


Client
Newsletter
Spring 2011

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Consultation of the Central Bank of Ireland (CBI) on Minimum Activities and Outsourcing: Consultation Paper 48

In November 2010, the Central Bank of Ireland (the "CBol") published its consultation paper (CP 48) entitled "Review of the Central Bank of Ireland's requirements regarding the minimum activities of Irish authorised investment funds to be undertaken in the State". Comments on the Consultation Paper were required to be submitted no later than 31 December, 2011.

As a result of the changes being introduced by UCITS IV in relation to the UCITS management company passport, the Central Bank is undertaking a review of the minimum activity requirements for Irish authorised investment funds. The CBol is considering whether it is still practical to require that specific activities in relation to the operations of investment funds must be carried out in Ireland. Pursuant to the consultation paper, the Central Bank is considering imposing a set of outsourcing requirements on Irish regulated administration companies. These requirements will be imposed as conditions under Section 14 of the Investment Intermediaries Act, 1995 and will be largely based on the Guidelines on Outsourcing published on 14 December, 2006 by the Committee of European Banking Supervisors ("CEBS"). The Central Bank has specified that it is essential that "where

administration companies outsource any part of the administration activity, they maintain adequate control and oversight over the process in order to comply with the Central Bank's requirements."

The Central Bank has also highlighted an intention to place more focus on the role of the board of an Irish authorised investment fund (which appoint the Irish administration company) to ensure that all existing and new regulatory requirements are met.

UCITS IV: Consultation Paper 50

General

On 16 February, 2011, the Central Bank published the consultation paper entitled "Consultation on amendments to UCITS Notices, NU Notices and Guidance Notes to reflect UCITS IV and other changes – Consultation Paper 50. 15 March, 2011 was specified as the deadline for receipt of responses from interested parties to provide comments on the draft UCITS Notices, NU Notices and Guidance Notes.

As set out in the consultation paper, the Central Bank has prepared draft UCITS Notices and Guidance Notes which have been amended to reflect and, where appropriate, implement the provisions of UCITS IV. The purpose of the consultation is to request feedback on; (i) those provisions of the draft UCITS Notices and Guidance Notes where the Central Bank has included additional clarification on the requirements and (ii) the general amendments.

The consultation includes the following:

- ▣ CP 50 – Consultation on amendments to UCITS Notices, NU Notices and Guidance Notes to reflect UCITS IV and other changes;
- ▣ Draft revised UCITS Notices;
- ▣ Draft Guidance Note 4/07 – Undertakings for Collective Investment in Transferable Securities (UCITS) Organisation of Management Companies;
- ▣ Draft Guidance Note 1/11 Undertakings for Collective Investment in Transferable Securities (UCITS) – Publication of a Key Investor Information Document;
- ▣ Draft Policy Update – 1/2011 Transition from the Simplified Prospectus to the Key Investor Information Document for UCITS;

- ▣ Draft Guidance Note 3/03 Undertakings for Collective Investment in Transferable Securities (UCITS) Financial Derivative Instruments;
- ▣ Draft Guidance Note 1/03 Amalgamation of Irish authorised collective investment with other collective investment schemes;
- ▣ Draft Guidance Note 2/97 Closed-Ended Collective Investment Schemes;
- ▣ Draft NU 12 – Collective Investment schemes other than UCITS – Schemes marketing solely to professional investors; and
- ▣ Draft NU 17 – Collective Investment schemes other than UCITS – Money Market Funds.

Transitional Arrangements

UCITS management companies: UCITS management companies must comply with the new UCITS IV requirements from 1 July 2011. In order to ensure that all necessary arrangements are in place on time, the Central Bank will require all existing UCITS management companies to submit revised business plans for review by Friday 29 April, 2011.

UCITS Self-managed investment companies: SMICs seeking authorisation from 1 July, 2011 must comply with all UCITS IV requirements. SMICs authorised before 1 July, 2011 must comply with Level 2 measures relating to Article 14 (rules of conduct) and Article 51 (risk measurement) of the UCITS IV Directive from 1 July, 2011. Accordingly, they will be required to confirm that their business plans have been amended to ensure compliance with draft Notices UCITS 10.6 and UCITS 16.2 before 1 July, 2011. These revised business plans do not need to be submitted to the Central Bank before 1 July, 2011. The Central Bank may request these business plans at a later stage for review and approval. SMICs must comply with all UCITS IV requirements by 1 July, 2013.

Transition from the Simplified Prospectus to the Key Investor Information Document

UCITS seeking authorisation from 1 July, 2011 must draw up a key investor information document (KIID).

In accordance with the Irish UCITS Regulations the Central Bank will allow UCITS authorised prior to 1 July, 2011 to continue to publish a simplified prospectus until 30 June, 2012. Draft Policy Note 1/2011 explains and clarifies the various provisions which apply to UCITS (including sub-funds of umbrella UCITS) which avail of this transitional arrangement.

UCITS IV: Organisational and Control Requirements

General

Pursuant to the UCITS IV Implementing Directive of July 1, 2010¹, the new draft Notices and Guidance Notes address the Level 2 measures relating to the organisational requirements for UCITS management companies under UCITS IV. The Implementing Directive must be introduced by Member States by end June, 2011.

New MiFID like organisational and internal control requirements and conflicts of interest requirements will be introduced and risk management requirements will be applied to UCITS management companies. In addition, UCITS management companies will need to comply with new rules of conduct.

The new requirements will impact all UCITS management companies, whether they operate on a fully delegated basis delegating out administration, investment management and distribution activities or whether they retain, for example, administration and delegate out investment management and distribution.

Self-managed investment companies are equally affected by these new requirements as "companies" should be read as also being a reference to self-managed investment companies.

In addition, the new requirements will impact boards of UCITS management companies and of self-managed UCITS investment companies which currently operate on a collective responsibility basis as it is envisaged that it will now be a requirement within a UCITS business plan and organisational structure to name specific individuals as being responsible for specific duties.

Proportionality Principle and Delegation

The Implementing Directive recognises the principle of proportionality. In other words, the application of most (but not all) of the requirements of the Implementing Directive must be proportionate and must take into account the different nature, scale, and complexities of individual UCITS management companies.

¹ Directive 2010/43/EC

Factors which may be relevant in determining the extent to which the proportionality principle should apply may include the number of UCITS managed, number of sub-funds within umbrellas, the extent of use of derivatives or of complex trading strategies and the number of investors.

The Implementing Directive also recognises the fact that UCITS management companies should be able to delegate some of their activities to third parties provided proper due diligence checks are carried out to ensure the third party is qualified.

Other requirements

General requirements: The Implementing Directive imposes general requirements on UCITS management companies to have adequate internal organisation and control mechanisms, clear reporting lines and assignment of responsibilities. Other requirements imposed are to protect confidentiality, the security and integrity of information and the requirement to ensure adequate business continuity policies. The principle of proportionality and the recognition of the ability to delegate, as highlighted above, are applicable.

Resources: The Implementing Directive requires UCITS management companies to employ “personnel with the skills, knowledge and expertise necessary for the discharge of the responsibilities allocated to them” and to carry out due diligence on delegates.

Complaints: The Implementing Directive requires UCITS management companies to establish, implement and maintain effective and transparent procedures for complaints handling.

Electronic data processing, record keeping and other recording requirements: The Implementing Directive imposes certain requirements in respect of electronic data processing, record keeping and other recording requirements.

Accounting procedures: The Implementing Directive imposes requirements in relation to the valuation of assets and liabilities of the UCITS, the calculation of the NAV and the application of the NAV to the subscriptions and redemptions.

Control by senior management and supervisory function: The Implementing Directive requires reinforced oversight duty by senior management in respect of delegated service providers.

Compliance function, internal audit function and risk management function: The Implementing Directive requires a permanent compliance function, an internal audit function

and a permanent risk management function respectively for UCITS management companies.

Exercise of Voting Rights: UCITS management companies will be required to develop adequate and effective strategies for determining when and how voting rights attached to instruments held in the UCITS' portfolios are to be exercised, to the exclusive benefit of the UCITS concerned.

Personal transactions and inducements: The Implementing Directive imposes certain requirements in relation to personal transactions and inducements.

Conflicts of interest: Articles 17 to 21 in Chapter III of the Implementing Directive extend the provisions under MiFID, which requires investment firms to identify, manage and disclose their conflicts of interest to UCITS and their management companies.

Rules of conduct: The rules of conduct are broadly grouped into four main areas, namely, the duty to act in the best interests of UCITS and their unitholders, the duty of UCITS management companies to ensure a high level of diligence on the selection and monitoring of investments in the best interests of the UCITS they manage, reporting obligations in respect of execution of subscription and redemption orders and best execution and order handling rules.

Best Execution and Order Handling: MiFID type best execution and order handling rules will be applied to UCITS management companies.

Conclusion

A number of aspects of the operation of the business of Irish UCITS management companies may need to be enhanced and procedures strengthened as detailed above. In all cases, it is expected that a revised business plan will be required to be filed with the Central Bank.

For further information, please see the Dillon Eustace publication entitled "New Organisational Requirements for UCITS Management Companies under UCITS IV" which can be found on our website.

Consultation on the UCITS Depositary Function and UCITS Managers' Remuneration

On the 14 December, 2010 the European Commission published its Consultation on the UCITS depositary function and UCITS managers' remuneration. The Consultation includes questions on how the duties of depositaries can be further clarified, including their eligibility and liability, and how they can be effectively supervised throughout the EU. Comments on the consultation paper were requested to be submitted no later than 31 January, 2011.

The European Commission has launched this consultation to gather views on the costs and benefits the possible changes could create. A central part of the consultation is on the role of depositaries - financial institutions entrusted with the safe keeping of UCITS assets.

Introduction of New QIF Criteria

The IFIA recently met with the Central Bank to discuss the introduction of new QIF criteria and competitive issues. Below is a summary of items the Central Bank has agreed to amend / consider amending through revised draft notices / guidance notes.

Regulated markets

It was proposed that the Central Bank should remove the requirement that the articles of association of an investment company list the regulated markets on which the transferable securities and money market instruments acquired by the investment company must be listed or traded and allow this information to be included in the prospectus instead.

Qualifying investor criteria

It was requested that the Central Bank revise the criteria for QIF investors to take into account MiFID "professional clients", the proposals under the AIFMD and the investor requirements for the equivalent structure in Luxembourg.

The Central Bank has agreed to reduce the minimum subscription to €100,000 and has agreed to change the qualifying investor criteria to include professional investors.

Frequency of calculation of net asset value

It was proposed that the Central Bank review its requirement for the NAV to be calculated on a twice yearly basis (it is acknowledged that a NAV would still have to be calculated in respect of any day on which securities are to be issued or redeemed by the QIF).

The Central Bank agreed to a minimum of one valuation per year for QIFs subject to dealing frequency.

New Guidance Notes

It is expected that the following guidance notes will be updated to reflect the recent discussions between the Central Bank and the Irish Funds Industry Association:

- ▣ Guidance Note 1/96 Permitted Markets for Retail Collective Investment Schemes;
- ▣ Guidance Note 2/96 Promoters of collective investment schemes;
- ▣ Guidance Note 1/00 Valuation of the Assets of Collective Investment Schemes;
- ▣ Guidance Note 1/07 Authorisation of Qualifying Investor Schemes – Application process; and
- ▣ Notice NU 24 Schemes which market solely to Qualifying Investors.

Consultation on ESMA's Guidelines on Risk Measurement and the Calculation of Global Exposure for Certain Types of Structured UCITS – Responses

On 13 January 2010, responses were published to the consultation issued by ESMA on guidelines on risk measurement and the calculation of global exposure for certain types of structured UCITS. Copies of the responses are available at <http://www.esma.europa.eu>.

Restructuring of CESR (now ESMA)

On 1 January, 2011 the Committee of European Securities Regulators (“CESR”) was restructured to increase efficiency and facilitate easier decision making, as part of the financial supervision reforms in Europe. It has now become part of the European Securities and Markets Authority (“ESMA”).

Irish UCITS and Non-UCITS Money Market Funds – Requirements to Comply with the Common Definition of European Money Market Funds by 1 July 2011

On 16 February, 2011 the Central Bank published the consultation paper entitled “Consultation on amendments to UCITS Notices, NU Notices and Guidance Notes to reflect UCITS IV and other changes – Consultation Paper 50.” The purpose of the consultation is to request feedback on; (i) those provisions of the draft UCITS Notices and Guidance Notes where the Central Bank has included additional clarification on the requirements and (ii) the general amendments.

One of the matters addressed in Consultation Paper 50 is the proposed changes to UCITS and Non-UCITS money market funds. Pursuant to the Consultation Paper, the Central Bank proposes that UCITS and non-UCITS money market funds must comply with ESMA’s Guidelines on a common definition of European money market funds by 1 July, 2011.




ESMA’s guidelines set out two categories of money market fund: Short-Term Money Market Funds and Money Market Funds. This approach recognises the distinction between short-term money market funds, which operate a very short weighted average maturity and weighted average life; and money market funds which operate with a longer weighted average maturity and weighted average life. For both categories of fund, CESR expects that there should be specific disclosure to explain clearly the implications of investing in the type of money market fund involved. For Money Market Funds, for example, this means taking account of the longer weighted average maturity and weighted average life of such funds. For both types of money market fund, this should reflect any investment in new asset classes, financial instruments or investment strategies with unusual risk and reward profiles.

An amendment to the prospectus of each money market fund, to indicate whether it is a “short-term money market fund” or a “money market fund”, must be implemented before 1 July 2011. The Consultation Paper currently proposes that draft prospectuses should be

submitted to the Central Bank for review before Friday 29 April, 2011. This deadline is currently under discussion with the Irish Funds Industry Association and may be subject to change.

BANKING AND CAPITAL MARKETS

In this issue:-

-  **McKillen vs National Asset Management Agency**
 -  **Credit Institutions (Stabilisation) Act, 2010**
 -  **Amendments to the Prospectus Directive and Transparency Directive**
-

McKillen vs National Asset Management Agency

On the 3 February, 2011 the Supreme Court allowed the appeal brought by Mr. McKillen against the High Court's rejection of his legal challenge to the decision of the National Asset Management Agency ("**NAMA**") to acquire €2.1 billion of loan facilities with Anglo Irish Bank and Bank of Ireland.

Mr. McKillen had claimed that the procedures adopted by NAMA in relation to the transfer of his loans constituted a denial of his constitutional right to fair procedures; that relevant considerations were not exercised when deciding to transfer his loan portfolio into NAMA; that the decision to acquire his loans was taken prior to the establishment of NAMA; that NAMA's proposal to acquire these loans would breach EU State Aid Rules; and that the NAMA legislation relating to the definition of eligible loans was so broad as to be unconstitutional.

The Supreme Court upheld one of those arguments; namely, that the decision taken in early December 2009 to acquire the loans connected with Mr. McKillen was invalid as NAMA only formally came into existence on the 21 December, 2009.

As anticipated at the time of the judgment, the decision of itself does not necessarily seem to preclude NAMA from subsequently conducting a valid acquisition of these loans as the Supreme Court held that "*the present case is focused entirely on the particular circumstances of the appellants and their loans which have been treated as eligible assets under the Act.*" Mr Frank Daly, Chairman of NAMA, has also stated that the decision relates specifically to the particular case as presented by Mr. McKillen and should not have implications for other acquisitions now completed by NAMA.

The Supreme Court rejected the contention concerning breach of EU State Aid Rules but reserved judgment on the remaining strands of the appeal, preferring to reconvene on the 9

February, 2011 to determine if, following its judgment, a ruling needs to be made in relation to those matters. This reservation reflects the possibility that NAMA will now conduct a valid acquisition of the relevant loans.

On the 9 February, the Supreme Court then announced that it would issue a ruling on the remaining strands of the appeal and heard that NAMA was to convene a special board meeting in the following two weeks to determine whether it will ratify the pre-2 December, 2009 decision to acquire Mr. McKillen's loans. As of the date of writing, there have been no developments on these fronts.

Credit Institutions (Stabilisation) Act, 2010

General

On the 22 December, 2010 the President of Ireland signed the Credit Institutions (Stabilisation) Act, 2010 (the "**Act**") into law. The Act provides a legislative basis for the reorganisation and restructuring of the Irish retail banking system as agreed in the joint EU-IMF Programme of Financial Support for Ireland (the "**Programme**").

The Act gives broad and significant powers to the Minister for Finance (the "**Minister**") (generally exercisable in consultation with the Governor of the Central Bank of Ireland (the "**Governor**")) to carry out certain stated purposes of the Act described in Section 4 which include: addressing the serious and continuing disruption to the economy and the financial system and the continuing serious threat to the stability of certain credit institutions in the State and the financial system generally; to implement the reorganisation/restructuring actions and recapitalisation measures envisaged in the Programme; to protect the interests of depositors in credit institutions; to address the compelling need to facilitate the availability of credit in the economy of the State, to protect the State's interests in the government bank guarantee and to protect the interests of the taxpayers.

The Act applies to "**Relevant Institutions**", namely, each of the banks that have received financial support from the State (i.e. Allied Irish Banks plc, The Governor and Company of the Bank of Ireland and Anglo Irish Bank Corporation Ltd. ("**Anglo**")), building societies (i.e. Irish Nationwide Building Society ("**INBS**") and EBS Building Society) and credit unions as well as any other person/ body designated by the Minister which ordinarily resides/has a place of business in the State and to whom/which any asset or liability of a Relevant Institution is transferred.

Stabilisation Powers

The Act confers the following powers on the Minister, in each case after consultation with the Governor and subject to confirmation by the High Court:

Direction Orders

Part two of the Act allows the Minister to make proposed direction orders in respect of a Relevant Institution and shall apply ex parte to the High Court to have such proposed orders confirmed (a “**Direction Order**”). Such an order may require a Relevant Institution to take / refrain from taking any action during a specified period. This includes issuing new shares or applying for a delisting of shares, increasing the authorised share capital of a Relevant Institution, amending the Memorandum and Articles of Association of a Relevant Institution or directing the disposal of an asset on specified terms.

This feature has already been used with respect to certain Relevant Institutions. In December, 2010, the High Court issued a Direction Order directing AIB to, among other things, issue immediately approximately €3.7 billion (net of expenses) of new equity capital to the National Pensions Reserve Fund Commission; apply to cancel its listing of ordinary shares on the Main Securities Market of the Irish Stock Exchange and to apply for admission to trading on the Enterprise Securities Market (“**ESM**”); apply to cancel the admission of its ordinary shares to the Official List maintained by the UK Financial Services Authority and to cancel trading on the main market of the London Stock Exchange (the “**UK Delisting**”); and to complete the sale of its Polish interests to Banco Santander S.A. pursuant to the Share Purchase Agreement dated 10 September, 2010 when all the regulatory conditions other than the approval of AIB’s shareholders have been satisfied, but not before the admission to trading on the ESM and the UK Delisting have occurred . In addition, on the 8 February, 2011 the High Court issued two Direction Orders in relation to Anglo and INBS requiring them: (i) to commence the process for the sale, by way of auction, of their deposits and certain assets; and (ii) to begin taking the necessary steps to proceed with the merger of Anglo and INBS.

In response, two of Anglo’s bondholders, Cayman Islands registered hedge funds run by Fir Tree Capital, filed a lawsuit in a New York district court seeking to block the Direction Orders claiming that they were “egregious” and “brazenly violate[d]” its right to be repaid. The proceedings are ongoing.

Special Management Orders

The Minister is empowered to make a proposed special management order under which the Minister may appoint, for a period of six months (which is extendable), an appropriately qualified and experienced Special Manager to take over the management of the Relevant Institution as a going concern with a view to preserving and restoring the financial position of the Relevant Institution. Again, the Minister shall apply ex parte to the High Court to have such proposed orders confirmed (a “**Special Management Order**”). Once appointed, the Special Manager may (with the consent of the Minister), substitute his decision for any decision that would otherwise be made by the shareholders and any such decision shall be taken to be the decision of the shareholders. The Special Manager may also acquire and dispose of any/all of the assets of a Relevant Institution.

Subordinated Liabilities Orders

The Minister may also make a proposed subordinated liabilities order (and subsequently apply ex parte to the High Court to have same confirmed (“**SLO**”)) in respect of the subordinated liabilities of a Relevant Institution to which the Minister has provided or intends to provide financial support under the government guarantee only if:-

- (a) the Minister has consulted with the Governor; and
- (b) having so consulted, the Minister is of the opinion that a SLO in terms of the subordinated liabilities is necessary for preserving or restoring the financial position of the Relevant Institution with the consequence of affecting (including reducing) the rights of subordinated creditors existing before the order.

An SLO may affect rights to interest and repayment of principal, events of default, the timing of obligations and the applicable law. An SLO can also make provision for the granting of a shareholding in a Relevant Institution to subordinated bondholders in exchange for their debt positions (i.e. a debt for equity swap). Furthermore, a Relevant Institution can be ordered to acquire subordinated liabilities for a specified consideration.

When making a SLO, the Minister must have regard to a number of factors including the amount of indebtedness of the Relevant Institution to its sub-debt holders, the extent and nature of the financial support provided by the State and the likely extent to which the subordinated creditors would be repaid in a winding up.

In addition, a number of the institutions have engaged in liability management exercises outside of the ambit of the Act with a view to implementing various burden-sharing measures on subordinated bondholders.

Transfer Orders

The Minister may make a proposed transfer Order in relation to the transfer of assets or liabilities of a Relevant Institution (and again apply ex parte to the High Court to have same confirmed (the “**Transfer Order**”). The Minister may, despite any contrary law or agreement, transfer to another person such assets and liabilities of a Relevant Institution as are specified in the Transfer Order. A Transfer Order may include appropriate financial incentives as the Minister may specify, this would include a payment, loan, guarantee or an exchange of assets. The amount of financial incentive provided under this section is a debt due and owing to the State by the transferor.

The Transfer Order must specify certain information, including the name of the transferee, any term or condition which is imposed on the transfer or to which the transfer is subject, the assets and liabilities to be transferred and the consideration paid to the transferee or a mechanism by which such consideration shall be calculated.

On 24 February, 2011, the High Court issued two Transfer Orders under Part 5 of the Act for the immediate transfer of the deposit books and corresponding assets of Anglo INBS to Allied Irish Banks, p.l.c. (**AIB**) and Irish Life & Permanent plc (**ILP**) respectively.

The Minister, having consulted with the Governor, was of the opinion that these Transfer Orders were necessary to ensure that both Anglo and INBS are in a position to continue the process for their restructuring in accordance with the provisions of the Programme.

No action is required to be taken by depositors following the making of the transfer orders by the High Court. The position of depositors in both Anglo and INBS remain protected under existing Government guarantee arrangements and it is expected that the transfer will have no impact on existing terms and conditions. Depositors continue to have access to their funds in the normal manner as they had under their arrangements with Anglo or INBS. In addition, certain employees who deal with the deposit taking activities in Anglo and INBS have transferred to the relevant acquiring bank.

Some Other Key Features

Directors’ Duties of Relevant Institutions

Pursuant to the Act, directors of a Relevant Institution now owe significant additional duties to the Minister (on behalf of the State) which will take priority over any other duty of the directors to the extent of any inconsistency. Such new additional directors’ duties include a duty to have regard to the need to protect the interests of taxpayers, to facilitate the

availability of credit in the economy of the State and to restore confidence in the banking sector.

Under the Act, the Minister may issue guidelines in relation to these additional duties and a director may rely on any such guidelines in demonstrating his compliance with his new duties.

Effect of the CIWUD Directive

The Act provides that any order that is declared to have been made with the intention of preserving or restoring the financial position of a credit institution is intended to have effect in accordance with the Credit Institutions (Winding Up) Directive² (“**CIWUD**”) and any laws giving effect to it.

Netting and Settlement

Importantly, Section 65 of the Act states that nothing in the Act affects the operation of the Netting of Financial Contracts Act, 1995 and other relevant legislation in relation to an agreement to which a Relevant Institution or any of its subsidiaries is a party save that, where a Transfer Order transfers a netting agreement (within the meaning of the Netting of Financial Contracts Act, 1995) or a financial collateral arrangement (within the meaning of the European Communities (Financial Collateral Arrangements) Regulations (SI No. 1 of 2004)), the Transfer Order shall transfer the whole of that agreement or arrangement.

Challenges and Appeals

The Act severely limits the power of affected persons to challenge an order made by the Minister under the Act. Any challenge must be made within five working days after the making of the contested order and may only be made by a Relevant Institution (or a member thereof) or, in the case of an SLO, a subordinated creditor.

In addition, the Act states that leave for judicial review of any decision under the Act shall not be granted unless (i) an application is made within 14 days of the contested decision of the High Court (or where the High Court is satisfied that there are substantial reasons why the application was not made within that time limit or it is in the interests of other affected persons and the public interest to do so); (ii) the High Court believes that it is just to grant leave; and (iii) the High Court believes that the application raises a substantial issue for determination.

² Directive 2001/24/EC

The Act also limits rights of appeal to the Supreme Court. It provides that no order under the Act, nor any decision of the High Court refusing leave for judicial review, may be appealed to the Supreme Court. The Act stipulates that a Direction Order, Special Management Order, SLO or Transfer Order, and an order varying such an order or setting it aside, is final and no appeal lies from the order of the Court to the Supreme Court except with the leave of the Court.

An appeal may only take place where there is a point of law of exceptional public importance to be determined and even then the Supreme Court may only rule on that point of law. In addition, the relevant limiting section of the Act does not apply in respect of any determination of the High Court in respect of the validity of any law having regard to the Irish Constitution.

Suspension of Rights

The Act also suspends/ qualifies a variety of rights of persons with a relationship with the Relevant Institution. For example, the Act provides that, following the appointment of a Special Manager, no proceedings for (i) the winding up of the institution; or (ii) the appointment of an examiner/ receiver/ inspector to the institution; or (iii) the enforcement of any order or judgement against the institution will be commenced while the Special Management Order is in place without the permission of the Minister.

Control of Secured Borrowings

The Minister has made the *General Government Secured Borrowings Order 2011 (SI 40/2011)*. The Order came into effect on 27 January, 2011 (the “**Order**”) and is required in order to comply with the loan agreements with both the European Financial Stabilisation Mechanism (EFSM) and the European Financial Stability Facility (EFSF) under the EU – IMF support programme.

The purpose of the Order is to give effect to Section 67 of the Act which provides that secured borrowing by the prescribed persons and bodies requires the consent of the Minister. There are a significant number of government departments and agencies, state bodies and educational entities prescribed in the Order.

The requirement under law is that a local authority or a person or body (including Departments) in the Schedule “shall not mortgage, pledge or encumber its own assets or revenues to secure any present or future indebtedness or any guarantee or indemnity given in respect of such indebtedness without the consent of the Minister”.

As such, with effect from 23 December, 2010 (for local authorities) or from 27 January, 2011 (in the case of all other prescribed bodies), the consent of the Minister to engage in secured borrowing, as set out in Section 67(2) of Act is necessary and the consent must be sought in advance.

The Department of Finance have also published a Circular with regard to the provisions of the Order and will maintain a register of all such encumbrances.

Expiration of the Act and the new Central Bank and Credit Institutions (Resolution) Bill 2011

Expiration of Act

The Act contains a 'sunset clause' in so far as it will cease to have effect on the 31 December, 2012. Although this date may be extended and any order made under the Act will continue to have effect according to its terms.

Central Bank and Credit Institutions (Resolution) Bill 2011

Under the Programme, Ireland was required to introduce legislation for a special resolution regime by the first quarter of 2011 and, accordingly, published the Central Bank and Credit Institutions (Resolution) Bill 2011 (the "**Bill**") at the end of February, 2011. As such, the Bill is intended to replace the Act and provide a permanent resolution regime for credit institutions in Ireland.

Many of the provisions contained in the new Bill are similar to those which are contained in the Act and it is envisaged that the new framework under that Bill will take effect once the Act expires.

The Bill is intended to apply to "authorised credit institutions" (i.e. licensed banks, building societies incorporated in Ireland and credit unions registered in Ireland) without the need for any designation by the Minister or Central Bank of Ireland. In that regard, it is not just limited to credit institutions which are in receipt of State support.

Powers under the Bill

The powers under the Bill are proposed to be vested in the Governor (unlike the Act which vested them in the Minister) and the Bill provides the Central Bank with the necessary powers to take swift and effective action in relation to distressed credit institutions and to protect the stability of our financial sector.

Two of the key powers outlined in the Bill are (i) the power to transfer assets and liabilities of a credit institution to a third party or pending such a transfer, to a "bridge-banks" (private companies incorporated and wholly owned by the Central Bank for the purposes of holding assets or liabilities which have been transferred under a transfer order.); and (2) power to make a special management order appointing a special manager to run an authorised credit institution

Current Status of Bill

The legislation was initiated in the Seanad Éireann (the Senate) by the last government and is currently at the First Stage. It is anticipated that the new Government will make changes to provisions of the Bill and we will provide a further update in our next newsletter.

Amendments to the Prospectus Directive and Transparency Directive

Directive 2010/73/EU (the "**Amending Directive**") which amends Directive 2003/71/EC (the "**Prospectus Directive**") and Directive 2004/109/EC (the "**Transparency Directive**") was published in the Official Journal of the European Union on 11 December 2010. The Directive came into force on 31 December, 2010 (the "**Effective Date**") and Ireland has until 1 July, 2012 to transpose the Directive into Irish law. Implementation of the Amending Directive across the Member States is expected to occur from March/April 2012 onwards.

Key Changes:

The following are some of the key changes arising from the Amending Directive:-

Summary of the Prospectus

The summary of a prospectus will be required to provide "key information" about the securities in order to aid investors when considering whether to invest including the essential characteristics and risks associated with the issuer/guarantor, the reasons for the offer, the general terms of the offer and any rights attaching to the securities. In addition, such information should enable investors to understand the nature and the risks of the securities that are being offered to them.

It is intended that there will be a common format to the summary in order to facilitate comparability of summaries for similar securities (e.g. by ensuring that equivalent information always appears in the same position in the summary) and the Commission has been given delegated powers to determine within 18 months of the Effective Date the detailed content and specific form of prospectus summaries.

Currently, civil liability for the prospectus summary only attaches if the summary is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus. The Amending Directive has extended this and, once implemented, liability will also now attach if the summary does not provide, when read together with the other parts of the prospectus, the key information required in order to aid investors when considering whether to invest in the issuer's securities.

Increase of Minimum Denomination

The Amending Directive includes a number of changes to the offer and admission related exemptions from the requirements of the Prospectus Directive.

One important change is that the exemption for an offer of securities whose denomination per unit is at least EUR 50,000 will be increased to EUR 100,000.

While this change need not be implemented in Member States' domestic laws until 1 July, 2012, the Amending Directive expressly provides that the exemption from the regular reporting requirements of the Transparency Directive for an issuer with only non-equity securities having a minimum denomination of EUR 50,000 (or equivalent) will only continue to apply if the relevant securities have been admitted to trading before 31 December, 2010. No grandfathering or transitional relief is provided in relation to this change.

Accordingly, any issuer which wishes to remain entirely in the "wholesale" category under the Transparency Directive will have to increase its new issuance denominations to a minimum of EUR 100,000 (or equivalent) and may find itself unable to reopen existing issues with a lower minimum denomination after the Effective Date.

Many issuers are already implementing this change in their transaction documentation.

Supplements and withdrawal rights

Article 16 of the Prospectus Directive requires an issuer to publish a supplement to a prospectus if a significant new factor, material mistake or inaccuracy with respect to information in such prospectus arises or is capable of affecting the assessment of the

securities to which that prospectus relates. The Amending Directive clarifies that this requirement should apply until the close of the offer or the admission of the securities to trading, whichever is the later.

In addition, the Amending Directive also amends the two-day walk away rights under Article 16(2) of the Prospectus Directive by clarifying that investors may only exercise the walk away right if the prospectus which is being supplemented relates to a non-exempt offer of securities. As such, if a supplement has been published in respect of a prospectus which has been prepared for admission purposes only, no walk away rights will arise. No such distinction is made under current law as investors may exercise such walk away rights regardless of whether the prospectus was required to be published to achieve admission to trading on a regulated market or for a non-exempt offer. In addition, the Amending Directive clarifies that the walk away rights will only be available where the circumstances which gave rise to the publication of the supplement arose before the close of the public offer. Finally, the period within which walk away rights must be exercised is to be set at two working days following publication of the supplement; although individual issuers will be able to choose a longer period if they so wish and the final exercise date must be specified in the supplement.

Passporting

The competent authority of the home member state will be required to notify the applicant of the certificate of approval at the same time as notifying host member states. In addition, the amending Directive will implement the existing best practice of requiring the issuer to provide copies of Final Terms to host member states as well as to the home member state.

Other Amendments

A number of other changes are being brought in which will need to be reflected in transaction documents, including selling restrictions, going forward:-

- ▣ *Qualified investors:* The definition of qualified investors will be aligned with that of professional clients for the purposes of Directive 2004/39/EC on markets in financial instruments (MiFID).
- ▣ *Annual information update:* Article 10 of the Prospectus Directive, requiring an issuer with securities admitted to trading to file an annual information update with the competent authority of the home member state will be repealed in light of the obligations imposed by the Transparency Directive. This is a welcome change, but, potentially, there is a knock-on effect for documents which can be incorporated by reference. The Amending Directive only provides for documents which have been

filed or approved with the home member state (rather than with any competent authority in the EEA) to be incorporated by reference, notwithstanding that, in practice, issuers often incorporate by reference documentation filed or approved elsewhere in the EEA.

- ▣ *Government guarantee schemes:* A prospectus relating to an issue of securities guaranteed by a member state may omit information about the guarantor. This is on the basis that member states produce "abundant" publicly-available information.
- ▣ *100 person exemption:* The number of people to whom securities may be offered under this exemption will be increased from fewer than 100 to fewer than 150 people per Member State.
- ▣ *Increased limits for other exemptions:* some of the exemptions under the Prospectus Directive relating to the total consideration for an offer of securities, calculated over a 12 month period, are to be increased, with EUR 2,500,000 being increased to EUR 5,000,000 and EUR 50,000,000 being increased to EUR 75,000,000.
- ▣ *An exemption for divisions, as well mergers:* The exemptions from the requirement to produce a prospectus under Article 4 of the Prospectus Directive have been extended to include "divisions", as well as mergers.
- ▣ *Final Terms:* The limited nature of information permitted to be in Final Terms is also clarified: Final Terms may only contain information specific to the issue and which relates to the securities note and must not be used to supplement a prospectus. The Recitals indicate the sort of limited information which might be acceptable to include, such as ISIN numbers, the issue price, maturity, coupon, exercise date, exercise price and redemption "and other terms not known at the time of drawing up the prospectus".
- ▣ *Electronic publication:* A new requirement will be that a prospectus must be published electronically, irrespective of any other means of publication, in order to improve investors' access to prospectuses

Further Reading:

European Commission proposal - 23 September, 2009:

http://ec.europa.eu/internal_market/securities/prospectus/index_e

Directive 2010/73/EU of the European Parliament and of the Council of 24 November, 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:327:0001:0012:EN:PDF>

▣ REGULATORY & COMPLIANCE

In this issue:-

- ▣ **Dillon Eustace Regulatory & Compliance - Breakfast Briefing Seminar**
- ▣ **Central Bank's Corporate Governance Code for Credit Institutions & Insurance Undertakings**
- ▣ **Corporate Governance Code for Irish Domiciled Funds**
- ▣ **Anti-Money Laundering – AML CTF Guidance Notes**
- ▣ **Notification of Legislative Changes to the Electronic Money Regulations**
- ▣ **Central Bank's Enforcement Strategy**

Dillon Eustace Regulatory & Compliance - Breakfast Briefing Seminar

Please note that the next Dillon Eustace Regulatory & Compliance - Breakfast Briefing Seminar, entitled; **Key Corporate Considerations for Insurance/Reinsurance Companies**, will take place on the 22 March, registration 07.45 - at Dillon Eustace Offices on 33 Sir John Rogerson's Quay, Dublin 2. If you would like to know more or register for this seminar please email edward.simpson@dilloneustace.ie

The briefing will cover key considerations to assist you in addressing any gaps in your Corporate Governance arrangements, including board composition and developing appropriate board sub-committees. In addition we will examine governance obligations under Solvency II and consider how companies can co-ordinate their approach to Corporate Governance so as to meet with the various obligations.

Central Bank's Corporate Governance Code for Credit Institutions & Insurance Undertakings

Following a consultation process, the Central Bank introduced its Corporate Governance Code for Credit Institutions and Insurance Undertakings (the "**Code**") in November, 2010. The Code establishes a set of governance rules designed to ensure sufficient oversight

exists and is exercised by boards of credit institutions and of insurance undertakings to minimise the effect of any future financial crises.

The Code is effective since 1 January, 2011 and all Irish banks, building societies, insurance companies (both life and non-life but excluding captives), and reinsurance companies (excluding special purpose reinsurance vehicles) have until 30 June, 2011 to implement any necessary changes. Where changes are required to board memberships then the Central Bank shall extend the compliance period to 31 December, 2011 to allow credit institutions and insurance undertakings the time to identify and to assess suitable candidates.

Stringent penalties for non compliance with the Code exist.

There are a number of distinctions between Major Institutions and other Financial Institutions and guidance on the factors relevant to determining if a Financial Institution is a Major Institution is provided for in the Code. Different criteria apply to credit institutions and insurance companies however both sets of criteria broadly focus size and risk profile of the credit institution or insurance undertaking.

Major Institutions are subject to more onerous requirements than other Financial Institutions.

The Code places primary responsibility on the board of a Financial Institution, however senior management are noted as being responsible for “operating effective oversight consistent with board policy”. The Code also sets out the roles of both executive and non-executive directors.

The board of a Financial Institution must consist of a majority of independent non-executive directors. An exception to this rule exists for companies within a group where the board of such a company must consist of at least two independent non-executive directors and a majority of group non-executive directors. Group non-executive directors can hold executive roles in other companies within the same group.

Guidelines on the maximum number of directorships an individual may hold are also contained in the Code. These guidelines provide for a rebuttable presumption that the individual will not have time to properly carry out their duties as a director where the number of directorships they hold exceeds specified limits. If an individual is on the board of a Major Institution then he/she can only hold two other directorships with Financial Institutions. If an individual is on the Board of a Financial Institution that is not a Major Institution then he/she may hold four other directorships in Financial Institutions. There are also guidelines regarding the number directorships in companies that are not Financial Institutions that can be held.

Subject to an optional exception for companies in a group, Financial Institutions are required to have both an audit and a risk committee. The format of these committees will depend on the number of directors on the board and the risk profile of the Financial Institution.

The Code also requires that a considerable amount of documentation be put in place, including:

- ▣ an annual statement of compliance with the Code;
- ▣ formal letters of appointment for directors;
- ▣ records of all considerations of conflicts of interest of board members;
- ▣ formal board reviews on an annual basis;
- ▣ a formal list of matters reserved specifically for the board to decide upon;
- ▣ terms of reference for the board and all sub-committees of the board;
- ▣ an expression of the company's risk appetite; and
- ▣ a risk-averse remuneration policy.

Corporate Governance Code for Irish Domiciled Funds

The Central Bank has requested the Irish Funds Industry Association to prepare a draft of a new version of the Corporate Governance Code for Irish Domiciled Collective Investment Schemes in conjunction with the Irish Funds Industry Association (“**IFIA**”). It is anticipated that this will replace the voluntary Corporate Governance Code for Irish Domiciled Collective Investment Schemes (the “**Voluntary Code**”) published by the IFIA in September, 2010.

A further update on this will be provided by Dillon Eustace in the next newsletter.

Anti-Money Laundering – AML CTF Guidance Notes

A further draft of Part 1 of the AML/CTF Guidance Notes has been prepared and published by a committee representing various sectors of the financial services industry (the “**Committee**”) and is available on the CBol's website. The Committee consulted with the

CBol during the drafting process of the Guidance Notes and the current draft incorporates the views of the CBol. This draft is structured in two parts. Part 1 contains core guidance which provides generic guidance that is applicable to all financial services designated persons. It is proposed that Part II will set down additional supplemental guidance notes for specific sectors.

Notification of Legislative Changes to the Electronic Money Regulations

The new Electronic Money Directive (the "**Directive**") will be effective in Ireland on 30 April 2011 and subject to the implementation of the European Communities (Electronic Money) Regulations. The CBol will be the competent authority for the purpose of implementation of the Directive. The provisions of the Directive will apply to persons issuing electronic money. Electronic Money is defined under the Directive as 'electronically, including magnetically, stored value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions as defined in point 5 of Article 4 of Directive 2007/64/EC, and which is accepted by a natural or legal person other than the electronic money issuer'.

Any person who provides electronic money services after 30 April, 2011 without an appropriate authorisation may risk committing a criminal offence.

Central Bank's Enforcement Strategy

The Central Bank which is now responsible for both central banking and financial regulation in Ireland has established an Enforcement Directorate – the main objective of which is

"the proper and effective regulation of financial service providers and markets, while ensuring that the best interests of consumers of financial services are protected".

The Enforcement Directorate's strategy for 2011 to 2012 was published by the Central Bank in December 2010 and sets out the responsibilities of the Enforcement Directorate, its enforcement powers and how it will work.

The Enforcement Directorate is responsible for enforcement cases pursuant to the Administrative Sanctions Procedure and for fitness and probity cases. Its main function is to investigate and take enforcement actions against regulated entities that have failed to comply with relevant regulatory requirements. The Enforcement Directorate has a particular responsibility for anti-money laundering and counter-terrorist financing, EU financial sanctions and for policing the perimeter of the financial services industry in the State, namely through the exercise of functions relating to the monitoring and investigation of unauthorised business activity.

However, under the Central Bank's risk-based regulatory framework, priority will be given to areas where Enforcement Directorate believes the greatest risks lie i.e. regulated financial service providers, including persons concerned in the management of such entities, that have been classified as higher risk or of systemic importance will generally be prioritised to a greater degree than those entities that are deemed to have a lower risk profile.

If you need further information on the above subject matter, please contact the Regulatory & Compliance Unit of Dillon Eustace

INSURANCE LAW

In this issue:-

ECJ Ruling on Unisex Insurance Premiums

ECJ Ruling on Unisex Insurance Premiums

The European Court of Justice (the “**ECJ**”) has ruled³ that Article 5(2) of Council Directive 2004/113/EC⁴ (the “**Directive**”) is invalid with effect from 21 December, 2012. This ruling will undoubtedly have a significant effect on the level of insurance premiums throughout the EU, with insurers prohibited from taking a person’s gender into account when calculating premiums from that date.

The ECJ’s ruling results from an Article 234 reference by the Belgian Constitutional Court which requested the ECJ to determine whether or not a domestic Belgian law implementing Article 5(2) of the Directive was valid in light of the principle of equal treatment for men and women⁵.

Equal treatment

The Directive lays down a common framework throughout the European Union for the prohibition of discrimination based on gender in the access to and supply of goods and services.

Recital 4 to the Directive makes express reference to Articles 21 and 23 of the Charter of Fundamental Rights which prohibits any discrimination based on gender and requires that equality between men and women is ensured in all areas.

Recital 18 of the Directive reflects that in order to ensure equal treatment between men and women, the use of gender as an actuarial factor should not result in differences in individuals’ premiums and benefits.

³ Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v Conseil des ministres (Case C-236/09)

⁴ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (L 373/37)

⁵ Article 8, Consolidated Version of the Treaty on the Functioning of the European Union (C 115/47)

Article 5(1) the Directive gives substantive effect to Recitals 4 and 18, providing that:

“Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits.”

The derogation

Article 5(2) of the Directive contains a derogation from the provisions of Article 5(1), allowing Member States to defer the introduction of measures necessitated under Article 5(1) until at least 21 December, 2012, so long as the use of gender as a determining factor in the assessment of risk is based on relevant and accurate actuarial and statistical data which is publicly available. At that date the Member State was, until now, permitted to reassess the situation within certain parameters.

The basis of the ECJ's ruling

In ruling that Article 5(2) of the Directive is invalid with effect from 21 December, 2012, the ECJ had regard to the following considerations:

- (i) As Recital 4 to the Directive expressly refers to Articles 21 and 23 of the Charter, Article 5(2) of the Directive must be assessed in light of those provisions.
- (ii) The use of actuarial factors in determining insurance premiums was widespread when the Directive was introduced. As such, the derogation and consequential transitional period (leading up to 21 December, 2012) was justified. The wording of Article 5(2), however, is such that it may permit the derogation (and therefore the unequal treatment of men and women) to persist indefinitely. This would be contrary to the intention of the Directive and Articles 21 and 23 of the Charter.

The practical effect of the ECJ's ruling, therefore, is that Article 5(2) of the Directive must be considered valid up to the expiry of the transitional period (i.e. 21 December, 2012).

Insurance premiums are based on risk profiles. There can be significant differences in the risk profile of men and women as regards certain perils. It is arguable that the ECJ's decision will result in the equal treatment of dissimilar situations. The ECJ has long held that equal treatment requires comparable situations to be treated similarly and dissimilar situations to be treated differently - unless there is an objective justification for doing otherwise. In

determining the comparability of a situation, the ECJ will have regard to the purpose of the EU measure giving rise to the comparison. In its ruling, the ECJ deemed Recital 18 of the Directive to reflect an objective justification for the comparable treatment of incomparable perils.

TAX

In this issue:-

Finance Act 2011




Finance Act 2011

On 6 February, 2011 Finance Act 2011 (the “**Act**”) was signed into Irish tax law. The following is a summary of some of the main changes in the area of structured finance, group financing, life assurance & investment funds and double tax treaty network.

Structured Finance (Section 110) Regime Amendments

Qualifying Assets

The Act has extended the current list of “*qualifying assets*” which are permitted to be held by Section 110 companies with the inclusion of commodities, plant & machinery and carbon offsets.

-  **Commodities** - which in the context of Section 110 means tangible assets (other than currency, securities, debts or other assets of a financial nature) which are dealt with on a recognised commodity exchange;
-  **Plant & Machinery** - which in the context of Section 110 would include aircraft, ships, motor vehicles, etc (including a business of leasing the plant and machinery); and
-  **Carbon Offsets** – (as further described in the Act).

These amendments are very welcome and further enhance Ireland’s excellent reputation as a top location for structured finance transactions. There is no doubt that the new categories of “*qualifying assets*” will be of particular interest to promoters, originators and investors.

Restrictions on Tax Deductibility of Certain Payments

The Act also contains certain (anti-avoidance) measures to deny a tax deduction on interest payments for the Section 110 vehicle in certain limited circumstances.

However in relation to the above the Act also contains certain grandfathering provisions such that the limitations on the deductibility of interest are dis-applied for interest or other distributions paid post 21 January, 2011, in respect of securities issued before that date or in respect of securities which were entered into under a binding written agreement made before that date.

Intra-Group Borrowings and Interest as a Charge

The Act has also introduced a new anti-avoidance section which denies a deduction, for corporation tax purposes, for interest on funds borrowed from a connected company where the funds in question are used to acquire assets from another connected company. It should be noted however that this section does not apply to certain qualifying intangible assets (e.g. a patent, registered design etc), or an asset acquired as trading stock (as specifically defined). Additionally where the funds are used to acquire a trade which immediately before its acquisition was carried out by a company which was not within the charge to Irish corporation tax, then the measures will not apply to so much of the interest that does not exceed the amount of the profits or gains of the acquired trade that are taxable as trading receipts for Irish corporation tax purposes in the accounting period.

It should be noted that acquisitions from a third party funded using either connected party or third party borrowings will not be impacted by the above.

The Act also introduced new anti-avoidance measures restricting the availability of interest as a charge. The below are some of the key measures:

- ▣ Interest on funds borrowed for trading purposes will be available for relief at the 12.5% trading rate as opposed to 25%;
- ▣ The company seeking to claim the interest as a charge must have a material interest (more than 5%) in the company which ultimately uses the borrowed funds and these companies must have a common director;
- ▣ Relief may either be limited or denied where the funds are lent to a non-Irish tax resident company and where that non-resident company is in receipt of interest income on the funds; and
- ▣ Restrictions similar to the above outlined in the case of interest deductions are included.

The above measures as regards interest apply to loans made on or after 21 January, 2011 and require careful consideration to ensure optimal tax efficiency for funding structures. In

this regard the Irish Tax Authority have provided a recent e-brief clarifying the application of the measures in certain circumstances.

Life Assurance and Investment Funds

The Act also gives effect to a 2% increase in the rate of tax applying to profits and/or gains from investments in both domestic and foreign life assurance policies and investment funds. The increased rates are 27% (for payments made annually or more frequently) and 30% (for payments made less frequently than annually).

The Act also confirms the increase in the rate of Deposit Interest Retention Tax from 25% to 27% (and from 28% to 30% in the case of longer term deposits).

Double Tax Treaty Network

The Act also gives effect to a number of double-taxation treaties which had been signed by Ireland but which had yet to come into effect. As a result of the passing of the Act taxation treaties with Hong Kong, Albania, Kuwait, Montenegro, Morocco, Singapore and United Arab Emirates now have force of law under Irish tax law.

For further information in relation to treaty access for Irish Investment Funds please see publication on our website entitled "**Taxation of Collective Investment Funds and Availability of Treaty Benefits**".

▣ LITIGATION AND DISPUTE RESOLUTION

In this issue:-

▣ Duty of Care: Implications from a Recent Court Case

Duty of Care: Implications from a Recent Court Case

A shot has been fired across the bows of accountants and auditors throughout Ireland by a recent decision of the Supreme Court. On 30 November, 2010, the Supreme Court, allowing an appeal from the High Court, ruled that an auditor of a company be disqualified or restricted on the grounds of unfitness. This decision has made it clear that the consequences stemming from a breach of duty or from misconduct can be far reaching for auditors and accountants alike. In circumstances where the misconduct is sufficiently serious, disqualification from acting as a director or auditor is a strong possibility.

In this case, a review by the Office of the Director of Corporate Enforcement (the "ODCE") brought to light serious deficiencies in the work undertaken by the auditor. This included a failure in his duty as auditor by signing unqualified reports on the company's financial statements for a number of years when he should have known that the impression given by the financial statements was false and misleading. To compound matters, there were also allegations of forgery made by the ODCE against the auditor. The Supreme Court held that the purpose of making a disqualification order was partly penal, to deter such conduct in the future, and partly to improve corporate governance. In reaching their decision to make a disqualification order, the Supreme Court held that the past misconduct of an individual was 'the key to disqualification'.

REAL ESTATE

In this issue:-

Repudiation and Disclaimer of Leases in cases of Examinership and Liquidation

Repudiation and Disclaimer of Leases in cases of Examinership and Liquidation

Leases entered into during the rising tide of the property boom are just one undesirable legacy of the Celtic Tiger for companies who are now struggling to reduce overheads. Leases containing upward-only rent reviews with an absence of a break clause and commanding over-inflated rents which bear no relationship to current market conditions have left many companies held into arrangement from which there is no escape. For companies in examinership or liquidation, however, there may be a way out.

With regard to companies in examinership, the Supreme Court has held that there is a statutory basis under s.20 of the Companies (Amendment) Act, 1990 for the repudiation of a lease to form part of a scheme of arrangement with creditors and that the High Court may use its discretion in the provision of such a scheme⁶. This was a significant decision, given that such an application for repudiation was not granted previously in the *O'Briens Irish Sandwich Bars* case⁷.

A liquidator may make an application to disclaim a lease under s.290(1) of the Companies Act, 1963 on the basis that the lease contains onerous covenants (i.e. excessive rent). Indeed, an examiner may apply for a Court order under s.9 of the Companies (Amendment) Act, 1990, empowering him to do the same.

While of obvious benefit to companies in examinership or liquidation who are seeking to preserve assets in as much as possible, the effect that the interpretation of these provisions may have on landlords (who may also have been affected by the downturn) should not be overlooked.

A more in depth analysis of these issues is available on our website.



⁶ *Linen Supply of Ireland v Companies Acts* [2009] IEHC 544

⁷ *O'Briens Irish Sandwich Bars Limited v Companies Acts* [2009] IEHC 465

This is an extract of an article published by Louise Wright in the Conveyancing and Property Law Journal 2010 - Vol 15. No. 4" Permission has been obtained from Round Hall for its publication".

LISTINGS

In this issue:-

-  ISE adopts New Rules on Corporate Governance
-  ISE Approve Additional Requirements for Listing Actively Managed ETFs
-  Listings Update

ISE adopts New Rules on Corporate Governance

On the 17 December, 2010 the Irish Stock Exchange (the "ISE") published the new Listing Rules (the "Rules") which require Irish listed companies to comply or explain against additional corporate governance provisions which arise from the recommendations contained in the report on Compliance with the Combined Code on Corporate Governance by Irish listed companies (the "ISE/IAIM Commissioned Report"). These Rules, contained in a new Irish Corporate Governance Annex, supplement the existing provisions which require Irish listed companies to comply or explain against the requirements of the UK Corporate Governance Code.

The new Rules are effective immediately, therefore Irish listed companies with accounting periods commencing on or after the 18 December, 2010 will be required to comply or explain against the Irish specific corporate governance provisions.

The requirement to comply with the UK Corporate Code is already in place, having applied to Irish listed companies with accounting periods beginning on or after 30 September, 2010.

ISE Approve Additional Requirements for Listing Actively Managed ETFs

Further to an application by Dillon Eustace to list the first actively managed ETF (as defined below) on the ISE, the ISE has issued a policy note addressing a number of rule changes facilitating the listing of such products.

The first actively managed ETF was listed on the ISE and passported to admission to trading on the London Stock Exchange in late February 2011.

The definition of an Exchange Traded Fund is amended as follows:

ETF means an open ended investment company:

- (a) which is an index tracker fund or an actively managed exchange traded fund;
- (b) whose securities have been admitted to the Official List of the ISE and are actively traded on Xetra®, the trading platform of the ISE, or another trading platform acceptable to the ISE; and
- (c) which is authorised and regulated as a UCITS.

The following additional listing requirements will apply:

An actively managed ETF will be subject to the following additional requirements:

- On each business day before commencement of trading in the units, the issuer will disclose on its website the identities and quantities of the securities and other assets held by the listed fund. The issuer will publish and send the most recent indicative net asset value in addition to the identities and quantities of the securities and other assets held by the listed fund to the C.A.O. at least on each business day before the commencement of trading in the units.
- Regular reporting and dissemination of indicative net asset values (“iNAV”) is required at appropriate intervals through a recognised data provider, subject to Guidance Notes issued by the ISE.

These policy changes are effective from 18 February, 2011.

If you have any questions on this policy change or would like to discuss the advantages of listing ETFs on the ISE and/or passporting to trading on other exchanges please let us know.

Listing Update

September 2010

Lyxor launched two new funds, Lyxor/GLG Emerging Equity Fund and Lyxor/Kaiser 2X Fund Limited. Lyxor/GLG Emerging Equity Fund Limited’s investment objective is, through alternative investment strategies, to seek medium term capital appreciation by primarily

investing in emerging markets equities, while Lyxor/Kaiser 2X Fund Limited aims to achieve its investment objective of capital appreciation through the speculation in exchange listed futures and foreign exchange spot and forward contracts.

New Capital Global Fixed Income Fund, a sub fund of New Capital UCITS Plc launched a new class on the 22 September, 2010. The subfunds investment objective is to seek long-term capital appreciation through a combination of capital growth and income. In seeking to achieve this, the Sub-Fund will look to invest in a broadly diversified range of global transferable debt securities issued by either Government or corporate borrowers in different currencies with short to medium term maturities.

A number of subfunds of the GAM Star Funds plc also listed additional classes.

October 2010

E.I Sturdza Funds Plc launched a new subfund, Strategic Emerging Europe Fund, which listed shares on 15 October, 2010. The investment objective of the subfund is to achieve long term capital growth by investing primarily in equity or equity related securities which are listed and/or traded on a Recognised Exchange

The Iveagh Wealth Fund, a subfund of Iveagh Global Strategies listed shares classes on 21 October, 2010. The investment objective of the subfund is to achieve capital growth through a long term strategic asset allocation framework.

November 2010

Multi-Asset Platform Fund SPC, a segregated portfolio umbrella investment company incorporated in the Cayman Islands, established a new portfolio, Fonrtedge Managed Futures Segregated Portfolio. The new portfolio listed several classes in this period. The portfolios investment objective is to deliver an investment return that tracks that of the global hedge fund industry with a similar level of volatility.

Lyxor/Trafalgar Catalyst Fund Limited and Lyxor/Hilltop Park Fund Limited listed Classes A, B, HE and HU shares in November, 2010. The investment objective of the former is to achieve long term capital appreciation and current income primarily through trading in international equity, equity derivative and securities markets, principally in Europe, the United States of America and Australia, using an even-driven strategy. Lyxor/Hilltop Park Fund Limited seeks to maximize capital appreciation concurrently with limiting volatility and risk, regardless of market conditions by focusing on listed equities.

E.I Sturdza Funds Plc launched a new subfund, Strategic Europe Value Fund, which listed shares on November, 2010. The investment objective of Strategic Europe Value Fund is to achieve long term capital growth by investing primarily in equities and equity related instruments listed or traded on a Regulated Exchange.

LG Asian Green Fund, a sub fund of Lloyd George Investment Company Plc listed shares on the 24 November, 2010. The sub fund aims to achieve long-term capital growth through investment in an actively managed portfolio, primarily invested in equity and equity-related securities of companies in the Asia Pacific region which, in the opinion of the Investment Manager, support the more efficient use of global resources.

December 2010

EW Special Opportunities Fund LLC, a Mauritian domiciled fund investing in Indian corporates, listed shares on the 6 December, 2010. The objective of the Fund is to achieve attractive returns by making investments, either directly or indirectly (through Investment Vehicles, Local Intermediaries or otherwise) in Securities of listed or unlisted Portfolio Companies in India or outside India that qualify as Special Opportunities.

Lyxor/Camargue Equity Fund Limited seeks to maximize risk-adjusted absolute returns over a market cycle. It aims to achieve this by investing primarily in highly liquid mid to large cap stocks which are listed in Continental Europe or the United Kingdom.

Lyxor/Avesta Fund Limited listed Classes A, B, HE and HU shares on the 20 December, 2010. The Fund seeks to maximize return on capital consistent with principles designed to minimize risk of capital loss through investments and transactions, both long and short, primarily using equity securities that are traded on a U.S. exchange or NASDAQ.

Lyxor/Millburn Multi-Markets Fund Limited uses a systematic strategy to exploit market opportunities.

Lyxor/QIC Global Fixed Interest Alpha Fund Limited listed Classes A, B, HE and HU shares in December. It aims to generate high, risk adjusted, returns, by investing in a broad range of strategies including but not limited to duration strategies; interest rate and credit yield curve strategies; credit indices strategies; inflation strategies; swap strategies; country interest rate and credit spreads; sector and industry allocation strategies and relative value strategies.

Lyxor/Pramerica Relative Value Fund Limited, an existing Lyxor fund, also launched HE and HU Classes in December. The Fund's investment objective is to maximise returns relative to 3-month LIBOR subject to a risk budget.

January 2011

The New Year saw the first Lyxor listing in Lyxor/Visium Institutional Partners Fund Limited, which launched Classes A, B, HE and HU shares on the 17 January 2011. The Fund's investment objective is to seek capital growth by taking long and short positions primarily in global securities and their derivatives

New Capital UCITS Fund Plc, an umbrella investment company launched a new subfund, New Capital Asia Pacific Equity Income Fund, which listed classes A, B, and C on 18 January, 2011, closely followed by Class F on 20th January. The investment objective of New Capital Asia Pacific Equity Income Fund is to achieve a relatively high level of income as well as capital appreciation by investing in securities in the Asia Pacific Region. New Capital Wealthy Nations Bond Fund, an existing subfund, also launched Class G on 18 January. The investment objective of New Capital Wealthy Nations Bond Fund is to seek long term appreciation, through a combination of capital growth and income.

GAM Star GEO, a subfund of GAM Star Funds plc listed an additional class in this period.

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