

European
Communities
Takeover Bids
Directive 2004
Regulations
2006

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EUROPEAN COMMUNITIES (TAKEOVER BIDS (DIRECTIVE 2004/25/EC)) REGULATIONS 2006

Introduction

The EU Takeovers Directive (2004/25/EC) (the “Takeovers Directive”) has been transposed into Irish law by the European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations, 2006 (S. I. No. 255 of 2006) (the “Takeovers Regulations”). The stated aim of the Takeovers Directive is to strengthen the Single Market in financial services by facilitating cross-border restructuring and enhancing minority shareholder protection. Many of the provisions of the Directive are already contained in the existing Irish regime for the supervision of takeovers set out in the Irish Takeover Panel Act, 1997 (the “Act”), the Takeover Rules, 2001 (the “Rules”) and the Companies Acts 1963 – 2005, which will continue to apply. The Takeovers Regulations cater for those areas not already dealt with in the existing regime or areas of the regime that needed to be adjusted as a result of the requirements of the Takeovers Directive.

As the Directive applies only to companies admitted to trading on a regulated market (in Ireland, the Official List of the Irish Stock Exchange), the Regulations will not apply to takeovers of companies listed on the Irish Enterprise Exchange and this position is consistent with the existing regime.

Closed-Ended Funds

Controversially, however, the Takeovers Regulations also apply to Irish authorised closed-ended funds which are listed on the Official List. Industry submissions to grant such funds a derogation from the Takeovers Regulations have not been accepted. This has the result that such funds are now subject to the annual levy payable to the Takeover Panel (which will be based on the market capitalisation value of the company) and the mandatory offer rules which require any person holding 30% or more of the value of the fund to bid for the remainder of the fund (unless exempted by the Panel and whitewashed by independent shareholders).

Whilst the Takeovers Regulations will not impact on those Irish domiciled closed-ended funds which do not seek admission to listing, many closed-ended funds do seek a listing to

facilitate investment by certain categories of investors who can only invest in a listed product or whose capacity to list in an unlisted fund is restricted.

One way this might be achieved is to provide an opportunity during the fund's life at which investors will have a capacity to request redemption out of the assets of the fund. While creating (or converting an existing fund into) such a limited liquidity fund will side-step the application of the Regulations, it is not a hugely appealing option given the widespread recognition of the 'closed-ended' concept, the general illiquidity of such funds' portfolios and the strategies pursued by such funds (real estate, private equity and venture capital in the main).

Shared Jurisdiction

The Takeovers Directive requires that each Member State designate a supervisory authority competent to supervise bids and generally carry out the obligations provided for in the Directive, and exercise its functions impartially and independently of all parties to the bid. In Ireland the Irish Takeover Panel has already been operating in a supervisory capacity since 1997 and is designated by the Regulations as the relevant supervisory authority. The Panel will generally have authority to supervise a bid if the securities of the offering company are admitted to trading on the Official List, or if listed on more than one regulated market, they were first admitted to trading on the Official List. In circumstances where the securities were first admitted to trading on more than regulated market simultaneously, the offeree company itself can determine which of the supervisory authorities of those Member States shall be competent to supervise the bid.

Threshold for Triggering "Squeeze Out" and "Sell Out" Rights

Section 204 of the Companies Act, 1963 allows a bidder to compulsorily acquire minority shareholdings on achieving 80% of acceptance in value within 4 months of publishing an offer. The Regulations have increased the protection available to minority shareholders by increasing this level from 80% to 90% in the case of offeree companies subject to the Regulations. This could encourage bidders in some situations to acquire control by means of a scheme of arrangement under Section 201 of the Companies Act, 1963, where all of the shares of the target are cancelled and shares in the bidder (or cash) transferred to the existing shareholders as compensation for their loss. This is because a scheme only requires the co-operation of the target's board and the approval of 75% in value of its members voting at a general meeting.

Conversely, the new 90% threshold will also apply to enable minority shareholders to require the majority shareholder to buy their securities following a takeover bid, in the event that the bidder does not exercise its compulsory acquisition right.

“Opt In” and “Opt Out”

The Takeovers Directive gives Member States the option of overriding frustrating action that may be taken by companies both prior to and during a takeover bid.

- ▣ Pre-bid Defences (Article 11) – such defences include differential share structures under which minority shareholders exercise disproportionate voting rights; limitations on share ownership and restrictions on transfer of shares set out in the company’s articles or in contractual agreements. These are referred to in the Directive as “breakthrough provisions”.
- ▣ Post-bid Defences (Article 9) – management of a target company are prevented from taking action to frustrate a bid, such as a sale of key assets of the company, without the approval of shareholders at the time of the bid.

The Takeovers Directive allowed Member States to decide whether to prohibit companies from taking such frustrating action. This was a moot point for Ireland as such defensive actions were already banned under Rule 21 of the Rules. Accordingly, the Takeovers Regulations did not apply these prohibitions. However Part 3 of the Regulations provide, as required by Article 12 of the Takeovers Directive, for companies to “opt in” to these provisions should they wish to do so. Having “opted in” by the passing of a special resolution, the company can “opt out” again by a further special resolution. As other Member States have decided not to apply the breakthrough provisions and / or the post-bid defences prohibitions (and in the absence of any pre-existing regime) this results in inconsistent legislation throughout EU Member States, which is an unfortunate result given the purpose of the Directive to harmonise takeover bids in the Single Market.

Disclosures to Employees

The Takeovers Regulations also contain obligations on the offeror and offeree companies to provide information to, and consult with employees of the target company.

Rule Changes

To ensure compliance with the Takeovers Directive, some of the Rules are amended with are provided for in a Schedule to the Takeovers Regulations.

We would echo industry calls for further review of the capacity to grant a general derogation from the Takeovers Regulations to Irish domiciled and listed closed-ended funds, as we do not see any added value to funds, shareholders, asset managers or promoters from such rules, only disadvantages which other fund domiciles will readily exploit.

In the bulk of other cases, the Takeovers Regulations do not represent any real change in Irish law, particularly in relation to frustrating actions which are already prohibited.

The increase in the percentage level relating to squeeze-out and sell-out rights will enhance the protection available to a “substantial” minority, that is holding more than 10% of securities affected, which may reduce the number of bids made and change the method used to achieve an acquisition, into the future.

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