

**Irish Takeover Panel Act, 1997, Takeover
(Amendment) Rules, 2004 and Irish Takeover
Panel Act, 1997, Substantial Acquisition
(Amendment) Rules, 2004**

A. Introduction

This is a public consultation paper seeking views on a proposed set of new takeover rules, Irish Takeover Panel Act, 1997, Takeover (Amendment) Rules, 2004 (the “2004 Takeover Rules”), and on a proposed set of new substantial acquisition rules, Irish Takeover Panel Act, 1997, Substantial Acquisition (Amendment) Rules, 2004 (the “2004 SAR’s”). The 2004 Takeover Rules and the 2004 SAR’s will amend, when they come into effect, the existing takeover rules, Irish Takeover Panel Act, 1997, Takeover Rules, 2001 and Irish Takeover Panel Act, 1997, Takeover (Amendment) Rules, 2002 (the “existing Takeover Rules”), and the existing substantial acquisition rules, Irish Takeover Panel Act, 1997, Substantial Acquisition Rules, 2001 (the “existing SAR’s”). When the 2004 Takeover Rules and the 2004 SAR’s come into effect they should be read in addition to the existing Takeover Rules and to the existing SAR’s.

While certain other amendments are proposed, the majority of the amendments proposed in the 2004 Takeover Rules and the 2004 SAR’s relate to the application of the takeover rules and the substantial acquisition rules to takeovers of relevant companies effected by schemes of arrangement pursuant to section 201 of the Companies Act, 1963 (“takeover schemes”).

The Irish Takeover Panel (“the Panel”) is inviting comments on this consultation paper. Comments should reach the Panel by 31 October, 2004 and may be sent in writing to:

Irish Takeover Panel

8 Upper Mount Street

Dublin 2

Telephone: 01 – 6789020

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B. The 2004 Takeover Rules

(i) Proposed amendments to Rules 2.2 and 3.3 of Part A of the existing Takeover Rules

It is proposed to amend Rule 2.2 (Associates) and Rule 3.3 (Acting in Concert) of Part A of the existing Takeover Rules. The proposed amendments are set out in Rule 3 of the 2004 Takeover Rules set out in paragraph D below.

Two amendments to Rule 2.2 are being proposed. Firstly, the definition of “Associates” is being amended such that a person will no longer be regarded as an associate of an offeror or an offeree solely on the basis that that person is acting in concert with the offeror or the offeree. Secondly, it is proposed that Rule 2.2 (f) be amended such that companies controlled by those persons regarded as associates under the existing Rule 2.2(f) will also be regarded as associates of the offeror or the offeree.

With regard to Rule 3.3, it is proposed that a new presumption Rule 3.3(g) be inserted. The effect of this presumption will be to regard certain close relatives, the trustees of every trust of which such relatives are a beneficiary and every company which is controlled by any one or more of such relatives and such trustees as all acting in concert with each other. The existing Rules 3.3(b) and (f) will also be amended to bring within those presumptions every company which is controlled by the persons referred to in those rules. While certain other textual and format changes to Rule 3.3 are proposed these do not alter the meaning or the scope of the existing presumptions.

(ii) **Application of the takeover rules to takeover schemes**

A takeover scheme involving an Irish public limited company whose shares are traded on any one of a number of prescribed stock exchanges constitutes a “takeover” within the meaning of the Irish Takeover Panel Act, 1997 (the “Act”) as it is a transaction whereby or in consequence of which “control” (as defined in the Act) of a relevant company is or maybe acquired. Accordingly, regulating a takeover scheme falls within the Panel’s duties and powers under section 7 (monitoring and supervising takeovers), section 8 (rule making) and section 9 (rulings and directions) of the Act. Section 92 of the Company Law Enforcement Act, 2001 confirms the Panel’s jurisdiction in relation to takeover schemes.

Rule 41 of the existing Takeover Rules is the principal rule relating to takeover schemes and sets out the current requirements of the Panel in relation to those transactions. However, the rule is largely procedural in nature and does not in any way apply the existing Takeover Rules to takeover schemes. Rule 41 states inter alia that the Panel may make such rulings and give such directions in relation to takeover schemes as it thinks fit, having regard to the General Principles. The requirements of the Panel to be contained in such rulings and directions would normally include specification of the manner in which the intent of relevant rules is to be satisfied in a particular case. In order to provide greater clarity and certainty for persons involved in a proposed takeover scheme, the Panel has decided that it is appropriate to introduce new rules which would clearly set out how the takeover rules and the substantial acquisition rules are to be applied to takeover schemes.

Rules 4, 5 and Appendix 4 of the 2004 Takeover Rules set out how the takeover rules are to be applied to takeover schemes. The general approach adopted is to seek to apply the takeover rules to takeover schemes without amending the takeover rules themselves. This approach was adopted in order to ensure that the integrity of the takeover rules is preserved.

However, it has been necessary to depart from this approach in certain instances and a small number of actual amendments to the existing Takeover Rules are included in Rule 5 of the 2004 Takeover Rules where it is necessary that both takeover offers and takeover schemes can be referred to in the same context. In addition to the latter amendments Rule 41 has also been amended.

Rule 4 of the 2004 Takeover Rules revises the existing Rule 41. The existing Rule 41 is now contained in Rule 41.1. A new Rule 41.2 has been introduced and is the central provision in the application of the takeover rules to takeover schemes. It provides that subject to and in accordance with the provisions of Appendix 4, the takeover rules shall apply mutatis mutandis to takeover schemes as they apply to takeover offers (“the Application”). It follows therefore that those rules which do not apply to takeover offers shall not apply to takeover schemes e.g. Rule 37. A new Rule 41.3 contains certain definitions used in Rule 41.2 and in Appendix 4.

Appendix 4 sets out the basis upon which the Application shall apply. Paragraph 1 of Appendix 4 specifies certain rules dealing with takeover offers which are expressly stated not to apply to takeover schemes (as it would not be appropriate to seek to apply such rules to takeover schemes). Paragraphs 2 and 3 adapt and replace certain definitions and takeover rules for the purposes of the Application.

C. The 2004 SAR's

The existing SAR's are being amended to ensure that a small number of references to an “offer” will embrace a takeover scheme where appropriate.

D. Irish Takeover Panel Act, 1997, Takeover (Amendment) Rules, 2004

WHEREAS the Minister for Enterprise, Trade and Employment has approved a draft of the following Rules in accordance with section 8(5) of the Irish Takeover Panel Act, 1997 (No. 5 of 1997) (the “Act”), the Irish Takeover Panel, in exercise of the powers conferred on it by section 8 of the Act, hereby makes the following Rules:

1. CITATION, CONSTRUCTION AND COMMENCEMENT

1.1 These Rules may be cited as the Irish Takeover Panel Act, 1997, Takeover (Amendment) Rules, 2004.

1.2 These Rules and the Irish Takeover Panel Act, 1997 Rules, 2001 and 2002, shall be construed together as one and may be cited together as the Irish Takeover Panel Act, 1997, Takeover Rules, 2001 to 2004.

1.3 These Rules shall come into operation on ● ● 200●.

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

In these Rules, the “**2001 Rules**” means the Irish Takeover Panel Act, 1997, Takeover Rules, 2001, as amended by the Irish Takeover Panel Act, 1997, Takeover (Amendment) Rules, 2002.

3. AMENDMENT OF RULES 2.2 AND 3.3 OF PART A OF THE 2001 RULES

3.1 Rule 2.2 of Part A of the 2001 Rules is hereby amended by the deletion from the initial paragraph thereof of the words “is acting in concert with the offeror or the offeree or” and by the substitution for paragraph (f) of the following:

“(f) is (i) a director of the offeror, of the offeree or of any associate of the offeror or of the offeree described in paragraph (a), (b) or (c); (ii) the spouse or a parent, brother, sister or child of any such director; (iii) a trustee of a trust (including a discretionary trust) of which any such director or any such member of his or her family is a beneficiary or a potential beneficiary; or (iv) a company controlled by any one or more of such directors, such members of their families and the trustees of all such trusts;”.

3.2 Rule 3.3 of Part A of the 2001 Rules is hereby amended by the substitution for paragraphs (a) to (f) of the following new paragraphs (a) to (g):

“(a) a company, its holding company, its subsidiaries and subsidiaries of its holding company, every associated company of any of the foregoing companies, and every company of which any of the foregoing companies is an associated company: all with each other;

(b) a company, and each company with which the first mentioned company is presumed in accordance with paragraph (a) to be acting in concert, with (i) each of the directors of the first mentioned company; (ii) the spouse, parents, brothers, sisters and children of each such director; (iii) the trustees of every trust (including a discretionary trust) of which any such director or any such member of his or her family is a beneficiary or a potential beneficiary; and (iv) every company which is controlled by any one or more of such directors, such members of their families and the trustees of all such trusts;

(c) a company, and each company with which it is presumed in accordance with paragraph (a) to be acting in concert, with the trustees of every pension scheme (other than an industry-wide scheme) in which the first mentioned company participates;

(d) a fund manager (including an exempt fund manager) and persons controlling, controlled by or under the same control as such fund manager with any other person (including a collective investment scheme) where such fund manager manages investments on a discretionary basis on behalf of such other person, in respect of the relevant investment accounts;

(e) a financial or other professional adviser (including a stockbroker) and, subject to Rule 7.2(b) of Part B, persons controlling, controlled by or under the same control as such adviser (except in any such case in the capacity of an exempt market-maker) with such adviser’s client; provided that, in the case of an adviser which is a partnership, the presumption shall apply to those partners and professional staff who are actively engaged in relation to the transaction concerned or who are customarily engaged in the affairs of

the relevant client or who have been engaged in those affairs within the period of two years prior to the commencement of the relative offer period in the case of an offer or to the time of the transaction in any other case;

(f) during the course of an offer in respect of a relevant company, or whilst the directors of a relevant company have reason to believe that an offer in respect of that company may be made in the near future, or whilst a relevant company is in the course of redeeming or purchasing its own voting securities, or whilst the directors of a relevant company propose that that company redeem or purchase its own voting securities: directors of the company with (i) each other; (ii) the spouse, parents, brothers, sisters and children of each such director; (iii) the trustees of every trust (including a discretionary trust) of which any such director or any such member of his or her family is a beneficiary or a potential beneficiary; and (iv) every company which is controlled by any one or more of such directors, such members of their families and the trustees of all such trusts;

(g) an individual; the spouse, parents, brothers, sisters and children of such individual; the trustee of every trust (including a discretionary trust) of which such individual or any such member of his or her family is a beneficiary or a potential beneficiary; and every company which is controlled by any one or more of such individual, such members of his or her family and the trustees of all such trusts: all with each other.”

4. AMENDMENT OF RULE 41 OF THE 2001 RULES

The 2001 Rules are hereby amended as follows:

- (a) by the substitution of the following rule for Rule 41 of Part B:

“RULE 41. TAKEOVERS BY SCHEME OF ARRANGEMENT

41.1 PROCEDURES IN RELATION TO TAKEOVER SCHEMES

(a) Where, in connection with a takeover scheme of arrangement, the relevant company concerned or any other person initiates or takes any other step in any proceedings in the Court under section 201 of the Companies Act, 1963, or otherwise, the company or (as the case may be) such other person shall on each such occasion notify the Panel in writing of that fact and provide the Panel with copies of all documents furnished or to be furnished by that person to the Court.

(b) Unless otherwise agreed by the Panel, such notification of and provision of documents to the Panel as is referred to in paragraph (a) shall be made at the same time as or immediately following the initiation of the relevant proceedings or (as the case may be) the notification of any such other step in such proceedings to the Court or to the offices of the Court but so that in any event copies of the takeover scheme, of the notice of the scheme meeting and of every explanatory statement proposed to be sent to any of its shareholders or creditors by the relevant company concerned in accordance with section 202(1)(a) of the Companies Act, 1963, shall be received by the Panel not later than the tenth business day before the date on which it is proposed that they be considered by the Court and copies of any such other documents as are referred to in paragraph (a) shall be received by the Panel not later than the fourth business day before the date on which it is proposed that they be considered by the Court.

(c) The Panel may seek leave of the Court to appear and be heard by the Court in the course of any such proceedings as are referred to in paragraph (a).

(d) The Panel may make such rulings and give such directions in relation to a takeover scheme as it thinks fit, having regard to the General Principles. Where any such ruling or direction is made or given by the Panel at any time prior to the scheme taking effect, the relevant company or such other person as the Panel may specify shall notify the Court of the ruling or direction promptly following the making or giving of the ruling or direction or the initiation of the relevant proceedings (whichever is the later).