rule 34** is hereby amended by:

- (a) the insertion of “(a)” at the beginning of the rule;
- (b) the substitution of “(i)” and “(ii)” for “(a)” and “(b)” respectively within the rule; and
- (c) the insertion after paragraph (a) of the following new paragraph (b):

“(b) If under any rule a shareholder withdraws his or her acceptance, the offeror shall ensure that all documents of title and other documents lodged with the form of acceptance are returned as soon as practicable (and in any event within 14 days after the receipt of the notice of withdrawal), and the offeror’s receiving agent shall immediately give instructions for the release of securities held in escrow).”

4.15 **Rule 41.2** is hereby amended by the insertion after “the provisions of Appendix 4” of “and unless the context requires otherwise”.

4.16 **Rule 41** is hereby amended by the insertion after Rule 41.2 of the following new Rule 41.3 and by the renumbering of existing Rule 41.3 as Rule 41.4:

“41.3 SWITCHING

- (a) (i) An offeror that is proposing to switch from an offer to a takeover scheme may not for that purpose withdraw its offer without the consent of the Panel.
- (ii) An acquirer that is proposing to switch from a takeover scheme to an offer may not for that purpose announce an offer without the consent of the Panel.

- (b) An offeror or acquirer shall not be prevented from making such a switch by reason only of its not having reserved the right to change the structure of its offer or scheme (as the case may be).
- (c) The Panel will determine the offer or scheme timetable that will apply following any switch in relation to which it has consented in accordance with paragraph (a).
- (d) The offeror or acquirer shall announce a switch to the Stock Exchange and the Panel. The announcement shall include:
- (i) details of all changes to the terms and conditions of the offer or scheme as a result of the switch;
 - (ii) details of any material changes to the other details originally announced pursuant to Rule 2.5(b);
 - (iii) an explanation of the scheme or offer timetable applicable following the switch (as determined by the Panel); and
 - (iv) an explanation of whether or not any irrevocable commitments or letters of intent procured by the offeror or acquirer or its associates will remain valid following the switch."

4.17 **Rule 41.4** (as so renumbered) is hereby amended by:

- (a) the substitution in paragraph (a) of "paragraphs (1) and (2) respectively of Section 2 in Appendix 4" for "sub-paragraphs (a) and (b) respectively of paragraph 2 in Appendix 4";
- (b) the insertion after paragraph (b) of the following new paragraphs (c) and (d):
- "(c) "**court sanction hearing**" means the hearing of the Court at which a petition to sanction a takeover scheme is presented;
 - (d) "**related general meeting**" means, in relation to a takeover scheme, a general meeting of the acquiree convened to consider a resolution to approve or to give effect to the scheme;"
- (c) the renumbering of existing paragraphs (c) to (h) as paragraphs (e) to (j) respectively; and
- (d) the insertion, in paragraph (g) (as so renumbered), after "in respect of the scheme;" of "and where, in relation to a takeover scheme, more than one such meeting is summoned or is to be summoned, "scheme meeting" shall, where appropriate, be construed to refer to each such meeting;"

5. AMENDMENT OF APPENDIX 4 TO PART B OF THE 2007 RULES

The 2007 Rules are hereby amended by the substitution for existing Appendix 4 to Part B of those Rules of a new Appendix 4 in the form set out in the schedule to these Rules.

SCHEDULE

(Rule 5)

APPENDIX 4

APPLICATION OF THE RULES TO TAKEOVER SCHEMES **Ap •**

Section 1. Certain rules not applicable to takeover schemes **Ap •**

Section 2. Adaptation of certain definitions and expressions **Ap •**

Section 3. Adaptation and replacement of certain rules **Ap •**

Section 4. Additional rules relating to takeover schemes **Ap •**

APPLICATION OF THE RULES TO TAKEOVER SCHEMES

The Application shall have effect subject to and in accordance with the following provisions of this Appendix.

SECTION 1. CERTAIN RULES NOT APPLICABLE TO TAKEOVER SCHEMES

The following rules shall not apply to takeover schemes:

Rule 5.2(a)(iv)(3);

Rules 10 and 11(e);

Rules 17, 18, 22, 24.6 and 24.13;

Rules 30.1, 30.2(a) and 30.3(a);

Rules 31.1 to 31.4(a) (inclusive);

Rules 31.5 to 31.7 (inclusive), the first paragraph of Rule 31.8 and Rules 31.9 and 31.10;

Rules 32.1(a), 32.2(b)(ii), 32.3, 33 and 34;

36.1, 36.3 to 36.8 (inclusive); and

Appendix 1

SECTION 2. ADAPTATION OF CERTAIN DEFINITIONS AND EXPRESSIONS

For the purpose of the Application:

- (1) a relevant company:
 - (i) in respect of which a takeover scheme has been or is intended to be proposed, or
 - (ii) in respect of which, or in connection with which, a person does any act in contemplation of proposing a takeover scheme in respect of that company

(in Rule 41 and in this Appendix referred to as the "**acquiree**") shall be treated as if it were the offeree;
- (2) a person (including persons acting in concert) who:
 - (i) acquires or will or may acquire control of the relevant company concerned consequent upon the takeover scheme taking effect, or
 - (ii) does any act in contemplation of acquiring control of the relevant company concerned consequent upon a takeover scheme taking effect

(in Rule 41 and in this Appendix referred to as the “**acquirer**”) shall be treated as if it were the offeror;

(3) the expression “acceptance of an offer”, in relation to a takeover scheme, shall be construed as if it referred to the casting by a member of the acquiree of his or her vote in favour of the scheme resolution, and cognate words and expressions shall be construed accordingly;

(4) the definition of “course of the offer” in Rule 2.1 of Part A, in relation to a takeover scheme, shall be construed as if paragraphs (i) and (ii) were replaced by the following paragraphs:

“(i) where, in the case of a proposed or possible takeover scheme, the acquirer or the acquiree announces that the scheme will not be proposed, the time of that announcement;

(ii) the time at which the acquiree announces that the scheme has taken effect or that it has lapsed or been withdrawn; and”;

(5) the expression “first closing date of the offer” in Rule 12(b)(i), in relation to a takeover scheme, shall be construed to mean the date of the scheme meeting;

(6) the expressions “offer document” and “first response circular”, in relation to a takeover scheme, shall each be construed as if it referred to the scheme circular;

(7) the definition of “offer period” in Rule 2.1 of Part A, in relation to a takeover scheme, shall be construed as if paragraphs (1) and (2) were replaced by the following paragraphs:

“(1) where, in the case of a proposed or possible takeover scheme, the acquirer or the acquiree announces that the scheme will not be proposed, the time of that announcement; and

(2) the time at which the acquiree announces that the scheme has taken effect or that it has lapsed or been withdrawn;”;

(8) the expression “unconditional as to acceptances”, in relation to a takeover scheme, shall be construed as if it meant that the acquiree has announced that the requisite majority of the shareholders or class of shareholders of the acquiree has voted in favour of the scheme resolution at the scheme meeting; and

(9) the expression “unconditional in all respects”, in relation to a takeover scheme, shall be construed as if it meant that the scheme has taken effect.

SECTION 3. ADAPTATION AND REPLACEMENT OF CERTAIN RULES

For the purposes of the Application:

(1) the following paragraph shall be deemed to be inserted after Rule 2.5(d):

“(e) An announcement of a firm intention to propose a takeover scheme shall not be treated as an announcement pursuant to Rule 2.5 unless it is issued jointly by the acquirer and the acquiree.”;

(2) Rule 2.6(b) shall be construed as if “offeree” were substituted for “offeror”;

- (3) the following paragraph shall be deemed to replace paragraph (e) of Rule 11:

“(e) In the case of a takeover scheme, the obligation to make cash available under paragraph (a) shall be satisfied if at the time at which the acquisition giving rise to such obligation was made, shareholders of the acquiree were entitled to elect for cash consideration at a price per share not less than that required by paragraph (a) (even if such right of election subsequently ceases to be available.”;

- (4) the following rule shall be deemed to replace Rule 17:

“RULE 17. ANNOUNCEMENTS FOLLOWING KEY EVENTS IN A TAKEOVER SCHEME

(a) At the earliest practicable time after the Court makes an order directing that a scheme meeting be convened and, in any event, by no later than 8.00 a.m. on the next following business day, the acquiree shall make an appropriate announcement to the Stock Exchange and the Panel, which announcement shall state the date, time and place of the scheme meeting and any related general meeting.

(b) At the earliest practicable time after the acquiree despatches a scheme circular to its shareholders or a class of its shareholders and, in any event, by no later than 8.00 a.m. on the next following business day, it shall make an appropriate announcement to the Stock Exchange and the Panel, which announcement shall state the fact that the scheme circular has been so despatched and the date, time and place of the scheme meeting and any related general meeting.

(c) At the earliest practicable time after the results of the scheme meeting and of any related general meeting are known and, in any event, by no later than 8.00 a.m. on the next following business day, the acquiree shall make an announcement to the Stock Exchange and the Panel stating whether the resolutions concerned were passed by the requisite majorities and giving details of the voting results in relation to the meetings, including:

(i) in the case of a related general meeting, if a poll was taken, the respective numbers of shares of each class which were voted for and against the resolutions concerned and the respective percentages of the shares of that class voted which those numbers represent; and

(ii) in the case of the scheme meeting:

(1) the respective numbers of shareholders of each class who voted for and against the resolution to approve the scheme and the respective percentages of the voting shareholders of that class which those numbers represent;

(2) the respective numbers of shares of each class which were voted for and against that resolution and the respective percentages of the shares voted which those numbers represent; and

(3) the respective percentages of the issued shares of each class which the shares of that class voted for and against that resolution represent.

(d) At the earliest practicable time after the Court sanction hearing and, in any event, by no later than 8.00 a.m. on the next following business day, the acquiree shall make an announcement to the Stock Exchange and the Panel, which announcement shall state:

(i) whether the Court has sanctioned the takeover scheme;

(ii) if the Court has sanctioned the scheme, details of any modification of or addition made to the scheme and of any condition approved or imposed by the Court;

(iii) if the Court has sanctioned the scheme, a summary of any outstanding conditions, the date on which those conditions are expected to be satisfied, and the date on which the scheme is expected to take effect; and

(iv) if the Court has not sanctioned the scheme, the reasons therefor and the consequences for the scheme, including whether the scheme has lapsed.

(e) At the earliest practicable time after a takeover scheme takes effect and, in any event, by no later than 8.00 a.m. on the next following business day, the acquiree shall make an announcement to the Stock Exchange and the Panel, which announcement shall state the date on which the scheme took effect and the date on which it is expected that the acquiree will despatch to shareholders of the acquiree the consideration due to them under the scheme."

(5) the following rule shall be deemed to replace Rule 30.1:

"The acquiree and acquirer concerned shall announce pursuant to Rule 2.5 their firm intention to propose a takeover scheme before they initiate or take any other step in any proceedings in the Court under section 201 of the Companies Act, 1963, or otherwise in connection with the scheme.";

(6) the following paragraph shall be deemed to replace paragraph (a) of Rule 30.2:

"(a) Except with the consent of the Panel and subject to Rule 2.7, the acquiree and the acquirer shall despatch the scheme circular to the shareholders of the acquiree within 28 days after the date of the announcement of a firm intention to propose a takeover scheme.";

(7) the following paragraph shall be deemed to replace the first paragraph of Rule 31.8:

"Except with the consent of the Panel, if a takeover scheme takes effect the consideration due to the shareholders of the acquiree shall be posted within 14 days after the date on which the scheme took effect. This requirement shall be included in the terms of the scheme.";

- (8) the following rule shall be deemed to replace Rule 31.10:

"31.10. RETURN OF DOCUMENTS OF TITLE

If a takeover scheme lapses or is withdrawn, or if a shareholder withdraws his election for a particular form of consideration, the acquirer shall ensure that all documents of title and other documents lodged with any form of election are returned as soon as practicable (and in any event within 14 days after the lapse or withdrawal), and the acquiree's receiving agent shall immediately give instructions for the release of securities held in escrow.";

- (9) the following paragraph shall be deemed to replace paragraph (a) of Rule 32.1:

"(a) If a takeover scheme is revised the acquiree and the acquirer shall despatch to the shareholders of the acquiree a revised scheme circular, drawn up in accordance with Rules 24, 25 and 27. Except with the consent of the Panel, a revised scheme circular shall not be despatched either:

(i) during the 14 days ending on the date of the scheme meeting or any related general meeting (or on any later date to which any such meeting is adjourned); or

(ii) following the scheme meeting or any related general meeting;

nor shall an acquirer place itself in a position in which it would be required to revise the scheme during either of those periods.";

- (10) Rule 32.1(c) shall be deemed to apply mutatis mutandis where takeover schemes, or a scheme and an offer, are competing with each other;

(11) Rule 35 shall be construed as if references in that Rule to an offer (not being a partial offer) were references to a takeover scheme (not being a partial takeover scheme) but the restrictions in Rule 35.1(a) and (b) and in Rule 35.2 shall not be modified in any respect;

- (12) the following rule shall be deemed to replace rule 36.1:

"Except with the consent of the Panel, a person shall not propose a partial takeover scheme in respect of a relevant company."; and

(13) Rule 36.2 shall be construed as if references in that rule to a partial offer were references to a partial takeover scheme but the restrictions in that rule shall not be modified in any respect.

SECTION 4. ADDITIONAL RULES RELATING TO TAKEOVER SCHEMES

For the purposes of the Application, the following additional rules shall apply:

(1) **MANDATORY OFFERS**

An obligation to make an offer under Rule 9 or Rule 37 may not be satisfied by way of a scheme of arrangement.

(2) **EARLIEST DATE FOR SCHEME MEETING**

Except with the consent of the Panel, the acquiree shall not convene the scheme meeting or any related general meeting for a date earlier than the 21st day following the date on which the scheme circular is despatched.

(3) **CHANGES TO THE EXPECTED SCHEME TIMETABLE**

(a) The acquiree shall promptly announce to the Stock Exchange and the Panel any adjournment of the scheme meeting or any related general meeting or the court sanction hearing and any decision by the board of the acquiree to propose such an adjournment. If either meeting or the hearing is adjourned to a specified date, the announcement shall include the relevant details. If either meeting or the hearing is adjourned without a date for the adjourned meeting being specified at the same time, the acquiree shall promptly announce the new date when it has been set.

(b) The acquirer or the acquiree (as appropriate) shall promptly announce to the Stock Exchange and the Panel any other change to the expected timetable of events set out in the scheme circular.

(c) In all of the circumstances referred to above, the acquirer or the acquiree (as appropriate) shall consult the Panel as to whether notice of the adjournment or other change to the expected timetable should also be posted to the shareholders of the acquiree.”

(4) **ALTERNATIVE CONSIDERATION**

(a) If a takeover scheme permits shareholders to elect to receive any alternative form of consideration, or to elect, subject to the election of others, to vary the proportion in which they receive different forms of consideration, the entitlement of shareholders to make such elections may not be closed off or withdrawn before the scheme meeting.

(b) A shareholder who has elected under a takeover scheme to receive a particular form of consideration in respect of any of his shares shall be entitled to withdraw his election, provided that such entitlement may be shut off not earlier than one week prior to the date on which the court sanction hearing is originally proposed to be held or, if for any reason the court sanction hearing is rearranged for a later date, not earlier than one week prior to that later date.

ANNEXE 2
NOTES ON RULES
[as proposed]

NOTES ON PART B

NEW NOTE 1 ON RULE 19.3

“1. Consulting the Panel

In the case of any doubt as to the application of this rule to a proposed statement, the party concerned and its advisers should consult the Panel.”

NEW NOTE ON RULE 31.4(b)

“Competition involving takeover schemes

The posting of a takeover scheme circular does not establish a timetable under the Rules in the same way as the posting of an offer document as there are no dates in a takeover scheme which are directly equivalent to, for example, “Day 46” or “Day 60” of an offer. Under Rule 32.1(a), an offer may not be revised during the 14 days ending on the final closing date, i.e. Day 60, without the consent of the Panel. Under Section 3(9) of Appendix 4, a takeover scheme may not be revised during the 14 days ending on the date of the scheme meeting or any related general meeting or following those meetings, without the consent of the Panel.

Where a competitive situation involves one or more takeover schemes, the Panel, having regard to all the relevant circumstances, will determine the appropriate date on which final revisions to the offer and the scheme or to the schemes, as the case may be, must be announced. Following the determination of that date, Rule 32.1(c) may then be relevant.”

NOTE 2 ON RULE 32.1

Add the following second paragraph:

“This note does not apply to takeover schemes.”

NOTE 1 ON RULE 35.1

Add the following paragraph (c):

“(c) Every switch under Rule 41.3 is also likely to require the Panel’s consent under Rule 35.1. In deciding whether to grant consent to a switch under Rule 41.3, the Panel will also take into account any factors that may be relevant in the context of Rule 35.1. See Note 2 on Rule 41.3.”

NOTES ON RULE 41.3

1. Determination of the scheme or offer timetable following a switch

Factors which the Panel may take into account when determining the scheme or offer timetable that will apply following a switch include:

(a) the time required to enable shareholders in the offeree or acquiree to reach a properly informed decision;

- (b) *the time which has elapsed since the switching offeror's or acquirer's original announcement under Rule 2.5 and the extent to which it is reasonable for the offeree or acquiree board to be hindered in the conduct of its affairs;*
- (c) *the views of the offeree or acquiree board and the switching offeror or acquirer; and*
- (d) *the likely effect of the new offer timetable on any competing offeror or acquirer.*

2. *Rule 35.1*

When an offeror or acquirer seeks the consent of the Panel to a switch, it should at the same time request any appropriate consent under Rule 35.1.

3. *Switches not precluded by no increase statement*

A switch to or from a takeover scheme will not normally, of itself, be regarded as an amendment that would be precluded by an earlier no increase statement in relation to the value or type of consideration offered. Accordingly, it will not be necessary for an offeror or acquirer making such a statement to reserve specifically the right to switch from one structure to the other.

4. *Panel consent to switches*

In considering whether to consent to a proposed switch, the Panel will have regard primarily to the effect that the switch is likely to have on the interests of offeree or acquiree shareholders. The views of the offeree or acquiree board and its Rule 3 adviser as to the effect of the proposed switch on the interests of those shareholders will be a relevant factor in the Panel's determination as to whether to grant its consent.

NOTE ON APPENDIX 4

Section 4

NOTE ON RULE (1)

Triggering Rule 9

During the course of a takeover scheme, the acquirer or a person acting in concert with it may acquire an interest in shares that requires it to extend a mandatory offer under Rule 9 only if the acquirer has obtained the Panel's prior consent to switch from a scheme to an offer. (See Rule 41.3)

