



WILLIAM FRY

## US — IRELAND UPDATE

**November 2011**

Welcome to our Thanksgiving edition of our US-Ireland Update.

It was a pleasure to meet many of you at the 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.



*David Carthy, William Fry Corporate Partner, John Larkin, William Fry Head of Insurance, Myra Garrett, William Fry Managing Partner, An Taoiseach Enda Kenny T.D., and ABA International Section Chair, Michael E. Burke on Thursday, 18 October.*

Furthermore, a new report commissioned by the American Chamber of Commerce in Ireland has revealed that US investment in Ireland is now worth US\$190 billion and has grown by a multiple of five over the last decade. Ireland's share of total US investment in Europe has risen from 5.2% to 8.7% over the same period. The report, authored by Wall Street economist and strategist, Joseph P Quinlan, entitled 'Built to Last – The Irish-US Economic Relationship', can be accessed [here](#).

We hope you find this e-zine informative. If you have any queries or comments, please let me or your usual William Fry contact know.

Happy Holidays!

**David Carthy**  
**Partner**

### **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 US\$1.5 billion (€1.1 billion) purchase of a 34% stake in Bank of Ireland from the Irish Government. The deal, which saw the first investment in an Irish bank by private institutional investors since 2008, was described by the Irish Minister for Finance as “a key point in changing the narrative on Ireland... and a very significant vote of confidence in the future of the Irish economy.”
- Advised **SCOR Reinsurance** on the US\$1.4 billion (€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 US\$1.35 billion (€1 billion)
- Advised **ACRA Control Limited**, the Dublin-based aerospace company and its shareholders, on the US\$62.3 million (€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 US\$200 million (€145 million) acquisition by Eurofins Scientific SE of Lancaster Laboratories Inc

#### **Recent Awards Include:**

- **"European Legal Services Provider of the Year 2011"** at the ICFA (International Custody and Fund Administration) Awards
- **"European Indirect Tax Firm of the Year 2011"** and **"European Tax Policy Firm of the Year"** at the International Tax Review Annual European Tax Awards
- **"2011 Award of Excellence"** in the Corporate Law Services and Solutions category from the Public Sector Journal
- **"Irish Intellectual Property Law Firm of the Year 2011"** by Managing Intellectual Property

#### **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, I 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 US\$2.4 trillion (€1.8 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 65<sup>th</sup> 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 un-hedged 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 US\$55.5 billion (€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

### **Tax Treaty Access – Favourable Tax Treaty with China**

The combination of the Ireland/China Double Tax Agreement ("DTA") and the Irish holding company regime has created many potential tax efficiencies for Ireland as a holding company location for investment into China. This combination allows for:

- An exemption from Chinese capital gains withholding tax on all disposals, regardless of shareholding size, of Chinese shares (not deriving their value from Chinese real estate);
- An exemption from Irish tax on gains on disposals of Chinese shares (again, not deriving their value from Chinese real estate); and
- A reduction of Chinese withholding tax on dividends, generally 5%, where the recipient holds at least 25% of the voting power of the Chinese company.

The Ireland/China DTA can match or exceed the benefits under the Chinese tax treaties with the current popular gateways into China, such as Mauritius, Barbados, Singapore, Hong Kong and Switzerland. The Irish treaty is one of the few DTA's which reduces the tax in non real estate gains to zero regardless of the shareholding size.

The above treaty based exemption, when combined with the Irish domestic capital gains tax exemptions for Irish resident companies disposing of shares in certain EU and tax treaty subsidiaries, provides for a potential tax free exit from an investment made in China. In order to qualify for the "Participation Exemption", the company in which the shares are being disposed of must be tax resident in an EU Member State (including Ireland) or a country with which Ireland has a double tax treaty (including China), and must be carrying on a trade or be part of a trading group. The Irish holding company making the disposal must have held at least 5% of the shares in the company in which the shares are disposed of, for a continuous period of 12 months ending within the previous 24 months.

A reduced rate of dividend withholding tax of 5% applies to dividends from a Chinese company to its Irish parent (provided there is at least a 25% interest). The changes introduced in Ireland's Finance Act 2008 result in a 12.5% tax rate applying in Ireland to dividends received out of trading profits of a Chinese company with credit for underlying Chinese tax suffered on the profits, provided at least a qualifying 5% interest is held in the Chinese company.

## **Other Attractive Features of Ireland's Tax Regime**

In addition to the Irish tax exemption on gains on disposals of trading companies mentioned above, other favourable aspects of Ireland's tax system allow investment into China to be achieved in a tax efficient manner where an Irish holding company is used, including:

- Ireland does not have controlled foreign corporation or thin capitalisation rules;
- Profit extraction from Ireland is assisted by the wide exemptions from Irish dividend withholding tax that apply in the case of an internationally held Irish company;
- Tax credits for foreign tax against Irish tax on dividend income may reduce or eliminate Irish tax on dividend income from a Chinese subsidiary;
- Full "onshore tax credit pooling" has been introduced to reduce or eliminate any Irish tax on dividends received by an Irish holding company; and
- Exemption on interest withholding tax available where the interest is paid by a company in the ordinary course of the trade to a company which is tax resident in an EU Member State or a country which Ireland has a double tax treaty.

Other attractive features include tax relief for interest on qualifying debt to fund qualifying share acquisitions or to fund connected companies and no capital duty in Ireland.

## **Conclusion**

The Irish holding company regime compares favourably against the popular regimes used for investing into China. While an Irish holding company will not be the most suitable type of holding company in every case, where an acquisition of Chinese trading companies is being considered and the exit is required to be at the China level, consideration should be given to the use of an Irish holding company as the acquisition vehicle.

**Contributed by:** Martin Phelan

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

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 US\$101.5 million (€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

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

During the summer, the Irish *Taoiseach* (ie 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; and
  - 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

## **The Commercial Court**

The Commercial Court has proven an effective forum for dispute resolution. This specialised commercial division of the High Court deals with a full range of commercial disputes involving claims exceeding US\$1.35million (€1,000,000). There is however, specific provision for the Court to deal with Intellectual Property matters (regardless of value), reflecting Ireland's drive towards becoming a highly skilled "smart economy".

The average time from entry into the commercial list and allocation of a trial date is 5 weeks and the average time from entry to judgment is 21 weeks. This is due to the rules governing the Commercial Court, which are designed to encourage litigating parties to agree as many issues as possible between them before the matter comes to trial, so that the hearing will focus only on relevant issues which remain in dispute.

## **Commercial Proceedings**

An application to have a case admitted to the commercial list can be made up to the close of pleadings but in practice unless a party seeks entry into the list at the outset of proceedings, it is unlikely to be admitted due to the pressure and demands on the court.

## **Initial Directions Hearing**

Once a case is entered into the commercial list, it is normal that the judge will immediately make what are termed, initial directions, as to the timing for the exchange of pleadings, exchange of requests for particulars and letters seeking voluntary discovery. Failure to adhere to directions may result in a costs penalty against the offending party, a measure which the Court has not been slow to enforce.

## **Judge Directed Case Management – Pre Trial Procedure**

Cases admitted to the Commercial Court are subject to very close case management. Commercial Court judges have a wide discretion as to the directions that can be made and the sanctions that can be ordered for non-compliance. This power is used in a diverse number of ways, such as requiring parties to redraft pleadings where the Court considers them deficient or to provide the pleadings in a particular form. If a case is particularly complex and involves a number of pre-trial issues then it may have a specific Commercial Court judge assigned to it who will preside over regular Directions Hearings to ensure that the case remains managed despite its complexity.

## **No Trial by Ambush**

Once discovery has been exchanged, the Court will give directions in relation to the exchange of witness statements as to fact or of an expert if the parties are to rely on oral evidence. The witness statement is a précis of evidence which must outline the essential elements of the evidence to be given and it must be dated and signed by the witness. It is not evidence in chief per se, unless the parties otherwise agree. In this way 'trial by ambush' is not possible in the Commercial Court as a party will know in advance the case it has to meet, the evidence to be adduced and the witnesses to be called to support the evidence. Thereafter the case proceeds to hearing.

## **Conclusion**

The Commercial Court has undoubtedly provided a modern framework within which to conduct business litigation. Proceedings are heard by judges with established commercial backgrounds. The initial directions hearings, case management and pre-trial conference mechanisms oblige the parties to reduce the issues in dispute from the outset and have led to shorter timeframes for exchange of pleadings and shorter trials.

Contributed by: Ann Henry

### Ireland Remains the Location of Choice for US Investment

Market leaders in the technology, pharmaceutical and financial services sectors continue to demonstrate confidence by further investing in Ireland...

- **Google** recently announced plans to invest US\$101 million (€75 million) in a new data centre in Dublin, which will rank as one of the most energy efficient centres in the world. This will further establish Ireland as a worldwide location of choice for cloud computing.
- **Microsoft** has been granted planning permission for a 11,090 square metre data centre adjoining its existing data centre at its facility in Dublin.
- **Dell** is to establish a Cloud Research and Development Centre in Dublin and the first of 22 international "Dell Solution Centres" in Limerick. Recruitment is currently underway at both facilities with a total of 150 people expected to be employed across both in the next two years.
- **Intel** has announced it is to locate its global Energy and Sustainability Lab in Ireland at its existing campus close to Dublin.
- **Twitter**, the global social networking giant, has announced plans to establish an international headquarters in Dublin. The office in Dublin will be the third twitter location outside the US.
- **JRI America Inc** plans to establish a software development facility in Tralee, County Kerry which is expected to create 100 highly skilled positions over the next 5 years.
- **Pivot Acquisition Corp**, the North American IT solutions provider, has announced the opening of a Shared Services Centre in Galway to support the company's rapid international growth and expansion.
- **BioMarin Pharmaceutical Inc** has invested US\$48.5 million (€35.6 million) in the purchase of Pfizer's 133,000 square foot bulk biologics manufacturing facility in Cork. The purchase of the facility is part of the company's phased expansion into Ireland's life sciences industry and follows the establishment of an international supply chain and logistics presence in Ireland in early 2011. It will also be the first time the company has placed internal biopharmaceutical production activities outside of the US.
- **Genzyme**, a world leader in biotechnology and pharmaceuticals, has invested a US\$203 million (€150 million) in a new facility at its biotechnology campus in Waterford. This brings Genzyme's total investment since arriving in Ireland ten years ago to US\$678 million (€500 million).
- **Boston Scientific Corporation**, which has been established in Ireland since 1994, is to invest US\$35 million (€26 million) in research and development at its Clonmel facility. The investment will enable the company to expand its R&D and technical capabilities in respect of next generation cardiac rhythm management devices manufactured at the Clonmel plant.
- **BNY Mellon** has announced that it is to establish a new company, **BNY Mellon Clearing International**, in Dublin. The new company will clear listed funds and option trades for EMEA based institutional clients and will create 50 new highly skilled jobs.
- **Glass Lewis**, the leading independent governance services and investment research firm, has opened an office in Limerick which will serve institutional investors throughout Europe. The Limerick office will be the fifth in Glass Lewis' global network.

## **Ireland Tops the Tables - Key Facts and Figures on Ireland**

Set out below is a selection of the rankings which show why Ireland remains the location of choice for foreign direct investment.

- The 2011 IMD World Competitiveness Yearbook ranks Ireland:
  - 1<sup>st</sup> for real corporate taxes
  - 1<sup>st</sup> for investment incentives
  - 1<sup>st</sup> for skilled labour that is readily available
  - 1<sup>st</sup> for business legislation for foreign investors
  - 2<sup>nd</sup> for consumer price inflation
  - 3<sup>rd</sup> for direct investment flows inwards
- Ireland ranked top location in world to invest (IBM 2011 Global Location Trends Report)
- Ireland ranked 1<sup>st</sup> in Eurozone countries for doing business (Forbes 2010)
- Ireland ranked Europe's number 1 R&D location from an after-tax cost perspective (Mazars 'Review of Global R&D Tax Incentives' Study 2010)
- Ireland moved from 14<sup>th</sup> place to 6<sup>th</sup> place in the Forbes fifth annual ranking of the Best Countries for Business

You might also be interested to learn that:

- Competitiveness has improved significantly, with costs now back to 2003 levels (NCC Cost of Doing Business in Ireland 2011)
- Construction tender prices are down 33% since peak levels in the first half of 2007 and are now back to 1998 levels
- Prime Dublin office rents are down 52% from peak levels
- Exports grew 5.8% in the first half of 2011

## **William Fry Advises on “M&A Deal of the Year” and on “Debt Loan Notes Deal of the Year”**

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 US\$2,352 million (€1,704 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.”*