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Investing In...

Ireland

Law & Practice
and
Trends & Developments

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2021

IRELAND

Law and Practice

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1. Legal System and Regulatory Framework

1.1 Legal System

Ireland is a common law jurisdiction similar to the United States and the United Kingdom.

Common law in Ireland co-exists with legislation enacted by the Oireachtas (the Irish Parliament). Statute law is enacted by the Oireachtas and secondary legislation is enacted by bodies or individuals which are conferred with that power by statute.

Ireland is also a member of the European Union (the only common law and the only English-speaking jurisdiction remaining in the EU since the UK left the EU on 31 January 2020), the laws of which are supreme to national law. This means that Ireland is bound by EU law and there is an obligation on national courts to interpret domestic law, as far as possible, in conformity with EU law.

The Irish High Court has full jurisdiction in, and power to determine, all matters and questions, whether of law or fact, civil and criminal. The High Court also operates a separate division, the Commercial Court, in order to resolve commercial disputes quickly, cost-effectively and in a relatively truncated timeline.

Appeals from the High Court may go to the Court of Appeal or Supreme Court. The Supreme Court is the court of final appeal. Appeals can only be made where the court grants permission in limited circumstances.

The Companies Act 2014 regulates most aspects of Irish companies from their formation to their dissolution. The Companies Act 2014 regulates share capital, distributions, duties of directors, publication of accounts and other documents, and the management and administration of companies.

Organisations relevant to the operation of business in the jurisdiction include, but are not limited to:

- the Companies Registration Office (CRO), which is responsible for the enforcement of the filing obligations of companies under the Companies Act 2014;
- the Office of the Director of Corporate Enforcement, which is responsible for the general enforcement of the Companies Act 2014;
- the Competition and Consumer Protection Commission (CCPC), which is responsible for the promotion and enforcement of competition law; and
- the Revenue Commissioners, which is Ireland's tax authority.

1.2 Regulatory Framework for FDI

Ireland currently has no restrictions on investors investing in Ireland but this will be subject to certain limited changes with the recent announcement of domestic legislation to be introduced – the Investment Screening Bill 2020, described further below.

Ireland is subject to the requirements of EU Regulation 2019/452 (the "EU FDI Regulation"). The EU FDI Regulation, which was adopted in April 2019 and came into force on 11 October 2020, is a response to growing concern amongst EU member states regarding the purchase of, and investment in, a number of strategic European companies by foreign-owned firms (and in certain cases, state-owned firms) that may undermine a member state's security or public order. See further details below.

2. Recent Developments and Market Trends

2.1 Foreign Direct Investment in the Current Climate

FDI into Ireland has continued to show significant strength and resilience throughout the COVID-19 pandemic.

Trends include:

- continued significant investment from the technology and pharmaceutical sectors;
- further interest in using Ireland as the location for European headquarters/platforms in the context of Brexit (with Ireland being the only common law and the only English-speaking jurisdiction remaining in the EU since the UK left the EU on 31 January 2020); and
- companies moving parts of their businesses to Ireland, also in the Brexit context, to ensure that they are governed by the EU GDPR regime.

3. Mergers and Acquisitions

3.1 Transaction Structures

Acquisitions in Ireland generally use one of five structures (each of which can include various options):

- acquisitions of shares;
- acquisitions of business/assets;
- schemes of arrangement;
- mergers (under the EU cross-border rules, a domestic merger or a continuation style cross-border merger in some cases); and

- use of a new holding company – this structure has many uses but is particularly useful for deSPACing transactions where the target is non-US.

Public Company Takeovers

Public company takeovers/acquisitions in Ireland are most frequently effected by scheme of arrangement under the Companies Act. This well-established framework has the advantage of acquiring 100% of the shares in the target on completion, including from any minority dissenting shareholders.

A tender offer which is made by a buyer to the target's shareholders is more commonly used in hostile or competitive situations. As part of this structure, provided certain minimum acceptance conditions are met, a buyer can use a statutory "squeeze-out" procedure to compulsorily acquire the shares of dissenting shareholders either under the Companies Act or the Takeover Board's Directive.

Under the European Communities (Cross-Border Mergers) Regulations 2008 (as amended) it is possible to acquire an Irish publicly traded company by way of a legal merger (where the merger involves at least one Irish company and at least one EEA company).

A reverse takeover under the Rules may also be used to acquire control of publicly listed Irish companies.

A recent change in stamp duty law means that schemes of arrangement no longer avoid stamp duty of 1% which applies to many share deals in Ireland.

Key Considerations

Key considerations for foreign investors include the following.

- The type of transaction (eg, share sales are the most common transaction in Irish mergers and acquisitions but asset sales are most commonly seen in: (i) insolvency processes; (ii) demergers/spins; and (iii) intra-group reorganisations).
- Stamp duty (which differs depending on the assets being acquired, eg, shares or other assets). Transfers of shares in Irish companies are normally subject to 1% stamp duty (subject to certain exceptions). Stamp duty of up to 7.5% can apply to the transfer of assets. However, this stamp duty does not apply to some assets (eg, IP) and proper structuring of the transaction can often reduce the applicability of this rate of stamp duty to all assets.
- Timing – eg, asset deals, whilst beneficial from a timing perspective on due diligence, as deals can be effected with limited due diligence if it is agreed that only specified assets and liabilities will be transferred, often result in the application of the EU TUPE rules which generally require a 30-day consultation process with employees. The shares in an Irish company can be acquired with a simple stock transfer form, subject only to conducting due diligence, agreeing deal terms and obtaining any regulatory approvals. Domestic mergers require financial statements to be available for review for 30 days prior to the relevant merger becoming effective and this timetable cannot be waived.
- Process – schemes of arrangement and cross-border mergers effected under the EU CBM regime usually involve court processes which can involve a process of six to eight weeks.

The advantages and disadvantages of the various structures are as follows.

Share Acquisitions

Advantages

The advantages of share acquisitions are:

- simplicity – the shares in an Irish company can be acquired with a simple stock transfer form;
- speed – unless regulatory or third-party approvals are required, shares can be acquired immediately upon the relevant documents being signed;
- only 1% stamp duty applies on the transfer of shares of Irish companies (subject to certain exceptions); and
- very little interruption to the business of the company – subject to change-of-control provisions, contractual arrangements to which the company is a party remain intact.

Disadvantages

The disadvantages of share acquisitions are:

- all liabilities, including unknown liabilities, remain with the company and hence become the buyer's indirect responsibility; however, allocation of risk in the share purchase agreement largely addresses this risk;
- as all liabilities, including unknown liabilities, remain with the company and hence become the buyer's indirect responsibility, the allocation of risk in the share purchase agreement needs detailed focus; however, the overall trend in the Irish market is towards focusing on deal-specific issues rather than heavily negotiating the share purchase agreement; and
- the tax basis of the assets owned by the company is unchanged. Accordingly, the buyer may inherit latent capital gains in the company's assets, resulting in a high liability to tax on capital gains on any future disposal of those assets by the company.

Asset Acquisitions

Advantages

The advantages of asset acquisitions are:

- selectivity – save in respect of the application of the EU TUPE rules to employees, the assets and liabilities being transferred can be agreed between the seller and the buyer – hence this is the preferred structure used where there are solvency issues with the seller;
- deals can be effected with limited due diligence as it can be agreed that only specified assets and liabilities will be transferred;
- the EU TUPE rules (where a business undertaking is being transferred) is such that employees transfer automatically as a matter of law to the buyer;
- shareholder approval is normally not required; and
- the tax basis in the assets acquired is stepped up to the value paid for them on acquisition, which will be beneficial if the acquiring company should dispose of those assets in the future.

Disadvantages

The disadvantages of asset acquisitions are:

- timing – the EU TUPE rules generally require a 30-day consultation period with employees such that a split signing and completion is normally required;
- restrictions on transfers, particularly in customer contracts and real estate arrangements can result in third-party consents often being required;
- restrictions on transfers, particularly in customer contracts and real estate arrangements can result in third-party consents often being required;
- stamp duty of up to 7.5% can apply to the transfer of assets; however, this stamp duty does not apply to some assets (eg, IP) and proper structuring of the transaction can often reduce the applicability of this rate of stamp duty to all assets;
- historic liabilities of the seller relating to the employees transferring under the EU TUPE rules transfer to the buyer (save in respect of pensions); and
- VAT can arise on asset acquisitions, although a transfer of business relief may be available depending on the facts.

Schemes of Arrangement

Advantages

The advantages of schemes of arrangement are:

- approval thresholds – approval required from a majority in number representing 75% in value voting at a shareholder meeting, which contrasts with the Irish statutory drag threshold of 80% (or 90% in some cases);
- 100% ownership delivered upon registration of the court order; and
- very little interruption to the business of the company – subject to change-of-control provisions, contractual arrangements to which the company is a party remain intact.

Disadvantages

The disadvantages of schemes of arrangement are:

- the court process has an effect on timing and control; however, schemes are a very commonly used structure, particularly in public company transactions, and with proper planning the court process is easily worked into the overall transaction process/timetable;
- all liabilities, including unknown liabilities, remain with the company and hence become the buyer's indirect responsibility; however, allocation of risk in the transaction agreement largely addresses this risk; and
- as all liabilities, including unknown liabilities, remain with the company and hence become the buyer's indirect responsibility, the allocation of risk in the transaction agreement needs detailed focus. However, the overall trend in the Irish market is towards focusing on deal-specific issues rather than heavily negotiating the transaction agreement. Stamp duty applies at a rate of 1% to a cancellation scheme or arrangement as a result of a recent change in Irish law.

Mergers

Advantages

The advantages of mergers are:

- clean transfer of assets/liabilities into the successor entity;
- the EU CBM process is a very well-known process and is widely used and understood;
- very little interruption to the business of the company – subject to change-of-control provisions, contractual arrangements to which the company is a party remain intact; and
- generally possible to avoid stamp duty either through a specific exemption or with appropriate structuring.

Disadvantages

The disadvantages of mergers are:

- court process for some of the processes (such as most EU cross-border mergers) has an effect on timing and control; however, CBMs are a very commonly used structure and with proper planning, the court process is easily worked into the overall transaction process/timetable;
- all liabilities, including unknown liabilities, transfer to the successor entity and hence become the buyer's indirect responsibility; however, allocation of risk in the transaction agreement largely addresses this risk;
- as all liabilities, including unknown liabilities, transfer and hence become the buyer's indirect responsibility, the alloca-

tion of risk in the transaction agreement needs detailed focus; however, the overall trend in the Irish market is towards focusing on deal-specific issues rather than heavily negotiating the transaction agreement; and
- there is no step-up in tax basis of the assets of the company, so latent gains in the company's assets will be inherited.

New Holding Company

Advantages

The advantages of a new holding company are:

- from a presentation perspective, this can often look most like a merger;
- the new entity becomes the main successor entity with the associated mitigation of risk around historic liabilities, or having to elect for one entity to be subsumed into another entity; and
- it may be possible to structure this without stamp duty, depending on structuring.

Disadvantages

The disadvantage of a new holding company is that, as with a share acquisition, there is no step-up in tax basis in the assets of the company being acquired.

Minority Investments

Minority investments are structured according to whether the investment is a primary or secondary transaction. In many transactions, the investor will subscribe for new shares in the relevant company.

If the minority investment involves a secondary sale by an existing shareholder this will usually be structured as a sale of shares to the new minority investor.

A secondary sale can also be structured as a subscription for new shares and existing shares can be bought back through a redemption mechanism from the proceeds of the subscription. Whilst this structure is sometimes seen when buying the entire issue shares of a company, it is relatively rare, and a straight sale of shares is far more common.

Irish law provides minimal protection rights to a minority investor, so almost invariably the minority investor will ask for a shareholders' agreement to be put in place. The parties to such arrangements are typically all other shareholders and the company, with some of the key provisions also being included in the company's publicly filed constitution. Practice can differ as regards what terms are included in the private shareholders' agreement and what terms are included in the publicly filed constitution. The better approach is for all terms to be included in the private shareholders' agreement and for only certain of these terms to be replicated in the publicly filed constitution. These would typically involve matters that the parties wish to be publicly available information such as restrictions on the issue of shares, restrictions on the transfer of shares, tag-along rights and, sometimes, details on the required quorum for a board meeting or a shareholders' meeting.

3.2 Regulation of Domestic M&A Transactions

The Investment Screening Bill 2020 will, once introduced into Irish law, provide the minister for Enterprise, Trade and Employment with the power to assess, investigate, authorise, condition, prohibit or unwind foreign investments from outside the EU, based on a range of security and public order criteria.

The merger control regime described below also applies.

The Irish Takeover Panel Act 1997 (the "Act"), the Irish Takeover Panel Act 1997 Takeover Rules 2013 (the "Rules"), the Substantial Acquisition Rules (SARs) and the European Communities (Takeover Bids) Regulations ("Takeover Regulations") together regulate the M&A activity relating to public companies. The provisions of the Act, Rules and Takeover Regulations are enforced by the Irish Takeover Panel (the "Panel").

The European Union (Market Abuse) Regulations 2016 impose obligations on companies that have securities listed on regulated markets.

The Irish Listing Rules ("Listing Rules") apply if the company is listed on the Irish Stock Exchange.

4. Corporate Governance and Disclosure/Reporting

4.1 Corporate Governance Framework

The key governing body of a company is its board of directors. The board usually delegates day-to-day management to employees – however, it is ultimately responsible for the management of the company, and it is expected to supervise managers and exercise oversight in order to fulfil its fiduciary duties.

Certain core matters are regularly reserved to shareholders for consent in joint ventures or where there are multiple shareholders – see further discussion below.

Companies

Companies are the main form of business vehicle used in Ireland and include:

- private limited companies;
- designated activity companies (DACs) limited by shares;

- DACs limited by guarantee;
- companies limited by guarantee;
- public limited companies;
- public unlimited companies with shares;
- public unlimited companies without shares;
- private unlimited companies with shares; and
- societas Europaea (deemed public companies).

The primary advantages of companies include:

- limited liability for members (except for an unlimited company);
- separate legal personality to members;
- tax advantages including corporate tax rate;
- having multiple members (up to 149 for private companies, unlimited for public companies); and
- perpetual succession.

However, the disadvantages of a company include:

- the requirement to deliver particulars of a large number of events to the Companies Registration Office for filing on the public register;
- the obligation to publicly file annual financial statements; and
- the obligation to have financial statements audited (except for certain small private companies).

Partnerships

Another form of business vehicle is the partnership model. A partnership can exist without formal registration and partners have unlimited liability.

Limited partnerships are also permitted in Ireland. In this case, a distinction is drawn between general partners who manage the firm's business and have unlimited liability, and limited partners who invest fixed amounts of money in the partnership and are liable for its debts and obligations up to the amount of their capital investments. Limited partners are not permitted to participate in the management of the partnership and may risk losing their limited liability status if they breach this obligation. It is possible for a limited liability company to be the general partner.

The law relating to partnerships is contained in the Partnership Act 1890 and common law and, for limited partnerships, the Limited Partnership Act 1907.

The primary advantages of a partnership are that they:

- are transparent from an accounting and taxation perspective;
- can provide for limited liability for the limited partners; and
- in practice can provide for limited liability for all partners, as the partners themselves are typically limited liability companies.

The main disadvantages are that:

- they do not have separate legal personality from the partners that comprise them (except in the case of limited liability partnerships where certain partners have unlimited liability);
- the set-up costs can be greater than those of a company, as the governing rules need to be considered in detail; and
- succession of ownership is not as straightforward as in a company.

The most common form of business vehicle used in Ireland is a private limited company (LTD). An LTD is an entity separate from its shareholders. The liability of shareholders is generally limited to the amounts (if any) unpaid on their shares. This means that directors' and shareholders' personal assets are generally not at risk in the event of the company's insolvency.

The major difference between an LTD and the other company types is that it has full and unlimited capacity, in that it does not have an objects clause.

There are certain limitations to an LTD, for example they cannot operate as a credit institution or insurance undertaking and they cannot have publicly listed debt or equity securities.

4.2 Relationship between Companies and Minority Investors

Minority shareholders generally have very few rights under Irish law, save for the right to attend and vote at annual general meetings.

There is a concept in Irish law of minority oppression but this is a difficult claim for a minority to bring if the minority has been treated fairly/equally with other shareholders.

It is very difficult under Irish law for shareholders to claim directly against directors in respect of any grievance.

Key principles for a minority investment in a public company are that:

- any material interest (generally 3%) will need to be notified to the relevant company;
- any material minority shareholder will tend to seek the right to appoint a representative on the board of directors; and
- minority investments are nearly always structured for an interest of less than 30%, as a holding of voting shares of

30% or more may require the shareholder to make a bid to acquire the entire company.

Rights for minority investors in private companies will very much depend on the level of the minority interest but would be expected to include at least:

- pre-emption rights on the issue of new securities;
- pre-emption rights on the transfer of securities;
- tag-along rights on any significant sale of shares;
- the right to a seat on the board; and
- veto rights typically in respect of a material number of matters relating to the operation of the relevant business.

4.3 Disclosure and Reporting Obligations

Filing Returns to the Companies Registration Office

Both public and private companies, with limited exceptions applicable to private companies, must file annual returns in the Companies Registration Office (CRO) in Ireland appending audited financial statements and providing the details of the company's officers, shareholders and share capital. An Irish subsidiary may file consolidated financial statements of an EEA parent instead of its own financial statements in circumstances where the parent has given a guarantee in respect of that subsidiary's liabilities.

Beneficial Ownership Information

There is a mandatory reporting regime for beneficial ownership information of shareholders as part of an EU-wide anti-money laundering regime. The European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019 ("2019 Regulations") came into force on 22 March 2019. The 2019 Regulations transpose Article 30 of Directive 2015/849/EU on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (Fourth EU Anti-Money Laundering Directive) (as amended) into Irish law. The 2019 Regulations restate a previously existing obligation on Irish companies to hold adequate, accurate and current information on their beneficial owner(s) in their own beneficial ownership register. A Central Register of Beneficial Ownership is maintained by the CRO. Companies are required to submit information on their beneficial owners electronically to the CRO. This information includes the name, date of birth, nationality, residential address and Personal Public Service (PPS) number of each beneficial owner and a statement of the nature and extent of interest held by each beneficial owner.

A company is obliged to keep the information on its internal beneficial ownership register accurate and up to date. If any updates to its internal register are required, the company must also notify the CRO of any relevant changes within 14 days of making the updates.

Certain state bodies (including *An Garda Síochána* (the police force), the Revenue Commissioners and the Criminal Assets Bureau) have unrestricted access to the Central Register of Beneficial Ownership. Members of the public are able to access certain information, including the name, month and year of birth, country of residence, nationality and statement of the nature and extent of the interest held or control exercised by each beneficial owner.

Data on FDI

The Central Statistics Office (CSO) collates data on FDI and reporting on same by relevant companies is obligatory (albeit that reports from the CSO do not include information on individual companies).

Reporting on Interests in Securities

There are various reporting obligations in respect of interests in securities. Such obligations arise under the Companies Act, the Irish Takeover Rules, the Listing Rules, the Transparency (Directive 2004/109/EC) Regulations 2007 (as amended) ("Transparency Regulations") and the European Union (Market Abuse) Regulations 2016.

5. Capital Markets

5.1 Capital Markets

The main equity capital markets used by Irish companies are the Dublin, London and New York capital markets and very often a combination of the same. Debt capital markets often involve the United States.

There are many Irish incorporated companies listed in the United States and there is a growing trend towards Irish companies accessing the US equity markets.

Bank financing from both domestic and international banks is common.

Private equity and venture capital financing is also very common. International investors are very active in the Irish market.

5.2 Securities Regulation

A foreign investor would not be subject to any particular laws simply because they are not a domestic investor.

The legal framework for the securities markets is established by the Companies Act 2014.

Securities laws are governed by the Companies Act; the Listing Rules; the Transparency Regulations and the European Union (Market Abuse) Regulations 2016; the Irish Takeover Panel Act

1997; the Irish Takeover Panel Act 1997 Takeover Rules 2013; the SARs; the Takeover Regulations; and various rules relating to the obligation to publish a prospectus.

The Central Bank of Ireland has been appointed as the competent authority for the purposes of the prospectus, transparency, market abuse and markets in financial instruments laws.

Securities exchange rules will also apply, depending on in which market the relevant securities are listed.

5.3 Investment Funds

FDI in Ireland by foreign investment fund structures does not, solely by virtue of such investment, subject that foreign investment fund to Irish regulatory review. However, foreign investment companies are generally not used for investment in Ireland, as there are a range of alternative structures that enable investment funds to address tax issues.

Irish Collective Asset-Management Vehicle

In Ireland, there is a specific fund vehicle known as an Irish Collective Asset-Management Vehicle (an "ICAV") that is subject to its own legislative regime. ICAVs benefit from special tax treatment with regard to the direct taxation of the vehicle and the taxation of shareholders. Under the US "check the box" taxation rules, an ICAV can elect to be classified as a transparent entity for US federal income tax purposes. This allows US investors to avoid certain tax consequences that would normally apply to passive foreign investment companies.

ICAVs do not need to comply with many Irish company law requirements, such as the requirement to produce consolidated accounts, which can reduce administration costs and ongoing obligations.

ICAVs are regulated by the Central Bank of Ireland. It is possible for investment funds established in the Cayman Islands, the British Virgin Islands, Bermuda, Jersey, Guernsey and the Isle of Man to migrate to Ireland as an ICAV by applying to the Central Bank of Ireland.

6. Antitrust/Competition

6.1 Applicable Regulator and Process Overview

Ireland has a merger control regime, which is set out in Part 3 of the Competition Act 2002 (as amended) (the "Competition Act").

Merger Control Regime

Thresholds

The CCPC is responsible for the enforcement of competition law in Ireland. The CCPC reviews notifiable mergers, which meet the mandatory thresholds for notification. These provide that a proposed "merger or acquisition" must be notified to the CCPC where:

- the aggregate turnover in the state of the undertakings involved in the most recent financial year is not less than EUR60 million; and
- the turnover in the state of each of two or more of the undertakings involved in the most recent financial year is not less than EUR10 million.

In the context of an acquisition of control, the turnover of the entire group to which the acquirer belongs is taken into account for the purposes of the above thresholds. However, only the turnover of the target business or businesses is taken into account, and not the turnover of the seller's group to which the target belongs, if only specific entities within the group are being acquired.

Control

The definition of "control" under the Competition Act is very similar to the definition under the EU Merger Regulation (EUMR) and concerns the ability for one undertaking to exert "decisive influence" over another. Decisive influence may be obtained on a legal or factual basis, including via the acquisition of a majority of voting rights at shareholder or board level, or the ability to veto strategic decisions of the target business.

Media Mergers

Notification is also mandatory where the proposed transaction constitutes a "media merger" under Part 3A of the Competition Act. Media mergers must be notified to the CCPC where:

- the merger or acquisition involves two or more undertakings which carry on a "media business" in the state; and
- the merger or acquisition involves one or more undertakings that carry on a "media business" in the state and one or more undertakings that carry on a "media business" elsewhere.

Media mergers must be notified even if the financial thresholds set out above are not met. In addition to being approved by the CCPC, media mergers must also be notified to the minister for tourism and media for an additional assessment before they can be put into effect.

Notification process

It is a criminal offence to fail to notify a transaction that meets the thresholds or otherwise qualifies for review under the Competition Act. Moreover, a transaction that is notified to the CCPC cannot be put into effect until the transaction is cleared or the applicable statutory period for the CCPC to make a determination expires without the CCPC making a determination.

The notification to the CCPC can be made once the parties are able to demonstrate a "good faith" intention to proceed with a transaction, and in practice this is usually made after a binding (but conditional) transaction agreement has been entered into by the parties. Since July 2020, the CCPC has introduced a Simplified Merger Notification Procedure for transactions that are unlikely to raise competition concerns (eg, because they do not give rise to any overlaps or because the combined share of the parties on the relevant markets is below a certain threshold).

Phase I Investigation

The CCPC has 30 working days from the date of notification to clear the transaction or open a Phase II investigation. The review time can be reset where the CCPC makes a formal Requirement for Information (RFI) in writing, in which case, the CCPC will have 30 working days from the date on which the RFI is complied with to clear the transaction or open a Phase II investigation.

Phase II Investigation

The CCPC has 120 working days from either the date of notification or the date on which the RFI is complied with to make a Phase II determination.

The deadlines by which the CCPC must issue a determination may be extended where proposals to address competition concerns are made by the parties.

EUMR

Where a transaction meets the financial thresholds for notification to the European Commission under the EUMR, then the Commission has exclusive jurisdiction to review the case, and no separate notification is required to be made to the CCPC (unless the transaction is "referred back" to the member state). Where the relevant financial thresholds are not met, the transaction can still be reviewed by the European Commission under Article 4(5) or Article 22 of the EUMR although, in practice, such cases are rare in an Irish context.

6.2 Criteria for Review

The CCPC examines whether the result of the merger or acquisition would substantially reduce competition in markets for goods or services in the state. The CCPC's approach closely follows that of the European Commission in applying the significant impediment to an effective competition test under the EUMR, and involves defining relevant product and geographic markets and assessing the economic impact of the proposed transaction on competition in those markets.

In conducting its analysis, the CCPC will consider a range of evidence. Parties are required to submit a detailed Merger Notification (similar to a Form CO notification to the European Commission). In addition, the CCPC may consider economic and documentary evidence submitted by the parties. It will also consider submissions received from third parties (and/or conduct market enquiries from customers, competitors and suppliers of the merging parties).

Specific areas of concern include the effect of the merger or acquisition on the price of the affected products, changes to output, quality, consumer choice and innovation. The CCPC examines the competitive effects of the merger not only on the immediate consumer but also on subsequent, intermediate and final consumers.

6.3 Remedies and Commitments

Where the CCPC identifies potential competition concerns, it may discuss with the undertakings involved in a transaction, measures which would remedy any effects of the merger or acquisition on competition. These commitments can be entered into at Phase I or Phase II. The types of remedies will depend on the particular circumstances of individual cases, but can include:

- structural remedies, such as divestments of overlapping business areas;
- behavioural remedies, such as commitments to provide access to certain equipment or technology or refrain from certain behaviours in the market; or
- a combination of the two.

Once commitments have been agreed with the CCPC, they will become binding on the undertaking that gives them.

6.4 Enforcement

A transaction that is required to be notified to the CCPC may not be put into effect until the CCPC has cleared the transaction. If a notified transaction is put into effect prior to receiving clearance, it will be void.

Enforcement

The High Court can grant injunctions to enforce compliance with the terms of commitments agreed with the CCPC. Any person who contravenes a commitment is guilty of an offence and can be liable to fines and/or imprisonment.

Appeal

The notifying parties can appeal the decision of the CCPC to prohibit a transaction or subject the transaction to certain conditions to the High Court. However, the High Court shall presume, unless it considers it unreasonable to do so, that any matters accepted or found to be fact by the CCPC were correctly so accepted or found. A further appeal may be taken from a decision of the High Court to the Court of Appeal on a point of law.

7. Foreign Investment/National Security

7.1 Applicable Regulator and Process Overview

To date, Ireland does not have a foreign investment/national security review regime applicable to FDI.

The EU FDI Regulation introduces minimum rules for countries that choose to screen FDI and obliges all member states to have a national contact point to receive and respond to queries from the European Commission and other member states in relation to FDI.

The EU FDI Regulation requires member states to receive and respond to queries from the European Commission or other member states and meet annual reporting obligations.

Co-operation with the European Commission and Member States

Where another member state considers that FDI planned or completed in Ireland is likely to affect the security or public order of that member state, it may provide comments to Ireland and request information. Comments and requests for information must also be sent to the European Commission, which will notify other member states about these comments or requests for information.

Where the European Commission considers that FDI planned or completed in Ireland is likely to affect the security or public order in more than one member state or, if it has information relevant to the FDI, it may issue an opinion to Ireland and request certain information. Another member state may also request an opinion from the European Commission if it considers the FDI is likely to affect its security or public order.

In the event that any comments or opinions are received in relation to FDI, Ireland must give such comments and opinions due consideration.

Annual FDI Report

By 31 March each year, each member state must submit an FDI report to the European Commission containing information on FDI that took place in their territory and any requests received from other member states that year. If the member state has a screening mechanism in place it will also need to provide information on the application of the screening mechanism.

Following a consultation process in early 2020, the Department of Enterprise, Trade and Employment announced in September 2020 that it was preparing legislation to give effect to the FDI Regulation in Ireland. This legislation, the Investment Screening Bill, will provide the Minister for Enterprise with the power to assess, investigate, authorise, condition, prohibit or unwind foreign investments from outside of the EU, based on a range of security and public order criteria.

The Bill is expected to be published in early 2021 and enacted during the course of the year. In the meantime, no specific guidance has been issued on its contents. However, when the Bill is introduced, investors should expect to be obliged to provide basic information regarding the investment, including details of its structure and the source, value and timing of the investment, together with details of the products/services involved. Depending on the structure of the screening process ultimately adopted in Ireland, there may be costs and timeline implications for transactions that fall within the jurisdiction of the new screening regime.

Whilst this will be the first significant piece of legislation to screen foreign investments in Ireland, it is not expected to fundamentally alter the Irish government's long-standing policy of creating a supportive environment to encourage foreign direct investment in the state.

7.2 Criteria for Review

The Investment Screening Bill 2020 will provide the Minister for Enterprise with the power to assess, investigate, authorise, condition, prohibit or unwind foreign investments from outside of the EU, based on a range of security and public order criteria, but the details of such items have not yet been published as at January 2021.

7.3 Remedies and Commitments

Remedies under the Investment Screening Bill 2020 could include the unwinding of foreign investments, so the details of such legislation will need to be considered in detail once published and introduced into Irish law.

7.4 Enforcement

As stated above, under the Investment Screening Bill 2020 the consequence of making an investment in Ireland without

the prior approval of the relevant authority could include the unwinding of investments after the investment is made.

8. Other Review/Approvals

8.1 Other Regimes

Laws and Regulations Applicable to a Foreign Investor

There is no foreign exchange control in Ireland.

The government may restrict financial transactions between Ireland and certain non-EU countries, provided the restriction conforms with EU law.

The EU implements sanctions at an EU level, or as a result of binding resolutions of the Security Council of the United Nations. Ireland adheres to the list of sanctioned individuals and entities prescribed by the EU.

Sanctions imposed by the EU can target governments of third countries, non-state entities and individuals (such as terrorist groups and terrorists).

The Minister for Finance makes regulations under domestic legislation (such as the European Communities Act 1972, the Financial Transfers Act 1992, and the Criminal Justice (Terrorist Offences) Act 2005, as amended), to give effect to the various EU regulations relating to sanctions.

There are no restrictions on foreign ownership of real estate in Ireland.

Investment in specific sectors

There are conditions to establishing businesses in certain industry sectors, including energy, broadcasting, water, waste, and banking and financial services. The relevant regulations apply equally to domestic and foreign acquirers. There are no FDI-specific considerations.

Gas and electricity industries are regulated by the Commission for Energy Regulation (CER). Companies involved in these sectors must obtain a CER licence. This will be relevant when considering an investment in or acquisition of a licence-holder.

Companies must obtain a licence from the Commission of Communication Regulation (ComReg) if an entity is providing television or radio services. These licences generally contain an obligation to notify ComReg of a substantial change of shareholding or control.

Water companies are regulated by the Environmental Protection Agency (EPA). The EPA grants both Integrated Pollution Prevention and Control (IPPC) licences and EPA waste licences for certain activities. IPPC licences are generally open-ended, subject to compliance with their conditions. However, a time limit can be included as a condition.

Waste companies are required to have licences, often granted with a limited time span. IPPC and EPA waste licences can only be transferred with the EPA's prior consent. The EPA will not consent to such a transfer unless it is satisfied as to both the technical and financial competence of the proposed transferee.

Banking and financial services companies must normally apply to the Central Bank of Ireland for authorisation.

9. Tax

9.1 Taxation of Business Activities

Companies in Ireland are subject to the following taxes:

Corporation Tax

Companies that are within the charge to Irish tax (whether by being Irish resident or otherwise being in the charge to tax by carrying on activity in Ireland or otherwise having Irish source income) are subject to tax at a rate of 12.5% on the profits of a trade carried on in Ireland. In order to benefit from this rate, it is important that the company is demonstrably carrying on a trading activity in Ireland. A corporate tax rate of 25% applies in all other cases to the income of companies within the charge to Irish tax (eg, passive income, income from foreign trades and income from certain excepted trades, eg, real estate rental income).

Value Added Tax (VAT)

VAT is charged on goods and services supplied in Ireland in the course of business and on certain imports. The rate of VAT ranges from 0% to 23% depending on the product or service.

Taxation of Capital Gains

Corporation tax is charged on capital gains realised by an Irish resident company on the disposal of its capital assets. Similarly, non-resident companies are liable to capital gains tax on gains arising on the disposal of certain specified assets (including Irish land and shares deriving their value from Irish land). The applicable rate in either case is currently 33%. There are a variety of exceptions, including for certain types of reconstructions and amalgamations, for disposals of substantial (ie, over 5%) shareholdings in subsidiaries, etc (subject to satisfaction of certain conditions).

Stamp Duty

Stamp duty is charged on certain documents (principally, but not exclusively, transfers of Irish situate property and transfers that relate to something done or to be done in Ireland). Stamp duty applies either as a fixed duty or a percentage of the value of the transaction, ranging from 1% (for transfers of shares) to 7.5% (for transfers of other property). There is a variety of exemptions, however, including for transfers of loan capital, IP, foreign shares and securities, intra-group transfers, etc.

Tax Relief

Ireland has an extensive and continuously expanding network of double-tax treaties with other countries worldwide that companies resident in Ireland may utilise. Where there is no double-taxation agreement with a particular country, unilateral provisions within Irish tax legislation allow for credit relief against Irish tax in certain cases.

Partnerships are generally regarded as transparent in Ireland (although the precise treatment of a foreign partnership may need to be considered) and accordingly, any charge to tax will fall on the partners. Other forms of entity can benefit from specific tax treatment. For example, certain regulated fund vehicles benefit from a complete exemption from Irish tax on profits and gains (save where such profits and gains relate to Irish land) and Section 110 of the Taxes Consolidation Act, 1997 provides a favourable tax regime for issuers in securitisation transactions.

9.2 Withholding Taxes on Dividends, Interest, Etc

Dividends paid by Irish companies are generally subject to withholding tax at a rate of 25%. However, there is a wide range of exemptions, including for:

- dividends paid to companies and individuals resident in other EU member states or jurisdictions with which Ireland has a double-taxation agreement; and
- dividends paid to a listed company or a subsidiary of a listed company where the listed company holds 75% of the shares in the subsidiary.

Interest paid to a non-resident is also subject to 20% withholding tax. Similarly, there is a wide range of exemptions under domestic law, including exemptions for:

- interest paid to companies resident in the EU or treaty countries; and
- interest paid on listed bonds.

9.3 Tax Mitigation Strategies

Companies based in Ireland utilise a number of tax mitigation strategies, which very much depend on the nature of the business and the level of presence in Ireland. However, many strategies historically deployed are no longer viable since the introduction of the Anti-Tax Avoidance Directives in the EU which introduced anti-hybrid rules, restrictions on interest deductibility, CFC rules, general anti-abuse rules, etc. Nonetheless, Ireland's 12.5% corporate tax rate remains a very attractive incentive to companies to establish trading operations here and, with additional incentives, this can result in a low effective tax rate for Irish entities. For example, there are a number of incentives available for the development and exploitation of IP through Ireland.

These incentives are:

- a tax credit equal to 25% of eligible expenditure on research and development;
- a capital allowances regime which permits a tax deduction for the amortisation expense taken in the accounts of the Irish company; and
- a 6.25% knowledge development box for income earned from IP to the extent that it is developed in Ireland (applicable to patents and copyrighted software).

9.4 Tax on Sale or Other Dispositions of FDI

A non-resident person is only subject to Irish capital gains tax on a disposal of "specified assets". These include Irish land and minerals and exploration rights or shares deriving their value from those assets, as well as Irish situate assets used for the purposes of a trade carried on in Ireland.

9.5 Anti-evasion Regimes

A general anti-abuse rule applies across a wide range of taxes which is not specific to FDI and targets "tax avoidance transactions" (a very broadly defined term). Transfer pricing also applies in Ireland and has recently been extended to apply to certain non-trading and capital transactions as well as trading transactions. The 2017 OECD Transfer Pricing Guidelines (and certain other OECD publications) have been adopted for the purposes of Irish transfer pricing interpretation. In addition, anti-hybrid rules introduced by the Anti-Tax Avoidance Directives (ATAD I and II) were brought into law in Ireland with effect from 1 January 2020. These rules apply to transactions between associated enterprises where such transactions involve payments made or received on hybrid financial instruments and payments made to or by hybrid entities or disregarded permanent establishments, as well as to payments giving rise to double deductions, withholding tax mismatch outcomes, tax residency mismatches and imported mismatches. With effect from 1 January 2022, Ireland will also be required to introduce the reverse hybrid rules of ATAD I and II.

10. Employment and Labour

10.1 Employment and Labour Framework

Employment and labour matters are governed by the Constitution of Ireland, Irish legislation, EU law, and the contract of employment between the employer and employee.

Employers are required to provide a written statement of terms and conditions of employment to employees. The employment contract includes both express and implied terms. Terms are implied by statute, common law, custom and practice, or the conduct of the parties.

Collective agreements and trade unions are relatively uncommon in Ireland.

The three main points that a foreign investor needs to know are:

- employees cannot be terminated at will – they need to be terminated for a reason, eg, performance-related or redundancy;
- employment tribunals rather than the courts are often the forum in which employment disputes are resolved and in some cases the burden of proof is on the employer rather than the employee; and
- the EU TUPE rules apply in Ireland, meaning that on the sale of a business (rather than shares in a company), the employees and historical liabilities to such employees normally (save for pension-related liabilities) transfer as a matter of law to the acquirer of the relevant business. This typically involves a 30-day consultation period.

10.2 Employee Compensation

Employee compensation is often a mixture of cash, pension contributions, healthcare contributions and other benefits.

Equity-based compensation is common. Careful structuring is required to have any equity-based benefits treated as capital gains tax rather than income tax, which treatment cannot always be ensured.

A common implication of a change-of-control is accelerated vesting of any unvested employees' equity. Employees generally tend to be cashed out of their equity interest as part of any M&A transaction and rollovers into the buyers' compensation structures are rare.

10.3 Employment Protection

The EU TUPE rules apply in Ireland (see **10.1 Employment and Labour Framework**).

Ireland does not have the concept of works councils.

11. Intellectual Property and Data Protection

11.1 Intellectual Property Considerations for Approval of FDI

Ireland does not have an FDI screening regime.

11.2 Intellectual Property Protections

Ireland has strong IP laws and this is reflected in the material amount of intellectual property that is owned by Irish companies as part of FDI, using Ireland as its European base.

11.3 Data Protection and Privacy Considerations

Ireland has very strong data privacy laws, as it is subject to the EU-wide General Data Protection Regulation (GDPR) which came into force on 25 May 2018. The Data Protection Commission enforces GDPR in Ireland and due to the prevalence of technology companies having their European headquarters in Ireland, the commission play an important part in the EU-wide enforcement of GDPR. GDPR provides for strong data protection rights for data subjects, and places strict requirements on organisations that collect and process data in relation to the proper collection and processing of data, reporting of data breaches and transfer of data.

The consequence of non-compliance with the GDPR includes fines of up to EUR20 million or 4% of worldwide annual turnover. Data subjects also have the right to claim, regardless of whether they have suffered material damage.

12. Miscellaneous

12.1 Other Significant Issues

There are no further significant issues at the present time.

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Trends and Developments

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Corporate/M&A

Special-purpose acquisition companies (SPACs) have certain drawbacks in that they seek non-US targets and they are traditionally incorporated through the Cayman Islands/BVI or other offshore locations in order to raise funds in Europe. This has created problems both from a marketing perspective and because the target usually needs to apply withholding tax on any dividends being paid to the offshore entity. To overcome these problems, an Irish holding company has been devised that is used to acquire both the target and the SPAC. This Irish company is then listed in the US at the time of the deSPAC transaction. As Irish law recognises trust concepts, this structure can also be put in place more easily when the SPAC is first created.

Investment Funds

In order to encourage a greater number of private equity and other investment funds to establish an entity in Ireland, a number of changes are being made to the existing Irish Investment Limited Partnership Act 1994, with the aim of improving the existing investment limited partnership (ILP) structure in Ireland. The revised law will introduce a number of changes to the ILP structure which, subject to the necessary changes to existing legislation, will make the ILP more broadly appealing to promoters of venture capital, and private equity funds in particular. These changes include provisions for:

- the establishment of umbrella ILPs;
- the broadening of "safe-harbour" provisions allowing limited partners to take certain actions without being deemed to be taking part in the management of the ILP;
- the amendment of the limited partnership agreement by majority (rather than by all general and limited partners); and
- the removal of the risk that limited partners could be liable to contribute to the partnership in an insolvency.

In addition, the Central Bank of Ireland has announced changes to the AIF Rulebook governing Irish alternative investment fund structures, which will make the use of private equity/private credit structures through Irish regulated funds (including ILPs) far easier.

Sustainable finance is becoming an area of significant focus for investors, and as managers react to demand, so the EU has begun to develop a regulatory framework around the integration of environmental, social and governance (ESG) investing into the investment process and investment products.

Foreign Direct Investment Screening

At present, Ireland does not screen FDI, nor is the state currently legally empowered to do so. However, the implementation of an investment screening regime has now taken priority at a European level, accelerated by the impact of the COVID-19 pandemic.

In particular, EU Regulation 2019/452 on establishing a framework for screening FDI in the EU (the "FDI Regulation"), which was adopted in April 2019 and came into force on 11 October 2020, is a response to growing concern amongst EU member states regarding the purchase of, and investment in, a number of strategic European companies by foreign-owned firms (and in certain cases, state-owned firms) that may undermine a member state's security or public order. The FDI Regulation introduces minimum rules for those foreign countries purchasing or investing in member states and obliges all member states to have a national contact point to enhance communication and co-operation and to receive and respond to queries from the European Commission or other member states.

Following a consultation process in early 2020, the Department of Enterprise, Trade and Employment announced in September 2020 that it was preparing legislation to give effect to the FDI Regulation in Ireland. This legislation, the Investment Screening Bill, will provide the Minister for Enterprise with the power to assess, investigate, authorise, condition, prohibit or unwind foreign investments from outside the EU, based on a range of security and public order criteria.

The Bill is expected to be published in early 2021 and enacted during the course of the year. In the meantime, no specific guidance has been issued on its contents. However, when the Bill is introduced, investors should expect to be obliged to provide basic information regarding the investment, including details of its structure and the source, value and timing of the investment, together with details of the products/services involved. Depending on the structure of the screening process ultimately adopted in Ireland, there may be costs and timeline implications for transactions that fall within the jurisdiction of the new screening regime.

While this will be the first significant piece of legislation to screen foreign investments in Ireland, it is not expected to fundamentally alter the Irish government's long-standing policy of creating a supportive environment to encourage foreign direct investment in the state.

Investment Resulting from GDPR

There has also been investment into Ireland to ensure that the country is governed by the EU GDPR regime (eg, in the technology sector, if this is a requirement of a company's customers).

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