

THE INITIAL PUBLIC
OFFERINGS
LAW REVIEW

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Contents

Chapter 11	RUSSIA	106
	<i>Alexey Kiyashko and Alexander Kovriga</i>	
Chapter 12	SINGAPORE.....	118
	<i>Siddhartha Sivaramakrishnan, Jin Kong, Ban Leong Oo and Sandra Tsao</i>	
Chapter 13	SPAIN.....	129
	<i>Alfonso Ventoso and Marta Rubio</i>	
Chapter 14	SWITZERLAND	139
	<i>Philippe A Weber, Thomas M Brönnimann and Christina Del Vecchio</i>	
Chapter 15	UNITED KINGDOM	153
	<i>Danny Tricot and Adam M Howard</i>	
Chapter 16	UNITED STATES	168
	<i>David J Goldschmidt</i>	
Appendix 1	ABOUT THE AUTHORS.....	181
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS.....	193

PREFACE

Welcome to the inaugural edition of *The Initial Public Offerings Law Review*. While it is largely agreed that the first ‘modern’ initial public offering (IPO) was by the Dutch East India Company (VOC) in 1602, IPOs now take place in nearly every corner of the world and involve a wide variety of companies in terms of size, industry and geography. Several of the earliest exchanges are still at the forefront of the global IPO market, such as the NYSE and LSE, however, the world’s major stock exchanges now are scattered around the globe, and many of them are now public companies themselves. Aside from general globalisation, shifting investor sentiment and economic, political and regulatory factors have also influenced the development and evolution of the global IPO market. For example, markets in the Asia-Pacific region, including Hong Kong, Shanghai and Tokyo, have enjoyed a significantly stronger presence in the global IPO arena in recent years owing to economic growth in the Asian markets.

Every exchange operates with its own set of rules and requirements for conducting an IPO. Country-specific regulatory landscapes are often dramatically different between jurisdictions as well. Whether a company is looking to list in its home country or is exploring listing outside of its own jurisdiction, is it important that the company and its management are aware of the requirements from the outset as well as potential pitfalls that may derail the offering. Moreover, once a company is public, there are ongoing jurisdiction-specific disclosure and other requirements with which it must comply.

Virtually all markets around the globe have experienced significant volatility in recent years. In 2016, the uncertainty surrounding the US presidential election, the unexpected outcome of the Brexit vote and numerous other geopolitical issues facing regions throughout the world furthered the general decline in both overall deal count and proceeds raised. Moving forward, however, many regions have a healthy IPO pipeline for the coming 12 months, including many household names.

The Initial Public Offerings Law Review seeks to introduce the reader to the global IPO regulatory environment and main stock exchanges in 16 different jurisdictions. Each chapter provides a general overview of the IPO process in the region, addresses regulatory and exchange requirements and presents key offering considerations. We hope this inaugural edition of *The Initial Public Offerings Law Review* introduces the reader to the intricacies of taking a company public in these jurisdictions and serves as a helpful handbook for companies, directors and managers.

David J Goldschmidt

Skadden, Arps, Slate, Meagher & Flom LLP
New York
March 2017

IRELAND

*Matthew Cole and Sheena Doggett*¹

I INTRODUCTION

An officially recognised stock exchange has been in existence in Ireland since the Stock Exchange (Dublin) Act of 1799. In 1971, the Dublin and Cork exchanges merged with the Provincial Brokers Stock Exchange to form the Irish Stock Exchange (ISE), which, in turn, merged with its UK equivalent in 1973 and became the Irish constituent of the International Stock Exchange of the United Kingdom and Republic of Ireland (now the London Stock Exchange (LSE)). The ISE split from the LSE in 1995 to become an independent entity (although it continues to be possible to maintain a dual primary listing and have shares admitted to the official lists in both Dublin and London). The ISE remains the competent authority for listing, although the Central Bank of Ireland (the Central Bank) has been responsible for prospectus scrutiny and approval since December 2011.

The ISE maintains three markets that admit equity securities. The Main Securities Market (MSM), the Enterprise Securities Market (ESM) and the Atlantic Securities Market (ASM).

Following a difficult period, the Irish equity markets have seen an upturn in initial public offering (IPO) activity in recent years, driven initially by IPOs of real estate investment trusts (REITs) in 2013 and 2014. Since 2013, there have been six listings on the MSM including three REITs and two move-ups from the ESM.² In the same period, there were nine IPOs on the ESM.³ As of March 2017, there were 27 issuers listed on the MSM and 24 on the ESM. The ASM was launched in 2015, but as of March 2017 does not have any constituent companies.

1 Matthew Cole and Sheena Doggett are partners at A&L Goodbody.

2 Green REIT plc; Hibernia REIT plc; Irish Residential Properties REIT plc; Hostelworld Group; Permanent TSB Group Holdings plc (move-up from ESM with fundraising); and Dalata Hotel Group (move-up from ESM).

3 Falcon Oil and Gas Ltd; Mincon Group; GameAccount Network plc; Dalata Hotel Group; Mainstay Medical International plc; Applegreen plc; Malin Corporation plc; Draper Esprit plc; and Venn Life Sciences Holdings plc.

II GOVERNING RULES

i Main stock exchanges

MSM

The MSM is the principal trading market of the ISE and admits equity, debt instruments and investment funds. It is a 'regulated market' for the purposes of the Markets in Financial Investments Directive (MiFID),⁴ and issuers are therefore required to comply with EU legislation such as the Prospectus Directive⁵ and the Transparency Directive.⁶

A primary listing requires an admission of securities to trading on the MSM and admission to listing on the ISE's Official List, and by virtue of the latter the listed company becomes subject to the full requirements of the ISE's Listing Rules (the Listing Rules). An Irish company seeking a listing on the MSM must apply for a primary listing, unless the company has or intends to have an overseas primary listing on a recognised stock exchange and its primary market is in a country other than Ireland.

Like a premium segment listing on the LSE, an MSM primary listing indicates high standards of corporate governance and issuers become subject to a number of obligations that are 'super-equivalent' to the minimum standards of regulation prescribed by European legislation. These are designed to enhance investor protection and include provisions on related party and substantial transactions (which may require shareholder approval), sponsors (a sponsor must be retained for the duration of an MSM listing) and compliance with codes relating to corporate governance and directors' dealing in the issuer's securities. Many of these super-equivalent standards apply to primary and dual-primary-listed companies only. A company with a primary listing on an overseas stock exchange may apply for a secondary listing on the MSM, which will subject it to less onerous obligations.

Through an agreement reached between the ISE and the LSE in 1995, an issuer may maintain a dual primary listing and have its shares admitted to the official lists in both Dublin and London on a primary basis. The procedure to effect a dual listing is very similar to applying for a single primary listing and the Central Bank and Financial Conduct Authority (FCA) in the UK will maintain a regular dialogue with each other throughout the process.

ESM

The ESM is an exchange-regulated (that is, it is regulated by the ISE) equity market for small to medium-sized issuers, and is a multilateral trading facility (MTF) for the purposes of MiFID. The ESM has been modelled very closely on the LSE's AIM, with reduced admission criteria, no requirement for a prior trading record and no minimum free float requirement. The one notable difference is that all ESM applicants are required to have a minimum market capitalisation of €5 million, in an attempt to prevent shell companies from undermining the credibility of the market. The ESM Rules for Companies (the ESM Rules) are complementary to the AIM Rules, allowing applicants the option of a dual listing by coordinating an IPO to achieve admission to both markets using the same timetable and essentially the same admission document. Of the 24 companies listed on the ESM as of March 2017, 19 are also listed on AIM.

4 Directive 2004/39/EC & 21 April 2004.

5 Directive 2003/71/EC & 4 November 2003.

6 Directive 2004/109/EC & 15 December 2004.

An issuer with a primary listing on the MSM or ESM may be eligible to be quoted on the ISE Quotient indices (the Irish equivalent of the FTSE indices), provided the listed securities are ordinary shares (or equivalent), are admitted to trading and the issuer is incorporated, or has its centre of economic interest, in either Ireland or Northern Ireland.

ASM

The ASM is also an MTF and is designed to be compatible with the Securities and Exchange Commission (SEC) requirements of companies listed on the New York Stock Exchange (NYSE) or NASDAQ. Primarily designed for companies already listed on one of these markets, issuers can avail of a dual quotation with trading in euros and US dollars.

ii Overview of listing requirements

MSM

An MSM issuer must appoint a sponsor for the duration of its listing, which must be registered with the ISE. The sponsor is the primary point of contact between the ISE and the issuer throughout the application process. The sponsor is responsible for various matters relating to the listing, including ensuring the issuer's suitability for listing prior to making any submission to the ISE.

Applicants to the MSM must comply with the Listing Rules for admission to the Official List and the ISE's Admission to Trading Rules for the admission of securities to trading. The key listing requirements under these rules for a primary or dual primary listing on the MSM include:

- a* that the issuer must be validly established and operating in conformity with its constitution and its securities must conform with the law of the issuer's country of incorporation, be freely transferable and fully paid;
- b* that the issuer should have a minimum market capitalisation of €1 million (although the ISE may make an exception if there will still be an adequate market for the shares);
- c* the preparation of a prospectus complying with the Prospectus (Directive 2003/71/EC) Regulations 2005 (the Prospectus Regulations) and relevant EU legislation that is reviewed and approved by the Central Bank (or passported in if the issuer's home Member State is not Ireland). The requirement for a prospectus is triggered by virtue of there being an application for transferable securities to be admitted on a regulated market, irrespective of whether there is also an offer being made of transferable securities to the public in the EEA;
- d* the issuer must have published or filed audited consolidated accounts covering a period of at least three years, ending no more than six months before the date of the prospectus (although this condition can be modified or waived by the ISE);
- e* the issuer must generally:
 - control the majority of its assets,
 - be carrying on an independent business as its main activity; and
 - possess a three-year revenue-earning record that supports at least 75 per cent of its business (100 per cent for an issuer seeking a primary listing only);
- f* the issuer satisfying the ISE that it has sufficient working capital available for at least 12 months following the date of publication of its prospectus;
- g* the issuer's securities being eligible for electronic settlement;

- b* the issuer maintaining a free float in one or more European Economic Area (EEA) Member States of 25 per cent (the ISE may relax this requirement in certain circumstances); and
- i* that an issuer seeking a primary listing must be able to carry on its business independently of any controlling shareholder (a person who either controls 30 per cent or more of the votes in the issuer or who has the right to appoint a majority of the board of directors), and all transactions and relationships between the issuer and any controlling shareholder must be at arm's length and on a normal commercial basis.

Most of the conditions referred to above apply equally to secondary listings, save for the requirements relating to the publication of accounts and the conditions relating to assets, business activities and working capital.

ESM

An ESM issuer is required to appoint an ESM adviser approved by the ISE (equivalent to a nominated adviser on AIM) for the duration of its listing. The role of an ESM adviser is broadly similar to that of a sponsor on the MSM. In particular, it is responsible for assessing the appropriateness of an applicant for admission. In light of this responsibility, there are no other specific eligibility requirements that apply to companies seeking admission to the ESM, save that there must usually be a minimum market capitalisation of €5 million.

As on AIM, an admission document, containing prescribed information set out in the ESM Rules (and similar in format to a prospectus) is required to be published in connection with the applicant's admission to the ESM and must be approved by the ESM adviser. The ESM adviser must make a declaration to the ISE that the admission document complies with the relevant requirements of the ESM Rules.

ASM

An ASM issuer must appoint an ASM adviser approved by the ISE for the duration of its listing. An ASM applicant must meet a number of listing requirements, of which the most important include:

- a* that the issuer must be seeking admission to, or be admitted to the NYSE or NASDAQ;
- b* a three-year revenue-earning record reflected in published or filed audited accounts;
- c* the issuer satisfying the ISE that it has sufficient working capital available for at least 12 months;
- d* the ability of the issuer to carry on its business independently of any controlling shareholder;
- e* a minimum market capitalisation of US\$100 million (although the ISE may make an exception if there will still be an adequate market for the securities);
- f* that the issuer's securities must be eligible for electronic settlement; and
- g* that the issuer must have a free float on admission of 15 per cent.

Applicants already listed on the NYSE or NASDAQ for 18 months are not required to publish an admission document, and can utilise a fast-track admission process (unless they are required to publish a prospectus by virtue of making an offer of transferrable securities to the public in the EEA). Other applicants must produce an admission document, but should usually be able to incorporate by reference information contained in its SEC registration statement or filings.

iii Overview of law and regulations

The laws and regulations applicable to IPOs in Ireland are derived from EU directives and regulations, domestic statutes and implementing regulations and guidelines. The key laws and regulations are set out below.

Prospectus Regulations and Rules

The Prospectus Directive, Prospectus Regulations and the Prospectus Rules issued by the Central Bank are the primary sources of prospectus law in Ireland.

The Prospectus Regulations implemented the Prospectus Directive in Ireland. They provide that a prospectus required to be published in connection with a public offer of securities or an admission to trading on the MSM must:

- a* contain, as a minimum, the information prescribed by the Prospectus Regulations;
- b* be approved by the relevant competent authority; and
- c* be published in accordance with the specific requirements of the Prospectus Directive.

The Central Bank's Prospectus Handbook draws together a number of sources of information relating to Irish prospectus requirements and procedures and is intended for use by issuers and their advisers. It also contains the Prospectus Rules and associated guidance, which cover the structure and content of a prospectus, the procedures for submission, review and passporting and applicable fees.

Listing Rules, Admission to Trading Rules, ESM Rules and ASM Rules

The Listing Rules, which are broadly comparable to the listing rules of the FCA in the UK, set out the detailed procedure for making an application for admission of an issuer's securities to the Official List of the ISE. They also contain requirements in relation to particular transactions effected by an issuer once listed and the continuing obligations that a listed company is required to observe. Broadly, the object of the continuing obligations is to maintain an orderly market in securities and to ensure that all users of the market have simultaneous access to the same information. The ISE's Admission to Trading Rules contain parallel rules and responsibilities in relation to a company's admission to trading on the MSM.

The ESM Rules and ASM Rules, both published by the ISE, govern the listing processes and ongoing obligations of issuers admitted to those markets.

Transparency Regulations and Rules

The Transparency (Directive 2004/109/EC) Regulations 2007 (the Transparency Regulations) implemented the Transparency Directive in Ireland. They establish minimum requirements in relation to the disclosure of periodic and ongoing information by issuers and are supplemented by rules published most recently in November 2016 by the Central Bank (the Transparency Rules), which set out procedural and administrative requirements and guidance in respect of the Transparency Regulations.

Market Abuse Regulation (MAR)

MAR came into effect in July 2016, replacing the previous rules implementing the Market Abuse Directive. It sets out a standardised EU-wide regime dealing with market abuse, market manipulation and insider dealing. It applies equally to issuers on regulated markets like the MSM, and MTFs like the ESM and ASM.

III THE OFFERING PROCESS

i General overview of the IPO process

Depending upon the complexity of the issuer's business and the structure of the offering, a typical MSM IPO process takes between four and five months. As an IPO on the ESM will not usually require a prospectus that must be vetted by the Central Bank, the process can be considerably shorter.

At the start of the process, the issuer (increasingly in conjunction with a financial adviser) will appoint one or more investment banks as bookrunners or underwriters (one of whom will act as sponsor or ESM adviser). Irish lawyers (and UK and US lawyers if a dual listing is contemplated) will also be appointed together with reporting accountants, registrars and financial PR agents. The investment banks will also appoint their own set of lawyers.

The reporting accountants will carry out financial due diligence and produce a long-form report on the issuer's business, a working capital report and a Financial Position and Prospects Procedures report (MSM only). At the same time, a legal due diligence process will be commenced and will form the basis of the prospectus or ESM admission document. The issuer's lawyers will verify the material statements in the prospectus or admission document.

If a prospectus is being produced, an advanced draft is submitted to the Central Bank for review. The Central Bank usually responds with comments within 10 working days (five working days or less for later submissions).

Following the diligence processes, a presentation will usually be given by the issuer to the independent analysts at the investment banks, who will subsequently publish research reports on the issuer to coincide with its 'intention to float' announcement. The issuer will then spend up to two weeks carrying out an investor roadshow, usually encompassing at least Ireland, the UK and the US where they will present a verified presentation to prospective institutional investors, often using a 'pathfinder prospectus' with an indicative price range as a marketing document. Simultaneously, the investment banks will be book-building on the basis of non-binding bids from investors. Recent IPOs have involved significant domestic and US 'cornerstone investors' who sign conditional subscription agreements and are named in the pathfinder prospectus.

Finally, pricing will occur, the Central Bank will approve the prospectus and it will be published (and passported into the UK in the case of a dual listing), or the ESM adviser will approve the admission document and it will be published. For an MSM IPO, the issuer's shares will be admitted to trading and to the Official List and credited to CREST accounts. When dealing commences, the IPO is complete.

ii Considerations for foreign issuers

Ireland has a listing regime that should be conducive to primary or secondary equity listings by non-domestic issuers. Ireland has an experienced and pragmatic regulator in the Central Bank and, as demonstrated by the creation of the ASM, the ISE is proactive in marketing Ireland as a listing venue and in creating listing products to attract overseas companies.

Dublin is home to sophisticated accountancy and law firms, and domestic investment banks who offer excellent coverage for Irish listed issuers and can therefore create relatively strong liquidity. However, such listings have been rare. This is, perhaps, unsurprising given the geographical proximity of London with its prestigious and highly liquid markets. Instead, Ireland has become better known as a debt-listing venue through the ISE's highly successful Global Exchange Market. This may change following the UK's exit from the European Union (Brexit), when the MSM will be the main English-speaking equity market still subject to European legislation and with the benefits of passporting.

IV POST-IPO REQUIREMENTS

i Introduction

An issuer with securities admitted to trading on the MSM must comply with certain continuing obligations set out in the Listing Rules. MSM companies must also comply with the Transparency Regulations and Transparency Rules and have regard to the UK Corporate Governance Code. In addition, the Admission to Trading Rules and the Prospectus Regulations contain certain continuing obligations for MSM companies. Irish companies listed on either the MSM, ESM or ASM must also have regard in general to the provisions of the Irish Companies Act 2014 (the Companies Act). The Takeover Rules and Substantial Acquisition Rules apply to takeovers of listed Irish issuers. Companies admitted to trading on the ESM must comply with continuing obligations contained in the ESM Rules, and ASM issuers are subject to the provisions of the ASM Rules on a continuing basis. MAR applies to both regulated markets and MTFs, and as such applies to issuers on all three markets.

ii Listing Rules

The Listing Rules impose obligations on MSM-listed companies to ensure timely disclosure to the market and equality of treatment of shareholders. Sanctions for breach include the public censure of the issuer, the public or private censure of directors and the suspension or ultimately cancellation of the issuer's listing.

Where an MSM issuer undertakes transactions of a certain size, a notification to the market is required. If a proposed transaction would constitute a 'Class 1 Transaction' because it represents 25 per cent of an issuer's value under a gross assets, profits, market value or gross capital test, it will require shareholder consent. Similarly, related party transactions require prior shareholder approval.

iii UK Corporate Governance Code

The UK Corporate Governance Code (the Code) together with the Irish Corporate Governance Annex (which is annexed to the Listing Rules) contains corporate governance guidelines for MSM issuers. The Code sets out good practice recommendations in the spheres of board leadership, accountability, remuneration and shareholder relations.

The Listing Rules require an MSM listed issuer to include in its annual report a compliance statement in respect of the Code, and auditors must review the statement in relation to financial reporting, internal controls and audit committees.

iv Transparency and disclosure

As described in Section II.iii, *supra*, the Transparency Regulations implemented the Transparency Directive into Irish law. The aim of the Transparency Directive was to harmonise, at an EU level, requirements for the provision of financial information, notification of major shareholdings and the disclosure of corporate information to shareholders. Most material modifications to the Transparency Directive are, in fact, contained in the Transparency Rules issued by the Central Bank.

The Transparency Regulations require MSM listed issuers to publish their annual financial report within four months of the end of the financial year, and a half-yearly financial report no later than two months after the period to which it relates, and contain detailed content requirements.

Under the Companies Act and the Transparency Rules, a shareholder must notify an Irish issuer and the Central Bank when it acquires an interest in 3 per cent or more of the issuer's share capital. Subsequent transactions that change the percentage interest by a whole number (up or down) must also be notified. In the case of non-Irish MSM issuers, the thresholds are at 5, 10, 15, 20, 25, 30, 50 and 75 per cent (being the thresholds set out in the Transparency Directive). When a shareholder ceases to have a notifiable interest, that must also be notified. The notification must be made within two trading days of the transaction or four days for non-Irish issuers. The issuer must notify the market by no later than the end of the trading day following receipt of a notification.

v Continuing obligations under the ESM Rules

The key continuing obligations for ESM issuers are as follows:

- a* information on new business developments must be notified to the market without delay;
- b* preparation of half-yearly reports and publication within three months of the period to which they relate;
- c* preparation of annual accounts and publication within six months of the period to which they relate;
- d* any documents sent to shareholders must be available on the issuer's website;
- e* an ESM issuer must ensure that its directors and certain relevant employees do not deal shares during a close period;
- f* an ESM issuer must notify the market without delay of substantial transactions (those representing 10 per cent or more of an issuer's value under a gross assets, profits, turnover, consideration or gross capital test (the ESM Class Tests)) and related party transactions representing 5 per cent or more under the ESM Class Tests;
- g* reverse takeovers (transactions representing 100 per cent or more under the ESM Class Tests) require shareholder approval as do fundamental changes of business (disposals that when aggregated with disposals in the previous 12 months exceed 75 per cent under an ESM Class Test);
- h* directors must accept full responsibility for compliance with the ESM Rules; and
- i* ESM issuers must retain an ESM adviser and ESM broker at all times.

vi Continuing obligations under the ASM Rules

Continuing obligations under the ASM Rules are designed to dovetail with SEC requirements so that an ASM listing does not create a significant extra administrative burden for an issuer. Indeed, the only significant further obligation for NYSE or NASDAQ listed issuers is compliance with MAR. The key requirements under the ASM Rules are that:

- a* an issuer that files information with the SEC or makes a public announcement pursuant to the rules of the NYSE or NASDAQ must issue a notification to the market;
- b* an issuer that discloses a material transaction under SEC rules in accordance with a Form 6-K or Form 8-K or undertakes a related party transaction that is required to be disclosed under Regulation S-K of the US Securities Act of 1933, as amended, or Form 20-F of the US Securities Exchange Act of 1934, as amended, must issue a notification to the market;
- c* an issuer that files annual or periodic financial reports in the US must issue an announcement to the market when such accounts are filed with the SEC. If it does not file such accounts then it must prepare and publish them outside of SEC requirements;
- d* directors must accept full responsibility for compliance with the ASM Rules; and
- e* ASM issuers must retain an ASM adviser at all times.

vii Market abuse

MAR applies equally to MSM, ESM and ASM issuers and contains three core principles:

- a* a prohibition on market manipulation and unlawful disclosure of inside information;
- b* restrictions on dealing in securities while in possession of inside information; and
- c* requirements as to prompt disclosure of inside information to the market.

There are also detailed provisions around the maintenance of ‘insider lists’ by issuers and restrictions on dealings by directors and certain senior officers. MAR provides for certain ‘safe harbours’ from these restrictions relating to share buy-back programmes, stabilisation measures and market soundings or wall-crossing.

V OUTLOOK AND CONCLUSION

As noted in Section III.ii, *supra*, the Irish IPO markets are likely to be greatly affected by Brexit. What remains to be seen is whether the effect will be positive or negative. Ireland may benefit as the home to the main English-speaking listing venues remaining within the EU, and could see a trend of overseas issuers carrying out IPOs in Ireland or taking secondary listings. Depending upon the terms of Brexit, it is certainly possible that UK-incorporated, London-listed issuers will consider electing Ireland as their home Member State in order to make the Central Bank their home regulator for the purposes of the Prospectus Directive. Equally, the UK may take advantage of Brexit by discarding European legislation that some issuers might consider to be onerous (such as MAR), therefore making London a more attractive listing venue to those issuers at the expense of Ireland and continental Europe. In any event, the next few years could be a defining period in the history of Irish equity capital markets.

ABOUT THE AUTHORS

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Matthew Cole is a partner in the capital markets group of A&L Goodbody in Dublin. He has an extensive track record advising issuers and underwriters on equity capital markets transactions, both in Ireland and in London where he practised for many years. His experience encompasses IPOs, rights issues and equity placings on the MSM and ESM in Ireland as well as the Main Market of the LSE and AIM. Mr Cole is listed in *The Legal 500*, who describe him as ‘a key name’ and *Chambers Europe*, who noted that ‘The technical expertise he has is extremely strong and his client service is excellent. He performs wonderfully well in a demanding environment’.

SHEENA DOGGETT

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Sheena Doggett is a partner in the corporate department of A&L Goodbody. She is head of the firm’s corporate team in London and splits her time between Dublin and London. She has been involved in many of the most important transactions in Ireland in recent years, and her key areas of expertise include corporate finance, public mergers and acquisitions, private equity transactions, share incentives and corporate governance. Ms Doggett is listed in *Who’s Who Legal* and *Chambers Europe*, who noted that ‘clients praise her “unrelenting pursuit of solutions to a problem”’.

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