Irish Takeover Panel

Consultation Paper

Proposals to Abolish the Substantial Acquisition Rules

24 November, 2008

1. Introduction

In this consultation paper the Panel is proposing to abolish the rules governing the substantial acquisition of shares. The purpose of the Irish Takeover Panel Act, 1997, Substantial Acquisition Rules, 2007 ("SARs") is to restrict the speed with which a person may increase a holding of voting securities, and rights over voting securities, of a relevant company to an aggregate of between 15% and 30% of the voting rights of that company. Accelerated disclosure is also provided for such acquisitions. The Panel believes that it is no longer appropriate to restrict such acquisitions and is proposing that the Irish Takeover Panel Act 1997 ("the Act") be amended to permit the SARs to be repealed.

The Panel is inviting comments on this consultation paper. Any comments should reach the Panel by 9 January, 2009. Comments should be sent in writing to:

Irish Takeover Panel
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Dublin 2

FAX: 353 1 6789289
Alternatively, comments may be sent by email to: takeoverpanel@eircom.net

1. Application of the SARs

Section 8(2) of the Act requires the Panel to make rules specifying the conditions under which an acquisition by a person of securities conferring voting rights in a relevant company is to be regarded as a substantial acquisition of securities. The SARs constitute such rules and were approved by the Minister for Enterprise, Trade and Employment as required by section 8(5) of the Act.

Section 8(2) of the Act expressly provides that those conditions must be specified by reference to:

(i) the proportion which the amount of securities conferring voting rights acquired or, as the case may be, to be acquired bears to the total amount of such securities held in the relevant company concerned;
(ii) the extent to which the acquisition of securities conferring voting rights increases or will increase any existing holding of such securities in the relevant company concerned; and
(iii) in the case of a series of acquisitions of such securities, the periods of time that elapse between each such acquisition being effected.

SAR 3 specifies these relevant conditions. It provides that an acquisition or a series of acquisitions of voting securities of a relevant company or of rights over voting securities of a relevant company will constitute a "substantial acquisition of securities" if:

(i) any voting securities so acquired by that person and the voting securities the subject of any rights so acquired by that person confer in the aggregate 10% or more of the voting rights in the company; and
(ii) any voting securities so acquired by that person and the voting securities the subject of any rights so acquired by that person, when aggregated with any voting securities already held by that person and any voting securities over which that person already holds rights, confer 15% or more, but less than 30%, of the voting rights in the company; and
(iii) in the case of a series of acquisitions of securities, all of such acquisitions are made within a period of 7 days.

Certain acquisitions are expressly excluded from this definition including acquisitions of new voting securities or securities convertible into new voting securities or acquisitions of existing voting securities by the exercise of an option.

The SARs are not relevant at or above the 30% threshold as "control" is defined in the Act as a holding, whether directly or indirectly, of securities of a relevant company that confer, in aggregate, not less than 30% of the voting rights in that company. An acquisition which would take a person's aggregate holding of voting rights in the company to or beyond 30% will trigger a mandatory offer under Rule 9 of the Irish Takeover Panel Act, 1997, Takeover Rules, 2007, as amended ("Takeover Rules"). Furthermore, Rule 5 of the Takeover Rules restricts the circumstances in which a person may increase his or her aggregate holding of shares carrying voting rights and rights over such shares to or beyond that level.

SAR 3 also provides that where two or more persons are acting in concert they will be regarded as a single person for the purpose of the SARs. SAR 8 sets out ancillary rules for concert parties.

SAR 4 (a) prohibits substantial acquisitions except in the circumstances set out in SAR 4(b) and SAR 5**.** The effect of this restriction is to slow down a person's ability to acquire a significant shareholding in a relevant company. The intention of this is to afford other shareholders an opportunity to sell their shares to the potential acquirer and to provide the company's board with sufficient time to advise their shareholders on how to proceed. Arguably, it may also create an opportunity for a third party to intervene in the process.

A substantial acquisition by a person will be permitted under the SARs:

- if the acquisition is by a dealer from a single holder of securities pursuant to SAR 4(b)(i) and the securities are to be sold on to an unrelated party before 12 noon the following day;
- if the acquisition is from a single shareholder and is the only acquisition of voting securities or of rights over voting securities of the company concerned by that person within any period of 7 days;
- if it is pursuant to a tender offer in accordance with SAR 7;
- immediately before that person announces a firm intention to make an offer in respect of the company concerned, provided that the offer will be recommended by, or the acquisition is made with the agreement of, the offeree board and the acquisition is conditional upon the announcement of the offer; or
- after that person has announced a firm intention to make an offer in respect of the company concerned provided that the making of the offer is not, at the time of the acquisition, subject to a pre-condition.

SAR 6 requires a person to disclose any acquisition of voting securities or rights over voting securities of a relevant company if either (i) his or her aggregate holding of voting securities or rights over voting securities would increase to or beyond 15% of the voting rights in the company, or (ii) he or she already holds an aggregate of between 15% and 30% of the voting rights and the acquisition would increase his or her aggregate holding to or beyond any whole percentage figure. Disclosure must be to the company, the Stock Exchange and the Panel not later than 12 noon on the business date following the date of the acquisition. This accelerated disclosure obligation underpins compliance with SAR 4.

SAR 7 sets out the procedural requirements for the making of a "tender offer".

2. Abolition of the SARs in the UK

The Panel on Takeovers and Mergers in the UK ("UK Panel") introduced rules on substantial acquisition of shares in 1980 following a number of dawn raids on the shares of listed companies. As no formal offers had been made and the acquisitions were below the threshold to trigger a mandatory bid under the Code, the purchasers in these cases were able to acquire significant stakes in the companies. The vendors were typically institutional investors and the UK Panel was concerned that the premiums

paid were not available to all shareholders in the companies in question. A further concern was that these acquisitions took place with such speed that the boards of the companies whose shares were acquired did not have an opportunity to comment on the acquisitions or advise their shareholders. Similarly, other potential bidders did not have had an opportunity to make competing bids before these significant shareholdings were acquired. Consequently, rules were introduced to restrict dawn raids and to accelerate disclosure.

In 2006 following an extensive market consultation exercise, the UK Panel abolished the SARs on the basis that it was no longer considered appropriate for the Panel to restrict the speed at which a person could acquire shares, and thereby the ability of shareholders to sell their shares, in circumstances where control of a company is not being acquired or consolidated.

3. Proposed Changes

(a) The SARs

The focus of the Takeover Rules and the Directive 2004/25/EC on Takeover Bids is on regulating the acquisition and consolidation of control. The Panel is of the view that in circumstances where control is not passing, it is no longer clear why a person should be restricted from acquiring shares and existing shareholders should be restricted from selling their shares.

The approach of the Takeover Rules to share dealings is, in the main, to focus on the consequences of such dealings rather than seeking to prohibit them. As a result, the Takeover Rules prohibit share dealings only in very specific circumstances and where there is some overriding policy concern, for example, in Rule 5 of the Takeover Rules.

Rule 5 of the Takeover Rules restricts, subject to certain exceptions, the ability of a person to acquire shares or rights over shares in a company which, together with the holdings of any parties acting in concert with that person, take their aggregate holdings of shares and rights over shares to 30% or more. This ensures that the board of an offeree company has a sufficient opportunity to make the company's shareholders aware of all relevant matters before control of the company passes. The Panel believes that the 30% threshold is the key threshold in the context of providing the offeree board with sufficient time to advise shareholders how to proceed.

In some cases the SARs by slowing down the speed with which a person can acquire shares in a company may ensure that a potential competing bidder has a greater opportunity to become involved in the process. However, the Panel believes that the assessment as to whether a potential competing bid might emerge is a matter for shareholders to evaluate in deciding whether to sell their shares and is not a matter for regulation under the SARs.

Shareholders may in fact benefit by not selling their shares to a potential acquirer undertaking a market raid. This would arise where the acquirer subsequently made an offer to all shareholders at a higher price than that paid in the market raid.

Given that the major rationale for SAR 6 is to underpin compliance with the restriction in SAR 4 and that it is proposed to repeal SAR 4, there is no need to retain SAR 6. Furthermore, in the case of Irish incorporated issuers whose securities are listed on an EU 'regulated market' such as the main market of the Irish Stock Exchange or the London Stock Exchange, the accelerated disclosure provisions in SAR 6 are in effect superseded by the disclosure requirements of the Transparency (Directive 2004/109/EC) Regulations (S.I. No. 277 of 2007) as supplemented by the Financial Regulator's Interim Transparency Rules of 2007. Under the Transparency Regulations, a person is required to notify such an issuer within two trading days where the percentage of the voting rights in it which he or she holds as a shareholder or through direct or indirect holdings of financial instruments, together with those of any concert party, reaches, exceeds or falls below 3% and each 1% thereafter up to 100%. The issuer must publish that information not later than the end of the trading day following its receipt of the notification.

It is anticipated that the above disclosure rules will be extended to Irish incorporated issuers whose securities are traded on non-'regulated markets' such as the ISE's IEX and the LSE's AIM. In the meantime, those companies remain subject to the disclosure provisions in the Companies Act 1990. Under Part IV chapter 2 of that Act, a person must disclose to such an issuer within 5 trading days when he or she, together with any concert party, acquires an interest in 5% or more of the voting share capital of an Irish public limited company and must subsequently disclose any acquisition or disposal that increases or reduces that interest through a whole percentage point. Where that issuer's securities are traded on the ISE, it must notify the ISE no later than the close of business on the trading day following its receipt of the notification.

In conclusion therefore, the Panel is of the view that there is no overriding policy concern in relation to acquisitions of securities below the 30% level i.e. in circumstances where control is not being acquired. Accordingly, the Panel is proposing that the SARs be abolished.

(b) Tender Offers

A "tender offer" is defined in the Takeover Rules as:

> "an invitation made by a person by public advertisement to holders of a class of securities of a relevant company to tender securities of that company, up to a stated number, for purchase by that person, on terms stipulated in the advertisement."

As noted above, SAR 7 sets out the requirements to be complied with in the conduct of a tender offer. The maximum aggregate percentage holding of voting securities or rights over voting securities of the person making the tender offer and any parties acting in concert with them must be less than 30% of the voting rights in the company on the date on which the tender offer closes. One of the main reasons to make a tender offer in these circumstances would be to enable a person to build a stake in a company in a manner otherwise precluded by SAR 4.

Tender offers may also be relevant under Rule 36 (partial offers). Note 1 on Rule 36.1 indicates that the Panel may consent to the making of a tender offer as an alternative to a partial offer where the proposed offer would constitute a substantial acquisition of securities. In such a case, the procedural rules in SAR 7.2 to 7.6 will apply. A tender offer may be considered preferential to a partial bid for a variety of reasons. A tender offer is made by means of an advertised offer to all shareholders which must be open for at least 7 days. There is a limit on the amount of information permissible in tender advertisements and no form of argument or persuasion is allowed. By contrast a partial offer is subject to the normal timetable and informational provisions of a general offer under the Takeover Rules as well as the additional requirements imposed by Rule 36. The process is likely therefore to be more lengthy and costly than a tender offer.

The Panel believes that even if the restriction in SAR 4 is abolished, a person wishing to increase his or her holding of voting securities up to 29.9% may still wish to do so by means of a tender offer. This would allow the person to acquire the desired number of shares from all shareholders in the company. The Panel believes that the General Principles which apply to general offers, in particular that all shareholders should be treated equally and should receive sufficient information and time, apply also in the context of a tender offer. Consequently, the Panel believes that it should continue to regulate tender offers.

Furthermore, a tender offer may be launched for shares in a company which is already the subject of a general offer in order to frustrate a hostile bid for the company or to persuade the first offeror to increase the offer. The Note on SAR 7.2 states that in such a case the Panel may consider extending the offer period in respect of the original offer, circulating the tender advertisement to all shareholders and disclosing the dealings of the tender offeror and any associates in the manner set out in Rule 8 of the Takeover Rules. The Panel believes that it would be important to retain the jurisdiction to regulate the competing tender offer in these circumstances.

It is thus proposed that the tender offer provisions currently in SAR 7.2 to 7.6 should be included with minor amendments in a new Appendix to the Takeover Rules. It is proposed that a new provision be added to provide that Panel consent would be required before a person may launch a tender offer. It is proposed that a note should explain that Panel consent would normally be granted where the tender offer could not result in the offeror and persons acting in concert with it holding voting securities or rights over voting securities carrying 30% or more of the voting rights of the company on the closing date of the tender offer.