The Foreign Investment Regulation Review

Editor
Calvin S Goldman QC

Law Business Research

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EDITOR'S PREFACE

This inaugural edition of *The Foreign Investment Regulation Review* aims to provide readers with a practical and comprehensive guide to foreign investment laws, regulations, policies and practices in key jurisdictions around the world. The topic of foreign investment has garnered significant attention in recent years, and is likely to become increasingly important as market barriers continue to fall, cross-border acquisitions continue to increase and national governments continue to regulate – or consider regulating – foreign investment in their jurisdictions. It is of particular interest to multinational companies seeking to expand the geographical scope of their operations through an acquisition, joint venture or other type of foreign investment. The number of foreign investment reviews of major transactions has grown in recent years, and this trend is expected to continue as the global economy becomes more integrated.

This book includes contributions from leading experts around the world from some of the most widely recognised law firms in their respective jurisdictions. It provides relevant information on and insights into the framework of laws and regulations governing foreign investment in each of the 23 featured jurisdictions, including the timing and mechanics of any required foreign investment approvals, and other practices that are specific to each jurisdiction. In describing the laws, regulations and policies related to foreign investment reviews, the focus is on practical and strategic considerations, including the key steps for foreign investors planning a major acquisition or otherwise seeking to do business in a particular jurisdiction. Recent trends and emerging issues include the growing role of national security considerations in the review of foreign investment, as well as the increasing scrutiny of foreign investments made by state-owned enterprises. In addition, given the fact that parallel regulatory reviews may indeed take place in a number of jurisdictions, the interface between foreign investment review and competition and other sectoral reviews is also discussed.

Foreign investment regimes face the difficult challenge of striking the right balance between, on one hand, maintaining the flexibility required to reach an appropriate decision in any given case and, on the other, creating rules that are sufficiently clear and predictable to ensure that the home jurisdiction offers the benefits of an attractive investment climate. The reality faced by foreign investors is that without sufficient advanced planning, foreign investment reviews, which sometimes takes place in a politicised environment and under close media scrutiny, can potentially result in delay, increased costs and even the blocking or unwinding of a transaction. Given these risks, parties to a proposed investment are well advised to gain a thorough understanding of the regulatory regimes in each jurisdiction – particularly given the significant variation in the foreign investment review regimes in place in various countries – and to engage with regulatory counsel early in the planning process so that deal risk can be properly assessed and managed.

We hope this publication will provide a valuable guide for parties considering a transaction that may trigger a foreign investment review.

I would like to personally express my appreciation to each of the chapter authors and their firms for the time and expertise that they have contributed to this book, and also thank Law Business Research for its ongoing support and for taking the initiative to launch this publication.

Please note that the views expressed in this book are those of the authors, and not those of their firms, any specific clients, the editor or the publisher.

Calvin S Goldman QC
Blake, Cassels & Graydon LLP
Toronto
August 2013

Chapter 12

IRELAND

Robert O'Shea and Sarah Jayne Hanna[1]

I INTRODUCTION

Ireland is one of the most popular and profitable locations for multinational corporations to invest in Europe. Globally recognised as a hub for financial services and the life sciences and information technology sectors, it is one of the leading 'gateways' to access the European market. The level of foreign investment into Ireland has been increasing recently, and the trend of redomestications continues with US companies in the fast-growing technology and social media sectors looking to establish EMEA headquarter operations to access the EU market (e.g., Linkedin, Dropbox, Facebook and Twitter have all established or relocated their operations in recent years). Recently, the large US power management company, Eaton Corporation, redomesticated to Ireland by virtue of its US$11.8 billion acquisition of the electrical equipment supplier, Cooper Industries plc (a US-listed plc), while Actavis Inc announced the acquisition of Warner Chilcott plc for US$5.1 billion.

Ireland's attraction as an investment location can be attributed to the positive approach of successive governments to the promotion of inward investment, its membership of the EU, a very favourable corporate tax regime, 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.[2]

In the mid-1990s, the 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.[3]

1 Robert O'Shea is a partner and Sarah Jayne Hanna is an associate at Matheson.

2 Report from the Economist Intelligence Unit, sponsored by Matheson: 'Investing in Ireland: A survey of foreign direct investors'.

3 OECD Reviews of Foreign Direct Investment: Ireland Report 1994, p. 28.

The government has used Ireland's tax infrastructure to facilitate the establishment and expansion of overseas companies, and has continually enhanced and refined the tax system to ensure that the country remains attractive to foreign investors.[4] Ireland has maintained a corporate tax rate of 12.5 per cent for active business, and offers a number of additional tax incentives such as recourse to an extensive double taxation treaty network.

The government aims to maintain an open and free market for investors. There are no general restrictions governing foreign direct investment (FDI) in Ireland,[5] 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 order and security reasons. Indeed, Ireland scored favourably in the Organisation for Economic Co-operation and Development's (the OECD) FDI regulatory restrictive index, which measures statutory restrictions on FDI in 56 countries.[6]

The Irish legal system is based on the English common law tradition, which is also similar to that in operation in the United States. It is modified by Irish legislation and case law, and is further influenced by Ireland's membership of the EU. In the area of company law, the government has stated that its 'overall aim is 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.'[7] Indeed, Ireland ranked 10th out of 186 countries for ease of doing business in the World Bank 2012 Doing Business Report.[8]

As part of its active promotion of foreign investment, the government offers limited state financial assistance in the form of grants to defray start-up or other costs, which are administered by the Industrial Development Agency (the IDA). The availability of grants is now limited, given the application of EU State Aid Rules. The IDA is responsible for the promotion and development of foreign investment into Ireland,[9] and recently has

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

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

6 The FDI index gauges the restrictiveness of a country's FDI rules by looking at the four main restrictions on FDI: foreign equity limitations, screening or approval mechanisms, restrictions on the employment of foreigners as key personnel and operational restrictions (e.g., restrictions on branching and on capital repatriation or on land ownership). Ireland scored 0.043, with zero representing an open market and 1 representing a restrictive market.

7 Trading and Investing in a Smart Economy: A strategy and action plan for Irish Trade, Tourism and Investment to 2015, p. 34.

8 World Bank 2012 Doing Business Report.

9 Shannon Development is another grant-awarding body that provides grants in respect of the Shannon area. Udarás na Gaeltachta is responsible for encouraging investment in the Irish (Gaelic) speaking areas of Ireland.

targeted sectors that produce sophisticated and high-value products and services, such as technology and pharmaceutical companies. The IDA meet with the investor and, if interested, request a business plan and evaluate the potential investment project.

Ireland does not have a single overarching body responsible for overseeing all investment into Ireland (the IDA is only responsible for overseeing financially assisted investment in Ireland). 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; these are examined in greater detail below.

i Mergers, joint ventures and acquisitions

Mergers, joint ventures and acquisitions are subject to competition legislation in Ireland and the EU.[10] The main Irish legislation in relation to competition law is the Competition Act 2002 to 2012 (the Competition Act). Any merger, joint venture or acquisition that qualifies for notification must be notified to the Competition Authority, which has the power to refuse to allow the transaction to proceed or to impose restrictions on it. A merger will qualify for notification when certain turnover thresholds are met. In addition, where a proposed merger, acquisition of joint venture meets certain threshold criteria, notification to the European Commission may be required instead under the EU Merger Regulation.[11]

Media mergers, however, are treated separately and must be notified regardless of the turnover of the undertakings involved. Media mergers are subject to an additional review by the Minister for Jobs, Enterprise and Innovation, 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.

The Credit Institutions (Financial Support) Act 2008 provides for the application of a special merger regime in circumstances where the merger involves a credit institution and the Minister for Finance is of the opinion that the merger is necessary to maintain the stability of the state's financial system. In these circumstances, it is the Minister for Finance, not the Competition Authority, who has the power to determine whether the merger should be approved under the merger control provisions of the Competition Act.

10 Undertakings in Ireland are subject to the competition 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.

11 Council Regulation (EC) 139/2004.

Such mergers will be notifiable to the Minister for Finance, rather than the Competition Authority, and may not be implemented without Ministerial approval.

Acquisition of a stake in an insurance or reinsurance undertaking of 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 licenced in Ireland), or that increases their control above certain levels (20 per cent, 33 per cent or 50 per cent), must first obtain the approval of the Central Bank. A 'qualifying holding' is defined as 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.

ii Public takeovers

Public takeovers in Ireland[12] 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. The Director General 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 Central Bank was appointed under the Central Bank Reform Act 2010 and regulates all financial services activities and the banking sector in Ireland. To operate in the financial

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

services industry and banking business,[13] a licence or approval is required from the Central Bank. To obtain a licence, the undertaking must satisfy several criteria, including capital requirements and having appropriate and proper procedures in Ireland. Investors 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 (the ISE), they will also be subject to regulation from the ISE.

Once licenced in Ireland, banking and other services (including investment services under MiFID[14]) can be passported throughout the EU in reliance on the Irish licence. An authorisation is usually not required if the investor is already authorised in another EU Member State.

Communications

The communications industry in Ireland is governed by the Communications Regulation Act 2002 (as amended) and a number of regulations[15] 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 attaching to 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 governed by the Broadcasting Act 2009, and is regulated by the Broadcasting Authority of Ireland.

Life sciences

Certain activities carried out in the life sciences sector are subject to regulation by the Irish Medicines Board (the IMB). The IMB was established to protect and enhance public and animal health through the regulation of medicines, medical devices and health

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13 The Central Bank Acts, as well as a number of domestic regulations transposing EU directives (the most notable being the CRD and the EU (Licencing and Supervision of Credit Institutions) Regulations)) apply to the provision of banking services in Ireland.

14 The Markets in Financial Instruments Directive 2004/39/EC.

15 Namely, the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011; the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011; the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011; the European Communities (Electronic Communications Networks and Services) (Universal Service and User's Rights) Regulations 2011; and the European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011.

care products. For example, in order to manufacture (which includes total and partial manufacture, dividing up, packaging and presentation) medicinal products in Ireland, or to import medicinal products into Ireland from outside the EEA, a manufacturing authorisation is required from the IMB.[16] All medicinal products must also be authorised before being marketed in Ireland, and the labelling of medicinal products must comply with the marketing regulations.[17] Medical devices are also subject to regulation by the IMB and must meet the requirements of national legislation that transposes a number of EU Medical Devices Directives.[18]

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 business in Ireland is by incorporation of an Irish company under the Companies Acts 1963 to 2012 (the Companies Acts). There are two basic types of company in Ireland: private and public. 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 the shareholder liability is limited to the amount paid for the shares. 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. It is important to note that a company will not be incorporated in Ireland unless the company will carry on an activity in Ireland. In addition, all companies must have a registered address in Ireland, and must have at least one secretary and a minimum of two directors. Usually, one director will be resident in the EEA unless an insurance bond is put in place.

The procedure for establishing a public limited company is similar; however, a public limited company will be subject to minimum capitalisation requirements and must have a minimum of seven shareholders. No such restrictions exist in respect of a private limited company.

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.

16 The granting of authorisations to manufacture medicinal products is principally governed by the Medicinal Products (Control of Manufacture) Regulations, 2007 (as amended).

17 The marketing of medicinal products is governed by the Medicinal Products (Control of Placing on the Market) Regulations 2007 (as amended).

18 Directive 90/835/EEC concerning active implantable medical devices, Directive 93/42/EEC concerning medical devices and Directive 98/79/EC concerning *in vitro* diagnostics.

Acquisitions can be structured as a share purchase, in which case the shares of the Irish company are acquired directly from the shareholders. All of the assets and liabilities of the target company are acquired in a share purchase. The transaction is documented by a share purchase agreement, which, 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, while the transfer of certain assets may need to be documented separately. In an asset purchase, there is 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 need to be carried out. Third-party consents may also be required in advance of the acquisition (e.g., consent may be needed from the Competition Authority). The acquisition of the 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 introduced a legal framework to enable cross-border mergers between public or private limited companies from Member States of the EEA. All the assets and liabilities of one or more companies are automatically transferred to another company by way of 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 relates to the assimilation of a wholly-owned subsidiary).

iii Joint ventures

Two 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;

b a partnership formed under the Partnership Act 1980 and 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 or the Irish Takeover Rules.

iv Migrations and redomiciliations

A foreign investor can redomicile in Ireland by migrating an existing foreign entity to Ireland. There are a number of ways in which a corporate migration can be effected, and the most suitable migration model depends on the facts and circumstances in each particular instance. Tax considerations in the existing home jurisdiction are the primary driver in the process. Often, the redomiciliation can be effected by the migration of the tax residence of an existing holding company to Ireland by the transfer of its central management and control to Ireland. Another common method is the incorporation of a new Irish legal entity that engages in a share-for-share exchange transaction with the existing foreign holding company and the shareholders.[19]

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 tax perspective for the foreign entity to establish a branch in Ireland. Any foreign 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.

A foreign company that does not register a branch but is carrying on business from a fixed address in Ireland must also register a place of business in Ireland within one month of establishment.

IV REVIEW PROCEDURE

The review procedure that will apply to a merger, acquisition or joint venture that comes within the scope of the Competition Authority is set out below. There is no specific review procedure in respect of public takeovers.[20]

i Financial thresholds

Mergers, acquisitions and full function joint ventures that meet the financial thresholds in the Competition Act must be notified to the Competition Authority within one month of the conclusion of the agreement or the making of a public bid. The financial thresholds that trigger the obligation to notify are:

a the worldwide turnover of at least two of the undertakings involved in the transaction is not less than €40 million;

b at least two of the undertakings involved in the transaction carry on business in any part of the island of Ireland (i.e., Northern Ireland and Ireland); and

c any one of the undertakings involved has turnover in Ireland of not less than €40 million.[21]

The Competition Authority takes a wide view of what constitutes 'carrying on business' in the island of Ireland, which includes undertakings that have any sales into the island

19 Where the foreign entity has been established as a public listed company in a common law jurisdiction, the share-for-share exchange can be effected by means of a court-sanctioned scheme of arrangement in the home country of the existing foreign entity.

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

21 These thresholds do not apply under the special media merger and credit institution regimes.

of Ireland and have a physical presence on the island, as well as undertakings having no physical presence in the island of Ireland that have sales of at least €2 million in the island.

Notified mergers are assessed by the Competition Authority according to whether they will substantially lessen competition in the relevant markets for goods or services in Ireland. This is known as the 'SLC' test.

ii Notification

Currently, merging parties cannot notify the Competition Authority until they have concluded a binding agreement or made a public bid.[22] Notification must be made within one month of the conclusion of a binding agreement or the making of a public bid.[23] A filing fee of €8,000 is payable to the Competition Authority for all mergers. Under the Competition Act, there is an obligation on 'each undertaking involved' to notify the Competition Authority (i.e., the seller and the purchaser).[24] Generally, parties jointly notify the Competition Authority in order to comply with this statutory requirement.

iii Timeline

The Competition Act provides for a two-phase review process. The Competition Authority has an initial period of one month (Phase I) from notification to decide whether to allow the merger to be put into effect on the grounds that there will not be an SLC test or carry out a more detailed investigation. During Phase I, the Authority may also request additional information from the parties, in which case the one-month period runs from the receipt by the Authority of the requested information. Where the Competition Authority 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 four months from notification (i.e., an additional three months, known as Phase II) within which to decide whether the merger should be allowed unconditionally, allowed subject to conditions or prohibited.

As noted above, media mergers are treated separately. While the initial notification in respect of media mergers is made to the Competition Authority, the Competition Act provides that a copy of the notification is sent to the Minister for Jobs, Enterprise and Innovation. If the Competition Authority determines at the end of a Phase I investigation that the media merger will not result in an SLC test, it must inform the Minister, who has a period of 10 days in which to decide, on the basis of specified 'public interest' criteria, to direct the Authority to open a Phase II investigation. If the Authority determines at the end of Phase II either to clear the media merger or to clear it subject to conditions, the Minister may, within 30 days, prohibit the merger or impose stricter conditions, again based on the 'public interest' criteria.

22 The offer must have been posted in accordance with the Irish Takeover Rules.

23 This contrasts with the position under the EU Merger Regulation, which allows for notification to the Commission where the parties demonstrate good faith to enter the transaction.

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

Around 97 per cent of all mergers are cleared in Phase 1.[25] To date, only three mergers have been blocked by the Authority: *IBM/Schlumberger*,[26] *Kingspan/Xtratherm*[27] and *Kerry/Breeo*.[28]

iv Failure to notify

Wilful and knowing failure to notify a transaction that falls within the scope of the Competition Act, or to supply information requested by the Authority within the specified time limit, constitute criminal offences. In addition, transactions that are put into effect without the approval of the Authority are void. To date, the Competition Authority 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 such behaviour.

v Mergers below notification thresholds

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

vi Appeal

A Competition Authority determination 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 Competition Authority determination.

vii Confidential information

As a public body, the Competition Authority is subject to the Freedom of Information Act, 1997–2003 (the FOI Act). Notwithstanding, the FOI Act provides for exemptions for the release of commercially sensitive information by public bodies. In general, the Competition Authority handles commercially sensitive information in accordance with its strict confidentiality obligations. Following receipt of a merger notification, the Competition Authority will publish a standard notice on its website stating that the transaction has been notified to it, and detailing the parties and industry involved.

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25 Competition Authority Annual Report 2012, available at www.tca.ie (in the 'Annual Reports' section).

26 Case M/04/032 *IBM Ireland Limited/Schlumberger Business Continuity Services (Ireland) Limited*. The Competition Authority's determination is at www.tca.ie (in the 'Merger Notifications 2004' section).

27 Case M/06/039 *Kingspan/Xtratherm*. The Competition Authority's determination is available at www.tca.ie (in the 'Merger Notifications 2006' section).

28 Case M/08/009 *Kerry/Breeo*. The Competition Authority's determination is available at www.tca.ie (in the 'Merger Notifications 2008' section).

The merger notification form submitted by the parties will not be made public; however, the Competition Authority's decision (which may contain information from the notification form) will be published. In practice, the Competition Authority 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 Act enables the Competition Authority to enter into arrangements with competition 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 Competition Authority seeks the consent of the notifying parties to enable it to discuss the case with competition officials in other jurisdictions where a notification is made and share information with them.

The Competition Authority is greatly influenced by the work of the International Competition Network, of which it is an active member, and also of the EU, UK and US competition authorities. In addition, it participates in the Advisory Committee on concentrations that must be considered by the European Commission before decisions are made under the EU Merger Regulation.

ix Third parties

Following receipt by the Competition Authority of a notification, third parties are entitled to a 10-day period to submit comments to the Competition Authority expressing their views on the likely effects of the proposed transaction.

V FOREIGN INVESTOR PROTECTION

There is no general regime, *per se*, regarding the protection of foreign investment. Investors from the EU and those from outside the EU 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 Acts, 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 Acts. 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 and can be held personally liable for certain breaches under the Companies Acts.

The Office of the Director of Corporate Enforcement (the 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 Acts 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 Act sets out the circumstances where a right of appeal exists against a decision taken by the Competition Authority. In addition to a right of appeal, there is a general right[29] 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 (Model Law) 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 EU, as the EU has a number of bilateral trade agreements in place. Ireland also has an extensive tax treaty network in place to eliminate or reduce double taxation. To date, Ireland has signed 69 double taxation agreements, 64 of which are in effect. Ireland's Competent Authority is willing to assist Irish taxpayers in requests for Competent Authority assistance under Ireland's double tax treaties, including mutual agreement procedures and advance pricing agreements, and is also active in international tax discussions and developments at EU and OECD level.

The World Bank Doing Business 2012 Report examined Ireland's regime for protecting investors, and ranked Ireland fifth out of the 183 countries measured. The Report measured 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.

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

VI OTHER STRATEGIC CONSIDERATIONS

Ireland offers investors a low corporation tax environment that does not breach EU or OECD harmful tax competition initiatives. As a member of the EU and OECD, Ireland is actively involved in forums to discuss and review FDI. In addition to the low corporation tax rate, Ireland offers investors recourse to an extensive and expanding double taxation treaty network.

Once a decision has been taken 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 early with competition law issues, particularly in relation to timing considerations, which need to take account of any applicable timetable for merger review. Depending on the presence of competition law issues, 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

Ireland continues to adapt and enhance its offering to ensure that it remains a key location for FDI. The government has set a target of becoming the best small country in the world in which to do business by 2016.

Ireland has been responsive to the global financial crisis, and has undertaken significant reforms designed to facilitate a return to growth and employment creation. The government has announced plans to transfer state-owned assets into private ownership, and the state-owned energy utility, Bord Gáis Energy, has been formally put up for sale. Consideration is also being given to the sale of the remaining 25 per cent stake held in Aer Lingus, the partially state-owned flag carrier. Ireland has also established itself as a centre for structuring effective investment in distressed assets through the flexibility of its legal and regulatory regime and favourable tax environment.

The Minister for Enterprise, Trade and Employment recently launched the IDA's strategic blueprint for attracting FDI into Ireland in the coming decade. The IDA intends to focus on winning new investments in global services, high-end marketing, research, development and innovation. The IDA recognises that Ireland's pro-business environment is attractive, and has stated that 'Ireland must ensure that it remains at the forefront of creating a regulatory environment that is robust, credible and 'fit for purpose'. One that does not place undue burdens on business'.

Ireland's legislative landscape is also changing. The recently published Companies Bill 2012 (the Bill) will consolidate and modernise Irish company law. The Bill will provide for a new model private company limited by shares. The new form of private company will:

a only require one director;
b have a one-page constitutional document;
c have the same legal capacity as a natural person; and
d no longer be required to hold a physical annual general meeting.

These changes will make it easier and less costly to start up and run a company. The introduction of the Bill marks 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.

As previously mentioned, Ireland offers investors a low corporation tax environment that does not breach EU or OECD harmful tax competition initiatives. The OECD recently published an Action Plan on Base Erosion and Profit Shifting to address perceived flaws in international tax rules, and Ireland is engaged fully in this process. Because Ireland has been hugely successful in attracting FDI, there has been an inevitable focus on the country, despite the fact that Ireland is not and has never been regarded as a tax haven. If the recommended OECD actions are implemented, Ireland should remain a highly attractive location for business. The American Chamber of Commerce in Ireland (which supports all tax policies that enhance Ireland's competitiveness for investment, increase economic growth and sustain job creation) has stated its commitment to monitor any developments in this area, and to work with the government to implement the recommended actions and respond to the international tax debate.

Appendix 1

ABOUT THE AUTHORS

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Robert O'Shea is a partner in the corporate department at Matheson. He is head of the firm's international business group and co-head of the firm's US business and inward investment groups. He practises corporate law, focusing primarily on the areas of inward investment, international corporate reorganisations, post-acquisition integration and consolidation projects, spin-off transactions, cross-border mergers and acquisitions, joint ventures, general commercial contracts, and corporate governance and compliance.

Mr O'Shea has extensive experience in leading multi-jurisdictional transactions, and has advised in relation to some of the largest inward investment and restructuring projects in Ireland. In particular, he has extensive experience drafting and advising on the legal documentation associated with cross-border restructurings and inward investment projects, and the complex legal issues that can arise in reorganisation projects. At Matheson, he leads a team of corporate lawyers in the international business group who deal directly with overseas clients and counsel on cross-border transactions, including reorganisations and restructurings involving Irish subsidiaries of foreign corporations and the establishment of business operations in Ireland, both by acquisition and start-up.

SARAH JAYNE HANNA
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Sarah Jayne Hanna is an associate in the firm's international business group. She advises US and other multinational clients on inward investment and establishment projects, international corporate reorganisations, pre and post-acquisition integration and consolidation projects, cross-border mergers and acquisitions, general corporate governance and compliance matters and commercial contracts.

She 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, cross-border mergers and acquisitions; and provides ongoing corporate advice and strategic counselling to a range of international corporations.

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