The Foreign Investment Regulation Review

Sixth Edition

Editor
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The LawReviews

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Chapter 9

IRELAND

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I INTRODUCTION

Ireland is one of the most popular and advantageous locations in Europe for multinational corporations to invest in and is a leading gateway to the European market. Ireland continues to lead the world in attracting high-value foreign direct investment (FDI) projects and its ability to attract such projects in key sectors – such as ICT, life sciences, and financial and business services – has been globally acknowledged.[2] Leading US companies in the technology and social media sectors have established EMEA headquarter operations to access the EU market (e.g., LinkedIn, Dropbox, Airbnb, Facebook and Twitter have all set up operations here in recent years). Indeed, the US top 10 ICT companies are located in Ireland and this has earned the country a reputation for being the heart of ICT in Europe. Ireland also remains attractive as a holding company jurisdiction for large US-listed multinational corporations seeking to achieve an appropriate balance between the practicalities of day-to-day management, solid shareholder rights and robust corporate governance within a stable and well-developed legal and regulatory environment.

Ireland's recovery from the sharpest economic contraction in its history is now firmly established and the Irish economy grew at the rate of 7.3 per cent in 2017, making it the fastest growing economy in the eurozone for the past four years (2014–2017).[3]

In light of the UK vote in June 2016 to leave the European Union, Ireland's position as an English-speaking gateway to one of the world's largest markets is now even more significant than in the past. Already, some important entities have moved, and others are expected to move, all or part of their operations or business lines from the United Kingdom to Ireland to retain access to the European market. The UK vote to leave has no effect on Ireland's status as a full EU Member State, and the Irish government is committed to Ireland's continued membership of the European Union.

Ireland's attractiveness as an investment location can be attributed to the positive approach of successive governments to the promotion of inward investment, its EU membership, a very favourable corporate tax regime and wider tax infrastructure, and a skilled and flexible labour pool, as evidenced by an Economist Intelligence Unit report examining the main factors that bring foreign investors to Ireland.[4] In the mid 1990s, the

1 Pat English is a partner and Grace Murray is an associate at Matheson.
2 IBM Global Location Trends 2016 Annual Report.
3 European Commission Winter 2018 Economic Forecast.
4 Report by the Economist Intelligence Unit, sponsored by Matheson: 'Investing in Ireland: A survey of foreign direct investors'.

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government embarked on a series of reforms to ensure that the level and structure of taxation, cost and quality of infrastructure, and the effectiveness of training and education were given greater emphasis.[5]

Irish governments have used Ireland's tax infrastructure to facilitate the establishment and expansion of overseas companies, and have continually enhanced and refined the tax system to ensure that the country remains attractive to foreign investors.[6] Ireland has maintained a corporate tax rate of 12.5 per cent for active business, and has an extensive double taxation treaty network.

The government aims to maintain an open and free market for investors. There are no general restrictions governing FDI in Ireland,[7] no limits on the percentage of foreign ownership permitted, no requirements that shares in Irish companies must be held by Irish citizens, and no restrictions on the purchase of land for industrial purposes by foreigners. Private investment, whether domestic or foreign, is not permitted in the arms industry, but there are no other foreign investment restrictions for public policy or security reasons. Indeed, Ireland scored favourably in the Organisation for Economic Co-operation and Development's (OECD) FDI regulatory restrictive index, which measures statutory restrictions on FDI in 68 countries.[8]

The Irish legal system, similar to that of the United States, is based on the English common law tradition. It is modified by Irish legislation and case law, and is further influenced by Ireland's membership of the European Union. In the area of company law, government policy has been 'to establish a legal framework that is among the world's best – an efficient and effective framework that ensures that Ireland is a less bureaucratic place to do business, for both indigenous and foreign-owned companies'.[9] Indeed, Ireland was ranked as the eighth best country in the world in which to do business in a recent study carried out by Forbes.[10] The study, for which 153 countries were surveyed, was based on analyses of 15 factors, including innovation, taxes, property rights, technology, corruption, infrastructure, market size, political risk, workforce, freedom (personal, trade and monetary) as well as red tape, investor protection and quality of life, with each category being equally weighted.

As part of its active promotion of foreign investment, the government operates a grant aid system administered by the Industrial Development Agency (IDA), which provides grant incentives to companies meeting certain criteria (linked to job creation and investment commitment with respect to specific locations). The IDA is responsible for the promotion and development of foreign investment into Ireland, and targets sectors that produce

5 Organisation for Economic Co-operation and Development, Reviews of Foreign Direct Investment: Ireland Report, 1994, p. 28.

6 Trading and Investing in a Smart Economy: A strategy and action plan for Irish Trade, Tourism and Investment to 2015, p. 33.

7 The Minister for Finance can restrict transfers between Ireland and certain designated countries provided that the restrictions conform with EU law.

8 The FDI index gauges the restrictiveness of a country's FDI rules by looking at the four main restrictions on FDI: foreign equity limitations, discriminatory screening or approval mechanisms, restrictions on key foreign personnel and operational restrictions (e.g., restrictions on branching and on capital repatriation or on land ownership). Ireland scored 0.04, with zero representing an open market and 1 representing a restrictive market. www.oecd.org/investment/fdiindex.htm.

9 Department of Enterprise, Trade and Innovation, 2010, *Trading and Investing in a Smart Economy: A Strategy and Action Plan for Irish Trade, Tourism and Investment to 2015*, p. 34.

10 Forbes 'Best Countries for Business' 2018 report, available at www.forbes.com/best-countries-for-business.

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sophisticated and high-value products and services, such as the technology, online and pharmaceutical sectors. The IDA, which has offices across the globe, can offer invaluable and practical advice, and should certainly be a first port of call for companies evaluating Ireland as a potential location in which and from which to do business.

Ireland does not have a single overarching body responsible for regulating investment into the country. However, depending on the circumstances of the investment and the nature of the industry, compliance with a regulatory regime and approval from a regulatory body may be required.

II FOREIGN INVESTMENT REGIME

The government is keen to ensure that there are no significant barriers to international trade or foreign investment in Ireland. However, certain types of investment and industries are subject to approval, regulation, or both, under Irish law.

i Mergers, joint ventures and acquisitions

Mergers, joint ventures and acquisitions are subject to antitrust legislation in Ireland and the European Union.[11] The main Irish legislation in relation to antitrust law is the Competition Acts 2002–2017. Any merger, joint venture or acquisition that qualifies for notification must be notified to the Competition and Consumer Protection Commission (CCPC), which has the power to refuse to allow the transaction to proceed or to impose restrictions on it. A merger will qualify for notification to the CCPC when certain turnover thresholds are met. A merger control notification may be required to be submitted to the European Commission, instead of an Irish notification, where the jurisdictional thresholds of the EU Merger Regulation[12] are triggered.

Media mergers are treated separately, however, and must be notified regardless of the turnover of the undertakings involved. Media mergers are subject to an additional review by the Minister for Communications, Climate Action and Environment (the Minister), who must have regard to certain public interest criteria, the extent to which ownership and control of media business is spread among individuals and undertakings, and the extent to which the diversity of views prevalent in Irish society is reflected through the activities of the various media businesses in the state.

Acquisition of a stake in an insurance or reinsurance undertaking or a credit institution may also be subject to prior approval from the Central Bank of Ireland (the Central Bank). Investors seeking to acquire a shareholding or other interest that would either give them a 'qualifying holding' in an insurance or reinsurance undertaking, or in a credit institution (authorised or licensed in Ireland), or that increases their control above certain levels (20, 33 or 50 per cent), must first obtain the approval of the Central Bank. A 'qualifying holding' is defined as a direct or indirect holding that represents 10 per cent or more of the capital of, or voting rights in, a target entity, or that confers a right to appoint and remove members of the board of directors or management, or otherwise allows that person to exercise a 'significant influence' over the direction or management of the target entity.

11 Undertakings in Ireland are subject to the antitrust provisions of the Treaty on the Functioning of the European Union (principally Articles 101 to 109) to the extent that their activities are likely to have an effect on trade between EU Member States.

12 Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings.

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ii Public takeovers

Public takeovers[13] are principally regulated by the Irish Takeover Panel Act 1997 (as amended), the European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations 2006 and the Irish Takeover Rules (the Rules). The Rules operate to regulate the orderly conduct of public takeovers in Ireland and, *inter alia*, to ensure that no takeover offer is frustrated or unfairly prejudiced and, in the case of multiple bidders, that there is a level playing field (e.g., frustrating actions are not permitted without target shareholder approval, and due diligence information provided by a target company to one bidder must be provided to all *bona fide* bidders). The Rules are not concerned with the financial or commercial advantages or disadvantages of a takeover.

The Irish Takeover Panel (the Panel) is responsible for making the Rules and monitoring and supervising takeovers. It works through the office of the Director General, who deals with the general administration of the Rules and is responsible for monitoring dealings in relevant securities. The Director General is also available for consultation and to give guidance before and during takeovers. The Panel has the sole power to make rulings and give directions during the course of a takeover. It also has the right to enquire into the conduct of any person involved in a takeover, and the power to admonish or censure a person for non-compliance with the Rules.

iii Regulated industries

Particular industries in Ireland are subject to regulation and supervision by various regulatory bodies. Some of the key industries are set out below.

International financial services

The European Central Bank (ECB) is the lead regulator of credit institutions in the European Union, and the European Securities and Markets Authority (ESMA) is the lead regulator of non-bank financial services entities. Both the ECB and ESMA are assisted by competent national authorities in each of the EU Member States. The Central Bank is the national competent authority in Ireland for both credit institutions and non-bank financial services entities. To operate a banking business[14] in Ireland, a licence or authorisation is required from the Central Bank or the ECB in respect of a credit institution that is a 'significant' institution.

Following the introduction of the ECB's Single Supervisory Mechanism (SSM) in November 2014, the Central Bank is the regulator (home state regulator) for 'less significant' institutions operating within Ireland, while the ECB is the home state regulator for significant institutions and works with the Central Bank to supervise these bodies. A credit institution will be considered significant if any one of the following conditions is met:

a the total value of its assets exceeds €30 billion or – unless the total value of its assets is below €5 billion – exceeds 20 per cent of national gross domestic product;

b it is one of the three most significant credit institutions established in a Member State;

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13 This refers to takeovers of Irish-registered public limited companies that are listed on a regulated market in the European Union, the ESM market of the Irish Stock Exchange, the AIM market of the London Stock Exchange, the New York Stock Exchange or NASDAQ.

14 The Central Bank Acts, as well as a number of domestic regulations transposing EU Directives (the most notable being Capital Requirements Directive IV) apply to the provision of banking services in Ireland.

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c it is a recipient of direct assistance from the European Stability Mechanism; or
d the total value of its assets exceeds €5 billion and the ratio of its cross-border assets and liabilities in more than one other participating Member State to its total assets and liabilities is above 20 per cent.

Failure to fulfil these criteria notwithstanding, the SSM may declare an institution significant to ensure the consistent application of high-quality supervisory standards.

The SSM designates the licensing of significant institutions as a 'core' activity that is the responsibility of the ECB, though the Central Bank must confirm to the ECB that the requirements set out in Irish legislation have been met by the applicant bank before a licence will be granted.

To obtain a licence for either a significant or a less significant credit institution, the undertaking must satisfy several criteria, including capital requirements and having appropriate and proper procedures in Ireland. Entities wishing to carry on an insurance or reinsurance business also require an authorisation from the Central Bank.

The Central Bank is also the competent authority for the regulation of the securities market in Ireland. In addition, if the securities are listed on the Irish Stock Exchange, they will also be subject to regulation by the Stock Exchange.

Once authorised in Ireland, banking and other services (including investment services under MiFID and payment services under PSD2)[15] can be passported throughout the European Union in reliance on the Irish authorisation. The home state regulator (i.e., the Central Bank in the case of less significant credit institutions and non-bank financial services entities) retains responsibility for the prudential supervision of the entity while the host state regulator (i.e., the regulator in the other EU Member State) will supervise the passported entity's business conduct in that EU Member State.

Communications

The communications industry is governed by the Communications Regulation Act 2002 (as amended) and a number of regulations[16] that implement the EU electronic communications reform package (the communications regime). Any entity intending to provide an electronic communications service or electronic communications network in Ireland must notify ComReg, the Irish telecommunications regulator, prior to commencing those services under the general authorisation regime, and be in possession of a general authorisation. Authorised entities must comply with the conditions that are part of their general authorisation, including various wholesale access obligations and consumer law requirements, and more generally with the communications regime. Wireless telegraphy licences are also required for the use of radio frequencies in Ireland.

Broadcasting

The broadcasting industry is primarily governed by the Broadcasting Act 2009 (as amended), and is regulated by the Broadcasting Authority of Ireland (BAI).

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15 The Markets in Financial Instruments Directive 2014/65/EU regulates investment services and the Payment Services Directive 2015/2366 regulates payment services.

16 https://www.comreg.ie/about_us/legislation.501.html.

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Life sciences

Certain activities carried out in the life sciences sector are subject to regulation by the Health Products Regulatory Authority (HPRA). The HPRA's role is to protect and enhance public and animal health by regulating medicines, medical devices and other health products. Manufacturers of human and veterinary medicines are required to hold a manufacturing authorisation granted by the HPRA.[17] Manufacturing includes activities such as total and partial manufacture, dividing, packaging and repackaging, as well as importing medicinal products into Ireland from a country outside the EEA. The HPRA will only grant a manufacturing authorisation if an applicant has at its disposal suitable and sufficient premises, equipment, facilities, staff, manufacturing operations and arrangements for quality control, record-keeping, handling, storage and distribution.

Subject to some minor exceptions, all medicinal products must be authorised before being marketed in Ireland. An application for a marketing authorisation must be made to the HPRA or the European Medicines Agency, where appropriate.

The HPRA is the competent authority for general medical devices, *in vitro* diagnostic medical devices and active implantable medical devices. The role of the HPRA is to ensure that all medical devices placed on the Irish market meet the requirements of national and EU legislation, and to monitor the safety of medical devices in Ireland after they are placed on the market.

Export of dual-use items

The control of the export of 'dual-use' items and military goods is governed by the Control of Exports Act 2008 and the Control of Exports (Dual Use Items) Order 2009, which gives effect to Council Regulation (EC) No. 428/2009 setting up an EU regime for the control of exports, transfer, brokering and transit of dual-use items. Dual-use goods and technologies are goods and technologies (including software) that are normally used for civilian purposes but may have military applications. The legislation and requirements are complex and cover a wide range of common products produced by industries dealing with electronics, computers (including software), telecommunications and aerospace technologies. The Export Licensing Unit is the division within the Irish Department of Jobs, Enterprise and Innovation that is responsible for managing controls on exports of dual-use items destined for countries to which trade sanctions apply.

III TYPICAL TRANSACTIONAL STRUCTURES

The following transactions structures are commonly used by foreign investors establishing a presence in Ireland.

i Companies

The simplest and most popular form of setting up a business in Ireland is by incorporation of an Irish company under the Companies Act 2014 (the Companies Act), which came into force on 1 June 2015 (the Companies Act consolidates the 1963–2013 Companies Acts as

17 The granting of a manufacturing authorisation in Ireland is principally governed by the Medicinal Products (Control of Manufacture) Regulations 2007, as amended, which transpose into Irish law elements of a number of EU Directives.

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well as introducing some innovations). There are two basic types of company in Ireland: private and public. Following the introduction of the Companies Act, there are two types of private limited company: the model private company (LTD) and the alternative Designated Activity Company (DAC). The vast majority of companies registered in Ireland are private companies limited by shares. Public limited companies are typically used where securities are listed or offered to the public.

The main advantage of the private limited company is that shareholder liability is limited to the amount paid for its shares in the relevant company. Once certain decisions are made (e.g., type of company, company name, company location, persons who will act as directors or company secretary), a company can be incorporated in Ireland within five working days. In addition, all companies must have a registered address in Ireland. An LTD must have at least one director and a separate secretary. An LTD has no objects clause and therefore has unlimited corporate capacity once acting within the law. Other company types must have a minimum of two directors and a secretary (but in this case, the latter can also be a director). Generally speaking, at least one director must be resident in the EEA unless an insurance bond is put in place. Other company types retain an objects clause, but a third party dealing in good faith with the company will not be prejudiced if the company exceeds its corporate capacity.

The procedure for establishing a public limited company is similar; however, a public limited company is subject to minimum capitalisation requirements.

All company types can be incorporated with a single shareholder.

ii Acquisition of assets and companies

A foreign investor may also acquire an existing Irish company, or acquire the business and assets of an existing Irish company.

Acquisitions can be structured as a share purchase, in which case the shares of the Irish company are acquired directly from the shareholders. All the assets and liabilities of the target company are acquired in a share purchase. The transaction is documented by a share purchase agreement that, if it includes any warranties, will typically be supplemented by a disclosure letter and an instrument of transfer of the shares.

In an asset acquisition, the purchaser can choose which assets and liabilities it wishes to acquire. The parties will typically enter into an asset transfer agreement that documents the assets to be transferred and the consideration payable. Depending on the asset profile of the business, specific additional transfer documents may be required to perfect the transfer of the assets in question. If the nature of the assets and liabilities being transferred is such that the transfer constitutes a transfer of undertakings, there will be an automatic transfer to the purchaser of the rights and obligations of the target company towards its employees by virtue of the European Communities (Protection of Employees on Transfer of Undertakings) Regulations, 2003.

Prior to an acquisition of either the assets or shares of an existing company, an extensive due diligence exercise will typically be carried out. Third-party consents may also be required in advance of the acquisition. The acquisition of shares in a public limited company may also be subject to compliance with the Irish Takeover Rules.

In addition to the above, the European Communities (Cross-Border Mergers) Regulations 2008 (as amended) introduced a legal framework to enable cross-border mergers between public or private limited companies from different Member States of the EEA. All the assets and liabilities of one or more companies are transferred to another company by way of

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universal succession and the transferor company is dissolved without going into liquidation. The merger can be effected by acquisition, by formation of a new company or by absorption (which involves the assimilation of a wholly owned subsidiary into the surviving company).

The Companies Act introduced a domestic statutory regime for Irish private companies modelled on the European Cross-Border Merger regime. At least one of the entities involved in the transaction must be an LTD. The transaction involves either a court approval process or use of the Summary Approval Procedure (requiring shareholder consent and the making of a declaration of solvency by the directors). Under the Companies Act, a private company limited by shares can also be split (by division) between two other Irish companies (one of which must be an LTD and neither of which can be a public limited company). Divisions are conducted through a court-approved process and the Summary Approval Procedure cannot be used. Mergers and divisions of public limited companies are also regulated under the Companies Act.

iii Joint ventures

Foreign investors may establish a joint venture in Ireland. In this regard, the following three structures are commonly used:

a a corporate joint venture involving the incorporation of a limited liability company to carry out the joint venture business (potentially a DAC with a specified objects clause);

b a partnership formed under the Partnership Act 1980 or the Limited Partnerships Act 1907. The partnership may be limited or unlimited, and will be subject to one level of tax; and

c a contractual arrangement whereby the terms of the joint venture and the legal relationship between the parties will be governed by contract law. Each party will be subject to separate tax.

There may also be notification requirements if the joint venture comes within the scope of the Competition Acts 2002–2017 or the Irish Takeover Rules.

iv Migrations and redomiciliations

Ireland also remains a potentially attractive destination for corporate groups choosing to redomicile their ultimate holding company (commonly referred to as ‘inverting’, or an ‘inversion’). Redomiciliations or inversions of US companies were prominent between 2012 and 2016, primarily driven by the US corporate tax regime. More recently, following the introduction of new regulations by the US Treasury Department, inversions have become less commonplace.

There are a number of ways in which a foreign corporate group may structure a redomiciliation into Ireland. One option is to migrate the existing holding company’s tax residence to Ireland (i.e., by the transfer of its central management and control to Ireland). This structure can present difficulties, however, since many jurisdictions impose a tax charge on a migration of tax residence. It can be a particularly unfeasible route for US companies, since the United States does not have a separate concept of tax residence as distinct from the place of incorporation. For public companies incorporated in a common law jurisdiction, a more common form of inversion structure involves the incorporation of a new Irish parent company between the existing parent company and the public stockholders that engages in a court-approved cancellation scheme of arrangement or a share-for-share exchange. Under a

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court-approved cancellation scheme of arrangement, the public stockholders agree to having their shares in the existing parent company either cancelled or swapped for shares in the new Irish parent company. Reverse mergers are also used, whereby the US purchaser merges into a subsidiary of the Irish target and the Irish target issues new shares to the stockholders of the US company. For EU-incorporated public companies, an inversion may also be achieved by re-registering the existing parent company as a European public company[18] and then transferring its place of registration to Ireland. EU parent companies can also redomicile to Ireland by merging with an Irish public company under the cross-border merger regulations; however, this option is not available to US parent companies.

Because of US anti-inversion rules, most inversion opportunities for US companies seeking to redomicile to Ireland are now arising in an acquisition context, where the US company undertakes a strategic acquisition or merger with a foreign company, with the ultimate holding company of the merged group being located in Ireland. The Irish holding company may subsequently list on a US stock exchange, such as NYSE or NASDAQ. Recent examples of acquisition inversions include the *Medtronic/Covidien Inc* and the *Johnson Controls/Tyco* transactions. In addition, we are also seeing an increase in the volume of spin-offs of non-Irish public companies into new Irish publicly listed companies. By way of example, the automotive seating business of Johnson Controls was separated from the company as part of its multi-industrial strategy to create Adient plc, an Irish-incorporated public company listed on the NYSE. We are seeing clients considering migrating to Ireland from jurisdictions other than the United States.

v Branch operations and place of business

It is usually preferable to establish a separate legal entity in Ireland; however, in some cases it may make sense from a regulatory perspective for the foreign entity to establish a branch in Ireland. Any foreign limited liability company trading in Ireland that has the appearance of permanency, an independent Irish management structure, the ability to negotiate contracts with third parties and a reasonable degree of financial independence is considered a branch under Irish law and must register the branch within one month of establishment. Under a recently introduced provision in the Companies (Accounting) Act 2017 (the Accounting Act), branch registration requirements are extended to a foreign unlimited company that is a subsidiary undertaking of a body corporate whose members have limited liability.

Under the Companies Act, 'place of business' registrations are no longer required or recognised in Ireland.

18 Also known as a *societas europaea*.

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IV REVIEW PROCEDURE

The review procedure that will apply to a merger, acquisition or joint venture that comes within the scope of the CCPC's jurisdiction is set out below. There is no specific review procedure in respect of public takeovers.[19]

i Financial thresholds

Mergers, acquisitions and full-function joint ventures that meet the financial thresholds in the Competition Acts 2002–2017 must be notified to the CCPC before they are put into effect. The financial thresholds that trigger the obligation to notify are:

a the aggregate turnover in the state (i.e., Ireland) of the undertakings involved is not less than €50 million; and

b the turnover in the state (i.e., Ireland) of each of two or more of the undertakings involved is not less than €3 million.

These turnover thresholds were amended in October 2014 with the intention of only capturing mergers that have a strong nexus to the state, thus eliminating the notification requirement for some 'foreign-to-foreign' mergers.

These thresholds are disapplied for 'media mergers'.

The CCPC also has jurisdiction under Sections 4 and 5 of the Competition Acts 2002–2017 to investigate mergers that fall below these thresholds (i.e., if it believes that the merger could have as its object or effect the prevention, restriction or distortion of competition, or involves the creation or strengthening of a dominant position).

As for the geographical allocation of turnover, for the purposes of the above-mentioned turnover thresholds, a guidance note by the CCPC provides that 'turnover in the state' means sales made or services supplied to customers within the state.

The substantive test for assessment of competition issues by the CCPC is whether 'the result of the merger or acquisition would be to substantially lessen competition in markets for goods or services' in Ireland (referred to as the SLC test).[20]

ii Notification

Merging parties can notify the CCPC of a proposed merger once they can demonstrate that 'a good faith intention to conclude an agreement or a merger or acquisition is agreed'.[21] A filing fee of €8,000 is payable to the CCPC for all mergers. Under the Competition Acts 2002–2017, there is an obligation on 'each undertaking involved' to notify the CCPC (i.e., the seller and the purchaser).[22] In practice, joint filings are submitted and the purchaser tends to lead on the drafting of the notification.

19 From time to time, a public takeover may involve the investor consulting with the Irish Takeover Panel to get dispensations from certain rules in the context of a particular deal.

20 Section 20(1)(c) of the Competition Acts 2002–2017.

21 Section 18(1A)(b)(ii) of the Competition Acts 2002–2017.

22 This contrasts with the position under the EU Merger Regulation, where the obligation to notify is generally on the purchaser or the party acquiring control.

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iii Timeline

The Competition Acts 2002–2017 provide for a two-phase review process. The CCPC has an initial 30 working days (Phase I) from notification to decide whether to allow the merger to be put into effect on the grounds that the merger does not trigger the SLC test or that it will not carry out a more detailed investigation. During Phase I, the CCPC may also issue a formal request for information (RFI) from the parties, in which case the 30 working days run from the time of receipt by the CCPC of the RFI (i.e., it has the effect of stopping and restarting the clock and the review period does not restart until the RFI has been complied with). If the CCPC has concerns about the likely effects of a transaction, it will initiate a more detailed second-phase investigation. In this case, it has a total of 120 working days from notification (known as Phase II) within which to decide whether the merger should be allowed unconditionally, allowed subject to conditions or prohibited. As in Phase I, the CCPC may 'stop the clock' on its merger review by making a formal RFI.

As noted above, media mergers are treated separately. While one notification in respect of a media merger must be submitted to the CCPC, the Competition Acts 2002–2017 require a second, separate notification to be submitted to the Minister. If the CCPC determines at the end of a Phase I investigation that the media merger does not trigger the SLC test, it must inform the Minister, who then has 30 working days to consider the media merger, commencing 10 days after a CCPC determination clearing the merger. If the Minister is concerned that the media merger may be contrary to public interest in protecting plurality of the media, the Minister will request the BAI to carry out a Phase II examination. Once in receipt of a BAI report, in these circumstances the Minister has 20 working days in which to make the final determination on the media merger and has the power to prohibit the merger or impose stricter conditions, again based on public interest criteria.

Of the 72 notifications received by the CCPC in 2017, only nine (12.5 per cent of cases) required an extended Phase I review (i.e., a formal RFI was issued by the CCPC) and there were no Phase II reviews. Between 1 January 2017 and 31 December 2017, the CCPC took an average of 24 working days to issue a Phase I decision. To date, only three mergers have been blocked by the CCPC: *IBM/Schlumberger*,[23] *Kingspan/Xtratherm*[24] and *Kerry/Breeo*.[25]

iv Failure to notify

Failure to notify a transaction that falls within the scope of the Competition Acts 2002–2017, or to supply information requested by the CCPC within the specified time limit, can constitute a criminal offence punishable by a fine of up to €250,000, plus €25,000 per day for a continued breach. In addition, transactions that are put into effect without the approval of the CCPC are void under Irish law. To date, the CCPC has not taken legal action against any parties to a merger where a transaction has been put into effect prior to clearance, although it has publicly condemned this type of behaviour.

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23 Case M/04/032 *IBM Ireland Limited/Schlumberger Business Continuity Services (Ireland) Limited*. The Competition Authority's determination can be found by searching at https://www.ccpc.ie/business/mergers/mergers-archive/.

24 Case M/06/039 *Kingspan/Xtratherm*. The Competition Authority's determination can be found by searching at https://www.ccpc.ie/business/mergers/mergers-archive/.

25 Case M/08/009 *Kerry/Breeo*. The Competition Authority's determination can be found by searching at https://www.ccpc.ie/business/mergers/mergers-archive/.

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v Mergers below notification thresholds

Mergers below the notification thresholds can also potentially limit competition. The Competition Acts 2002–2017 provide for a voluntary merger notification system for mergers that do not meet the thresholds but still raise antitrust issues. Once notified, voluntary notifications are dealt with in the same way as mandatory notifications.

vi Appeal

A determination by the CCPC to prohibit a merger, or permit a merger subject to conditions, can be appealed to the High Court by the parties to the transaction. Complainants and third parties do not have a right of appeal, but may apply to the High Court for judicial review of a CCPC determination.

vii Confidential information

As a public body, the CCPC is subject to the Freedom of Information Act 2014. Notwithstanding, the Act provides for exemptions for the release of commercially sensitive information by public bodies. In general, the CCPC handles commercially sensitive information in accordance with its strict confidentiality obligations. Following receipt of a merger notification, the CCPC will publish a standard notice on its website stating that the transaction has been notified to it, and detailing the parties and industry involved.

The merger notification form submitted by the parties will not be made public; however, the CCPC's decision (which may contain information from the notification form) will be published. In practice, the CCPC will allow the parties an opportunity to request the removal or redaction of any commercially sensitive information from the determination prior to publishing a non-confidential version of the determination on its website.

viii Coordination with other jurisdictions

The Competition Acts 2002–2017 enable the CCPC to enter into arrangements with antitrust bodies in other jurisdictions in relation to the exercise of its merger control function. One of the questions on the standard notification form requires the parties to identify the other jurisdictions where the transaction has been or will be filed. In certain circumstances, the CCPC seeks the consent of the notifying parties to enable it to discuss the case with antitrust officials in other jurisdictions when a notification is made and to share information with them.

The CCPC is greatly influenced by the work of the International Competition Network and the European Competition Network, of which it is an active member. The CCPC also maintains regular contact with competition authorities in other jurisdictions, in particular the UK Competition and Markets Authority and the European Commission, as well as the antitrust bodies in the United States, regarding cases that are subject to parallel reviews in those jurisdictions that may affect Ireland.

ix Third parties

Generally a 10-day working period is provided for by the CCPC during a Phase I review (and a 15-day working period for a Phase II review) for third parties to submit comments expressing their views on the likely effects of a proposed transaction on competition in the market.

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V FOREIGN INVESTOR PROTECTION

There is no general regime *per se* regarding the protection of foreign investment. Investors from both within and outside the European Union receive the same treatment as domestic investors under Irish law.

However, various protections are contained within the statutory frameworks referred to above. Pursuant to the Companies Act, shareholders, directors or creditors of a company have the legal standing to bring an action to the High Court against a company or an officer of a company for failure to remedy a breach of the Companies Act. This provision does not discriminate between foreign and domestic shareholders. In addition, under Irish law, directors of Irish companies are subject to a range of extensive duties (common law fiduciary duties having been codified in the Companies Act) and can be held personally liable for certain breaches under the Companies Act.

The Office of the Director of Corporate Enforcement (ODCE) was established under the Company Law Enforcement Act 2001 to improve the compliance environment for corporate activity in Ireland. The ODCE encourages compliance with the Companies Act and brings to account those who disregard the law. The ODCE has investigative and disciplinary powers, and can act on complaints from auditors, professional bodies and the public.

Foreign investors may also be entitled to appeal a decision taken by a regulatory body. For example, the Competition Acts 2002–2017 set out the circumstances where a right of appeal exists against a decision taken by the CCPC. In addition to a right of appeal, there is a general right[26] to a judicial review by the High Court against a decision made by any person or body (usually set up by means of legislation) exercising a public function. Accordingly, judicial review will lie in respect of decisions of government departments, tribunals, regulators, or other persons or bodies making decisions by public or statutory authority.

Ireland provides strong, enforceable protection for all aspects of intellectual property (IP). The Irish Commercial Court was established as a division of the High Court in 2004 to deal with major commercial and IP cases. It offers a fast-track process to quickly and efficiently deal with IP disputes (usually within one year). In relation to interlocutory applications, costs are awarded at the interlocutory stage, which provides a very powerful tool to combat IP infringement. The Commercial Court provides investors with a strong platform for protecting their assets.

Ireland also promotes alternative dispute resolution. The government has incorporated the United Nations Convention on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration into Irish law, and the Arbitration Act 2010 provides the legislative framework supporting the conduct of arbitrations in Ireland. The Rules of the Superior Courts also promote the use of mediation.

Foreign investors will benefit from Ireland's membership of the European Union, as there are a number of bilateral trade agreements in place. Ireland also has an extensive tax treaty network to eliminate or reduce double taxation. To date, Ireland has signed 74 double tax treaties, 73 of which are in effect. Ireland's Revenue Commissioners act as Ireland's 'competent authority' under double tax treaties and as a competent authority it assists Irish taxpayers in requests for competent authority assistance, mutual agreement procedures and advance pricing agreements.

26 In certain circumstances, the right to judicial review may vary, for example, in the financial services sector.

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The World Bank *Doing Business* report for 2018 examined Ireland's regime for protecting investors and ranked the country 17th of the 190 measured. The report measures the strength of minority shareholder protections against directors' misuse of corporate assets for personal gain. The indicators distinguish three dimensions of investor protections: transparency of related-party transactions, liability for self-dealing and shareholders' ability to sue officers and directors for misconduct. The data came from a survey of corporate and securities lawyers, and are based on securities regulations, company laws, civil procedure codes and court rules of evidence.

VI OTHER STRATEGIC CONSIDERATIONS

Ireland offers investors a low corporation tax environment that does not breach harmful EU or OECD tax competition initiatives. As a member of both organisations, Ireland is actively involved in forums for discussing and reviewing international tax changes. In addition to the low corporation tax rate, Ireland has an extensive and expanding double taxation treaty network.

Once a decision has been made to invest in Ireland, it is important for each individual case to be assessed to determine the most efficient structure for the foreign investor. Investors must also consider whether any regulatory regime will apply to the investment. For example, when effecting a merger or acquisition, it is useful to engage with antitrust law issues early in the process, particularly in relation to timing considerations, which need to take account of any applicable timetable for merger review. Depending on whether there are antitrust law issues to be addressed, it may be necessary to draft an appropriate condition precedent in the purchase agreement or public offer to deal with clearance prior to closing the transaction. Similar considerations will apply when the company being acquired is subject to the Irish Takeover Rules.

VII CURRENT DEVELOPMENTS

As mentioned in Section I, Ireland was ranked as the eighth best country in the world in which to do business in a recent study carried out by Forbes[27] and this is supported by the influx of foreign direct investment into Ireland in recent years.

Indeed Ireland's competitiveness has improved dramatically since the global financial crisis, and has been ranked the 12th most competitive country in the world in 2018,[28] and this international competitiveness shows no signs of slowing down. Dublin was ranked second in the fDi's European Cities and Regions of the Future 2018/19 report, which acknowledges that the city continues to go from strength to strength as a hub for software and financial services FDI'.[29]

Ireland was responsive to the global financial crisis and undertook significant reforms designed to facilitate a return to growth and employment creation. The recent initial public offering of AIB, seven years after the bank was nationalised, marked a significant milestone in Ireland's economic recovery. The Irish government plans to gradually sell its remaining stake in AIB over the coming years.

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27 See footnote 10.

28 IMD *World Competitiveness Yearbook 2018*.

29 https://www.fdiintelligence.com/Rankings/fDi-s-European-Cities-and-Regions-of-the-Future-2018-19-Winners. FDI Intelligence is a division of the *Financial Times*.

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Brexit creates both challenges and opportunities for all industries and sectors in the Irish economy. In May 2017, the Irish government published a comprehensive strategy document on Ireland and the negotiations for the United Kingdom's withdrawal from the European Union, setting out its headline priorities, including minimising the effect on Ireland's trade and economy, maintaining the common travel area with the United Kingdom and securing Ireland's future in a strong European Union.[30]

The General Data Protection Regulation (GDPR) came into effect on 25 May 2018. The GDPR is directly effective in each EU Member State, with the aim that the same rules will be applied uniformly within the European Union and to simplify regulation through the introduction of a 'one-stop shop mechanism' whereby multinational organisations will only have to deal with a single supervisory authority located in the Member State of their establishment. This marks a shift in the approach to data protection at a European level, which, until 25 May 2018, relied on national implementing legislation in individual EU Member States.

Ireland continues to adapt and enhance its offering to ensure that it remains a key location for FDI. The IDA's strategic blueprint for attracting FDI into Ireland sets out key objectives for 2015–2019.[31] A critical element of the IDA's strategy is a continued strong focus on the traditional key sectors of technology, media and content, business services, biopharmaceuticals, medical devices, engineering, ingredients and financial services. The IDA plans to 'help foster a strong mutually supporting enterprise base where multinationals partner with Irish enterprise'. Targets include winning 900 new investments for Ireland, the creation of 80,000 new jobs, €3 billion in new investments in research and development, and balanced regional growth.

Ireland's legislative landscape is also changing.

The Companies Act came into force on 1 June 2015. It was the largest piece of substantive legislation in the history of the Irish state, and consolidated and modernised Irish company law. The Companies Act introduced several positive company law reforms, which further enhanced Ireland's competitive position as a location for business investment.

These changes made it easier and less costly to start up and run an Irish company. The entry into force of the Companies Act marked a significant development in the strategic reform of Irish company law, and represents Ireland's strong desire to ensure that it has a modern company law regime in place that will further enhance Ireland's attractiveness as a place to do business.

Legislation to transpose the Accounting Directive (2013/34/EU) came into force in June 2017 in the form of the Accounting Act. The legislation effectively abolishes 'non-filing structures' in their current form for Irish unlimited companies. This means that certain types of unlimited company that previously avoided the public filing of financial statements at the Companies Registration Office will come within the filing regime (in respect of accounting periods commencing on or after 1 January 2017) if the ultimate shareholders of the unlimited companies have the benefit of limited liability protection. New country-by-country reporting obligations have also been introduced, which will apply to large companies

30 The Department of Foreign Affairs and Trade, https://www.dfa.ie/brexit/key-documents/.

31 IDA Ireland, 'Winning: Foreign Direct Investment 2015–2019', https://www.idaireland.com/about-ida/winning-fdi.

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and public-interest entities involved in oil and gas exploration or extraction, and logging in primary forests. In addition, smaller companies will benefit from more relaxed accounting and disclosure regimes, and a new 'micro company' concept has been introduced.

The European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016 (the 2016 Regulations), which were signed into law in November 2016, mean that most Irish companies must gather information about individuals who are their underlying beneficial owners. It is possible that this beneficial-ownership information will become publicly accessible when related measures concerning a central register of beneficial ownership come into force later in 2018. The 2016 Regulations came about as a result of the EU Fourth Anti-Money Laundering Directive, in part aimed at increasing transparency in relation to the real ownership of corporate vehicles. Other EU Member States must introduce similar beneficial-ownership measures.

Ireland offers investors a stable corporation tax environment and a low corporation tax rate, and it has been an active participant in the OECD's base erosion and profit shifting (BEPS) project.

As a result of that participation, Ireland has implemented country-by-country reporting rules and a BEPS-compliant 'knowledge development box', which applies a lower tax rate (6.25 per cent) to income earned through commercialising certain qualifying intellectual property that is developed in Ireland. Since the final BEPS reports were issued in October 2015, Ireland has separately participated in EU negotiations with a view to implementing (EU-wide) a number of the BEPS recommendations. These changes were agreed under the Anti-Tax Avoidance Directive. The first changes under that Directive will be implemented on 1 January 2019.

It is intended that Ireland will remain a highly attractive location for international business. This is reflected in a document published by the Department of Finance following Ireland's consultation on BEPS:[32] 'Ireland now needs to place itself in the best position possible to become the country of choice for mobile foreign direct investment in a post-BEPS environment.'

32 'Competing in a Changing World – A Road Map for Ireland's Tax Competitiveness', Department of Finance, October 2014.

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Appendix 1

ABOUT THE AUTHORS

PAT ENGLISH

Matheson

Pat English is a corporate partner and head of the international business group at Matheson. He is also a senior member of the US business and inward investment groups. He practises corporate law, focusing primarily on advising overseas clients on establishing operations and doing business in and from Ireland.

In addition to advising on establishment projects, Mr English advises a broad range of international and, in particular, US clients on international corporate reorganisations, pre- and post-integration transactions, cross-border mergers and general commercial contracts, corporate governance and compliance issues and strategies. In September 2011, he returned from his role as resident counsel and head of the firm's US offices in New York, where he had been based for two years.

In 2016, *The American Lawyer* named Mr English a 'Transatlantic Rising Star', an award that honours lawyers under the age of 40 'for excellence in handling transatlantic matters across the key areas of corporate, finance, disputes and outstanding transatlantic strategy'.

GRACE MURRAY

Matheson

Grace Murray is an associate in Matheson's international business group. She advises US and other international clients on inward investment and establishment projects, international corporate reorganisations, pre- and post-acquisition integration and consolidation projects, general corporate governance and compliance matters. Ms Murray also advises leading US and other international corporations on the establishment of Irish operations; provides corporate counsel to a range of US and other international corporations in respect of their Irish operations; advises Fortune 500 companies on international corporate reorganisations, strategic restructurings, integration and consolidation projects; and provides ongoing corporate advice and strategic counselling to a range of international corporations.

Ms Murray is a member of the Law Society of Ireland.

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ISBN 978-1-912228-57-7

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