The Foreign Investment Regulation Review

Third Edition

Editor
Brian A Facey

Law Business Research

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THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

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EDITOR'S PREFACE

I am pleased to present the third edition of *The Foreign Investment Regulation Review*. Building on our most recent publication of last year, this edition provides insight into the national regulatory framework for foreign investment review in major jurisdictions around the world, as well as an overview of current trends and developments in this field.

Over the past few years, foreign investment has grown to match levels that were attained during the pre-economic crisis era of the mid-2000s. Relatedly, national economies have continued their recovery from the global financial crisis; on 19 May 2015, the Dow Jones Industrial Average reached a new all-time high. Within this environment, foreign investment often constitutes a source of capital that is key to promoting and sustaining domestic economic growth. From the perspective of investors, it can represent an important opportunity to expand into new markets or to implement efficiency-enhancing improvements to a supply chain. Legislators and regulators operating within this framework frequently face the challenge of attracting sufficient capital to develop the local economy while at the same time protecting national interests, including national security.

The diversity among foreign investment regimes reflects the fact that each nation has a unique set of goals and priorities to consider. Some countries, such as China and Saudi Arabia, have recently introduced reforms aimed at attracting greater foreign investment. At the same time, the experience of jurisdictions such as Canada highlights that foreign investment review remains a balancing act between attracting foreign capital and protecting domestic interests in certain sectors of the economy. One common theme across jurisdictions is that foreign investment reviews continue to present complex issues for businesses, regulatory authorities and legal counsel alike.

Both legal practitioners and companies seeking to do business internationally will benefit by familiarising themselves with the regulatory frameworks outlined in this treatise. Of particular importance, this edition provides readers with practical guidance to navigate investments in major jurisdictions by anticipating key timing and substantive issues. We hope that it allows investors and businesses being acquired to better evaluate and manage risks associated with investments that may be subject to foreign investment review, ultimately reducing transaction uncertainty and delay.

This edition contains contributions from leading experts practising in 23 jurisdictions around the world. I would like to express my gratitude to each author and law firm involved in this project for their commitment of both their expertise and time.

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.

Brian A Facey
Blake, Cassels & Graydon LLP
Toronto
August 2015

Chapter 12

IRELAND

Gina Conheady and Kacey O'Driscoll[1]

I INTRODUCTION

Ireland is one of the most popular and advantageous locations in Europe for multinational corporations to invest in. 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, 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, Airbnb, Facebook and Twitter have all established their operations here in recent years). Ireland 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 attractiveness 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 Gina Conheady is a partner and Kacey O'Driscoll 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 (OECD) FDI regulatory restrictive index, which measures statutory restrictions on FDI in 58 countries.[6]

The Irish legal system, similar to that of the US, 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 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 as the fourth best country in the world in which to do business in a recent study carried out by Forbes.[8] The study, which surveyed 146 countries, placed Ireland fourth following an analysis of 11 different factors including innovation, taxes, property rights, technology, corruption, freedom (personal, trade and monetary) as well as red tape and stock market performance. The report noted that Ireland 'has grown slowly since 2011, but managed to reduce the budget deficit to 7.2 per cent of GDP in 2013. In late 2013, Ireland formally exited its EU-IMF bailout programme, benefiting from its strict adherence to deficit-reduction targets and success in refinancing a large amount of banking-related debt.'

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 Forbes Best Countries for Business 2014 Report, available at www.forbes.com/best-countries-for-business-report.

As part of its active promotion of foreign investment, the government operates a grant aid system administered by the Industrial Development Authority (IDA) that provides grant incentives to certain 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 recently has targeted sectors that produce 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 to do business.

Ireland does not have a single overarching body responsible for regulating investment into 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 anti-trust legislation in Ireland and the EU.[9] The main Irish legislation in relation to antitrust law is the Competition Acts 2002 to 2014. 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 when certain turnover thresholds are met. In addition, where a proposed merger or acquisition of a joint venture meets certain threshold criteria, notification to the European Commission may be required instead under the EU Merger Regulation.[10]

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 Communications, Energy and Natural Resources (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.

9 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.

10 Council Regulation (EC) 139/2004.

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 (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 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[11] 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 (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 (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 services industry and banking business,[12] a licence or approval is required from the Central Bank. To obtain a licence, the undertaking must satisfy several criteria,

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11 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.

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

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 (ISE), they will also be subject to regulation by the ISE.

Once licensed in Ireland, banking and other services (including investment services under MiFID[13]) 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[14] that implement the EU electronic communications reform package (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 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 in Ireland are required to hold a manufacturing authorisation granted by the HPRA.[15] Manufacturing includes activities such as total and partial manufacture, dividing up, 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

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

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

15 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.

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 on the Irish market meet the requirements of the national legislation which transposes into Irish law three EU Directives which form the core legal framework for medical devices.[16]

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 Act 2014 (Companies Act) which came into force on 1 June 2015 (the Companies Act consolidates the 1963–2013 Acts as well as introducing some new innovations). There are two basic types of company in Ireland: private and public. Following 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) which is close in form to the private limited company established under previous companies legislation. 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). 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.

16 Including Directive 90/385/EEC concerning active implantable medical devices, Directive 93/42/EEC concerning medical devices and Directive 98/79/EC concerning in-vitro diagnostics, together known as the Medical Devices Directives.

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 of 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. Where the nature of the assets and liabilities transferring 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 (e.g., consent may be needed from the 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 (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 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 be split 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.

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 (most likely a DAC with a specified objects clause);

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 2002 to 2014 or the Irish Takeover Rules.

iv Migrations and redomiciliations

Ireland continues to be an attractive destination for corporate groups choosing to redomicile their ultimate holding company (commonly referred to as 'inverting' or an 'inversion'). These inversions are driven by the desire to take advantage of Ireland's favourable tax and corporate governance regime, which can result in a better overall tax rate and reduced compliance costs for the group. In circumstances where a corporate group has significant foreign operations or revenues (or where it is anticipated it will have in the future), an inversion can be a particularly attractive option.

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 US 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 court-approved cancellation scheme of arrangement, the public stockholders agree to the cancellation or swap of their shares in the existing parent company in return for shares in the new Irish parent company. For EU incorporated public companies, an inversion may also be achieved by re-registering the existing parent company as a '*Societas Europaea*' (SE) (the new form of European public company) 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 – this option is not available for US parent companies.

Due to US anti-inversion rules (which continue to treat a foreign company as a US company for tax purposes if over 80 per cent of its shareholders are in the US and it does not have substantial business activities in the foreign jurisdiction), 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 and places the ultimate holding company of the merged group 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 previously mentioned *Actavis Inc/Warner Chilcott Inc* and *Medtronic/Covididen Inc* transactions. Eaton Corporation plc and Perrigo also redomiciled to Ireland courtesy of their acquisitions of Cooper Industries and Elan respectively.

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

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.[17]

i Financial thresholds

Mergers, acquisitions and full function joint ventures that meet the financial thresholds in the Competition Acts 2002–2014 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 (ie, 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.

The above 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.

The above turnover thresholds are disapplied for 'media mergers'.

17 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.

The CCPC also has jurisdiction to investigate mergers which fall below the above turnover thresholds under sections 4 and 5 of the Act (ie, where 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 geographic allocation of turnover, for the purposes of the above 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.

Notified mergers are assessed by the CCPC 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

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'.[18] A filing fee of €8,000 is payable to the CCPC for all mergers. Under the Competition Acts 2002–2014, there is an obligation on 'each undertaking involved' to notify the CCPC (i.e., the seller and the purchaser).[19] Generally, parties jointly notify the CCPC to comply with this statutory requirement.

iii Timeline

The Competition Acts 2002–2014 provide for a two-phase review process. The CCPC has an initial period of 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 request additional information from the parties, in which case the 30 working day runs from the receipt by the CCPC of the requested information. Where 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 request for information.

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 2002–2014 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, commencing 10 days after a CCPC determination clearing the merger, to consider the media merger. If the Minister is concerned that the media merger may be contrary to the public interest in protecting plurality of the media, the Minister will request the

18 Section 18(1A)(b)(ii) of the Competition Acts 2002–2014.

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

Broadcasting Authority of Ireland (BAI) to carry out a 'Phase II' examination. Once in receipt of a BAI report, in such circumstances the Minister has a period of 20 working days to make the final determination on the media merger and has the power to prohibit the merger or impose stricter conditions, again based on the 'public interest' criteria.

Around 95 per cent of all mergers are cleared in Phase 1 (and usually within one calendar month).[20] To date, only three mergers have been blocked by the CCPC: *IBM/Schlumberger*,[21] *Kingspan/Xtratherm*[22] and *Kerry/Breeo*.[23]

iv Failure to notify

Failure to notify a transaction that falls within the scope of the Competition Acts 2002–2014, or to supply information requested by CCPC within the specified time limit, can constitute criminal offences punishable by fines 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 such behaviour.

v Mergers below notification thresholds

Mergers below the notification thresholds can also potentially limit competition. The Competition Acts 2002–2014 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, 1997–2014 (the FOI Act). Notwithstanding, the FOI Act provides for exemptions for the release of commercially sensitive information by public bodies. In general, the CCPC

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20 The Competition Authority's Annual Report 2013, available at www.tca.ie (in the 'Annual Reports' section).

21 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).

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

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

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 decision of the CCPC (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 2002–2014 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 where a notification is made and 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 such as the EU, United Kingdom and United States, including in particular the UK Competition and Markets Authority and the European Commission regarding cases that are subject to parallel reviews in the United Kingdom and Ireland and EU cases that may impact on Ireland.

ix Third parties

Following receipt by the CCPC of a notification, third parties have a 10-day period to submit comments to the CCPC 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 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 to 2014 sets out the circumstances where a right of appeal exists against a decision taken by the Authority. In addition to a right of appeal, there is a general right[24] 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 to eliminate or reduce double taxation. To date, Ireland has signed 72 double tax treaties, 68 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,

The World Bank Doing Business 2015 Report examined Ireland's regime for protecting investors, and ranked Ireland sixth out of the 189 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.

24 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 antitrust 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 antitrust 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 antitrust 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. In light of Ireland's ranking in the 2014 Forbes study as the fourth best country in the world in which to do business, it would seem it is well on target to achieving this.

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's strategy of transferring state-owned assets into private ownership has thus far proven successful, as evidenced by the sale of the former state-owned energy utility, Bord Gáis Energy, to Centrica in a €1.1 billion deal. The government has agreed to approve 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 IDA's strategic blueprint for attracting FDI into Ireland sets out key objectives for 2015–2019.[25] 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, bio pharmaceuticals, medical devices, engineering, ingredients and financial services. 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 and the creation of 80,000 new jobs. Ireland's legislative landscape is also changing. The Companies Act came into force on 1 June 2015. It is the largest piece of substantive

25 IDA Ireland: Winning: Foreign Direct Invesment 2015–2019.

legislation in the history of the Irish State and consolidates and modernises Irish company law. The Companies Act introduced several positive company law reforms that will further enhance Ireland's competitive position as a location for business investment. As explained, the Companies Act provides for a new model private company limited by shares, the LTD. The LTD:

a only requires one director;
b has a streamlined one-document constitution;
c has the same legal capacity as a natural person; and
d is no longer required to hold a physical annual general meeting.

These changes make it easier and less costly to start up and run an Irish company. The coming into force of the Companies Act 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.

In terms of developments in Irish antitrust legislation, the enactment of the Competition and Consumer Protection Act 2014, has reformed the turnover thresholds and timelines of Irish merger notification procedures.

As previously mentioned, Ireland offers investors a stable corporation tax environment and a low corporation tax rate. Ireland's corporation tax regime does not breach EU or OECD harmful tax competition criteria. Ireland is an active participant in the OECD's base erosion and profit shifting (BEPS) project. Indeed, in 2014, the Irish Department of Finance launched a public consultation on BEPS in an Irish context to gather views on how Ireland's tax system should respond to a changing international tax environment. At the early stages of the BEPS project there was some focus on Ireland and in particular its tax residence rules for Irish incorporated companies. Ireland made changes to those rules in 2014 to address those concerns. Ireland's corporate tax residency rules now restrict the ability of Irish incorporated companies to be treated as non-Irish resident. This change affects certain companies that have implemented the 'double Irish' arrangements. For existing companies, a grandfathering period will apply until the end of 2020 (i.e., for six years) allowing companies considerable time to revisit their current arrangements. The change applies to all new companies incorporated on or after 1 January 2015.

At the time the changes to the corporate tax residency rules were announced, the Irish Minister for Finance also announced a new tax regime for intellectual property called the 'knowledge development box'. Similar to a patent or innovation box, the knowledge development box will offer a competitive low tax rate for income earned exploiting certain qualifying intellectual property. Full details of the new regime are due to be announced in late 2015.

It is intended that Ireland will remain a highly attractive location for international business. This is reflected a document published by the Department of Finance following Ireland's consultation on BEPS (entitled Competing in a Changing World – A Road Map for Ireland's Tax Competitiveness): '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.'

Appendix 1

ABOUT THE AUTHORS

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Matheson

Gina Conheady is resident counsel at Matheson's Palo Alto office and a partner in the firm's international business and US business groups.

She practises corporate law, focusing primarily on advising US and other overseas clients on inward investment and establishment projects, international corporate reorganisations, pre and post-acquisition integration and consolidation projects, cross-border mergers and acquisitions, corporate governance and compliance matters, and general commercial contracts.

Ms Conheady 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, she 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.

Ms Conheady is a member of the Law Society of Ireland and the California Bar.

KACEY O'DRISCOLL

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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.

She gained a BA (Hons) in Law and Accounting from the University of Limerick and is a member of the Law Society of Ireland.

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