



Client
Newsletter
Summer 2009

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FINANCIAL SERVICES

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European Commission proposed Directive on Alternative Investment Fund Managers

The proposed directive on Alternative Investment Fund Managers (“AIFM”) covers non UCITS funds including hedge funds and private equity funds and aims to create a harmonised regulatory and supervisory framework for AIFM within Europe.

The proposed Directive will require all applicable AIFM to be authorised and subject to harmonised regulatory standards on an ongoing basis. It will also increase the reporting and transparency of AIFM and the funds they manage for investors and public authorities. The aim is to improve Member States macro prudential oversight of the funds sector and take harmonised action where appropriate with regard to the proper functioning of financial markets.

The proposed Directive will:

-  Adopt an 'all encompassing' approach to ensure that no significant AIFM is outside of regulation and oversight, whilst providing exemptions for much smaller managers. It will only apply to AIFM managing a portfolio of €100 million plus. A higher threshold of €500 million applies to AIFM not using leverage (and imposing a five year lock-in period for investors) as they are not regarded by the EC as posing any systemic risk. According to analysis by the EC, a threshold of €100 million implies that about 30% of hedge fund managers, managing almost 90% of assets of EU domiciled hedge funds, would be covered by the proposed Directive;
-  Aim to regulate major sources of risk in the alternative investment value chain by ensuring that AIFM are authorised and subject to ongoing regulation and that key

service providers, including depositaries and administrators, are subject to robust regulatory standards, as is currently the situation in Ireland;

- ▣ Increase the transparency of AIFM and the funds they manage for supervisors, investors and other key stakeholders;
- ▣ Ensure that all regulated entities are subject to governance standards and have robust systems in place for the management of risk, liquidity and conflicts of interest;
- ▣ Permit AIFM to market funds to professional investors throughout the EU subject to compliance with regulatory standards; and
- ▣ Grant access to the European market to third country funds after a transitional period of three years. The EC have said this is to allow the EU to check whether the necessary guarantees are in place in the countries where the funds are domiciled (with respect to among others equivalence of regulatory and supervisory standards and exchange of information on tax matters).

Industry activities have been set up to consider the implications of the proposed Directive and to try to ensure that it is positioned to reflect the environment it may ultimately yield. An industry task force (including industry companies, representatives and committees) has been formed to develop a project plan and take responsibility for the industry initiatives relating to the proposed Directive.

More information on the proposed Directive is available at:

http://ec.europa.eu/internal_market/investment/alternative_investments_en.htm

Credit Default Swaps: Central Clearing Platform (“CCP”) and ISDA Auction Hardwiring

The size and systemic importance of Credit Default Swaps (“CDS”) has led to many calling for the regulation and oversight of this \$54trillion market. Recently, the EU Commission has announced a breakthrough in the establishment of a CCP, with nine of the largest CDS dealers all agreeing to use the EU-based central clearing for eligible EU CDS contracts by the end of July, 2009. All of these CDS dealers have agreed to work closely with infrastructure providers, regulators and the EU Commission in resolving any outstanding technical, regulatory, legal and practical issues which may arise in the course of the process. It should be noted that each firm will decide on an individual basis on which central clearing house or houses might best provide its risk management objectives and this, of course, will be subject to the requisite regulatory approval of any such clearing house. The EU

Commissioner for the Internal Market has welcomed this development; however there is a strong likelihood of formal EU regulation coming some time in the future.

In addition to these developments, ISDA has recently announced a renewed draft for the hardwiring of its CDS Auction Settlement Protocol. This undertaking, called the 'Big Bang' Protocol, is designed by ISDA to incorporate into its standard documentation the auction settlement of contracts after a default or other credit event on a company referenced in CDS transactions. ISDA has published an Auction Settlement Supplement and opened the Auction Settlement Protocol on 12 March, 2009. This protocol was open for adherence from 7 April, 2009. Changes to the documentation covered by the Protocol would take effect upon closure of the Protocol. The Auction Supplement proposes to amend the ISDA CDS Definitions and incorporate the CDS settlement auction terms that are currently included in the CDS auction protocols. The Auction Supplement will also include provision for the use of the ISDA Determinations Committee, which will make binding determinations on issues such as whether a Credit Event has occurred, whether an auction will be held and whether a particular obligation is deliverable.

The new terms, which are contained in ISDA's 2009 March Supplement (the "2009 Supplement") and are incorporated into existing CDS documentation by the Big Bang Protocol, come into effect from 8 April, 2009 onwards and include the following:

- ▣ The 2009 Supplement adds the concept of Auction Settlement as a settlement method that will eliminate the need for credit event protocols to cash settle CDS transactions.
- ▣ It incorporates the resolutions of the Determinations Committees into the terms of standard CDS contracts, which will make binding determinations for issues such as whether a Credit Event has occurred; whether an auction will be held; and whether a particular obligation is deliverable. ISDA announced the final composition of the Credit Derivatives Determinations Committees on 3 April, 2009.

Information related to the Determinations Committees is available at www.isda.org/credit.

- ▣ The 2009 Supplement adds credit event and succession event "look back" provisions (or backstop dates) into the CDS documentation that institute a common standard effective date for CDS transactions. Under the Big Bang Protocol, these "look back" provisions will come into effect for legacy transactions on 20 June, 2009.

In combination with the changes in market practice that support standard coupons for CDS, these developments will introduce greater certainty to transactional, operational and risk considerations for treatment of CDS.

Third Anti-Money Laundering Directive – 2005/60/EC

General

Minister for Justice, Equality and Law Reform has published the Bill that will lead to the law implementing Directive 2005/60/EC on the "Prevention of the use of the Financial System for the Purpose of Money Laundering and Terrorist Financing" (the "Third Anti-Money Laundering Directive") in Ireland. The Financial Regulator has been assisting the Department of Finance and the Department of Justice, Equality and Law Reform with financial services related queries raised by Parliamentary Counsel.

It is expected that the next step is for the Bill to be debated in the Oireachtas. However, as the Oireachtas is currently in summer recess, the Bill will not be debated until September, 2009. However, it is understood that the drafting of the Guidance Notes will be resumed now that the Bill has been published.

It is anticipated that legislation will be fully in place by October, 2009 (the "2009 Act"). For now, until the legislation is passed, the Criminal Justice Act, 1994 (as amended) and the Criminal Justice (Terrorist Offences) Act, 2005 continue to apply.

When the 2009 Act takes effect, the Financial Regulator will conduct a public consultation through its website www.financialregulator.ie on both the provisions of the 2009 Act and on the industry's core and sectoral guidance notes.

New Requirements for Trustees and Corporate Service Providers

Trustees and corporate service providers should be aware that the Bill provides for an authorisation and registration procedure for persons carrying on the business of a "trust or company service provider" who are not already regulated as members of a designated accountancy body or are not a barrister, solicitor, credit institution or financial institution. This is required in order to implement Article 36 of the Directive which provides, *inter alia*, that trust and company service providers shall be licensed or registered and that a "fit and proper" test be applied to persons who direct or are the beneficial owners of such businesses. It will be an offence to carry on the business of a trust or company service provider without an authorisation from the Minister. The Bill also sets out additional requirements with respect to the conduct of trustees and corporate service providers business including taking reasonable steps to ensure that principal officers are fit and proper persons. The Minister will also establish and maintain a register of authorised trustees and corporate service providers which will be publically available.

For the purposes of the Bill, a "trust or company service provider" means any person whose business it is to provide any of the following services:

- ▣ forming companies or other bodies corporate;
- ▣ acting as a director or secretary of a company under an arrangement with a person other than the company;
- ▣ arranging for another person to act as a director or secretary of a company;
- ▣ acting, or arranging for a person to act, as a partner of a partnership;
- ▣ providing a registered office, business address, correspondence or administrative address or other related services for a body corporate or partnership;
- ▣ acting, or arranging for another person to act, as a trustee of a trust;
- ▣ acting, or arranging for another person to act, as a nominee shareholder for a person other than a company whose securities are listed on a regulated market

A person is deemed to have committed an offence if the person carries on business as a trust or company service provider without being the holder of an authorisation issued by the Minister under the Bill which carries penalties of a fine not exceeding EUR 5,000 and/or imprisonment for a term not exceeding 12 months (on summary conviction) or a fine and/or imprisonment for a term not exceeding 5 years (on conviction on indictment).

While corporate service providers in Ireland have existing know-your-customer procedures in place, they should note that a designated person (including a trust or company service provider) will be required to perform customer due diligence in relation to a customer prior to

- ▣ establishing a business relationship with the customer;
- ▣ carrying out for or with the customer a single transaction, or a series of transactions that are or appear to be linked to each other, or prior to assisting the customer to carry out such a single transaction or series, if:
 - (a) it does not have a business relationship with the customer, and
 - (b) the total amount of money paid by the customer in the single transaction or series is greater than EUR 15,000;
- ▣ carrying out any service for the customer if the designated person has reasonable grounds to believe that there is a real risk that the customer is involved in, or the service sought by the customer is for the purpose of, money laundering or terrorist financing based on the factors set out in Section 33(1)(c)(i)-(vi) of the Bill; or

- ▣ carrying out any service for the customer if the designated person has reasonable grounds to doubt the veracity or adequacy of documents (whether or not in electronic form) of information previously obtained by it for the purposes of identifying the customer.

Notwithstanding the foregoing, a designated person may verify the identity of a customer or beneficial owner during the establishment of a business relationship if it has reasonable grounds to believe that verifying the identity of the customer would interrupt the normal conduct of business and there is no real risk that the customer is involved in, or the service sought is for the purpose of, money laundering or terrorist financing.

In addition, a designated person is not required to apply the customer due diligence measures specified in Section 33(2) and 35(1) of the Bill if the customer or product concerned is a “specified customer” or “specified product” which helpfully includes a listed company whose securities are admitted to trading on a regulated market.

For further information on the proposed Bill, please contact any member of our Banking & Capital Markets or Regulatory & Compliance departments.

▣ UCITS IV

The European Council voted on 22 June 2009 for the adoption of the UCITS IV Directive (the “Directive”), as already adopted by the European Parliament in plenary session on 13 June 2009. The Directive has now been adopted in accordance with the co-decision procedure, thus marking the end of the first step for the implementation of a European text.

The UCITS IV proposal containing amendments to the UCITS Directive 85/611/EC was first proposed by the EC on 16 July 2008. This proposal did not take into account the management company passport which, after having been debated at CESR level, was reintroduced in December 2008.

According to the Lamfalussy process, there remains three levels before the transposition of the Directive shall be considered as fully completed among Member States. Similar to MiFID, the Directive provides that the details of certain provisions should be covered by Level 2 implementing measures to be adopted by the EC with a view to harmonise the implementation of the text. On 13 February 2009 the EC submitted to CESR a provisional request for technical advices on the new UCITS Directive implementing measures, most of which are due in July 2010.

The final two steps of the Lamfalussy process will take place during and after the period of transposition of the Directive. Under level 3, CESR will be in charge of issuing interpretation recommendations to national authorities and under level 4 the EC will control and advise Member States as to a proper interpretation and application of the Directive. Member States will have until 1 July, 2011 to transpose the Directive into national legislation.

The following is a summary of the key implications of the Directive:

▣ Management Company Passport

The Directive enables European funds created under the UCITS regime to be managed by a management company authorised and supervised in a Member State other than the home Member State of the fund.

▣ Fund Mergers

The Directive establishes a unified regime for both cross-border and domestic mergers of funds. Pursuant to the Directive, all funds are entitled to merge regardless of their structure (corporate, unit trust, or contractual type of funds).

▣ Master Feeder Structure

The Directive establishes the first European regulation concerning the setting-up of master feeder funds. A feeder fund is defined in the Directive as a UCITS or a sub-fund thereof which has been approved to invest at least 85% of its assets in units of another fund. It can also set aside 15% of its assets to investments in derivative instruments or liquid assets etc. As far as the master fund is concerned, it cannot itself be a feeder fund, nor hold units of a feeder fund.

▣ Key Investor Information

The key investor information shall replace the simplified prospectus which failed to provide investors with all basic information to enable them to make an informed investment choice. It is intended to be as short pre-contractual document written in a brief manner and in a non-technical language which shall provide easily understandable, fair, clear and not misleading information on the fund to contemplated or actual investors.

▣ Simplified Notification Procedure

A fund willing to market its units in a Member State other than that of its country of incorporation will be required to notify its supervisory authority of such project, through a







notification procedure which will then be transferred by its home regulator to the competent supervisory authorities of the contemplated host country (new “regulator-to-regulator” procedure).

▣ Enhanced Cooperation between Supervisory Authorities

The proposed amendments to the Directive will result in increased cross-border operations necessitating a full and timely cooperation between supervisory authorities. The Directive encourages the exchange of information, harmonises the powers of the supervisory authorities and allows for the possibility of immediate verifications and investigations, consultation and mutual help mechanisms.

BANKING AND CAPITAL MARKETS

In this issue:-

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-  Recent Developments in relation to the National Asset Management Agency
-  Amendments to the Capital Requirements Directive including the new 5% “Skin in the Game” Requirement
-  Key Changes introduced under the Financial Measures (Miscellaneous Provisions) Act 2009
-  Proposed Establishment of the Central Bank of Ireland Commission
-  One to Watch - Target Securities 2

Regulation EC No. 24/2009 of the European Central Bank concerning statistics on the assets and liabilities of financial vehicle corporations (“FVCs”) engaged in securitisation transactions (ECB/2008/30) (the “FVC Regulation”)

The FVC Regulation imposes reporting obligations on many categories of FVCs resident in a Member State that are involved in securitisation transactions. These include the obligation to report their existence to the relevant national central bank (“NCB”) and to make quarterly reports on an on-going basis which detail their assets and liabilities, write-offs and write-downs. The first reporting deadline is 28 January 2010 in respect of data relating to the quarter ending in December 2009.

NCBs may grant a derogation to FVCs with respect to the maturity, sector and residency breakdowns of outstanding securitised loans on their balance sheets if these loans were originated and are being serviced by a euro-area Monetary Financial Institution (MFI) through a true-sale securitisation. The Central Bank and Financial Services Authority of Ireland (“CBOI”) will grant this derogation in applicable cases as set out in the following guidance issued in relation to same: www.centralbank.ie/data/starepfiles/derogation%20on%20securitised%20loans.pdf

Recently, CBOI has created a new section on its website in relation to the FVC Regulation http://www.centralbank.ie/sta_fvc.asp which will be updated on an on-going basis. This currently includes various notification and reporting templates for FVCs which are required to report to CBOI under the FVC Regulation. It is expected that CBOI will also publish its

national guidelines in relation to the FVC Regulation over the coming months. It is hoped that these guidelines will provide further clarity to the ambiguous wording in the FVC Regulation so that industry stakeholders can consider whether it is something which needs to be addressed within their structures and reporting lines.

As there are significant penalties for failing to comply with the FVC Regulation, special purpose vehicles involved in securitisation and structured finance transactions may wish to consider seeking legal advice on a case-by-case basis to assist in determining whether the FVC Regulation is applicable to them and, if so, whether certain amendments are required to the existing transaction documents to ensure that the reports can be compiled and submitted in a timely and efficient manner.

For further information on the FVC Regulation, please contact any member of our Banking & Capital Markets department.

Recent Developments in relation to the National Asset Management Agency

On 30 July 2009 the Minister for Finance of Ireland published draft text of the proposed legislation for the National Asset Management Agency (“**NAMA**”) which is to be established on a statutory basis to deal with the negative impact on the Irish economy resulting from deficiencies in the asset quality in the banking system.

The legislation will be brought before the Oireachtas (the Irish national parliament comprised of the President of Ireland and two Houses: Dáil Éireann (the House of Deputies or Representatives) and Seanad Éireann (the Senate)) in September for debate by all parties and key enabling regulations are expected to be published by the Minister in September. In the interim, the Government are expected to continue collaborating with the European Commission in relation to State Aid approval. It has been reported that consultations will also be undertaken with the European Central Bank.

As set out in the Minister’s speech when publishing the paper, the principal features of NAMA and the draft paper include:

- ▣ NAMA will buy the appropriate eligible assets of the participating institutions. It is proposed that the price will include an appropriate write down which the participating institutions will have to reflect in their books, rather than being based on the book value of the loans.

- ▣ Eligible assets for transfer to NAMA will include land and development books and associated loans.
- ▣ NAMA will purchase the assets through the issuance of Government securities and/or guaranteed securities by NAMA to the participating banks. The replacing of property related loans with Government bonds is aimed at strengthening the balance sheets of the banks and increasing their capacity to access liquidity in the financial markets and, if necessary, through Eurosystem liquidity operations.
- ▣ NAMA will set the price it is prepared to pay for assets and, in acquiring loans, it will have all necessary powers to carry out full due diligence and acquire all necessary information.
- ▣ The principles of the valuation methodology are set out in the draft legislation and the Minister is expected to issue detailed regulations based on these principles in September. The methodology will aim to set a reasonable price having regard to a longer term perspective on the property market. Valuations by NAMA will be consistent with EU Commission guidelines and will be based on the current market value of the underlying collateral, adjusted to reflect a longer term economic value which the underlying asset could reasonably be expected to attain. The valuation methodology and indeed the scheme as a whole will require EU State Aid approval.
- ▣ Participating institutions are obliged to act in good faith and comply with appropriate directions from NAMA.
- ▣ NAMA will have all the powers necessary to purchase, hold, and dispose of assets and if necessary complete developments with a view to achieving an optimum return to the State.
- ▣ NAMA will be accountable to the Oireachtas and reports will be laid before the Oireachtas.
- ▣ Various legislative exemptions and variances have been provided to enable NAMA to complete its work as efficiently as possible.
- ▣ As a counter-measure to the danger that persons might seek to impede NAMA's operations in some instances, NAMA has been provided with very limited powers to obtain property or interests compulsorily.
- ▣ Where litigation arises in respect of NAMA's operations, provisions have been made to ensure this does not unduly obstruct NAMA's efficient operations and such litigation proceeds without delay.

- ▣ NAMA will be provided with powers necessary to enforce the security on loans, including the appointment of statutory receivers and to be vested with ownership of the underlying asset where appropriate.
- ▣ The issue of the set off of tax by the banks against losses will be addressed by the Minister in the publication of the Bill in September.

For further information on the foregoing, please see other Dillon Eustace publications in relation to NAMA or contact any member of our Banking & Capital Markets department.

Amendments to the Capital Requirements Directive including the new 5% “Skin in the Game” Requirement

The European Parliament voted in favour of certain amendments to the Capital Requirements Directive (comprising of Directives 2006/48/EC and 2006/49/EC, together the “CRD”) to, among other things, introduce the new 5% ‘skin in the game’ retention requirement for originators, sponsors or original lenders.

The new ‘skin in the game’ requirement means that the originator, sponsor or original lender in a particular structure will be required to retain on an on-going basis (and explicitly disclose that it has a retained) a material net economic interest in the deal, which shall not be less than 5%, as a precondition for other EU banks’ investment in that deal. In that regard, the retention of the first loss tranche (to the extent that it represents at least 5% of the nominal value of the securitised exposure) will be sufficient to meet the new retention requirement.

The Directive amending the CRD must be transposed into national law by Member States before 31 October 2010 and then applied (to new securitisations) from 31 December 2010 and, for existing securitisations where new underlying exposures are added/substituted, from 31 December 2014.

In addition, the Commission announced in July 2009 that it was proposing further amendments to the CRD that will impose higher capital requirements for re-securitisations in order to ensure that banks take proper account of the risks of investing in such complex financial products and to tighten up disclosure requirements to increase the market confidence that is necessary to encourage banks to start lending to each other again. In addition, the new proposals are aimed at changing the way that banks assess the risks connected with their trading books to ensure that they fully reflect the potential losses from adverse market movements in the kind of stressed conditions that have been experienced recently. The Commission confirmed that the proposal will tackle perverse pay incentives by requiring banks and investment firms to have sound remuneration policies that do not

encourage or reward excessive risk-taking. Under the proposed amendments, banking supervisors will be given the power to sanction banks with remuneration policies that do not comply with the new requirements.

The proposal is available at: http://ec.europa.eu/internal_market/bank/regcapital/index_en.htm

Finally, the Commission Services have invited submissions in relation to further possible changes to the CRD which relate to through-the-cycle expected loss provisioning; specific incremental capital requirements for residential mortgages denominated in a foreign currency; and the removal of national options and discretions. In addition, changes are also proposed to simplify the Bank Branch Accounts Directive (89/117/EEC). Responses should be submitted to the Commission Services by 4 September 2009.

For further information on the CRD and proposed amendments, please contact any member of our Banking & Capital Markets department.

Key Changes introduced under the Financial Measures (Miscellaneous Provisions) Act 2009

The Financial Measures (Miscellaneous Provisions) Act 2009 (the “**Act**”) was signed into law on 26 June 2009 and all its provisions are in effect from that date. The Act contains a range of miscellaneous financial provisions which may be of interest including:

- ▣ a provision making technical amendments to the Prospectus Directive Regulations 2005 and the Investment Funds, Companies and Miscellaneous Provisions Act 2005 in order to protect the Exchequer by removing the requirement to take responsibility for, and legal liability on the Minister for Finance as guarantor of certain debt securities in relation to the accuracy of information contained in prospectuses that relate to such securities. This is consistent with guidelines previously issued by the Financial Regulator;
- ▣ an amendment to the Central Bank Act 1989 to clarify that any acquisition coming within the scope of the Directive 2007/44/EC on the Prudential Assessment of Acquisitions in the Financial Sector will not also be subject to the provisions of that Act;
- ▣ amendments to the Insurance (No 2) Act 1983 and the Insurance Act 1989 to allow the Financial Regulator to present a petition to the High Court for the administration of life and reinsurance companies;
- ▣ a technical amendment to the Netting of Financial Contracts Act 1995 that clarifies the application of that Act for netting agreements where one party to the agreement has created a security interest in favour of a third party. Section 20 amends the Netting of

Financial Contracts Act 1995 by inserting a new definition of “party” in that Act. The purpose of this amendment is to clarify the application of that Act for netting agreements where one party to the agreement has created a security interest in favour of a third party. The Netting of Financial Contracts Act 1995 encompasses only bilateral netting agreements. However, prior to this amendment, the creation of a security interest by either party to a netting agreement could have resulted in an interpretation that the agreement was between more than two parties. In such circumstances, the protections afforded by the Netting of Financial Contracts Act in the event of insolvency may not have applied. This had the potential to cause significant difficulties for parties to netting agreements, including issues affecting the capital adequacy position of the parties, as well as impacting on the cost and viability of such transactions in the Irish market. The amended definition of “party” clarifies that it does not include any person in whose favour a security interest has been created; and

- ▣ extension of the guarantee contained in the Credit Institutions (Financial Support) Act 2008, beyond the current expiry date of 29 September 2010.

For further information on the Act, please contact any member of our Banking & Capital Markets or Financial Services departments.

Proposed Establishment of the Central Bank of Ireland Commission

The Minister for Finance has announced the Government's intention to establish a single fully integrated regulatory institution, the Central Bank of Ireland Commission. This new structure is intended to replace the current structure of the Central Bank and the Financial Services Regulatory Authority. It is expected that the new Central Bank Commission will be chaired by the Governor of the Central Bank and will be responsible for both the supervision of individual firms and the stability of the financial system generally.

For further information on the foregoing, please contact any member of our Banking & Capital Markets department.

One to Watch - Target Securities 2

The European Central Bank has taken further steps towards launching a single settlement service for securities trades by signing a memorandum of understanding on 16th July, 2009 which sets out the mutual obligations of the Eurosystem and the European central securities depositories. The ECB is aiming to launch Target 2 Securities as a ‘one-stop shop’

settlement service for securities trades in 2013. It plans to cut costs significantly by replacing the current patchwork of national settlement systems that make settlement of cross-border transactions particularly costly. A binding contract is due to be signed in the first half of 2010 if the outstanding issues can be resolved in that time. For example, the ECB are seeking to include trades denominated in sterling as Britain is Europe's biggest share trading centre but the Bank of England has expressed concerns about the degree of ECB control over the project. As such, this is one to watch for the future.

For copy of the MOU, Please see http://www.ecb.europa.eu/paym/t2s/pdf/T2S_MoU.pdf

REAL ESTATE

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Alienation of a Leasehold Interest: Landlord and Tenant Perspectives

Introduction

The current economic downturn has created tension between landlords and tenants of commercial premises.

While landlords wish to protect the value of their investment, tenants on the other hand wish to reduce their outgoings and have greater flexibility with their accommodation arrangements.


Most modern commercial leases contain restrictions preventing a tenant from assigning, sub-letting or otherwise parting with possession of a premises without a landlord's prior consent and may often contain an absolute prohibition on a partial assignment or sub-letting. Such a provision is incorporated into a lease to enable landlords to retain control over the occupier of the premises and to protect the value of their investment. In changed market circumstances this article proposes to look at the options open to a tenant and to a landlord.

Tenant's Options

The following are the options that are available to a tenant:

Break Option

If a tenant has a break option in its lease the tenant can exercise its option to break and bring the tenancy to an end. The break option will be subject to the conditions as set out in the clause being complied with which may include the following:

-  Six to twelve months prior notice in writing and the notice provisions in the lease are to be strictly adhered to in this regard. The notice is served as provided in the lease, service by registered post is recommended also;

- ▣ Payment of a penalty of approximately 6/12 months rent to the landlord prior to the date of surrender;
- ▣ Compliance with all the covenants in the lease. Failure to do so could prevent a valid exercise of the break option;
- ▣ Payment of all rents, outgoings, etc. to the date of the surrender;
- ▣ Time is of the essence.

Surrender

In the event that there is no break option provided in the lease the tenant may attempt to negotiate a surrender of the premises to the landlord in consideration of a reverse charge premium. It is at the discretion of the landlord as to whether or not it will agree to such a surrender.

Group companies

In the event that the tenant has the option to group share it may avail of such an option in order to assist with the payment of the rent subject to the conditions as set out in the lease being complied with which may include the prior renunciation in writing of the group or associate company of its right to renew.

Pre-emption clause

In the event that there is a pre-emption clause in the lease in favour of the landlord the tenant will be in a position to notify the landlord in accordance with the provisions in the lease of its intention to assign the lease providing the landlord with the right to match a third party offer.

Assignment

An assignment involves an out and out transfer of the interest of the tenant. An assignment transfers the tenancy to the assignee and the tenant ceases to have any interest in the premises. The assignee steps into its shoes and assumes all the rights and liabilities of the tenancy for as long as it holds it. The tenant will have no liability going forward under the lease provided that it has completed all the necessary formalities.

Sub-lease

The crucial point in a sub-letting is that the tenant retains its interest in the premises and remains liable to the landlord on the terms under the head lease. Unlike an assignee of the tenant, a sub-tenant has no privity of estate with the landlord. The head lease will specify that the rent in the sub-lease is either the open market rent or equivalent to the rent passing under the head lease for the time being whichever is the greater. Given the current economic climate such a provision may prove to be an obstacle to the tenant as it can only sub-let at the higher rent. When negotiating a lease this is a provision that the tenant should carefully consider.

Unsuitable market conditions which render sub-letting problematic do not relieve the tenant from having to comply with the pre-conditions to sub-letting set out in the lease. This issue arose in the case of *Allied Dunbar Assurance Plc v Homebase Limited* [2002] 2 EGLR 23. In this case the defendant tenant Homebase Limited had been granted a lease for 25 years. After 12 years the defendant tenant no longer needed the premises and wished to sub-let it. The head lease permitted sub-letting with consent but only if it satisfied the following conditions, (i) that the covenants in the sub-lease reflected those in the head lease; (ii) that the rent was to be at or above the full market rent; and (iii) that the rent was to be reviewed to a level no less than the full market rent. The defendant agreed a sub-lease with a sub-tenant satisfying this requirement, however, it entered into a collateral agreement expressed to be personal to the parties, that the defendant would indemnify the sub-tenant for any higher rent following the next rent review effectively fixing the rent for the sub-tenant and against the cost of specified repairs. The plaintiff landlord Allied Dunbar refused consent on this basis and sought an injunction to prevent the sub-let. The defendant counterclaimed, alleging that consent had been unreasonably withheld. On May 17, 2002, the Court of Appeal upheld the High Court's finding that the collateral agreement and the head lease were interdependent and to be read as one document. As there was an anticipated breach of the head lease it was held that the plaintiff had not unreasonably withheld its consent. This case in effect decided that side agreements are likely to be ineffective.

Partial Sub-lease

In the event that the tenant has the option to sub-let part of the premises in its lease it may wish to avail of such an option in order to supplement the rent payable or if it has surplus space. The ability to sub-let may often be restricted to one sub-let at any one time or if the premises naturally lends itself to being sub-let it is not uncommon for a lease to permit a sublet on a floor-by-floor basis, however, this may be limited to one or two sub-lets at any one particular time. The tenant will be obliged to comply with all conditions in the lease in relation to such a sub-let which are generally the same as those applicable to a sub-let of the entire of the premises. If this is not permitted in the lease it is recommended that the tenant

liaises directly with the landlord seeking permission. It is at the discretion of the landlord as to whether or not to agree to such a sub-let.

Landlord's Considerations

Assignment

An assignee will be the person to whom the landlord will look for payment of the rent and compliance with all the covenants and conditions in the lease. The last thing a landlord wants is a tenant who refuses to take care of the premises and who fails to pay the rent regularly. A landlord will carefully approve the proposed assignee who will be subject to financial tests and may be required to provide guarantees and/or rent deposits. A typical test to establish the financial viability of the assignee is to see whether its accounts show pre-tax profits of not less than three times the rent payable.

Requirement of a landlord when approving an assignee:

- ▣ Financial standing -The landlord will have to ensure that the assignee is of good financial standing otherwise the landlord could suffer because of the cost and inconvenience of enforcement of the covenants in the lease and because of the adverse effect that an assignee of doubtful financial standing could have on the value of the reversion.

Sub-lease

The following conditions are commonly imposed by landlords in leases in respect of a sub-letting in order to protect the value of its investment:

- ▣ Rent reserved in the sub-lease - The landlord will be concerned about the rent to be reserved in any sub-lease and accordingly the head lease will almost certainly impose some requirements in this respect. Generally it will provide that no sub-lease is to be granted at a fine or premium and that the rent reserved under the sub-lease should be no less than that reasonably obtainable in the open market or the rent for the time being passing under the head lease whichever is the greater;
- ▣ Rent reviews - The landlord will also seek to tie in rent review provisions into the sub-lease to ensure that the sub-lease rent keeps pace with the head lease;
- ▣ Covenants and conditions - The covenants and conditions in the sub-lease are generally the same as those in the head lease.

In the event that a head lease is forfeited for whatever reason the sub-tenant may be left to claim equitable relief against forfeiture though the sub-tenant may have its position

preserved under s.78 of the Landlord and Tenant (Amendment) Act 1980. It is for this reason that a landlord will also apply the same requirements, i.e. good financial standing, satisfactory tenant etc. when approving a proposed sub-tenant as it does with an assignee in the event that a sub-tenant seeks the approved reliefs to remain on in the premises following forfeiture.

Partial Sub-lease

Generally a landlord will impose the same conditions in a lease in respect of the sub-letting of the entire of the premises to the sub-letting of part of the premises. However, it is far more desirable to have one good tenant than multiple tenants in a premises which increases the risk for the landlord and possible breaches of the tenancy such as non-payment of rent. The landlord needs to consider the following matters that may arise in the event that a partial sub-let is agreed:

- ▣ Devaluation of the premises - when a premises has been fragmented by assignments or sub-lettings of small portions this may reduce the value and marketability of the landlord's reversion. In such cases the landlord should always be advised to obtain professional advice from a valuer. If the valuer is of the opinion that either the value or marketability of the reversion would be prejudiced then clearly the landlord should be advised not to consent to the division of the premises;
- ▣ Statutory rights - From the landlord's point of view it is crucial to ensure that such a sub-letting does not give the sub-tenant statutory rights to renew. In the event of consenting to such a sub-let the landlord would have to ensure that the sub-tenant renounced its right to renew and executed a valid deed of renunciation;
- ▣ Management and administration - The sub-division of the premises may cause the landlord problems as management, administration and control would be increased if the tenant dropped out of the picture in such a way as to render the landlord the immediate landlord in respect of the sub-divided premises;
- ▣ Deterioration of the premises - In addition, the landlord may be concerned that sub-division taken too far will result in the deterioration of the premises.

Consent application

In seeking consent whether to an assignment or sub-letting it is a matter for the tenant to provide the landlord with all the necessary information required in accordance with the terms and conditions provided in the lease. When making the application the tenant should put the landlord on notice as to how urgent it is. Time begins to run as soon as the landlord has

received all the necessary information and provided that all the preconditions in the lease have been satisfied.

Reasons for landlord to refuse consent

- ▣ The proposed assignment/sub-let would adversely affect the value of the landlord's reversion.
- ▣ The proposed assignee/sub-tenant is clearly unacceptable even if diminution in the value of the reversion cannot be shown.
- ▣ The proposed tenant cannot demonstrate that it is in a position to fulfil the covenants under the lease. This usually arises in the area of finance which would have a negative affect on the landlord's investment.
- ▣ That the proposed user is not in keeping with the development or that it is already a restrictive user.

In this jurisdiction it is up to the tenant to prove the unreasonableness of the landlord.

A recent case on unreasonable refusal to grant consent to a change of use is *Dunnes Stores [Ilac Centre] Ltd v Irish Life Assurance PLC & Anor* [2008] IEHC 114. This case involved the plaintiff tenant Dunnes Stores, requesting a change of use of one of its units to a "high quality food hall use". It was refused by the defendant landlord Irish Life Assurance PLC & Anor "on the grounds of good estate management" and they later stated that "the plaintiff's proposed use would not be consistent with the defendants' vision and image for that part of the Ilac Shopping Centre, namely as a primarily retail fashion area". Prior to the application for change of user the defendant and the plaintiff had been in discussions in relation to the surrender of all or part of the leases. The plaintiff sought a declaration on the basis that consent was unreasonably withheld. The judge granted the declaration to the plaintiff on the basis that there was a strong possibility that the defendant refused consent in order to secure the surrender of all or some of the plaintiff's leases in respect of its units held at the Ilac Shopping Centre in order to gain possession and by virtue of the fact that the refusal of the consent was inconsistent with the provisions in the lease which provided that when considering applications for change of user regard had to be given to the necessity and desirability of the business being "as diverse as possible".

Both cases are strongly against the landlord. It is possible that this can only increase in the current climate as judges are becoming more and more sympathetic to tenants who through no fault of their own are in a difficult financial position.

In *International Drilling Fluids Limited v Louisville Investments (Uxbridge) Limited* (1986) 277 E.G. 62, the judgment of Balcombe L.J. contained a summary of the principles to apply in determining whether or not a landlord's consent has been unreasonably withheld which are summarised as follows:

- ▣ The purpose of the restriction against alienation is to protect the landlord from having its premises used or occupied in an undesirable way or by an undesirable tenant;
- ▣ A landlord is not entitled to refuse consent on grounds that have nothing to do with the landlord-tenant relationship;
- ▣ The onus of proving that consent is unreasonably withheld is on the tenant;
- ▣ The landlord does not have to prove that its reasons for refusing consent were justified if such an opinion was to be held by a reasonable individual in the circumstance;
- ▣ It may be reasonable to refuse consent on the grounds of the proposed use of the premises even if that use is not prohibited in the lease;
- ▣ It is a question of fact in each case depending on the circumstances as to whether or not consent has been unreasonably withheld.

Statutory provisions provide that a landlord cannot unreasonably withhold its consent in accordance with s.66(1) of The Landlord and Tenant (Amendment) Act 1980, which provides that regardless of what prohibitions are in a lease in respect of assignment or sub-letting, the landlord is bound by these provisions.

Remedy for landlord if the tenant proceeds without consent

- ▣ Damages - it may be difficult to show a loss of reversion, especially if the lease is still alive and may not be relied upon if the landlord does not seek a reversion. Compensatory damages may be awarded if appropriate. Damages are only usually sought in the alternative or in addition to another remedy.
- ▣ Forfeiture - this is a commonly used remedy however given the current economic situation it may not be favourable for a landlord to have the premises vacant.
- ▣ Injunction - this may be granted if appropriate but is discretionary.

Remedy for tenant if the landlord unreasonably withholds consent

- ▣ Court declaration - the court can declare that the consent has been unreasonably withheld and grant an order permitting the tenant to proceed with the assignment or sub-letting without the consent of the landlord. It is not always practical for a tenant to do this in view of the delay involved.
- ▣ Proceed with no consent - can be done, however, this may be risky.
- ▣ Damages - the amount awarded may not just be compensatory but also exemplary.

Conclusion

Given the current economic situation, it is crucial for both the tenant and the landlord to understand each other's position and endeavour to reach an agreement that is suitable to both parties in the event that this is required, i.e. if the tenant cannot repay the rent as it is too high it is better for the landlord to reduce the rent to a level that is reasonable to both parties. This should prove to be advantageous to both parties in so far as the landlord will still have the premises let and the tenant can remain on the premises for the effective running of its business.

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LITIGATION AND DISPUTE RESOLUTION

In this issue:-

E-Discovery

E-DISCOVERY

Introduction

Rule 12 (1) of Order 31 of the Rules of the Superior Court, which govern procedures in the High Court, states:

“Any party may apply to the Court by way of notice of motion for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession, power or procurement relating to any matter in question therein.”

This is, and has long been, the foundation of the discovery process in the Irish Courts. While the rules in relation to discovery are extensive and have increased over the years, there has been little provision for the mode in which the majority of documentation is now created and stored; that is, electronically.

New Rules on E-Discovery

That position has now changed and Order 31 has been amended by S.I. 93 of 2009 dated 22 March, 2009 to introduce the concept of Electronically Stored Information or ESI. Usefully, the new rules now provide that where an order for discovery includes ESI the party seeking ESI must specify whether they require the information in searchable format and, if so, whether they require inspection and searching facilities using any IT systems owned or operated by the party requested to be made available.

The Court can order that the information is provided in searchable format or, if it cannot be searched, without the party seeking discovery incurring unreasonable expense, the Court can direct the party ordered to make discovery to make available searching and inspection facilities using their own IT systems.

Where the ESI in question comprises sensitive non-discoverable data, the Court may attach conditions to ensure this information is secured and not discoverable or may order that an

independent expert carry out the inspection and search for the relevant information. The costs of the independent expert will be met by the party seeking discovery.

The question of the cost of this type of discovery will clearly be an issue for clients and where the cost of giving discovery becomes excessive or onerous then the party giving discovery can apply to the court to vary the order.

Another helpful provision of the amended order is that documents must now be listed or provided in a sequence corresponding with the manner in which the documents or data has been stored or kept in the usual course of business. In practice this is likely to result in discovery being provided on a series of discs with a searchable index or catalogue of documents and it is imagined that this will be one of the provisions which will be of consolation to those practitioners whose task it is to review the discovered documents.

Judicial Approach to Discovery Unchanged

While these innovations will certainly have their effects, it should be noted that the restrictive approach of the Irish Courts to discovery remains in place. There has long been a desire to discourage general discovery requests which result in time wastage and unnecessary costs for the parties engaged in litigation. This imperative has been closely guarded by the judiciary who are highly critical of broad, generic requests for discovery or “fishing expeditions.” Accordingly, all discovery requests must be framed precisely stating the category of documents being sought and the reason why it is considered that such documents are material to the issues to be considered.

Each category of document contained in a discovery request is judged on relevance to the matters in question in the action and on necessity. In addition, documentation will not be discovered if it is available to the requesting party through other sources. As with soft copy documentation, requests for the disclosure of electronic documentation should be specific and should disclose the rationale for the belief that the documentation requested is needed.

Role of Peruvian Guano Test in the E-Discovery Era

One issue which will be of concern to both clients and practitioners is the retention of the so-called Peruvian Guano (*Compagnie Financiere du Pacifique v. Peruvian Guano Company (1882) 11 QBD 55*) test of relevance in relation to E-Discovery. The classic, and oft quoted, statement of Brett LJ in that case is as follows:

"It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to

damage the case of his adversary. I have put in the words "either directly or indirectly", because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry which may have either of these two consequences [italics added].... In order to determine whether certain documents are within that description, it is necessary to consider what are the questions in the action: the Court must look, not only at the statement of claim and the plaintiff's case, but also at the statement of defence and the defendant's case."

The report of Lord Woolf, MR, to the Lord Chancellor on the civil justice system in England and Wales in 1996 stated that “[t]he result of the *Peruvian Guano* decision was to make virtually unlimited the range of potentially relevant (and therefore discoverable) documents, which parties and their lawyers are obliged to review and list, and which the other side is obliged to read, against the knowledge that only a handful of such documents will affect the outcome of the case. In that sense, it is a monumentally inefficient process, especially in the larger cases. The more conscientiously it is carried out, the more inefficient it is.” The English Civil Procedure Rules 1998 which implemented Lord Woolf’s reforms largely replaced the *Peruvian Guano* Test in that jurisdiction.

Nevertheless, the *Peruvian Guano* test has been re-affirmed numerous times in the Irish courts and remains the test of relevance in this jurisdiction. It remains to be seen how the test will be applied in respect of E-Discovery where the sheer volume of “metadata” (so-called “data about other data”) which is stored on electronic files which is “indirectly” or potentially relevant in any given case may threaten to swamp the entire E-Discovery process.

Costs

Finally, it should also be noted that a party seeking discovery is obliged to convince the Courts that discovery is necessary, either for disposing fairly of the case or for saving costs. As a result, the Courts may take into account the costs involved in complying with a discovery request prior to making its decision on whether or not to grant the request and this may affect the willingness of the courts to grant E-Discovery in certain instances.

Conclusion

Given the increase in complex litigation which continues to be a corollary of the worldwide downturn it is to be hoped that E-Discovery will be easier, cleaner and more cost-efficient (not to mention more environmentally friendly) for all concerned. The amended Order 31 is a welcome and long awaited step which, if used properly by the Courts and practitioners, should aid enormously in streamlining the discovery process.

CORPORATE LAW AND M&A

In this issue:-

Publication of the Companies (Amendment) Act 2009

Publication of the Companies (Amendment) Act 2009

The Companies Amendment Act 2009 (the “**2009 Act**”) was signed into law by the President of Ireland and came into force on 12 July 2009. The key provisions of the Act are:

1. Irish Resident Director


The 2009 Act has amended the requirement to have at least one of director of an Irish company resident in the State. It is now sufficient to have one director resident in a member state of the European Economic Area (EEA) i.e. all of the EU plus Iceland, Norway and Liechtenstein. This change means that a company which has no Irish resident directors but at least one director resident in the EEA, will not be required to either (i) put a bond in place to the value €25,394.76 in accordance with the prescribed form as set out in the Companies (Amendment)(No.2) Act, 1999 (Bonding) Order 2000; or (ii) obtain a certificate of a real and continuous link with one or more activities in the State from the Revenue Commissioners.

Nevertheless, some companies such as Irish special purposes vehicles involved in structured finance and other transactions will still need to consider other important factors and tax considerations in relation to the composition of their boards of directors and day-to-day operations which is likely to result in the continued appointment of Irish resident directors to manage and direct the business of the SPVs.

2. Disclosure Obligations of Licenced Banks increased

The 2009 Act has increased the transparency of transactions entered into between licensed banks and their directors and persons connected with them by subjecting banks to an obligation to disclose such information in its accounts. The Act shall also provide support to the Director of Corporate Enforcement in his efforts to enforce compliance with company law whether the company being investigated is a bank or not.

(i) Directors and Connected Persons

-  Transactions between a bank and its directors will be treated in the same way as non-banking companies. Specifically all transactions above a *de minimis* threshold with each

individual named director will have to be disclosed separately in the annual accounts, as opposed to in aggregate format. The maximum amount outstanding during the year will also be disclosed and not simply the amount outstanding at the end of the financial year;

- ▣ In so far as connected persons are concerned, the 2009 Act provides for additional disclosure but it is the aggregated information only that is required to be disclosed; and
- ▣ It is an offence for companies (banking and non-banking) and their directors not to comply with the disclosure provisions in the Companies Acts regarding loans etc. to directors and connected persons and regarding material interests of directors in company contracts.

3. Loans to Directors

The 2009 Act provides that if a company enters into a transaction or arrangement that contravenes Section 31 of the Companies Act 1990, the company and every officer of the company at that time will be guilty of an offence. Liability can only be avoided if an officer can prove that all reasonable steps to secure compliance have been taken. This aligns the offence with numerous similar offences under the Companies Acts, and replaces the existing requirement for a successful prosecution to effectively prove wilful default.

4. Increase in the Powers of the Office of the Director of Corporate Enforcement

The 2009 Act has extended and clarified the rights of access and of search and seizure of the Office of the Director of Corporate Enforcement (the “ODCE”) in the following ways:

- ▣ The 2009 Act provides a specific right of access for the Director of Corporate Enforcement to the statutory Register of Directors’ Interests in contracts made by the company;
- ▣ The 2009 Act also provides a specific right to access for the Director of Corporate Enforcement to the statutory Register of Loans to Directors and Connected Persons.
- ▣ The 2009 Act provides for an extension of the period of validity of a search warrant to beyond a month, subject to a Court Order. An extended power of seizure is also provided for. Subject to safeguards, an officer of the ODCE conducting a search has the power to remove anything if he has reasonable grounds for believing it may contain material information and it is not reasonably practicable for a determination to be made on the premises. Subject to specified exceptions, before utilising this extended power of seizure the officer must make arrangements for the storage of the relevant material information, allow for the owner of such material information to have reasonable access to it, and ensure that confidentiality of the material information will be maintained. The

2009 Act provides that ODCE's extended powers of seizure are subject to judicial review.

- ▣ The 2009 Act amends existing provisions of the Companies Act, 1990 which formerly protected a person from having to disclose information which, in the opinion of the court, the person would be entitled to refuse to disclose on grounds of legal professional privilege. The new provisions will permit the seizure of information (whether privileged or not) on a sealed and confidential basis and provide that either the Office of Director of Corporate Enforcement or any person affected may apply to court for a determination of matters relating to privilege. The amendments also provide for the introduction of a mechanism where the court can be assisted by the appointment of an experienced independent person with suitable legal qualification to examine the information and prepare a report with a view to assisting or facilitating the court in making its determination.
- ▣ The 2009 Act clarifies the power of the Director of Corporate Enforcement to compel third parties to produce records relating to the company under investigation and details the procedural requirements for the exercise of this power.

5. Amendment to Collective Citation

The 2009 Act has changed the collective citation of the Companies Acts to "1963 to 2009". Accordingly, this citation will appear on all copies of Memoranda and Articles of Association adopted by Irish companies. In addition, the appropriate annotation in the auditors' report and in financial statements signed on or after 12th July 2009 should be the "Companies Acts, 1963 to 2009".

EMPLOYMENT LAW

In this issue:-

The Rights of the Reluctant Transferee under “TUPE”

What if I don't want to go? – The rights of the reluctant transferee under “TUPE”

The Irish rules regarding the transfer of undertakings are set out in the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (“the Regulations”) which implement an EC Directive. While the abbreviation derives from the UK regulations, the Regulations are often referred to colloquially as “TUPE”. Each Member State was obliged to implement the Directive but the Regulations may differ in their detail as between Member States. In brief, where the appropriate circumstances exist, the Regulations operate to automatically transfer employment contracts from one company to another where there is a relevant “transfer” which could, for example, be a merger or an outsourcing arrangement. In the Regulations, the current employer is referred to as the “transferor” and the new employer is referred to as the “transferee”. The general terms in which the Directive and the Regulations have been drafted have led to them being the subject of much litigation and references to the European Court of Justice (“ECJ”) for interpretive guidance since the original Directive was introduced in 1977 and it looks like there will be more litigation in the future.

Where a relevant transfer occurs there are obligations under the Regulations on both the transferor and the transferee to inform employees about various aspects of the transfer and any impact which it may have on them. The general expectation is that employees will be glad that their employment and service will be protected and recognised by the new employer. However, some employees, for their own reasons, may not wish to transfer to the new employer and a question then arises as to what their rights are. One interpretation of that situation was that an employee who did not wish to transfer to the new employer would be treated as having been made redundant by his original employer who would have to pay the employee statutory redundancy.

In the case of *Symantec v Declan Leddy* [2009] IEHC 256, and in a second related case, the High Court has recently decided on the rights of an employee who refuses to transfer to the new employer in a transfer of undertakings situation where the new employer was offering terms and conditions of employment which were not substantially different from those on which the employee was currently employed so that the employee would suffer no detriment regarding terms and conditions.

The Symantec case involved two employees who objected to the proposed transfer of their employment despite the fact that they had been told that their refusal to transfer would be treated as if they had resigned. The employees sought statutory redundancy payments from their existing employer. The Employment Appeals Tribunal decided that the employees could not be forced to work for the new employer and that they were entitled to the statutory redundancy payments. The employer appealed to the High Court under the Redundancy Payments Acts and also relied on a provision in the Regulations to the effect that the existing employer's rights and obligations under a contract of employment existing on the date of a transfer automatically transfer to the new employer.

The High Court considered a number of cases which had been decided by ECJ. The employer argued that the purpose of the Regulations was to safeguard employees' rights and that all rights and obligations transferred to the new employer at the date of the transfer and that, accordingly, the original employer was released from its obligations to the employees even if those employees did not wish to transfer. The Directive, which the Regulations implement, allows a Member State to provide for joint liability on the original and new employer but the Regulations in Ireland do not contain such a provision.

The ECJ cases had held that the Directive allowed the employee be employed by the new employer on the same conditions as were agreed with the original employer but it did not mean that the employee had to continue to work for the new employer. The ECJ recognised the employee's fundamental right to choose his employer and to decide, of his own accord, not to avail of the protection offered by the Directive.

In the Symantec case, the employer argued that that an employee is entitled to object to the transfer and cannot be obliged to work for the new employer but the fact that an employee is not obliged to work for the new employer does not mean that his contract of employment is not transferred automatically to the new employer. Symantec referred to the definition of a redundancy to support its case that there were no circumstances justifying a redundancy by it, whatever about the new employer.

The High Court disagreed completely with the employees' arguments and agreed fully with the employer's argument that the Regulations do not state what will occur if employees decide not to transfer. The Court held that it did not follow that, merely because an employee decided not to transfer, a situation of redundancy automatically arose with respect to the existing employer because the fact that an employee objected to the transfer did not of itself have the effect of negating the transfer. The High Court decided that if the Oireachtas had wished the employment relationship with the transferor to continue so as to facilitate the employee in making a claim for redundancy it could have enacted legislation to that effect but this had not been done. The High Court decided that it was not possible for the employees in the Symantec case to make a redundancy claim against their original employer.

The Symantec case is therefore authority for the proposition that if the new employer is willing to take an employee on without any detrimental change to the employee's existing terms and conditions of employment then a refusal by an employee to transfer does not constitute a redundancy situation which would require the existing employer to make a statutory redundancy payment to the employee. It is worth noting however that Article 4(2) of the Directive and Regulation 5(3) of the Regulations provide that if the contract of employment is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, then the employer is to be regarded as having been responsible for the termination.

The Symantec case is a useful clarification of the law in Ireland on this particular point and it is a reminder that the Regulations very often give rise to differing views as to whether and how they apply and are to be interpreted, particularly in circumstances where there have not been any Court determinations on the point in issue in a given case. It appears inevitable that the Regulations will be subject of further litigation in the future.

EU AND REGULATORY AFFAIRS

In this issue:-

-  **Data Protection - Guidance on Data Breaches**
 -  **Data Protection Commissioner publishes Annual Report for 2008**
 -  **Payment Services Directive**
-

Data Protection - Guidance on Data Breaches

On 14 April 2009, the Data Protection Commissioner published Interim Guidance on Data Breaches to assist organisations in dealing with the loss of personal data. A working group established by the Minister for Justice, Equality and Law Reform is currently examining if changes in data protection law are necessary to deal with such breaches.

The Interim Guidance advises that an organisation should notify the Data Protection Office immediately where it has a loss of personal data for which it is responsible. Examples include loss of personal data through loss of a portable device (laptop), a misaddressing of mailings or a “leak” from the organisation. A dedicated phone number (1890 252 231) and email address have been provided (info@dataprotection.ie).

Following notification of a breach, the Data Protection Office will investigate the issues surrounding the breach and will conduct an investigation depending on the circumstances and seriousness of the data breach. The Data Protection Office have emphasised that prevention is better than cure and have provided advice on data security measures which organisations should adopt. This includes measures for physical security, back-up systems, portable devices and wireless networks.

Data Protection Commissioner publishes Annual Report for 2008

On 13 May 2009, the Data Protection Commissioner launched his annual report for 2008. The report focuses on the responsibility of private and public sector organisations to treat the personal information of their customers and clients with respect.

During 2008 there was a significant decrease in the number of complaints to the Data Protection Commissioner in relation to unsolicited direct marketing text messages, phone calls, fax messages and emails. The Commissioner welcomed this development which reflects increasing awareness of data protection obligations among service providers in this sector and the impact of prosecutions undertaken by the Commissioner to challenge illegal

practices in the text marketing sector. There has been a corresponding increase in the number of complaints related to access rights under the Data Protection Acts 1988 and 2003. The Commissioner considers that this reflects a higher level of awareness among members of the public of their rights in this area.

As in previous years the Office sought to achieve amicable resolutions to complaints as often as possible, as mandated by section 10 of the Data Protection Acts, 1988 and 2003. In such cases complainants may be content to receive an apology from the data controller concerned and an undertaking to ensure there will be no repeat of the incident. These settlements have also, on occasion, involved sizeable donations to charity in recognition of the breach of data protection requirements that occurred.

The annual report includes the top ten threats to individual privacy as identified by the Data Protection Commissioners Office, based on the queries and issues the office deals with on a day to day basis. The top ten threats to privacy are as follows:

- ❑ Failure of organizations to have even the most basic protocols in place to minimize the loss of customer/employee data;
- ❑ Continued lack of proper proceedings in public and private sector bodies to limit access by employees to personal data on a “need to know” basis;
- ❑ Failure to take account of legitimate privacy expectations of the general public when moving towards greater efficiency of public services;
- ❑ Tendency of new legislation to seek more personal data from the public and the sharing of that data between organizations without a real business case to justify such sharing;
- ❑ Criminals using sophisticated methods to extract personal data from the general public for criminal and fraudulent use;
- ❑ The extended use of the Personal Public Service Number (a number assigned to individuals to identify them when interacting with public bodies);
- ❑ Publication and availability of excessive personal data on the internet;
- ❑ Continued lack of awareness among data controllers of their data protection obligations;
- ❑ Indifference on the part of data controllers to the consequences of their own actions when they deliberately and persistently refuse to respect the data protections rights of their customers;
- ❑ Continued lack of awareness on the part of the general public.

The full report is available on www.dataprotection.ie

Payment Services Directive - 2007/64/EC

The Payment Services Directive 2007/64/EC (“PSD”) was formally adopted and published in the Official Journal of the European Union and must be transposed into Irish law by 1

November 2009. It establishes a harmonised legal framework for payments services in the EU and EEA.

The PSD essentially deals with three issues:

- ▣ it establishes who may provide payments services;
- ▣ it establishes transparency requirements to ensure that payment service providers give requisite information to their customers as related to payments; and
- ▣ it sets out the relative rights and obligations of payment service providers and payment service users.

The PSD covers payments made by electronic means but excludes payments made by cash and cheque.

The six categories of payment service provider covered by the PSD are:




- ▣ Credit Institutions;
- ▣ Electronic Money Institutions;
- ▣ Post Office Giro Institutions;
- ▣ Payment Institutions;
- ▣ European/National Central Banks; and
- ▣ Member States or Regional/Local Authorities.

The PSD creates a new class of regulated firm known as Payment Institutions which must obtain authorisation from the Financial Regulator in order to provide payment services. Payment Service Providers are also permitted to provide payment services under the PSD and must comply with certain provisions of the PSD but are not required to seek authorisation.

The Financial Regulator recently stated that any person who provides payment services after 1 November, 2009 without an appropriate authorisation may risk committing a criminal offence. Payment Institutions that require authorisation by 1 November 2009 were required to contact the Financial Regulator (Clare Ahern or Shane Howe, Financial Institutions and Funds Authorisation, Financial Regulator, PO Box 9138, College Green, Dublin 2, Telephone: (01) 2244308 or (01) 2244386 Email: clare.ahern@financialregulator.ie or shane.howe@financialregulator.ie) by 30 June 2009.

INSURANCE LAW

In this issue:-

-  **Financial Services Ombudsman Annual Report 2008**
-  **Consultation on the Financial Conglomerates Directive**
-  **Review of the Insurance Mediation Directive**

Financial Services Ombudsman Annual Report 2008

On the 7 May 2009, the Financial Services Ombudsman (FSO) Joe Meade, launched his annual report for 2008.



During 2008, the FSO received 5,947 complaints, an increase of 36% over 2007. Of the 5,947 complaints received, 4,887 were resolved and closed. Of the resolved cases, 62% were resolved to the complainant's satisfaction with 38% being rejected.

Consultation on the Financial Conglomerates Directive – 2002/87/EC

On the 28 May 2009, the Committee of European Banking Supervisors (CEBS) and the Committee of European Insurance and Occupational Pensions (CEIOPS) - through the Joint Committee on Financial Conglomerates (JCFC) published the formal consultation on its proposed advice to the European Commission (EC) on its review of the Financial Conglomerates Directive (FCD).

The review focuses solely on how some of the provisions of the FCD have been applied and how they might be improved in the areas of definitions and terminology, scope and internal control requirements. The review is based on the current framework implemented in national legislation.

The JCFC has identified the following four issues where the FCD may not achieve its objectives:

-  The definitions of different types of holding companies in the FCD and their impact on the scope of sectoral group supervision;
-  The definition of "financial sector" in Article 2.8 of the FCD and the application of the threshold conditions in Article 3 of the FCD;

- ▣ Implications of different treatments of participations for the identification and scope of supplementary supervision of financial conglomerates; and
- ▣ The treatment of 'participations' in respect of risk concentrations and intra-group transactions supervision and internal control mechanisms (respectively, Articles 7, 8 and 9 of the FCD).

The consultation paper sets out a detailed analysis of these issues, along with options that could address them and solutions recommended by the JCFC. Comments from the industry should be emailed to fcdadvice@c-eps.org and to Secretariat@ceiops.eu, indicating the reference "JCFC-09-10" no later than the 28 August 2009.

In total, the FSO has received 17,450 complaints since the office opened on the 1 April 2005, with 87% of these cases now being resolved. The FSO has estimated that €45 million has been refunded to consumers as a result of his findings since April 2005.

Many of the current year's complaints deal with investments which have not performed as well as expected or which are even worthless and where alleged mis-selling of investment products has taken place. Each case is considered on its merits.

Property type investments are becoming a new source of complaint. Some Financial Service Providers are trying to argue that where property is involved, it does not come under the remit of the FSO. However, the FSO is of the view that where a consumer seeks investment advice and part or all of the investment advice was to invest in a property then that is a matter which falls within the FSO remit.

Geared property funds are beginning to feature on the radar also and it is obvious that in many instances the implications of these were not fully explained when people were buying into them, especially the downside risk.

The FSO received a number of complaints against accountants who gave investment advice but the FSO could not deal with them. Whilst accountants are authorised as investment intermediaries, they are generally authorised under approved professional bodies status, and therefore are not subject to the FSO remit but to their self regulatory accountancy body. The FSO would like to see a change in this area so there is a level playing field for all areas.

Following the High Court decision in July 2008 in relation to the Davy Stockbrokers/Enfield Credit Union case, the FSO amended his procedures in relation to the handling of complaints. The revised procedures were launched in August 2008 and outline detailed steps and timeframes from lodging a complaint to mediation, investigation and issuing the finding.

The Annual Report for 2008 is available at the following link:



http://www.financialombudsman.ie/about-us/2008_Annual_report_EN.pdf

Review of the Insurance Mediation Directive – 2002/92/EC

In May 2009, the European Commissioner for the Internal Market and Services, Mr. Charlie McCreevy, confirmed that the European Commission will commence its review of the Insurance Mediation Directive (IMD) in early 2010. The European Commission's planned review of the IMD in 2008 was postponed when its focus switched to Member States implementation of the IMD. Mr. McCreevy has also confirmed that the Commission intends to review the existing insurance guarantee schemes in order to achieve more uniformity across the EU in this area.

LISTINGS

In this issue:-

-  **Funds Listing – Quarterly report April to July, 2009**
 -  **Debt Listing – Quarterly report April to July, 2009**
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Funds Listing – Quarterly report April to July 2009

Key listings include:

April 2009

Listing of Euro Distributing Class Shares and Euro Accumulating Class Shares of Strategic Euro Bond Fund (the “Sub-Fund”) of E.I. Sturdza Funds Plc on the Irish Stock Exchange, on 28 April 2009.

Lyxor launched the Lyxor/PJM Fund Limited on the Irish Stock Exchange on 27 April 2009.

GAM Star US All Cap Equity, a subfund of GAM Star Fund Plc, launched USD C Class Accumulation on the 21 April 2009. This month also saw another sub fund of GAM Star Plc, GAM Star Japan Equity, launch Institutional Shares EUR Class on the 30 April 2009.

May 2009

RCM Global Equity High Alpha, a subfund of RCM Global Series Fund Plc listed the Sterling Hedged Class Shares, the Euro Hedged Class Shares and Dollar Hedged Shares.

Lyxor listed the H Class Shares of Lyxor/Paulson Advantage Fund Limited on the Irish Stock Exchange on 6 May 2009

Valorica Fund, an open-ended umbrella Unit Trust established in Ireland and managed by Valorica Capital e Inversiones, S.G.I.I.C., S.A., listed the Class A Units of each of Valorica Alpha Return, Valorica Global Return and Valorica Macro Return on the Irish Stock Exchange on 26 May, 2009. The investment objective of each of the portfolios is to seek to obtain absolute returns, irrespective of market trends.

St. Lawrence Trading Inc., an existing BVI fund managed by GAM Limited listed on 7 May.

GAM Star European Equity, a subfund of GAM Star Fund Plc, launched USD Class A Accumulation Shares on the 12 May 2009.

June 2009

Iveagh Global Strategies Plc's subfund The Iveagh Wealth Fund listed X Swiss Franc (Acc) Class Shares, Y Swiss Franc (Acc) Class Shares, X Swiss Franc (Inc) Class Shares and Y Swiss Franc (Inc) Class Shares on the Irish Stock Exchange.

Lyxor launched Lxyor/GLG European Opportunity Fund Limited on 22 June 2009. The Fund will attempt to achieve its Investment Objective and implement its Trading Strategy with respect to the Principal Investment Portfolio, primarily, but not exclusively, through use of the following securities, financial instruments and contracts:

- ▣ equity securities (including ADRs and GDRs);
- ▣ options (whether listed or unlisted) and futures;
- ▣ over the counter contracts, such as contracts for difference and currency forward contracts;
- ▣ any instrument or contract deemed necessary by the Manager and/or the Sub-Manager to implement the Trading Strategy.

GAM Star Asia-Pacific Equity, a subfund of GAM Star Fund Plc, launched USD Class Accumulation Shares on the 10 June 2009.

July 2009

This month saw New Capital Total Return Bond, a subfund of the New Capital UCITS Fund Plc list its Sterling Distributor Class shares

Iveagh Global Strategies Plc's subfund The Iveagh Wealth Fund listed Swiss Franc (Acc) Class Shares on 16 July 2009 and Swiss Franc (Inc) Class Shares on the Irish Stock Exchange.

Lyxor launched a new Fund. Lyxor/Gartmore European Long/Short Fund Limited listed on 13 July 2009. The Fund's principal investment objective is to seek to achieve capital growth by taking long and short positions primarily in European equity securities and their derivatives.

F&C Zircon Fund Limited launched US\$ Shares on the 2 July 2009.

Debt Listing – Quarterly report April to July, 2009

Key listings include:

Rayo Finance Ireland (No.1) Limited listed Series 4 EUR 439,269,808 Floating Rate Secured Notes due 2021 linked to a Spanish 2005 Electricity Tariff Deficit Surcharge on the 24 July 2007.

On the 29 July 2009, Dolphin Energy Limited, a company established under the laws of Abu Dhabi, listed US\$1,250,000,000 aggregate principal amount of 5.888% Senior Secured Bonds Due 2019 on the newly established Global Emerging Market (“GEM”) which replaced the Alternative Securities Market, of the Irish Stock Exchange.

On the 13 July 2009, Irish Life & Permanent plc issued a €200,000,000 final terms pursuant to the EUR 8,000,000,000 Euro Commercial Paper Programme of Irish Life & Permanent plc which is currently listed on the Irish Stock Exchange. Irish Life & Permanent plc also updated their €8bn ECP programme on the 28 July 2009.

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