Chapter 11
Implementation of the Takeover Bids Directive in Ireland

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1. Introduction

Directive 2004/25/EC provides employees in both the company making a takeover offer and the company that is the target of the bid with the right to information and consultation; the employees of the target company and/or their representatives also have the right to give an opinion on a proposed takeover of their enterprise.

The Directive was adopted by the Council in 2004 and came into force in May 2006. It was transposed into Irish legislation by Statutory Instrument 255, 2006. In particular, the Instrument transposed the relevant parts of the Directive into the Irish Takeover Panel Rules and other articles of the Directive directly into Irish company law. The rights of workers to be informed about the bid and to express an opinion on it in theory represent an improvement on the pre-Directive legislation. However, the right to express an opinion has had little practical application up to now.

To demonstrate the application of the Directive in Ireland, this chapter presents a case study on the three offers Ryanair made for control of Aer Lingus between 2006 and 2011.

2. Key elements of the Irish Takeover Panel Act

Prior to the setting up of the Irish Takeover Panel in 1997, the UK Takeover Panel acted on behalf of Irish business in the event of takeover bids. The Irish Takeover Panel was established as a limited company by the Takeover Panel Act 1997. In the 2006 transposition of the EU Takeover Bids Directive (2004/25/EC) the bulk of the 1997 legislation continued to apply. The national transposition, Statutory Instrument 255 of 2006, designates the Panel the competent authority for the purpose of

Article 4.1 of the Directive. Thus, the Panel continues to have the extensive powers formulated under the 1997 Act to make rulings and give directions, to hold hearings, to summon witnesses and to require production of documents and other information, where appropriate in the discharge of its statutory functions.

The board of the Panel consists of seven members, appointed by:

— the Consultative Committee of Accountancy Bodies, Ireland;
— the Law Society of Ireland;
— the Irish Association of Investment Managers;
— the Irish Banking Federation;
— the Irish Stock Exchange;
— the Governor of the Central Bank has the powers to appoint the Chairperson and Deputy Chairperson of the Panel.

There are no representatives of trade unions or workers.

In holding hearings into takeover bids, the Panel has quasi-judicial powers. It has the powers, rights and privileges of the High Court to require the attendance of witnesses and to examine them under oath. It can compel the production of relevant documents. A summons signed by a director of the Panel is considered the equivalent of any formal judicial process for enforcing the attendance of witnesses and requiring the production of documents.

A witness before a Panel enquiry is entitled to the same immunities and privileges as if they were a witness before a Court. Any witness who obstructs the work of the Panel, gives evidence that they know to be false or does not believe to be true or who doesn't produce relevant documents when requested by the Panel to do so is considered to have committed an offence and can be referred to the High Court for a judicial review.

One of the fundamental objectives underlying the general principles of the takeover rules is to prevent the board of target companies from taking action without shareholder approval and to disregard their interests. This applies to both hostile and recommended bids. Directors, advisors, employees and former employees of the Takeover Panel are bound by secrecy regarding information they have, until the Panel formally makes such information public.

3. Workers' rights

Statutory Instrument (SI) 255, 2006, amends the Takeover Panel Act, 1997, and transposes Directive 2004/25/EC into Irish legislation. The Schedule to the SI amends the relevant parts of the Takeover Panel Rules. Under the pre-Directive legislation there was no reference at all to representatives of trade unions or workers and there was no requirement in the 1997 legislation to inform employees of either the offeror or offeree companies when a takeover bid was made.

The notification methods do not differ between voluntary and mandatory offers. With regard to the Directive articles related to employee rights, these are amended as follows:

— The 1997 Takeover Panel Rule 24.1 (d) dealt with the offeror's intentions with regard to the continued employment of the employees of the offeree and its subsidiaries, but not in such detail. In line with Articles 3.1 (b) and 6.3 (i) of the Directive, Rule 24.1 covers the impact of the bid on employment (strategic plans and 'their likely repercussions on employment'), conditions of employment (intentions with regard 'to safeguarding the employment of the employees and management of the offeree and of its subsidiaries, including any material change in the conditions of employment') and the locations of a company's places of business.

— The disclosure of information to employees and/or their representatives of both the offeror and offeree companies (Article 8.2, and Article 9.5). New Rule 2.6 (c) and (d) states that, after publication of an announcement, both the offeror and the offeree shall make that announcement or a circular summarising the terms and conditions of the offer readily and promptly available to the representatives of their respective employees or, where there are no such representatives, to the employees themselves. In case a circular summarising the terms and conditions of the offer is sent to shareholders or employee representatives or employees, the offeree shall make the full text, under Takeover Panel Rule 2.5, of the announcement readily and promptly available to them.

— In the event of a revised offer, the provision of the revised offer document to employees and/or their representatives is covered by an amendment to Rule 32, by inserting a new sub-section 6 that says that, when any revised offer document is despatched to shareholders of the offeree, both the offeror and the offeree shall make that document readily and promptly available to the representatives of their respective employees or, where there are no such representatives, to the employees themselves. In a similar way a response circular containing an opinion on a revised offer shall be made readily and promptly available to employee representatives or, where there are no such representatives, to the employees themselves.

— The right of employees of the offeree company and/or their representatives to give an opinion on the offer (Article 9.5) is covered by an amendment to Rule 30 by the insertion of sub-section 3. The offeree board shall append to its opinion on the offer to the shareholders of the offeree (the first response circular) a separate opinion from the representatives of its employees on the effects of the offer on employment, provided such an opinion is received in good time before the despatch of that circular. The offeree shall make this first response circular readily available to the offeree's employee representatives or, where there are no such representatives, to the employees themselves. In the event of a revised offer, the attachment of the opinion of the employees' and/or their representatives to a response circular from the offeree company is covered in a similar way.

Articles 10 and 11 of the Directive (with the exception of Article 11.5 concerning compensation for holders of securities and voting rights), including Article 10 (e) on information regarding a 'system of control of any employee share scheme where the control rights are not exercised directly by the employees', have not been included in the amendments to the Takeover Panel Rules, but are transposed directly into company law.

4. Case study – takeover bids by Ryanair for Aer Lingus

Aer Lingus, the 'flag-carrier' airline of the Irish State, was set up by statute in 1936 and operated as a commercial State-owned company until September 2006, when the government decided on an Initial Public Offering (IPO) of the company shares. However, the government decided to retain 25.1 per cent of the equity in state ownership. As part of the agreement with the trade unions, employees would receive a shareholding of 14.2 per cent, to be held in an Employee Share Ownership Trust (ESOT), which was established to administer this employees' equity in the company on behalf of the workforce.[1] The trade unions' Central Representative Council (CRC) estimated that in 2012 some 10 per cent of the shares were still held by individual staff members and retirees.[2]

On flotation, the Irish Airline Pilots Association (IALPA) pension fund purchased 2.2 per cent of the available shares and Ryanair, a rival Irish airline, snapped up some 16 per cent of the shares, quickly increasing its holding to over 26 per cent.

Founded in 1985, Ryanair successfully pioneered the low-cost/low-fare business model. In the year ending September 2014, it carried 83.8 million passengers, through some 1,600 routes in 30 countries across Europe, including flights from Ireland to twelve airports in Great Britain. Its shareholding increased, in stages, to 29.82 per cent by July 2008. The Aer Lingus board and management have consistently maintained that the minority shareholding of close to 30 per cent by Ryanair is a form of commercial harassment and that it has a 'detrimental effect' on the company's commercial strategy and operations.

4.1 First bid

Shortly after the flotation, Ryanair launched a bid to buy Aer Lingus on the basis, according to its CEO Michael O'Leary, that it was a unique opportunity to form an Irish airline. He envisaged that this 'new' airline would carry over 50 million passengers a year. On the same day Aer Lingus rejected Ryanair's takeover bid. There were immediate concerns with the bid, as it would mean little competition on the Dublin–London route, one of the busiest in Europe.[3]

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1. The ESOT ran into financial difficulties when the Aer Lingus share price fell in 2007/08. As a result, the company injected 25.3 million euros into the ESOT funds as a full and final payment to the Trust. This covered the ESOT's existing borrowings. The Trust was wound up in December 2010, and its remaining shares in the company (then 12.5 per cent of the Aer Lingus share capital) were distributed to 4,700 current and former employees.
2. However, these employees did not exercise the voting rights vested in their shares, as only 171 employees cast votes at the 2011 company AGM.
3. For the Ryanair offer see http://www.ise.ie/app/announcementDetails.aspx?ID=1311919 For the Aer Lingus rejection see http://www.ise.ie/app/announcementDetails.aspx?ID =1312507

The European Commission expressed its concerns that such a takeover and the merging of the two airlines would reduce consumer choice and result in increased fares. In December 2006, Ryanair withdrew its bid, but stated its intention to launch another bid after the European Commission had finished its investigations. The Commission finally announced its decision, in June 2007, to block the bid on competition grounds, saying that the two airlines controlled more than 80 per cent of all European flights to and from Dublin airport.[4]

4.2 Second bid

In December 2008, Ryanair launched a second takeover bid for Aer Lingus, making an all-cash offer of 1.40 euros per share, valuing the company at approximately 748 million euros. In making the bid, Ryanair said that Aer Lingus, as a small, standalone regional airline, had been marginalised and bypassed as most other EU flag carriers consolidate. Its intention was for the two airlines to operate separately and its plans for Aer Lingus would result in 1,000 new jobs.

Again, Aer Lingus rejected the offer and advised its shareholders not to respond, stating that the company was in a strong financial position with total cash reserves of 1.3 billion euros and net cash of 803 million euros. It noted that the Ryanair offer valued the company at 525 million euros, thus seeking to acquire control of this 1.3 billion euros cash balance. The government also considered that the Ryanair offer undervalued the airline and reiterated its concerns that such a merger would have a significant negative impact on competition in the industry and on Irish consumers.[5]

The CRC, which includes all trade unions representing the 3,500 strong Aer Lingus workforce, sent an 'open letter' to all shareholders, including the government, setting out its arguments against acceptance of the offer. These were:

— the undervaluation of Aer Lingus and poor value for shareholders (which included the ESOT);

4. See http://www.rte.ie/news/2013/0227/369827-aer-lingus-ryanair
5. For the Ryanair offer see http://www.ise.ie/app/announcementDetails.asp?ID=2035516) For the Aer Lingus rejection see http://www.ise.ie/app/announcementDetails/asp?ID =2053562)

— concerns about Ryanair controlling 80 per cent of air traffic out of Ireland, which would result in higher fares for the travelling public and serious consequences for Irish aviation policy;
— the impact on collective bargaining, taking into consideration the fact that Ryanair's track record showed a blatant disregard for the rights of workers to join and be represented by a trade union. Furthermore, Ryanair would use its position to force down conditions of employment in the aviation sector in general;
— the lack of credibility of the commitment in the offer document to create 1,000 new jobs, noting that in its first bid it promised to cut 1,000 jobs in Aer Lingus;
— the CRC did not believe that the European Commission would approve the bid.[6]

The offer was finally rejected by a majority of the other shareholders, combining the government's, the ESOT's and IALPA Pension Fund shareholdings and the shares of other like-minded investors, which came to in excess of 45 per cent of the equity. Ryanair withdrew its offer on 30 January 2009. Following this failed second bid Ryanair stated that another bid was very unlikely.

4.3 UK Competition Commission investigation

Aer Lingus management and board had a continuing concern that the 29.82 per cent Ryanair stake was an impediment to the normal day-to-day commercial operations of the company. This unease was shared by the UK Office of Fair Trading (OFT) as there was the possibility that the shareholding could be a constraint on competition on twelve overlapping routes between Ireland and the UK. In October 2010 the OFT announced that it had instigated an examination of this shareholding. In its submission to the OFT examination Aer Lingus outlined its commercial concerns.[7] Aer Lingus submitted that Ryanair's continual (since 2007) blocking of the disapplication of pre-emption rights amounted to material influence over its commercial policy relevant to its behaviour in the

6. *An Open Letter to the Shareholders of Aer* Lingus Aer Lingus CRC, 22 December 2008.
7. *Completed Acquisition by Ryanair Holdings plc of a minority interest in Aer Lingus plc,* UK Office of Fair Trading ME/4694/10, (OFT reference document to the UK Competition Commission) 5 July, 2012.

marketplace. By doing so, the company argued, Ryanair was denying Aer Lingus one of the normal mechanisms available to listed companies to raise fresh capital.

In July 2011 the case was referred to the UK Competition and Markets' Authority, which undertook to assess whether the shareholding had resulted in a merger situation, and if so, if such a merger had resulted or could result in a substantial lessening of competition. The Competition Commission ruled in August 2013 against Ryanair and ordered it to divest its shareholding in Aer Lingus down to 5 per cent.[8]

4.4 Third bid

In May 2012, the Irish government stated that it would sell its 25.1 per cent stake in Aer Lingus at an appropriate time. This was part of the requirements imposed by the Troika (European Commission, European Central Bank and the International Monetary Fund): the government is required to sell state assets as a condition of the financial 'bail-out'. Notwithstanding its earlier stated intention not to make a third bid for Aer Lingus, Ryanair announced it would, after all, do so, this time valuing Aer Lingus at 694 million euros. Again, Ryanair stated that, if successful, it would operate the two airlines separately.

The Aer Lingus board rejected this third offer and advised its shareholders not to take any action in relation to the bid. In its detailed document rejecting the offer, the company pointed out that any offer from Ryanair was unlikely to be concluded due to (i) the 2007 decision of the European Commission to block the first Ryanair bid on competition grounds, which was still relevant, and (ii) the UK Competition and Markets' Authority's ruling after its investigation of Ryanair's minority stake in Aer Lingus. Furthermore, the statement said that the Aer Lingus board believed that

8. The UK Supreme Court rejected the Ryanair appeal and referred the case to the Competition Appeals Tribunal, which heard the case in February 2014 and, in its judgment on 7 March 2014, rejected all the Ryanair arguments. The company then appealed the Appeals Tribunal ruling to the UK Court of Appeal. This court upheld the original CAT ruling that the company should reduce its Aer Lingus equity holding to 5 per cent, but it added that Ryanair must get written agreement from the Competition and Markets' Authority to sell any of its shareholding, thus giving the regulator a final say on who can purchase the shares. Ryanair again appealed this Court of Appeal judgment to the UK Supreme Court.

the offer undervalued the company, given the airline's profitability and balance sheet, including cash reserves in excess of 1 billioneuros (as of end-March 2012).

With regard to the future of Aer Lingus staff, Ryanair stated in its bid document that it expected to continue to safeguard the existing employment rights of the management and employees in accordance with statutory requirements. However, it also stated that Ryanair would help Aer Lingus to increase the productivity of its staff through a mixture of efficiency increases and growth.

The Aer Lingus rejection document stated that its board believed that Ryanair would seek to impose significant changes to Aer Lingus' existing arrangements, cutting payroll costs and unit costs, having an adverse effect on the terms and conditions of employment for existing employees.[9] In February 2013, the European Commission published its decision prohibiting the third bid.[10]

4.5 Opinion of employee representatives

In line with the requirements of Statutory Instrument (SI) 255, 2006, the Aer Lingus board and management formally informed the employee representatives (CRC) of the Ryanair offer. For the third bid the CRC set out its objections in a detailed opinion, which was appended, as envisaged by Article 9.5 of the Takeover Bids Directive and the Rules of the Takeover Panel, to the formal rejection of the offer by the Aer Lingus board. In preparing the staff response to the Ryanair offer, the CRC sought and got legal and political advice from a number of sources, including a number of Irish MEPs, in particular Emer Costello MEP. When requested by the CRC, the European Commission, DG Competition, clarified a number of aspects of the Council Merger Regulation (EC No. 139/2004) and the Council Regulation implementing the Mergers Regulation (EC 802/2004). In particular, it confirmed that the CRC could be granted, on application, third-party status, and then could be invited to attend any

9. For Ryanair offer see http://www.ise.ie/app/announcementDetails.aspx?ID=11267949
For Aer Lingus's rejection see http://www.ise.ie/app/announcementDetails.aspx?ID =11268702

10. Ryanair appealed this European Commission ruling to the European Court of Justice.

public hearings to give its opinion on the impact of the takeover, if the European Commission was to proceed with such hearings.

The CRC opinion included such issues as:

— the financial strength of Aer Lingus with net cash reserves of almost 500 million euros;
— the undervaluation of the company in the offer, including the value of the 23 landing/take-off slots in London Heathrow Airport (LHR);
— the continued relevance of the anti-competitiveness issue that concerned the European Commission;
— doubts about the credibility of Ryanair's stated intentions for Aer Lingus, including its intention to lease the LHR slots, as stated in its 2007 offer document.

Also, the CRC expressed concerns about, first, the Ryanair plans for staff and collective bargaining arrangements and, second, future staff pension entitlements. With regard to the first, the CRC expressed scepticism about the Ryanair statement in the offer document that it would increase the number of pilots, cabin crew and engineers employed by Aer Lingus, as there was no information in the bid documents as to how this would be achieved. Nor did the CRC believe that Ryanair would

> respect and safeguard the existing employment rights of the management and employees ... in accordance with statutory requirements. It is widely known that Ryanair does not recognise trade unions for collective bargaining purposes and has a history of opposing trade union recognition. The history of Ryanair's actions towards employees at Buzz following its 2003 takeover would cause concern to Aer Lingus workers.[11]

11. *Aer Lingus Staff Should Reject This Ryanair Offer* CRC, August, 2012. Interestingly, Aer Lingus management had legal advice from a UK legal firm, hired to assist it in drafting the rejection document, not to engage with staff during the takeover period. Consequently, all formal meetings between the CRC and management were suspended and no formal assistance was given by Aer Lingus management to the CRC in the preparation of its opinion. It is unclear why this recommendation was given or what was the legal basis for this advice.

The CRC opinion drew attention to the existing flexible working relations between staff and management in Aer Lingus that had contributed significantly to its ability to adapt to the much-changed circumstances in the Irish aviation sector over the past three years. According to the CRC opinion, Ryanair would undo much of this good work if the takeover went ahead. The second significant staff concern with any takeover of Aer Lingus – the future of the pension schemes – had already been expressed by the CRC. The opinion noted that there was no information in the bid document about Ryanair's intentions regarding the Aer Lingus pension schemes, and indeed that in the past Ryanair had threatened to sue Aer Lingus if any additional funds were injected into the pension fund. Finally, the opinion stated that, from a staff point of view, the offer document was highly selective.

5. Conclusion

Directive 2004/25/EC was transposed into Irish legislation by Statutory Instrument (SI) 255, 2006. This was a straightforward transposition of the Directive and its relevant articles were incorporated in the Rules of the Irish Takeover Panel. Under the Directive, employee representatives have a legal right to receive the offer document and give an opinion when a takeover offer is made by appending its formal view to any rejection document. The legal provisions do not go beyond those contained in the Directive and there are no 'enhanced rights' to information in the Statutory Instrument.

These rights do represent an improvement over the pre-Directive situation, but to date they seem not to have played a major role in takeover situations in Ireland. In the case of the third Ryanair offer, the employee representative body of Aer Lingus, the CRC, drafted a formal opinion that was appended to the rejection document from the Aer Lingus Board. However, the Takeover Panel did not see this opinion when the rejection document was submitted to the Panel, as required by its Rules. In fact, this is the only occasion known to the Takeover Panel that a formal employee opinion has been prepared for attachment to a rejection document.

However, the Aer Lingus CRC played a significant role in putting together a 'coalition' of shareholders to vote down any possible takeover by Ryanair. This coalition included the ESOT's 14.2 per cent, the Irish State's 25.1 per cent, the IALPA pension fund's 2.2 per cent and a number of corporate and individual shareholders who opposed the Ryanair bids. This illustrates the role that worker representatives can play in discouraging negative takeover bids from completion, when joining forces with other relevant actors.[12]

12. After two unsuccessful bids by the International Airlines Group (IAG), the Irish Government accepted the third IAG bid and agreed to sell its shares in May 2015. Ryanair also sold its shares, as did other shareholders, and the sale of Aer Lingus was completed in September 2015.