



June 2012

Welcome to the third edition of our Ireland Update – a review of recent Irish legal developments for our Continental European friends and contacts.

This edition includes articles on:

- Reasons for Investing in Ireland
- M&A Trends in Ireland
- Irish Cartel Enforcement
- Recent Irish Tax Developments
- The European Fiscal Treaty – Ireland Votes ‘Yes’
- Pre-pack Sales in Ireland

As always, we hope you find this e-zine informative. We also very much hope to have the opportunity to meet you later this year at the International Bar Association Annual Conference 2012 which is being hosted in Dublin. The conference, which runs from 30 September to 5 October, will feature a wide array of seminars, workshops and panel discussions on a variety of topics from M&As to human rights. Over 5,000 delegates are expected to attend and it promises to be a most enjoyable and worthwhile event. William Fry will also be hosting a welcome reception on Monday, 1 October in the Round Room at Dublin’s Mansion House and we would be delighted to see you there.

In the meantime, we hope you have a wonderful summer and if you have any queries or comments, please let one of us know.

Recent high profile work at William Fry includes advising:

- **Datac Instrumentation Limited** and **RealFlex Limited** on their acquisition by **Lufkin Industries, Inc**;
- **EirGen Pharma Limited** in the sale of a 48.5% interest to **Saudi Pharmaceutical Industries and Medical Appliances Corporation**;
- **The European Investment Bank** on a €90 million facility made available to University College Dublin ("UCD") in connection with the financing of the second phase of construction of the new student centre, refurbishment and new construction of student residences, construction of the science link building, and construction of the School of Law buildings in each case at UCD’s Belfield campus; and
- **Barclays Bank plc** as security trustee in relation to the issue of US\$1.65 billion Senior Secured Notes due 2019 by **INEOS Finance plc**.

Recent awards include:

- Law Firm of the Year 2012 (at the inaugural Irish Law Awards)
- Best Irish Firm for Women in Business Law (Euromoney Women in Business Law Awards 2012)
- Equity Capital Markets Deal of the Year & Most Innovative Deal of the Year (Finance Dublin 2012)
- European Private Equity Tax Team of the Year (International Tax Review 2012)

Why Invest in Ireland?

Year after year, large multinationals as well as new and emerging companies are drawn to Irish shores. Ireland is now home to:

- 3 of the Top 5 games companies;
- 8 of the Top 10 global ICT corporations;
- 9 of the Top 10 global pharmaceutical corporations;
- 17 of the Top 25 global medical device companies;
- More than 50% of the world's leading financial services firms; and
- 10 top "Born on the Internet" companies.

How is it that Ireland, a small country with a population of little more than 4.5 million, continually attracts the world's leading companies? We think the facts speak for themselves:

The IMD World Competitiveness Yearbook 2012 ranks Ireland:

- 1st for availability of skilled labour;
- 1st for flexibility and adaptability of workforce;
- 1st for investment incentives;
- 1st for attitudes towards globalisation;
- 2nd for business legislation – openness to foreign investors;
- 2nd for large corporations that are efficient by international standards;
- 2nd for adaptability of companies; and
- 4th for corporate tax rate on profit and real corporate taxes.

The top rankings do not stop there - Ireland has also been named:

- 1st for value of investment projects (IBM's 2011 Global Location Trends Report);
- 2nd for inward investment per capita (IBM's 2011 Global Location Trends Report);
- 2nd most attractive company globally for Foreign Direct Investment;
- the best place to invest in Western Europe (Global Best-to-Invest Rankings 2011 compiled by international magazine Site Selection); and
- the global leader for the availability of skills and the least difficult location globally in which to fill talent (the 2012 Talent Shortage Survey commissioned by the ManpowerGroup).

So far this year, over 40 European-based companies have announced plans to invest in Ireland or to expand already existing operations, including **BSkyB; SAP; Smartbox; Sogeti; Culture Translate; iMosphere; Nimble Apps; and ZMDI.**

M&A Trends in Ireland, 2011 and Beyond

Earlier this year we published the William Fry M&A Review 2011. Our review found that M&A activity in 2011 increased by 44% in value (from €9.9 billion to €14.3 billion), and 5% in volume (from 76 to 80 deals) compared to 2010. This boost in M&A activity builds on the increase shown in 2010 from 2009 and is likely to continue through 2012. Bryan Bourke, Partner and head of Corporate and M&A at William Fry says that 2011's figures build on a good performance in 2010 and show steady recovery since a low in 2009: *"Provided we can work through the eurozone crisis, this year should continue the positive trend in terms of overall activity, driven by the disposal of non-core bank assets and also strong performances in the pharma and TMT sectors."*

Some key findings of our M&A Review were:

Disposal of Financial Services Assets Opportune for M&A

2011's strong performance was largely driven by activity in the financial services sector, driven to a large extent by the banking crisis. Comprising almost one-third of the total deals (23 out of 80), financial services sector deals accounted for over two-thirds of the total deal value (€10.4 billion). These included the 98% investment by the National Pensions Reserve Fund in AIB; the €2.3 billion investment by the Irish Government in Irish Life & Permanent Group; and the €1.1 billion

investment in Bank of Ireland by Fairfax Holdings, WL Ross & Co, Kennedy Wilson and others. As the banks continue to dispose of assets in 2012, it is expected that the financial services sector will continue to account for a majority of deals.

Ireland Attracts Overseas M&A investors

There was a notable dominance of foreign acquirers in 2011. Overseas buyers appeared in six of the top 10 deals and over half of the overall number of deals (45 out of 80), highlighting the attractive opportunities available in Ireland. This also reinforces Ireland's reputation as a European hub with a strong track record for developing innovative businesses offering further growth opportunities. Unless derailed by uncertainty in the Eurozone, the influx of overseas buyers should help drive Ireland's recovery in 2012 where businesses across the financial services, telecoms, media and technology TMT and pharma, medical and biotech sectors continue to present opportunities for interested investors.

Reputation for Innovation Proves Important

The traditionally strong area of pharma, medical and biotech accounted for a total of 14% of deals, showing that Ireland's reputation for innovation and opportunities in these businesses continues to be attractive for potential investors. This sector is expected to remain strong in 2012 and, as the financial sector opportunities decline with the recovery of the banking sector in future years, pharma and TMT are likely to advance Ireland's move towards a firm and sustainable recovery.

Contributed By: Bryan Bourke

Recent Developments in Irish Cartel Enforcement

The detection of cartels is the top enforcement priority of the Irish Competition Authority. Irish competition legislation generally prohibits and renders void arrangements between two or more undertakings that have as their object or effect the restriction or distortion of competition in the trade of any goods or services in the Republic of Ireland. An undertaking found guilty of what is considered a "hard core" offence (e.g. price-fixing or market-sharing) is liable on summary conviction to a fine of up to €5,000, or on conviction on indictment to a fine of up to €5 million or 10% of its worldwide turnover, whichever is the greater. Where a director, manager or similar officer of the undertaking is found to have authorised or consented to the offence, he may be personally liable to the same fines as the undertaking and to a term of imprisonment of up to six months (on summary conviction) or ten years (on conviction on indictment).

The Irish Cartel Immunity Programme

Immunity from prosecution for criminal competition law offences may be granted in certain circumstances where an application is made to the Authority under the Irish Cartel Immunity Programme ("CIP").

In 2010, the Authority held a public consultation regarding proposed amendments to the CIP, one of which was that the current ban on ringleaders being granted immunity be removed. However, the Authority remains of the view that cartel instigators and undertakings that have coerced others to participate in a cartel should be prohibited from being granted immunity. The Director of Public Prosecutions ("DPP") is considering the proposed reforms and it is understood that the Authority intends publishing a revised CIP later this year.

Home Heating Oil Cartel

In 2004, following an application under the CIP, the DPP initiated criminal proceedings for price-fixing against 24 individuals and companies involved in the distribution of home heating oil in the west of Ireland. A total of 18 convictions were secured, the majority of the defendants having entered guilty pleas, with fines of up to €12,500 imposed on participants. The cartel organiser, who pleaded guilty to aiding and abetting price-fixing, was fined €15,000 and received a six months prison sentence, suspended for twelve months.

The final conviction in the case was made on 3 May 2012 when a jury unanimously found Pat Hegarty, a former oil company employee, guilty of having participated in the cartel. Mr Hegarty had previously challenged the case against him on the basis that the company which employed him had not been convicted of any offence. However, in October 2011 the Irish Supreme Court ruled that officers of companies may be tried for competition offences, even where the company itself has not been formally convicted. It is sufficient in such circumstances that the jury makes a finding of fact that the company has committed a competition offence. Mr Hegarty was fined €30,000 and given a suspended two-year prison sentence.

Citroën Motor Dealers Cartel

The Citroën motor dealers cartel lasted for nearly nine years, during which time participants met regularly to set prices for Citroën cars and spare parts. Four companies and five individuals pleaded guilty to price-fixing and one individual pleaded guilty to aiding and abetting the offence. Suspended prison sentences ranging from six to nine months were handed down by the Irish courts, in addition to fines ranging from €2,000 to €80,000.

The court also imposed suspended sentences of six and nine months for the respective offences of entering and implementing the cartel on motor dealer, Patrick Duffy. Mr Duffy and his company, Duffy Motors Ltd, each received fines totalling €50,000. Given the fact that fines on undertakings might not always provide an incentive for individuals to obey the law, the Duffy judgment emphasised that serious antitrust law infringements require tough punishment, namely, prison sentences. In deciding the sentences to be imposed, the judge considered various criteria, including the gravity, nature and duration of the offences and the personal circumstances of Mr Duffy and his company. Apart from the guilty plea, the judge rejected various factors put forward in mitigation. For example, he stated that Mr Duffy's role in the price-fixing conspiracy involved active participation on a long term basis such that his conduct could not be said to be 'out of character'. The judge also emphasised that the low likelihood of recidivism would not be a mitigating factor.

Future Cases

At the end of 2011, the Authority was pursuing seven cartel investigations, four of which were launched following applications under the CIP. Time will tell whether any of these investigations will result in the imposition of a significant prison sentence by the Irish courts.

Contributed by: Cormac Little

Ireland, Far More Than a Headline Tax Rate

The company behind the Angry Birds phenomenon is the latest in a long line of European companies considering migrating to Ireland. With all the discussion centring on Ireland's corporation tax rate, it is sometimes easy to forget about the other selling points of the Irish tax regime. Recent pro-business tax changes have been positively received by foreign investors doing business in Ireland. In addition to specific measures targeted at the international financial services industry, the many general enhancements should encourage further investment in Ireland.

Here are some of the key recent developments:

- **Minimal Compliance Headaches**
Ireland has maintained its position for the fifth year in a row as the easiest country in Europe to pay taxes in the World Bank and PWC 'Paying Taxes in 2012' Report. Ireland is also ranked fifth most user-friendly country for business taxes globally in 2012.
- **Reducing Costs of Rewarding Employees**
Employees sent to work in Ireland from abroad may now benefit from the enhanced Special Assignee Relief Programme (SARP) which provides an income tax exemption for a portion of a qualifying employee's salary.

Companies can also now reward key employees (excluding directors) whose duties are primarily R&D related with a portion of the credit for R&D expenditure which can be used to

offset the income tax liability of the employee. This R&D relief was previously only utilisable by the company itself against its corporate tax liability.

A further welcome measure is the reversal of the 2011 proposal to charge employer PRSI (social security contributions) on share based remuneration. Share based remuneration therefore continues to be exempt from the 10.75% employer PRSI.

A new Irish income tax deduction (capped at €35,000 per annum) is now available to employees sent to the "BRICS" countries for business purposes. BRICS includes South Africa (S), as well as the BRIC countries of Brazil, Russia, India and China.

- **Irish Property**

Irish property prices are now considerably down from the peak reached in 2006. A newly introduced relief from Capital Gains Tax applies to properties purchased before 31 December 2013, provided the property is held for seven years. A further positive change is a reduction in the rate of stamp duty (transfer tax) on commercial property (including business assets) to a maximum of 2%. Previously a rate of up to 6% applied.

- **Research and Development (R&D) Regime**

In addition to the potential to use R&D credits to reward key employees, further changes to the R&D regime should benefit companies. Previously the special R&D tax relief was only available to a company in a tax year if the company's R&D expenditure in that year exceeded its expenditure in the base year which was set at 2003. This meant that companies already engaged in R&D in 2003 were at a disadvantage.

In future, the first €100,000 of qualifying R&D spend will benefit from the R&D credit regardless of the level of R&D expenditure of the company in 2003. Further enhancements also improve Ireland's offering as a R&D centre.

Other Enhancements

- The corporation tax exemption for certain start-up businesses will be extended to include companies set up in 2012, 2013 and 2014. The exemption applies to new trading companies in respect of which the corporation tax payable does not exceed €40,000 in a year, provided other conditions in relation to the number of employees are satisfied.

When weighing up the positives of investing in Ireland, foreign investors are increasingly looking beyond the corporate tax rate to the host of other advantages offered by the Irish system - not least the finding that we are the easiest country in Europe to pay taxes!

Contributed by: Niamh Keogh

Ireland Says Yes to the Fiscal Treaty

On 31 May last, Ireland overwhelmingly voted in favour of ratifying the proposed Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, more commonly referred to as 'the Fiscal Treaty'. Over 60% of voters approved the Treaty, with only five of Ireland's 43 parliamentary constituencies voting 'No'.

The Treaty is an intergovernmental agreement between 25 of the 27 EU member states, with the aim of promoting economic recovery and preventing a repeat of the financial crisis we have seen in recent years. The United Kingdom and the Czech Republic opted not to support the new arrangements set out under the Treaty.

Ireland's Taoiseach (i.e. Prime Minister), Mr Enda Kenny, described the Yes vote as another step on the road towards economic recovery. The President of the European Commission, José Manuel Barroso, also welcomed the outcome of the referendum emphasising that without stability economic growth is not achievable.

What the Treaty Does?

The Treaty aims to strengthen the Economic and Monetary Union by adopting strict rules to improve both budgetary discipline and the coordination of economic policies.

Nothing in the Treaty changes the conditions under which Ireland currently receives financial assistance from the EU/IMF/ECB. However, from 1 March 2013, in order to be eligible for financial assistance from the European Stability Mechanism (ESM), the new permanent rescue fund, a country must have ratified the Treaty. Therefore, following the Yes vote, Ireland will now have access to emergency ESM funding in the future, if indeed it is needed.

Calling a Referendum

Ireland is the only country to hold a referendum to determine ratification. A referendum was necessary in Ireland as the Treaty was considered to be outside the existing EU architecture and thus not subject to the general constitutional protection given to other EU treaties. In the absence of a referendum, Ireland's ratification of the Treaty would likely have been subject to constitutional challenge before the Irish courts. In the event that such a challenge was successful, the Irish Government would have been obliged to hold a referendum.

The 'Yes' and 'No' Campaigns

In general, supporters of the Treaty focused on the goal of bringing stability to the euro and clarity to Ireland's position within the Eurozone, not least regarding its ability to access emergency funding in the future. The "Yes-side" strongly argued that ratifying the Treaty would renew confidence and keep Ireland on the path to recovery.

Opponents of the Treaty argued for the most part that, in ratifying the Treaty, Ireland would completely transfer its fiscal sovereignty to the European institutions and copperfasten current austerity policies, thus further hindering economic growth.

The debate on the Treaty also covered many issues regarding the Eurozone crisis in general, though access to funding under the ESM proved to be one of the more decisive elements.

Next Steps

At the time of publication, Ireland is one of nine EU member states to have ratified the Treaty, of which, four are Eurozone countries. The Treaty will come into force in January 2013, provided a total of 12 of the 17 Eurozone countries ratify the Treaty.

Contributed by: Cormac Little

Pre-Pack Sales in Ireland

The term "pre-pack" can have different meanings in different jurisdictions but its essence is that before an insolvency process occurs – whether that be receivership, liquidation or examinership – the buyer/investor has been identified and the commercial and legal terms negotiated to a conclusion, thereby enabling the deal to be completed immediately or closely following the appointment of the insolvency office holder, and without interruption to the trading activity of the target company.

The usage of pre-pack insolvency sales is less developed in Ireland than in other jurisdictions, but there has been an increasing number of asset sales structured through pre-pack receiverships over the last year. The most recent successful example was the sale of the A-Wear retail chain by its receiver Jim Luby of McStay Luby. In July 2011 the Superquinn grocery chain was sold to Musgraves by its receivers Kieran Wallace and Eamonn Richardson of KPMG, in what was probably the largest ever pre-pack transaction in this market.

In other jurisdictions, most notably the UK, detailed guidelines for the conduct of pre-packs have been adopted by professional bodies and approved by regulators (SIP 16, Statement of Insolvency Practice) The UK Government recently announced its decision not to intervene with prescriptive legislation in this area.

In Ireland there are no corresponding rules or guidelines in general usage, although some insolvency professionals follow the SIP 16 guidelines. In the absence of detailed rules, the critical standard for the appointed insolvency office holder is to ensure that he obtains the best price possible for the assets at the time of sale. Provided the insolvency office holder complies with this test and adheres to the highest professional standards, there is no barrier to effecting a pre-pack sale in a manner which will stand up to scrutiny and which will allay the concerns of creditors.

There has been some debate in Ireland as to whether an examinership process can be used to implement a pre-pack restructuring. Again there is no reason why the terms of a restructuring and of any necessary investment cannot be agreed before a company files for examinership, which can then be implemented through the examinership process. The statutory requirements to hold formal meetings of members and creditors and to obtain High Court confirmation of the scheme of arrangement cannot be dispensed with, although the timeframe for following these processes can be shortened. Most importantly, the High Court recently emphasised that no matter what amount of negotiation has taken place with investors prior to the filing for examinership, it will always be the duty of the examiner to ensure that the deal he recommends to creditors and the court is the best deal available for the company and its members and creditors. This in turn necessitates the examiner unearthing all prospective investors and may mean that the investor identified before the company enters examinership will not necessarily be the successful investor after the examiner has followed his process.

Because of the absence of formal reporting requirements for pre-packs, there are no hard statistics available on its usage in Ireland. Anecdotal evidence suggests that the process is being increasingly used and it is clear that investors looking for a speedy transaction, with a view to preserving the value of a company's goodwill and other assets, can avail of pre-packs in Ireland.

Contributed by: Michael Quinn