



**November 2011**

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

It was a pleasure to meet many of you at last month's Fall Meeting of the International Law Section of the American Bar Association, hosted in Dublin, and we hope you enjoyed your visit to our capital city. William Fry was honoured to have been involved in the organisation of such a prestigious event at which a number of our partners were included in the line-up of speakers. William Fry also sponsored the ABA International Reception & Dinner at the Guinness Storehouse, where the guest of honour was our Taoiseach (i.e. Prime Minister), Mr Enda Kenny, pictured below with our Managing Partner, Myra Garrett.



*An Taoiseach Enda Kenny T.D., Myra Garrett, William Fry Managing Partner, and ABA International Section Chair, Michael E. Burke on Thursday, 18 October.*

Despite much negative media commentary on the European financial situation, the Irish economy is continuing to improve. Indeed, investment levels into Ireland are now at the highest level since 2002, and the first six months of this year saw a 40% increase in the number of new investors into Ireland when compared with the same period last year. Set out below is a selection of some of the rankings which show why Ireland remains the location of choice for foreign direct investment:

- 1st for real corporate taxes (IMD Competitiveness Yearbook 2011)
- 1st for skilled labour (IMD Competitiveness Yearbook 2011)
- 1st for investment incentives (IMD Competitiveness Yearbook 2011)
- 1st for business legislation for foreign investors (IMD Competitiveness Yearbook 2011)
- 1st in Eurozone countries for doing business (Forbes 2010)
- Europe's number 1 R&D location from an after-tax cost perspective (Mazars 'Review of Global R&D Tax Incentives' Study 2010)

We hope you find this e-zine informative. If you have any queries or comments, please let one of us know.

**Barry Cahir; Cormac Commins; David Fitzgibbon; Shane Kelleher; Cormac Little; Sonya Manzor and Brian O'Callaghan**

Recent high profile work at William Fry includes:

- Advised the lead investors, including Fairfax Financial Holdings Limited, WL Ross, Kennedy Wilson and others on the €1.1 billion purchase of a 34% stake in Bank of Ireland from the Irish Government
- Advised SCOR Reinsurance on the €956 million acquisition of the life mortality business of Transamerica

- Advised Green Property on its joint venture with Lloyds Bank under which Green Property will manage Irish commercial properties put into the receivership process by Bank of Scotland (Ireland). This will cover a portfolio of up to €1 billion
- Advised ACRA Control Limited, the Dublin-based aerospace company and its shareholders, on the €46 million sale of its entire issued share capital to Curtiss-Wright Controls (UK) Limited
- Advised Thermo Fisher Scientific Inc on the Irish aspects of the €145 million acquisition by Eurofins Scientific SE of Lancaster Laboratories Inc

We have won the 2011 Award of Excellence in the Corporate Law Services and Solutions category from the Public Sector Journal. The Public Sector Journal is a key title in the public sector arena and the 'Excellence in Business' awards are awarded to companies who can demonstrate outstanding service, continuity, track record and general excellence in business to the public sector

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### **Ireland - More Than Just a Tax Rate**

One could be forgiven for thinking that Ireland is only about a 12.5% or lower rate of corporation tax. The amount of publicity that our 12.5% rate of corporation tax has received over the past 24 months, from the Financial Times to the Wall Street Journal, from Le Monde to Der Spiegel, could easily make you believe that we have nothing more to offer than the lowest corporation tax rate in Europe.

It is true that for over half a century many companies have found Ireland a compelling location to springboard into the rest of Europe, the Middle East and Africa. Our legal system, language, time zone and highly educated workforce have always made the decision to invest in Ireland an easy one.

It is also true that there is no such thing as bad press, and to the world's media, we thank you for your relentless (free) advertising campaign that Ireland offers the most competitive tax rate in Europe.

Possibly, one of the lesser publicised, but equally impressive, foreign investment activities in Ireland is our funds industry. From humble beginnings in the early eighties, the Irish funds industry has grown to be one of the biggest in Europe and one of the most respected in the world. Over 12,000 people and growing are employed in this industry, with over €1.9 trillion assets under management serviced from Ireland. So why has Ireland become the world-class leader for global funds?

### **The People**

Having a pool of highly educated young people with the requisite skills, qualifications and ability has no doubt helped Ireland to attract and retain fund management activity. Ireland has one of the highest per capita third level education participations in Europe. For such a small country it is outstanding that three of our universities are ranked in the world's top 300 universities, with Trinity College Dublin ranked 65th in the 2011/2012 QS world university rankings. The professions are equally well represented with multinational and domestic administrators, legal, tax and accountancy firms helping to forge ways to achieve the ultimate and make things happen in an effortless and seamless manner.

### **The Regulatory Environment**

Without a doubt the regulatory environment is a key ingredient in the attractiveness of a location for investment vehicles. A fast, efficient, knowledgeable and flexible attitude fertilised the growth of the funds industry in Ireland. A regulator must command respect, but must also display confidence in decisions and not shun new ideas or strategies. The Central Bank of Ireland has never been wanting in any of these characteristics. It has the confidence to fast track investment structures for approved promoters to avoid costly delays in getting to market.

### **Benign Tax System**

Enabling our regulated funds to provide a tax free environment in which their investments can grow and allowing non-residents a return free of Irish tax leakage provides an environment on a par with any tax haven jurisdiction.

Ireland has meticulously and skilfully negotiated full tax treaties with 63 countries and continues to grow its network. Treaties with Singapore, China and Hong Kong could open up a world of possibilities connecting the east to the west. Potential access to such a valuable tax treaty network must make Ireland an interesting location for many private equity alternative investment funds.

The marriage of a regulated fund and a section 110 company (securitisation vehicle) could provide a potent weapon in the armoury of a private equity investor fund. Such a combination could open up the treaty network to our tax exempt funds to provide exciting pathways to China or anywhere else for that matter.

Our securitisation regime has featured in many structured finance deals, from asset-backed securities to collateralised debt offerings. The section 110 company offers a quick unregulated vehicle that can partner with most international structures covering financial assets, precious metals (synthetic or physical), plant and machinery, to include leasing and insurance contracts or life settlements. Our flexible debt regime for a section 110 company can help reduce local tax on investment returns.

With careful planning, our holding company rules can facilitate tax free disposals of participations and maximise foreign dividend repatriation.

Our tax laws facilitate the management of foreign domiciled funds from our shores without bringing the foreign fund assets into the Irish tax net.

Moreover, our tax code was recently amended to incorporate the principles of Sharia law into our financing concepts, further enhancing Ireland's ability to facilitate global finance products and structures.

## **Legal Environment**

While Ireland is a common law jurisdiction, as a member of the EU and a signatory to its treaties, civil law too can play a role. That makes Ireland interesting from a legal perspective. Recently we amended our law to cater for the redomiciliation of foreign companies into Ireland where such companies are to be regulated companies in Ireland. This will facilitate, for example, a Cayman corporate fund migrating to Ireland without triggering a sale of its underlying assets. Such a facility may prove indispensable in future periods if tighter regulation or restrictions are imposed on Cayman domiciled funds.

## **FX Management**

While the currency of Ireland is the euro, in certain circumstances our accounting and tax laws allow for other currencies to be the functional currency and for the computation of profits in that currency to avoid unhedged exchange movements.

## **Europe**

An essential ingredient into the mix is the ability to passport services throughout Europe and other countries. The ability to be regulated in one country and to be able to attract investors from anywhere in the EU is a compelling characteristic. It is even more opportune where third country regulatory bodies authorise EU regulated funds for their local markets. Hong Kong, Taiwan and Chile are cases in point.

Obviously these "freedoms" are only of real value to the extent that other suppliers cannot market as easy in this market. Commonality of regulation is required as a result of recent financial turmoil. The proposed Alternative Investment Fund Managers Directive may well make Ireland an attractive location to domicile such fund managers in the future.

## **Outlook**

The funds industry is one of Ireland's great successes. It is forecast that by the end of 2011 the funds industry will have created 1,143 new jobs in Ireland since 2009. Ireland topped the table with inflows into Irish domiciled UCITS in the first half of 2011 attracting over €41 billion in net assets during that period, significantly ahead of its nearest rival, Luxembourg.

In addition to retail investment funds such as UCITS, Ireland is also a leading centre for the administration of hedge funds and other alternative investment vehicles. There is a significant piece of legislation being drafted by the EU on the regulation of alternative investment fund managers which is likely to lead to a number of funds domiciled in offshore jurisdictions such as the Cayman Islands relocating to the EU, and Ireland is well positioned to accommodate these funds.

This article was originally published in the American Lawyer (October 2011).

Contributed by Martin Phelan.

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### **Ireland's Cool Climate Attracts Technology Giants**

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Over the past decade, Ireland has become an international strategic hub for technology giants and it is now home to some of the largest data centres in Europe. Microsoft, IBM, Data Electronics and Amazon all have a base here, and in September Google announced that it would be investing €75 million in the acquisition, build out and fit out of a new data centre facility located outside our capital city. So what is it that makes Ireland an ideal location for such centres?

Part of the answer to this question seems to be our climate, with both Google and Microsoft citing it as a significant factor in their decision to invest here. To understand why our climate is such a draw, it is first necessary to understand what a data centre is. In basic terms, a data centre is a specialised facility which houses computer servers and other technology used to run services delivered over the Internet, including cloud computing services. Such centres require vast amounts of power, not only to run the technology, but also to keep it from overheating. This is where our climate fits in. Our prevailing westerly winds can drive air into the data centres cooling down all the equipment inside, a technique known as "free-air cooling". This obviates the need for air conditioning units and other cooling equipment, which apart from being costly in financial terms, are costly from an environmental perspective. Further, the multinationals can rest easy in the knowledge that data centres located in Ireland are unlikely to be affected by earthquakes, volcanoes or other natural disasters, which could cause significant damage to equipment and services.

Microsoft's Dublin data centre, which opened in 2009, is the sixth largest data centre in the world and is the hub for online services and cloud computing across Microsoft. Water consumption in the environmentally friendly facility is reported to be 1% of that of traditional data centres and power consumption less than 50%. Head of Microsoft's global infrastructure group, Arne Joofesberg, referred to Ireland as "*one of the best places in the world to build a data centre*" and described our climate as "*one of the most environmentally sustainable*." As for Google, once its new facility is complete, it will rank as one of the most energy efficient centres in the world.

Our cool climate aside, Ireland also has the benefit of experience in constructing data centres. Such facilities must be specifically designed to withstand environmental hazards, fires, break-ins and so on and a high level of expertise is required in their design, construction and fit out. Other attractions no doubt include the availability of land in close proximity to our cities; competitive construction costs; our infrastructure network; our highly educated and skilled workforce; and our low rate of corporation tax and other tax incentives.

All in all, with talks of introducing the equivalent of an energy star rating for data centres, Ireland looks set to continue to be at the fore of the cloud computing industry. As John Herlihy, Director of Google Europe, recently put it, this is a "*rare case where the Irish weather is a cause for praise*."

Contributed by David Cullen.

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### **Good News for Football Fans, But Bad News for Digital Rights-Holders?**

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In early October, a European Court found that a ban on the use of foreign decoders to watch live broadcasts of English Premier League football matches is unlawful.

Football Association Premier League Limited (FAPL) runs the English Premier League. This governing body usually licences its broadcast rights on a national basis since there is limited demand for pan-European rights. When a bidder wins a tender for a particular region, FAPL awards the bidder the exclusive right to show live Premier League matches in that area. In order to protect this exclusivity, FAPL requires each

licensee to 'scramble the picture' provided to its subscribers who, in turn, require decoders to decrypt the signal. In addition, FAPL seeks to prevent the circulation of decoders outside the territory of the relevant licensee.

FAPL took various legal actions in order to prevent attempts by English pubs to get around this exclusivity. These proceedings, collectively known as the "pub football" cases, were referred by the English High Court to the Court of Justice of the European Union for preliminary ruling.

The European Court found that national legislation preventing UK residents from watching TV broadcasts from other Member States infringes the EU free movement of services principle. Indeed, the Court also held that this restriction is not justified by the necessity of ensuring appropriate payment for the rights-holder since FAPL is already remunerated by a Greek based broadcaster for the right to show Premier League matches in Greece. While the Court stated that granting a licensee the exclusive right to broadcast Premier League matches is not, in itself, anti-competitive, it did hold that ancillary provisions aimed at preventing the sale of decoders outside the relevant territory are unlawful. Given that there is no copyright in the live footage of the matches themselves, the Court noted that FAPL could not restrict broadcasts of the actual matches. However, associated works such as logos, graphics and highlights of previous games are protected under copyright and thus require the prior approval of the rights-holder before being broadcast to the public.

The "pub football" cases represent good news for consumers wishing to watch foreign pay-TV since they cannot be prevented from purchasing decoders sourced from abroad. Indeed, the judgment clearly undermines FAPL's current model of selling exclusive broadcast rights to the English Premier League on a territory by territory basis. Accordingly, future licences for the broadcasting of Premier League games may be packaged on a pan-European basis with broadcasters selling packages to subscribers at a single price across the EU. Moreover, any business model for the distribution of other forms of digital content such as books, films and music that uses a 'country by country' basis will need to be reconsidered.

Contributed by Cormac Little.

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## Draft Companies Bill 2011

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The Irish Government plans to introduce a new Companies Bill as part of a move to consolidate and simplify existing company law. On 30 May 2011, the Minister for Jobs, Enterprise and Innovation published a draft of Pillar A of the proposed Bill. This will represent two thirds of the future Companies Bill and contains all of the law relating to private companies limited by shares. The remainder of the proposed draft is expected to be published in 2012.

Some of the key proposed changes for private companies in the draft Bill include:

- **Single Constitution**  
Each private company's existing Memorandum and Articles of Association will be replaced by a single document called a Constitution.
- **Directors' Meetings**  
There are prescriptive provisions determining where a directors' meeting is deemed to be held if some or all of the directors participate by conference call. This may have implications for determining where the "management and control" of the company is located.
- **Single Director Companies**  
A major (and welcome) change is the ability to have single director companies.
- **Transition**  
An existing private company which does not wish to convert into a private company under the Bill will have a six month period from the time when the relevant section of the Bill is commenced to convert into a "designated activity company". After that six month period, every private company will have a 12 month "transition period" to adopt a new Constitution.
- **Directors' Compliance Statements**  
The concept of directors' compliance statements, which was shelved in 2003, has been re-

introduced. This requirement will apply to public limited companies and directors of large private companies with both a balance sheet total of over €12.5 million and a turnover of over €25 million.

- **Annual General Meetings**  
Under the proposed reforms, AGMs may be dispensed with in favour of written resolutions where all the members consent.
- **Majority Written Resolutions**  
One of the most welcome reforms of the Bill is the proposal to permit majority written resolutions of shareholders (both ordinary and special) and to dispense with the requirement to have unanimous written resolutions.
- **Full and Unlimited Capacity**  
One of the most significant changes in the Bill is that private companies will have the same capacity, for the purposes of company law, as natural persons. This will effectively abolish the doctrine of “ultra vires” in relation to companies and will remove any concern companies or lenders may have as to a company’s ability to perform a transaction or grant security.

Contributed by David Fitzgibbon.

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### **Irish Government Launches International Financial Services Industry Strategy**

During the summer, the Irish Taoiseach (i.e. Prime Minister), Mr Enda Kenny, launched the Strategy for the International Financial Services Industry in Ireland 2011-2016. The aim of the strategy, which highlights our Government’s commitment to the financial services industry, is to protect economic activity and jobs and to continue to grow the international financial services sector in Ireland. To achieve this, the strategy proposes enhancing the efficiency and effectiveness of our legal, regulatory and tax environment as they relate to the provision of international financial services.

To this end, it lays down a number of initiatives, including:

- **Tax framework:** An absolute commitment to maintaining our 12.5% corporation tax rate
- **Regulation:** The adoption of a regulatory regime that is credible, responsible and internationally respected, but also balanced and proportionate
- **Development of new business lines:** The improvement of Ireland’s position as a financial centre by:
  - Prioritising Ireland’s growth as a global provider of vital shared services for international firms
  - Establishing a hub for innovative services for finance, including fraud and anti-money laundering detection technology
  - Enhancing the skills and operating environment to support Islamic finance
  - Developing Ireland as a centre for excellence in green finance and carbon management
  - Capturing a significantly larger share of the international payment services market
- **Opportunities for growth:** The identification of opportunities for growth in insurance, investment funds, banking, aircraft leasing, payment services, green financial services, Islamic finance, private equity and venture capital and cross-border pensions
- **Control of business costs:** A commitment to containing business input costs under the control of the Government and to endeavouring to ensure that reductions in public expenditure do not result in higher charges for services being passed on to private enterprise
- **Integrated support for investment and growth:** The maintenance of an ambitious investment programme for productive infrastructure, research and development and innovation
- **Coordinated international engagement and marketing:** The promotion of Ireland as a financial centre through marketing and business development activity. This is to include highlighting the



stability and security of Irish Financial Services Centre firms and ensuring that those involved in the development of EU measures are aware of the potential impact of such measures on the Irish financial services industry.

Contributed by Cormac Commins.

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**William Fry advises on "M&A Deal of the Year" and on "Debt Loan Notes Deal of the Year"**

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Underlining our position as one of Ireland's leading corporate law firms, William Fry has advised on two of Finance Dublin Magazine's Deals of the Year 2011.

The Firm advised Ardagh Glass Group plc on its sale of €1,704 million (US\$2,352 million) of notes in September 2010. The proceeds of the deal enabled Ardagh to fund the acquisition of metal packaging group Impress Coöperatieve UA from the private equity firm, Doughty Hanson & Co. This deal was the winner of the "Debt Securities Notes Deal of the Year Award".

Speaking on the Ardagh deal, David Fitzgibbon, Corporate Partner at William Fry, said: *"In a difficult marketplace, this transaction had to be effected in a short window to ensure that Ardagh was in a position to proceed with the Impress Packaging acquisition and effect any related refinancing. The issue of the notes and the related escrow arrangements involved a series of interlinked steps which had to work alongside the corporate transaction. The issue of secured notes as part of the offering increased the level of complexity involved in the offering and required the input of counsel from almost every jurisdiction in Europe. We were proud to have the opportunity to work with Ardagh on such a complex and novel offering."*

William Fry also advised ESB on its acquisition of Northern Ireland Electricity (NIE) from the Viridian Group. The transaction brought about the consolidation of the ownership of the electricity transmission and distribution network on the island of Ireland into a single entity serving the all-island Single Electricity Market. This deal won the "Mergers and Acquisitions Deal of the Year Award".

Bryan Bourke, Head of Corporate at William Fry, who led our team on the transaction said: *"The ESB acquisition of NIE, which saw ESB acquire the Northern Ireland electricity transmission and distribution grid, was a hugely significant and strategic transaction for ESB. It is probably the ESB's largest acquisition, as well as being the biggest acquisition in the semi-state sector in 2010."*