DUBLIN CORK BOSTON TOKYO

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FINANCIAL SERVICES AND BANKING UPDATE

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Companies (Amendment) Bill 2009 – Loans to Directors

On 31 March 2009, the Department for Enterprise, Trade and Employment Ms. Mary Coughlan T.D. announced the publication of the Companies (Amendment) Bill 2009 ("2009 Bill"). The Bill has three key aims:

- To improve the transparency of loans made by licensed banks and their holding companies, to their directors and to persons connected with them.

- To support the Director of Corporate Enforcement in his efforts to enforce compliance with company law whether the company being investigated is a bank or not.

- To amend some existing provisions relating to Irish registered non-resident companies to meet EU Commission concerns.

Transparency of Loans

Section 8 of the 2009 Bill amends sections 41 and 43 of the Companies Act 1990 in respect of a company which is, or is the holding company of, a licensed bank. The net effect of the amendments to Section 41 is that, in future, all loans above de minimis thresholds to each individual director will be disclosed separately in the annual accounts and will include the maximum amount outstanding during the period covered by the accounts. The net effect of the amendments to Section 43 is to require the disclosure in the annual accounts of loans made to persons connected with directors, where these loans are above the de minimis

thresholds and are made on favourable terms. In this instance aggregate disclosure will continue to suffice but maximum amounts outstanding during the reporting period will also have to be disclosed. The amendments also recognise that licensed banks may be required to make similar or even more detailed disclosure under rules, directions or requirements imposed by the Financial Regulator.

Section 9 of the 2009 Bill makes a number of amendments to section 44 of the Companies Act 1990 whereby a licensed bank or its holding company will no longer be required to make available, prior to and at each annual general meeting, a statement containing the particulars of interested party transactions, arrangements and agreements provided that this information is already disclosed in the accounts of the company, either on a voluntary basis or as a result of a separate requirement by the Financial Regulator.

Director of Corporate Enforcement

The 2009 Bill is also expected to contain a number of amendments sought by the Director of Corporate Enforcement. Specifically, Section 2 will empower the Director of Corporate Enforcement to inspect the book maintained by the relevant company for recording the declaration by a director that he is to be deemed to be directly or indirectly interested in a contract or proposed contract with the company. Section 4 will clarify the right of access of the Office of Director of Corporate Enforcement to certain records of the company under investigation and to certain related third party records. Section 5 will make a number of amendments in relation to the clauses which deal with the entry and search of premises by authorised officers of the Director of Corporate Enforcement on foot of a search warrant issued by a judge of the District Court. Section 6 will provide a mechanism for the Irish courts to determine whether or not legal professional privilege attaches to some seized material. Section 7 will lighten the evidential requirement on the Director of Corporate Enforcement so that he will not have to prove a director was wilfully in breach of the loans to directors provisions of Company Law. Currently, under Section 40 of the Companies Act 1990, the Director of Corporate Enforcement must prove that the director in question authorised a breach of the directors' loans requirements, knowing or having reasonable cause to believe that the breach was a contravention of the Companies Acts.

Amendment to the Provisions relating to Irish Registered Non-Resident Companies

Section 10 of the 2009 Bill amends sections 43 and 44 of Companies (Amendment) (No. 2) Act 1999 to delete the requirement that at least one director of a company must be resident in the State. This requirement will be replaced with a requirement that at least one director of a company must be resident in a member state of the EEA. This amendment has been made in order to address the concerns of the European Commission that certain elements of the current provisions are not compatible with the EC Treaty. The methods by which a

company can prove that it has a link with economic activity in the State are also being clarified.

Exchange Traded Funds and the UCITS Framework

An Exchange Traded Fund (“ETF”) is an investment vehicle that, in its typical form, is designed to enable investors to track a particular index through a single liquid instrument that can be purchased or sold on a stock exchange.

An ETF offers characteristics of an investment fund (such as low costs and broad diversification) but also characteristics more commonly associated with equities (such as access to real time pricing and trading).

ETFs have seen dramatic growth in recent years, in terms of assets invested and the number of products available, in contrast with the net outflows being currently experienced by many traditional investment funds. The scope of the products on offer has also widened with ETFs covering a broad range of asset classes as well as specific sectors.

Set out below is a summary of some of the main advantages that ETFs offer to investors, a brief overview of how an ETF is structured as well as how ETFs can be established in Ireland within the UCITS framework.

What is an ETF?

An ETF is a particular type of investment fund structured to facilitate trading of its shares on an exchange. ETFs generally function as index tracking funds, i.e. they provide their investors with an exposure to the securities in an index. The listing on an exchange means the ETF shares can be bought and sold by investors - on an intra-day basis and using realtime pricing - much like an equity security.

Advantages of an ETF

Low costs

In almost all circumstances, an ETF will not be required to sell securities within its portfolio, nor will it typically be required to purchase such securities directly on the open market, due to the in kind subscription and redemption arrangements regarding creation units (as discussed further under “ETF construction” below). The decreased level of portfolio transactions means that the ETF is subject to lower transaction costs than a traditional index tracking fund in addition to the generally lower management costs of pursuing an index tracking strategy when compared with an actively managed fund.

As a result, ETFs offer a lower cost alternative to other investment funds where the average expense ratio of an ETF might be 0.25 per cent for an ETF compared to 1.5 per cent for an actively managed fund. However, transactions in ETF shares by investors in the secondary market may be subject to brokerage commissions and/or transfer taxes associated with the trading and settlement through an exchange.

Diversification and choice

Investment in an index tracking product will automatically provide diversification across the sector covered by the index, the actual level of diversification being determined by the specific index.

Available ETFs cover indices on most major equity markets as well as regional, industry specific and country-specific sectors. ETFs also cover other asset classes such as fixed income securities with the range of available ETFs continuing to increase. This means that with an ETF, an investor can gain a broad exposure to any number of markets/sectors through the purchase of a single security.

Transparency

As the components of the basket for the purchase or sale of creation units are published on each dealing day, an ETF provides greater portfolio transparency than a traditional

investment fund which would not publish portfolio holding information on a daily basis and, if published, would generally be made on a lagged periodic basis only.

Real-time pricing and intra-day trading

Intra-day trading enables investors to buy and sell their shares at any time throughout the day, unlike traditional investment funds which would generally deal only once a day (or less frequently). ETFs therefore offer greater liquidity and opportunities to avail of intra-day pricing changes.

In addition, by virtue of being listed on an exchange, investors purchase ETF shares with real-time prices. This differs from traditional investment funds, the shares/units in which are purchased at forward prices.

Shorting and margin

As an ETF share is an exchange traded security, it can be treated by investors similar to an equity security and so can be sold short or purchased on margin, subject to regulatory restrictions that may apply.

Flexibility and range of investors

As ETFs can be openly purchased on an exchange there is normally no requirement to open a specific account or provide any particular documentation specifically for the ETF, although an account with a broker/clearing system will generally be required to trade listed securities.

ETFs are generally available to both retail and institutional investors. They attract both active traders and long-term investors. Investment managers may utilise ETFs where they find it difficult to achieve out-performance of a market in a certain sector or region.

How is an ETF constructed?

ETFs are typically established as index tracking funds where they aim to track an index by holding a portfolio of securities that represents or replicates the index, to the extent possible. As a passive investment vehicle, the only trading activity conducted by the ETF itself would be to reflect changes made to the index at a rebalancing interval by making a corresponding change to its own portfolio.

The ETF will be structured to offer shares to investors on the secondary market, facilitated by the use of banks/brokers who effectively act as market makers between the ETF and the investors subscribing for shares with the market makers being the only direct investors in the ETF.

Primary market

The market maker subscribing directly to the ETF for shares will become an "Authorised Participant" registered with the ETF's administrator.

Typically, subscriptions and redemptions in the ETF will be for one or multiple "creation units" comprising a designated number of shares (50,000 for example) corresponding to the underlying assets within the ETF. These shares will then be sold by the Authorised Participant on the secondary market.

The issue price of a creation unit corresponds to a pre-established fractional value of the underling index that is set at the time of the initial offer of shares by the ETF. Payment for a creation unit will generally be given in kind by the delivery of a basket of securities which closely replicates the composition and weighting of the securities held within the relevant index (although cash subscriptions may also be facilitated and the subscription may also include a cash "balancing amount" to cover any disparity between the value of the creation unit and value of the securities delivered). A list of acceptable securities and their respective weightings (representing the securities and weightings, or components, of the index) comprising the basket for the purchase or sale of such creation unit is published and made available by the ETF on each dealing day.

Secondary market

The ETF shares received by the Authorised Participant will be listed on an exchange (such as NYSE Arca or the London Stock Exchange) where they can be freely purchased and sold, with the settlement of trades in ETF shares on an exchange being facilitated through one or more recognised clearing and settlement systems, for example, CREST, Clearstream or Euroclear.

As a result, investors can buy and sell ETF shares in large or small amounts through the exchange on a real time, intra-day basis without attracting subscription or redemption charges.

The price of ETF shares traded on the secondary market will be determined by the market but should correspond approximately to the net asset value per share of the ETF based on the value of its underlying assets. Generally an indicative net asset value is issued by or on behalf of the ETF at regular periods intra-day. This obliges Authorised Participants to quote bid/offer spreads on the secondary market within a few basis points of the most recent indicative net asset value. The bid/offer spreads allows the Authorised Participant to cover the risk of buying/redeeming shares in the primary market at a price different to the price the shares are sold/bought on the secondary market. The Authorised Participant creates a

market by subscribing/redeeming in the primary market in order to settle trades which it has made with investors on the secondary market.

Pricing and arbitrage

As both the underlying securities and the ETF publish closing prices and the ETF portfolio holdings are disclosed, Authorised Participants can take advantage of the disparities between the net asset value of an ETF (which will vary in accordance with the changes in the price of the underlying securities) on the one hand and the price of ETF shares on the secondary market (which will vary in accordance with the supply and demand for such shares) on the other hand by either (a) purchasing ETF shares on the secondary market (trading at a lower price to ETF shares in the primary market) and redeeming them for underlying securities which they can then sell at a profit; or (b) shorting ETF shares in the secondary market (trading at a higher price to ETF shares in the primary market), purchasing the underlying securities and subscribing in kind for ETF shares on the primary market in creation unit size denominations and delivering the ETF shares on the secondary market to settle the short position. This arbitraging activity operates as a market force ensuring that the ETF prices do not vary to a significant extent from the prices of the underlying securities.

Custody

When ETF shares are bought and sold on the open market, the underlying securities delivered to the ETF by the Authorised Participant(s) as payment for the creation units remain in the ETF's custody account and are not impacted.

Redemptions

Secondary market redemptions are satisfied by selling the ETF shares on the exchange. Primary market redemptions may be effected by the Authorised Participant by redeeming in kind with the ETF directly. Such redemptions must be in portions corresponding in size with one or more creation units with the creation unit(s) being cancelled and the corresponding underlying securities delivered to the Authorised Participant.

Establishing an ETF as a UCITS fund

To date, many ETFs in Ireland have been set up under the UCITS regime, authorised by the Irish Financial Regulator as an undertaking for collective investment in transferable securities (UCITS) pursuant to the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations, 2003 (S.I. No. 211 of 2003), as amended (the "UCITS Regulations"). UCITS funds benefit from the principle of mutual recognition within the EU and can be marketed in other member states under the UCITS

"passport" once authorised in one EU Member State. While a UCITS fund may be established as a unit trust or common contractual fund, the listing on an exchange generally means that, in a typical case, an ETF would be constituted in Ireland as a variable capital company (VCC) with limited liability.

UCITS Funds – Index Tracking

Importantly, as with any other UCITS, an ETF set up under the UCITS Regulations would have to comply with UCITS rules relating to index replication.

(i) 5/10/40 Rule

Under what is commonly known as the 5/10/40 rule, a UCITS may invest no more than 10% of its net assets in transferable securities or money market instruments issued by the same body, provided that the total value of transferable securities or money market instruments held in issuing bodies in each of which it can invest more than 5% is less than 40%.

This fundamental UCITS principle did create problems for UCITS which wished to track an index where the weighting of a constituent element of the index exceeded the 5% limit or where the relationship between two or more constituent elements of the index meant that they were considered to constitute a single issuer resulting in an aggregation of the exposure. UCITS III then introduced more flexible provisions, specifically for index tracking UCITS funds.

(ii) 20% and 35% Rule

Under UCITS III, a UCITS whose policy is to replicate an index may invest up to 20% of net assets in shares and/or debt securities issued by the same body, with the 20% limit being raised up to 35% in the case of a single issuer where justified by exceptional market conditions. This flexibility is permitted where the relevant index is recognised by the Financial Regulator on the basis that it is sufficiently diversified, it represents an adequate benchmark for the market to which it refers and it is published in an appropriate manner.

(iii) Index replication

The reference to “replication” of the composition of a shares or debt securities index is considered by the Financial Regulator to mean replication of the composition of the underlying assets of the index including the use of derivatives or other permitted UCITS efficient portfolio management techniques and instruments.

(iv) Sufficient diversification

Although somewhat circular, reference to an index's composition being diversified refers to an index which allows for a maximum weighting per issuer of 20% with a capacity for a single constituent to exceed 20% but not exceed 35% of the index.

(v) Adequate benchmark

The reference to the index representing an adequate benchmark for the market to which it refers is a reference to an index whose provider uses a recognised methodology which generally does not result in the exclusion of a major issuer of the market to which it refers.

(vi) Publication

The requirement that the index be published in an appropriate manner is taken as a reference to an index which is accessible to the public and where the index provider is independent from the index replicating UCITS. Note, however, that this second requirement does not preclude index providers and the UCITS forming part of the same economic group provided that effective arrangements for the management of conflicts of interest are in place.

(vii) Eligibility of assets comprising the index

If an ETF wishes to track an index by directly holding components of the index (rather than employing derivatives to gain synthetic exposure to the components of the index), then, as a UCITS, such an ETF could only target indices comprising eligible assets for UCITS investment. This would exclude, for example, commodities indices. An Irish UCITS fund may, subject to compliance with certain requirements of the Financial Regulator, gain exposure – only via derivatives - to a financial index comprised of non-eligible assets.

Prospectus Disclosure Requirements

The Financial Regulator's Guidance Note 2/07 requires that, where indices are used for investment purposes, the prospectus must provide sufficient disclosure to allow a prospective investor to understand the market the index is representing, why it is being used as part of the UCITS investment strategy, how the investment will be made (i.e. directly through investment in the constituents or indirectly through derivatives) and where additional information on the index may be obtained.

Legal/regulatory features particular to an ETF

Key considerations that must be addressed when establishing an ETF include:

Construction

The structure will normally provide that only Authorised Participants can directly subscribe for and redeem shares in the form of creation units. The terms and conditions applicable to an application for the issue of shares directly in the ETF by an Authorised Participant, together with subscription and settlement details and procedures and the timeframe for receipt of applications, will be specified in the ETF's prospectus.

Clearing and Settlement Systems

Trading and settlement of ETF shares in the secondary market is facilitated through one or more clearing and settlement systems. Some of these systems provide for the trading and settlement of shares in dematerialised form, i.e. shares which are transferred without requiring the transfer to be evidenced by written transfer of ownership.

The Irish Companies Act 1990 (Uncertificated Securities) Regulations 1996 provides for an electronic share settlement system known as CREST which provides for (i) real time settlement for a range of securities traded on the London Stock Exchange and Irish Stock Exchange; and (ii) the ability to hold securities in dematerialised form.

The merger of CRESTCO (which operates the CREST system) and Euroclear Group plc has created Europe's largest settlement services provider, operating under the Euroclear brand name.

Other clearing and settlement systems (such as Clearstream) facilitate the trading and settlement of shares which although are not dematerialised are immobilised, i.e. one initial share certificate is issued which is then held at a depository within the system with all the details of initial beneficial ownership and subsequent changes recorded in electronic media rather than on share certificates.

Registrar and Transfer Agent/Depository – Clearing System Member

Another requirement if shares are to settle on an electronic clearing system is that the ETF must appoint a registrar and transfer agent or depository which is a member of the electronic clearing system.

The transfer agent/depository will maintain a sub-register for ETF shares purchased on the electronic clearing system and will process the transfers involved. The transfer agent/depository will not be required to conduct anti-money laundering checks in relation to investors purchasing and selling ETF shares through the electronic clearing system.

The transfer agent/depository will be entitled to receive a fee out of the assets of the ETF for its services.

Listing on the London Stock Exchange / Recognised Scheme Status

Many Irish UCITS ETFs are listed on the London Stock Exchange which requires that a set of listing particulars is prepared in accordance with the Listing Rules under Part VI of the UK Financial Services and Markets Act 2000 (“FSMA”). This is generally facilitated by incorporating necessary disclosures required by the UK Listing Authority into the ETF’s prospectus.
Certain rules regarding publication of net asset value information will also apply as a result of the listing.

In addition, under chapter 16 of the UK Listing Rules, the ETF will also need to obtain “recognised scheme” status under section 264 of the FSMA. In order to do so, it needs to appoint a UK paying agent for UK resident shareholders in relation to dividend payments and to provide a representation office for the ETF in the United Kingdom.

The UK paying agent will also be entitled to receive a fee out of the assets of the ETF for its services.

The future of ETFs in Europe

While this certainly remains a turbulent time for the investment funds industry, the European market in ETFs seems set to continue its expansion in the short and medium term as ETFs offer retail and institutional investors quick, inexpensive access to top performing indices and sectors. Coupled with the increasing success of UCITS brand worldwide and the continuing development of the UCITS framework, UCITS ETFs promise to offer exciting opportunities for asset managers and investors alike.

Third Anti-Money Laundering Directive

The Department of Justice has now submitted its draft heads of legislation to Parliamentary Counsel in the Attorney General’s Office in a move towards implementing the 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 the Parliamentary Counsel.

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

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.

IFIA Cash and Trustee Issues

The Irish Funds Industry Association (the "IFIA") has prepared a paper to assist members of the funds industry in dealing with current turbulent market conditions with an emphasis being placed on the holding of cash and trustee/custodian responsibilities.

Cash Assets

The paper outlines the distinction in respect of cash assets and non cash assets. Non cash assets are held distinct from the proprietary assets of the custodian and should be available to a fund in the event of bankruptcy of the custodian. However, cash is held on the balance sheet of the ultimate party with whom the cash accounts are held and will not generally be protected from the bankruptcy of such bank; i.e. the fund will be a general unsecured creditor of the bank despite the cash being held in an account in the name of the custodian on behalf of the fund.

Similarly, cash moved by the investment manager to a third party deposit taker will be held on the balance sheet of that entity and should the third party bank become insolvent, the fund would become a general unsecured creditor of the third party deposit taker.

Trustee Responsibilities

The trustee/custodian ("trustee") to the fund must exercise due care and diligence in selecting and appointing a sub custodian to safe-keep the assets of the fund so as to ensure that the sub - custodian has and maintains the appropriate levels of expertise, competence and standing to discharge their obligations. It is also essential that the trustee maintains an appropriate level of supervision to ensure that the obligations continue to be competently discharged.

The trustee must ensure that there is legal separation of non-cash assets held in custody and that such assets are held on a fiduciary basis and that appropriate internal control systems are maintained such that records clearly identify the nature and amount of all assets

under custody, the ownership of each asset and the location of documents of title for each asset.
The fund's non cash assets should be fully segregated from those of the trustee so that in the event of the trustee becoming bankrupt or entering into insolvency proceedings, the non cash assets of the fund should not be available to the trustee's creditors.

The trustee may also have to approve the suspension of redemptions on a fund where there is limited liquidity in the fund assuming the trustee is satisfied that the circumstances for temporarily suspending redemptions are set out in the Prospectus, the Memorandum and Articles of Association or the Trust Deed of the relevant fund. Notification of such suspensions must be made immediately to the Financial Regulator, the Irish Stock Exchange (if listed) and the shareholders.

Side Pockets

The Financial Regulator has acknowledged the difficulties facing Irish authorised investment funds, particularly investment funds established as funds of funds or feeder funds and as such has outlined various changes to the existing regime to deal with the current market environment. The use of side pockets on a temporary and exceptional basis as a money market remedy has been dealt with in a pragmatic manner by the Financial Regulator.

The following should be noted:

- Shareholder approval will not be required before establishing side-pocket shares in respect of Non-UCITS schemes whose fund documentation (both the Prospectus and the Memorandum and Articles of Association) permit the establishment of same.

- The Financial Regulator will not limit the amount of assets which a QIF or PIF might, in current market conditions, allocate to a side pocket, a partial suspension or a partial redemption arrangement.

- A submission to the Financial Regulator in respect of the creation of side-pocket shares will not be required in advance of creating such share classes, provided that the board of directors of the investment company (or the management company) and the trustee confirm in writing to the Financial Regulator that this action is in accordance with the fund rules and takes into account the interests of all investors.

- The Financial Regulator is currently considering a submission to allow side pocketing within UCITS funds.

Changes to Client Asset Requirements

Bi-Annual Audit Requirement

Under Requirement 4.9 of the Client Asset Requirements (“CAR”) a firm is required to commission an audit of the firm’s systems and procedures and to examine compliance by the firm with the CAR on an annual basis or more frequently as required by the Financial Regulator.

In November 2008 the Financial Regulator sent a letter to all relevant firms advising that, given the current environment, an audit should be completed more frequently and therefore requiring firms to commission a bi-annual audit of their compliance with the CAR.

The Financial Regulator requires the audit to be completed within four months of the audit period end date so that the first audit is received and reviewed by the Financial Regulator before the second audit begins.

Margined Transactions

The Financial Regulator has recently amended Requirement 2.1.6(a) and Requirement 4.10 of the current CAR such that margin received from all clients in respect of current open positions does not fall to be treated as client assets. However, it should be noted that any margin received in excess of the required margin should be treated as client assets and held in accordance with Requirement 4.10 of the CAR.

Hedge Fund and Private Equity Fund Consultation Document

The European Commission’s Hedge Fund and Private Equity Fund consultation document published in December 2008 posed a number of questions in relation to the activity of these types of funds, their impact on financial markets and their interactions with investors and other market participants and was discussed at a high level conference held by the European Commission in Brussels on 27 February, 2009.

The current position in relation to regulatory developments arising out of this consultative process, is that it is anticipated that the European Commission will move forward in this area and will propose a comprehensive legislative regime in draft form with the aim of establishing regulatory and supervisory standards for hedge funds, private equity and other systemically important players before the end of April 2009. The discussions and responses arising out of the consultation process will be used as the basis for the regulatory proposals in relation to

hedge funds and private equity funds and will also be used for a parallel international discussion at G20 level scheduled for 2 April, 2009.

http://ec.europa.eu/internal_market/consultations/2008/hedge_funds_en.htm

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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 over sight 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 EU-based central clearing for eligible EU CDS contracts by the end-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.

http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/77&format=HTML&aged=0&language=EN

In addition to these developments, ISDA has recently announced a renewed draft of it hardwiring of its CDS Auction Settlement Protocol. This undertaking, called the 'Big Bang Project' 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 is anticipated to be 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 Supplement will also include provision for the use of the ISDA Determinations Committee, 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.

http://www.isda.org/press/press031209.html

▣ REAL ESTATE

In this issue:-

- Lending Business Premises – the Right to Renew a Tenancy

Introduction

The Landlord and Tenant (Amendment) Act, 1980 (the "1980 Act"), as amended by the Landlord and Tenant (Amendment) Act, 1994 (the "1994 Act") governs the relationship between landlords and tenants of business premises and in particular, provides for a number of statutory reliefs for tenants, notably the right of a tenant to renew his or her lease.

The right to a new tenancy, and in particular the right to a new business tenancy, has been amended by Section 47 of The Civil Law (Miscellaneous Provisions) Act, 2008 (the "2008 Act") which enables landlords and tenants of business premises to agree that the tenant shall have the option to opt out of the tenant's statutory entitlement to a renewal of the lease.

This article outlines the evolution of the laws governing a commercial tenant's rights of renewal and identifies the changes made by Section 47 of the 2008 Act.

The Landlord and Tenant (Amendment) Act 1980 (the "1980 Act")

Section 16 of the 1980 Act provides that where Part II of the 1980 Act applies to a tenancy, the tenant shall be entitled to a new tenancy, commencing on the termination of the previous one, subject to proving any one of the following "equities";

- Business equity under Section 13(1) (a), as amended by Section 3 of the 1994 Act - if the tenant has continuously occupied the premises for 5 years.

- Long possession equity under Section 13(1) (b) – the tenant is required to be twenty years in possession.

- Improvements equity under Section 13(1) (c) – if the tenant is entitled to compensation for improvements and the said improvements amount to half or more than half of the letting value of the tenement when the notice of intention to claim relief is served, then the tenant has an improvements equity.

If a new tenancy is established based on business equity, the new tenancy will be fixed at twenty years or such lesser term as the tenant may nominate. It will not however be fixed for a period of less than five years without the landlord's agreement.

If a new tenancy is based on long possession equity or improvements equity, the term of the new tenancy will be thirty-five years or such lesser term as the tenant may nominate in accordance with Section 23(2) of the 1980 Act, as amended by Section 5 of the 1994 Act. The new tenancy will commence on the termination of the previous tenancy.

Contracting out of one's rights under the 1980 Act is not permitted and Section 85 provides that any provision in a tenancy agreement to contract out of the said act will be void. The position changed somewhat with the implementation of the 1994 Act, as detailed below.

The Landlord and Tenant (Amendment) Act, 1994 (the "1994 Act")

Section 4 of the 1994 Act allows a tenant of an office premises to contract out of his or her right to a new tenancy, subject to the following conditions:

- The premises must be a business premises;
- The premises must be wholly and exclusively for office use;
- The tenant must validly renounce in writing his or her entitlement to a new tenancy before the term of the new tenancy commences; and
- The tenant must receive independent legal advice in respect of the renunciation.

The ability to contract out under the 1994 Act was only available to office tenants and did not apply to all business tenants.

Section 47 of the Civil Law (Miscellaneous Provisions) Act 2008 (the "2008 Act")

Section 4 of the 1994 Act was amended by Section 47 of the 2008 Act, which came into operation on the 1st July, 2008. The 2008 Act allows all business tenants, regardless of user, who have a tenancy pursuant to Section 13(1) (a) of the 1980 Act, to contract out of their entitlement to renew their tenancy, after five years. However it would appear that tenants who have a tenancy pursuant to Section 13(1) (b) and 13(1) (c) do not qualify under Section 47 of the 2008 Act and as such are not able to contract out of their rights to renew.

For this provision to apply the tenant must renounce his or her right to a new tenancy, in writing, and must receive independent legal advice in respect of the implications of the renunciation.

There is no requirement that this renunciation should be executed prior to the commencement of the tenancy (as was required under Section 4 of the 1994 Act), which means a tenant can agree to renounce his or her rights during the term of the lease.

Assuming a landlord wishes to avoid the legal obligation of having to renew a tenancy, the landlord should prior to the signing of a lease ensure that the tenant executes a valid deed of renunciation and is satisfied that the tenant has received independent legal advice regarding the implications of the renunciation.

Conclusion

Section 47 of the 2008 Act provides greater flexibility and freedom to both landlords and tenants when negotiating the term of the lease. It allows the landlord and tenant the opportunity to agree a tenancy term which is in keeping with their requirements and commercial realities without the landlord being statutory obliged to renew the lease. The contracting out provisions as provided for in the 2008 Act applies not only to a lease for office use but also includes retail, industrial and other business sections.

LITIGATION AND DISPUTE RESOLUTION

In this issue:-

- Allianz SpA and Another v West Tankers Inc

Introduction

In the latest of a series of judgments interpreting the EU regime on jurisdiction, the European Court of Justice has ruled that a court in one EU member state cannot have proceedings stayed in another member state on the ground that the parties had agreed to refer any disputes between them to arbitration in the first state. (*Allianz SpA and Another v West Tankers Inc, Case C-185/07, Published February 13, 2009*).

This decision has come as a surprise to many given that Article 1 (2)(d) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Regulation No 44/2001") specifically states: "[This] regulation shall not apply to … arbitration."

Facts

The *Front Comor*, a vessel owned by West Tankers Inc and chartered by Erg Petroli SpA, under a charter-party governed by English law and containing a clause providing for arbitration in London, ran into a jetty in Syracuse, Italy, owned by Erg, damaging it.

Erg claimed compensation from its insurers: Allianz SpA and Generali Assicurazioni Generali SpA, who under their right of subrogation to Erg's claims, brought proceedings against West Tankers before the Tribunale di Siracusa, Italy.

West Tankers raised an objection of lack of jurisdiction, on the basis of the existence of the arbitration agreement.

West Tankers also brought proceedings in England for a declaration that the dispute between itself and the insurers was to be settled by arbitration pursuant to the arbitration agreement, and for a so-called "*anti-suit injunction*" restraining the insurers from pursuing any proceedings other than arbitration and requiring them to discontinue the proceedings in Italy.

The High Court granted the anti-suit injunction sought, and the insurers appealed to the House of Lords, arguing that the granting of the injunction was contrary to Council

Regulation (EC) No 44/2001 of December 22, 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L12/1).

House of Lords

The House of Lords took the view that the principle, decided in *Case C-116/02 Erich Gasser GmbH v MISAT Srl ([2005] 1 QB 1)* and *Case C-159/02 Turner v Grovit ([2005] 1 AC 1)*, that an injunction restraining a party from commencing or continuing proceedings in a court of a member state was not compatible with the system established by Regulation No 44/2001 and could not be extended to arbitration, which was completely excluded from the scope of the regulation by article 1(2)(d). Nevertheless, the question was referred to the European Court of Justice ("ECJ") for a preliminary ruling.

The House of Lords asked whether it is incompatible with Regulation No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement, even though Article 1(2)(d) of the regulation excludes arbitration from the scope thereof.

ECJ

The ECJ held that even though proceedings do not come within the scope of Regulation No 44/2001, they may nevertheless have consequences which undermine its effectiveness, namely preventing the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters. This is so, *inter alia*, where such proceedings prevent a court of another Member State from exercising the jurisdiction conferred on it by Regulation No 44/2001.

It was found that where the subject matter of a dispute comes within the scope of Regulation No 44/2001 (as the substantive action in the Tribunale di Siracusa was found to be) then a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application. It is therefore exclusively for that court to rule on any objection and on its own jurisdiction, pursuant to Articles 1(2)(d) and 5(3) of that regulation.

As set out in the *Gasser* and *Turner* decisions, an anti-suit injunction effectively amounts to stripping the seised court of the power to rule on its own jurisdiction under Regulation No 44/2001 and is therefore incompatible with that Regulation.

Conclusion

The House of Lords pointed out, in their reference to the ECJ in *West Tankers*, the value of the anti-suit injunction for the court in the seat of arbitration in the promotion of legal certainty and diminution of the risk of conflict between an arbitral award and the judgment of a national court. The question was also raised as to whether the abolition of the anti-suit injunction would make Member States less competitive than other arbitration centres such as New York, Bermuda or Singapore. These arguments fell on deaf ears in the ECJ.

This is clearly a decision with potentially far reaching consequences and has been widely publicised. There would not appear to be any need to amend arbitration clauses as any wording would be ineffectual to override the provisions of Regulation No 44/2001. The House of Lords expressed a concern that this would lead to seats of arbitration being moved outside the EU. However, any anti-suit injunction launched from an arbitration centre outside the EU against court proceedings in a Member State will also surely run aground on the *West Tankers* precedent.

Recent decisions of the ECJ in interpreting Regulation No 44/2001 have effectively sounded the death knell not only for the anti-suit injunction but also the long established rules of *lis alibi pendens* and *forum non conveniens*. The ECJ has left the courts of the Member States in little doubt that decisions on jurisdiction must be decided first and foremost on the basis of Regulation No 44/2001 and the old rules of private international law must make way.

CORPORATE LAW AND M&A

In this issue:-

Bankruptcy in Ireland – A Process Best Avoided

Introduction

There has been some recent publicity about a well known celebrity chef in Northern Ireland attempting to reach a deal with his creditors to avert a petition to have him declared bankrupt. Apparently, the celebrity is working with his advisers to reach what is called an Individual Voluntary Arrangement ("IVA") with creditors. The IVA is a relatively cheap, court-supervised, legal process that is available in parts of the United Kingdom which allows individuals to work with an insolvency practitioner to reach agreement with creditors and thereby avoid the publicity and stigma of bankruptcy.

So why don't we hear more about IVA's in Ireland? The simply reason is that there is really no equivalent to the IVA in Ireland. We have a court-controlled system for seeking to make arrangements with creditors but it is such an unwieldy, expensive, process-laden system and is so unattractive to overburdened debtors and to out-of-pocket creditors that proceeding with a bankruptcy usually seems the more rational alternative. It is no secret that our bankruptcy laws are in need of change.

What is bankruptcy?

To quote the oft-used definition, "Bankruptcy is a law for the benefit and the relief of creditors and their debtors, in cases in which the latter are unable and unwilling to pay their debts."

Either a debtor or a creditor may petition the High Court to have the debtor adjudicated bankrupt. A primary pre-requisite to bringing the petition is that there is liquidated debt of more than €2,000 owing. Bankruptcy law is said to act for the benefit and relief of debtors because, for an admittedly heavy price, it frees debtors of the burden of excessive debt and of vindictive creditors and allows the debtors eventually to make a fresh start. Bankruptcy law is said to act for the benefit and relief of creditors because it secures some equality of distribution of the bankrupt's assets and property among the creditors and, of course, punishes fraudulent debtors.

A bankrupt is somebody who has been adjudicated bankrupt by an order of the High Court. Once a debtor is adjudicated bankrupt, bankruptcy law requires the mandatory vesting of all of the bankrupt's assets and property (including his family home, all of his stocks and shares and all assets and property acquired by the bankrupt after being adjudicated bankrupt) in the person of an Official Assignee (or sometimes in the person of a private trustee).

Under the supervision of the Court, the Official Assignee will realise the bankrupt's assets and distribute the assets rateably among the creditors. The Court will take account of the bankrupt's family responsibilities and of his personal situation. The Court may, for example, delay the sale by the Official Assignee of the debtor's family home.

The bankruptcy process does not have many attractions for either the bankrupt or his creditors. For the bankrupt, there is the unfortunate stigma attached to being declared bankrupt. If a person is adjudicated bankrupt, a notice of the adjudication must be published in Iris Oifigiuil (i.e. an official publication in Ireland) and in one national and one local newspaper. The specific legal effects of bankruptcy are described below. For the creditor perhaps the most noticeable pitfall in the bankruptcy system is the fact that the petitioning creditor gains no priority over other creditors in relation to the payment of his debt if he makes the debtor bankrupt. The petitioner, whether debtor or creditor, must also indemnify the Official Assignee as to his costs, fees and expenses.

The Legal Effects of Bankruptcy

When a debtor is adjudicated bankrupt, the most notable effects on his personal situation are as follows:

- All the debtor's assets and property vest automatically in the Official Assignee. It will be of little comfort to the bankrupt to know that the Bankruptcy Act 1986 allows the bankrupt to retain "such articles of clothing, household furniture, bedding, tools or equipment of his trade or occupation or other necessaries for himself, his wife, children and dependent relatives residing with him, as he may select, not exceeding in value [€3,175] or such further amount as the Court on an application by the bankrupt may allow".

- The bankrupt must disclose to the Official Assignee any property acquired after being adjudicated bankrupt.

- Any payment or any transfer of property by the bankrupt to a creditor in preference over other creditors that took place in the six-month period prior to being adjudicated bankrupt shall be deemed to have been fraudulently done and may be undone or otherwise dealt with by the Court (subject to certain exceptions for bona fide recipients or transferees).

- Any sale of property at an under value that the bankrupt carried out in the three-month period prior to being adjudicated bankrupt may be avoided and undone by the Official Assignee (subject to certain exceptions for sales to bona fide purchasers).
- Any person who is known or suspected to have in his possession or control any property of the bankrupt or to have disposed of any property of the bankrupt or who is supposed to have indebtedness to the bankrupt or any person who is capable of giving information relating to the trade, dealings, affairs or property of the bankrupt may be summonsed by a Court.
- The bankrupt's salary is likely to be attached in favour of the Official Assignee.
- The Court may make to the bankrupt out of "his" assets (those that now vest in the Official Assignee) such allowances as the Court thinks proper in any special circumstances brought to its attention.
- Certain of the bankrupt's post may be re-directed to the Official Assignee.
- It is an offence for the bankrupt to act as an officer of or directly or indirectly take part or be concerned in the promotion, formation or management of any Irish company or even of any foreign company which has an established place of business in Ireland.
- The bankrupt cannot obtain credit over €630 without disclosing his status as a bankrupt.
- After twelve years the bankruptcy may be discharged.

The bankrupt commits an offence if he does not disclose all his property to the Court or conceals any part of his estate or if he obtains by false representation any property or credit. Offences carry the penalty on summary conviction of a fine not exceeding €630 or up to twelve months prison or both and on indictment of a fine not exceeding €1,000 or up to five year prison or both.

The Priorities of Creditors' Claims

The costs of the bankruptcy rank in priority to all other claims. After that, the priority of claims is very similar to that which applies in the case of a company's liquidation. Priority is next given to preferential claims such as those relating to local rates due from the bankrupt and all property and income tax assessed on him. These preferential claims, which also include wages and salaries that the bankrupt owes, rank equally between themselves. Thereafter, non-preferential claims rank equally as between themselves also.

Alternatives to Bankruptcy

Part IV of the Bankruptcy Act, 1988 prescribes the Irish process for entering into settlement arrangements with creditors while being under the supervision and protection of the Court. It is a court-controlled process and necessarily requires a number of court hearings. This all takes time and money. The IVA process in the UK that is referred to at the opening of this article gives more control of the settlement process to the debtor and, more particularly, to the insolvency practitioner that the debtor retains. This allows the courts to adopt a more hands-off and less intrusive approach.

Conclusion

There has been much speculation of late that the number of bankruptcy petitions in Ireland will increase considerably over the next few months and years. It is a pity that we do not have the legal systems and processes in place to assist debtors in coming to arrangements with their creditors and thereby giving those debtors a chance to avoid being adjudicated bankrupt.

EU AND REGULATORY AFFAIRS

In this issue:-

- **Plans to Regulate Credit Agencies**
- **Retention of Data - Directive 2006/24/EC**
- **Data Protection Audit Resource**

Plans to Regulate Credit Agencies

In November 2008 the European Commission published a legislative proposal on regulating credit rating agencies within Europe on the grounds that self regulation has not worked effectively in the industry.

Currently there is no specific regulation of credit rating agencies, although aspects of their business are subject to the Market Abuse Directive, the Capital Requirements Directives and the Markets in Financial Instruments Directive.

The aims of the legislative proposal are:

(a) To improve the quality of the ratings by improving the quality of the methodologies used by the credit rating agencies;
(b) To increase transparency by setting disclosure obligations for credit rating agencies;
(c) To ensure credit rating agencies avoid (or at least adequately manage) conflicts of interest in the rating process; and
(d) To ensure an efficient registration and supervision framework so as to avoid regulatory arbitrage between EU Member States.

The proposal must now be approved by the European Council and the European Parliament through the co-decision process.

Retention of Data – Directive 2006/24/EC

Directive 2006/24/EC on the "retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC" (the "Directive") was not implemented in Ireland on 15 March, 2009. Ireland had challenged the legal validity of the Directive before the European Court of Justice, however we were unsuccessful in this

challenge. According to the Data Protection Commissioner's Office, primary legislation is expected to transpose the Directive in April, 2009.

In summary Internet Service Providers ("ISPs") will be required to keep records on personal data traffic for at least 6 months and no more than 2 years. The records to be kept will include to whom people are contacting, when and where they are communicating and what type of communication it is. It does not refer to the content of the communication.

This data will be made available to the Gardai and other public authorities for crime or public order investigations.

Data Protection Audit Resource

On the 28 January, 2009 the Office of the Data Protection Commissioner (ODPC) published a new Data Protection Audit Resource to increase data protection awareness and compliance.

The Data Protection Audit Resource outlines the process which the ODPC will follow during an actual inspection including the audit methodology, pre-audit and post audit procedures, sample audit questions, what happens on the day of inspection and audit follow up.

The ODPC has been conducting compliance audits since 2003, to ascertain whether a particular organisation is operating in compliance with the Data Protection Acts 1988 to 2003 (as amended) ("the Acts") and to review how effective an organisation is in adhering to policies concerning the handling of personal data. The ODPC has the power to carry out scheduled audits and 'on the spot' unannounced inspections.

When issues are identified the ODPC may seek immediate remedial action such as rectification, blocking or deletion of data. The ODPC may publish the principal findings of an audit in its annual report or issue public statements and warnings. The potential harm to an organisation's reputation is viewed as an effective deterrent in may cases, however, if required, it is also within the ODPC's legal enforcement powers to bring about a change in an organisation's data protection practices.

The Data Protection Audit Resource also includes a self-help checklist on data protection policy to help organisations assess their compliance with their obligations under the Acts.

When announcing the launch of the new Data Protection Audit Resource, the Data Protection Commissioner commented on the large number of very high profile losses of personal data in the recent past, which shows there is a clear room for improvement. It is

hoped that the Data Protection Audit Resource will help organizations to easily identify areas where improvement in their data protection practices are required.

INSURANCE LAW

In this issue:-

- **Solvency II Framework Directive**
- **Financial Regulator's Recent Settlement Agreements**
- **Review of the Intermediary Market**
- **Review of the Unit Linked Whole of Life Policies**
- **Report on the Functioning of the Coordination Committees**

Solvency II Framework Directive

The Solvency II Framework Directive will introduce a risk based capital regulatory regime for insurers, reinsurers and captive companies with more than €5 million in gross premium volume that operate in the European Union. This Directive is due to be implemented no later than 31 October, 2012.

On the 26 March, 2009 the Committee of European Representatives, a group made up of representatives of EU Member States, reached an informal and unanimous agreement on the text of the Directive, which is due to be formally endorsed in early April. The informal agreement was reached after language concerning so called "group support" was left out in a compromise version of the Directive. Group support would have allowed the capital adequacy requirements of subsidiary insurance firms to be calculated on a cross border basis and encourage co-operation between the EU supervisors, however Regulators in smaller EU countries argued against group support as they felt it would reduce the local supervisors' control over multinational insurers.

While the Comite Europeen des Assurances (CEA), which represents insurers and reinsurers in Europe, welcomed the informal agreement which means the that the timetable for implementing the Directive is now on track, they expressed disappointment that the group support provision was left out of the compromise Directive language as this would have provided a tool which would have met the need for an efficient and effective supervision of multinational groups as highlighted in the De Larosiere Group's report on financial supervision.

The European Parliament will now put the Directive to a plenary vote on the 22 April, 2009. Formal adoption of the Framework Directive could then take place during the 5 May Economic and Financial Affairs Council (ECOFIN).

Financial Regulator's Recent Settlement Agreements

On the 24 October, 2008 the Financial Regulator entered into a Settlement Agreement with Quinn Insurance Limited ("QIL") and the Chairman, Sean Quinn. Due to suspected breaches under the Insurance Acts and Regulations, including failure to notify the Financial Regulator prior to providing loans to related companies, the Financial Regulator required QIL to pay a monetary penalty of €3,250,000 and Sean Quinn to pay a monetary penalty of €200,000.

QIL confirmed to the Financial Regulator that the suspected breaches have not given rise to any consequences for the firm's policyholders.

Sean Quinn has stepped down as Chairman and as Director with James Quigley being appointed as Chairman.

On the 17 November, 2008 the Financial Regulator entered into a Settlement Agreement with Hibernian Direct Limited ("Hibernian") whereby it required Hibernian to pay €45,000 for non disclosure of information required under the Consumer Protection Code ("the Code") when selling optional extras on motor insurance policies to customers and for failure to appropriately obtain customer consents when selling such optional extras.

The Financial Regulator confirmed that no customer had complained directly to the Financial Regulator in relation to the suspected breaches.

Hibernian confirmed the suspected breaches arose due to misinterpretation by it of its obligations under the Code.

On the 17 December, 2008 the Financial Regulator entered into a Settlement Agreement with Michael McGarrigle, a mortgage intermediary for failure to comply with certain provisions of the Code including, among other things, a failure to draw up terms of business, failure to record sufficient information before providing a service to certain customers, failure to issue statements of suitability to certain customers, failure to submit a signed declaration to the mortgage lender that the firm had sight of all original supporting documentation to mortgage applications and failure to maintain up to date consumer records. Mr. McGarrigle has sought revocation of his authorization as a mortgage intermediary.

Review of the Intermediary Market

On the 10 December, 2008 the Financial Regulator issued the report of the working group on the review of the intermediary market ("the Review").

The Review covers two main areas namely:

- Intermediary categorisation – considers appropriate terms to describe insurance and mortgage intermediaries that reflect the range of services provided and are clear for consumers.

- Transparency for the consumer – focuses on improving transparency in relation to the services provided by insurance intermediaries, their remuneration, their relationship with the consumer and their relationship with the product producer in so far as it affects consumers. This consideration was confined to the insurance intermediary market.

Consumer research indicated that consumers generally referred to intermediaries as “brokers” and had little understanding of other terms.

The Review outlined a number of recommendations to deal with intermediary categorisation including using the definitions contained in the Insurance Mediation Regulations and the Consumer Credit Act to describe intermediaries, only using the word “independent” in limited circumstances and defining the word broker and when that term could be used.

Research found that consumers were generally happy with their brokers but were unclear about the level of service provided, their remuneration and their relationship with product providers. The Review details a number of recommendations to improve transparency. These include:

Non-life insurance intermediaries should disclose remuneration arrangements with product providers in general terms and that, prior to the sale of the product, they should either inform the consumer of the amount of the remuneration receivable in respect of that sale or that details of remuneration are available on request.

- The Department of Finance should complete its review of the current Insurance Mediation Regulations and introduce amended Regulations that will remove insurance mediation from the Investment Intermediaries Act, 1995 (as amended).

- An insurance provider should not terminate an appointment solely based on the volume of new business introduced by the intermediary.

- Intermediaries should clearly inform consumers about the extent of the market they intend to search.

The recommendations made in this Review will be implemented through the Financial Regulator's Consumer Protection Code. Legislative amendments will be addressed to the Department of Finance and the Advisory Forum on Financial Legislation.

Review of the Unit Linked Whole of Life Policies

The Financial Regulator has completed an examination of Unit Linked Whole of Life policies as a result of concerns raised by consumers, particularly regarding the review of their policies and the current sales practices relating to these products.

In December 2008 the Financial Regulator wrote to all firms selling such products outlining their findings. The inspection found that some firms who conduct policy reviews had not done so in a timely manner. One of the main reasons for such delays appears to be an over reliance on manual processes when conducting policy reviews. The Financial Regulator has advised that policy reviews should be conducted on time in accordance with the policy terms and conditions and firms should have the system functionality in place to deliver on the terms and conditions of the policy.

Where the reviews are not completed on time, the firm must ensure that the policyholder is not placed in a worse financial position than if the policy review had occurred when it was due.

The Financial Regulator also emphasised that the key issues specific to a Unit Linked Whole of Life policy such as the periodic review feature must be highlighted to clients at the point of sale. The suitability statement should include information on the policy review feature, in particular the risk of the premium increasing.

Report on the Functioning of the Coordination Committees

In February 2009, the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) released the results of their survey on the 2007-2008 practical supervisory co-operation within the Coordination Committees (Co-Cos) under the current legal Solvency I Framework as well as on the expectations for 2009. The 'lead' supervisors of all 110 cross-border insurance groups have participated in the exercise.

The main findings of the survey are:

- The performance of the Co-Cos has substantially improved since the previous surveys held in 2004 and 2006.
- Almost all groups have a lead supervisor appointed, while contacts on a day-to-day basis have intensified and diverse joint activities were planned and reported.
- Supervisors of all large and middle-sized insurance groups organize Co-Co meetings on a regular basis.
- There are areas which require development such as the systemization of work plans agreed within the Co-Cos and performing more joint activities.

CEIOPS will continue to seek ways to improve the functioning of Co-Cos and the Colleges of Supervisors in preparation of the Solvency II Framework

▣ TAX

In this issue:-

- **EU Savings Directive Proposed Amendment**
- **Investment Funds – How the Taxation Environment in Ireland Continues to Lead the Way**
- **Holding Companies in Ireland**

EU Savings Directive Proposed Amendment

The EU Savings Tax Directive (2003/48/EC) ("ESD") introduced at the beginning of July 2005 provides a mechanism for reporting (and ultimately taxing) cross border interest type payments under which paying agents must either report interest income received by taxpayers resident in other EU Member States or levy a withholding tax on the interest income received.

The European Commission adopted an amending proposal to the ESD in November 2008 with a view to closing what it considered to be existing loopholes and eliminating tax evasion. It proposes to broaden the scope of the existing ESD to include life assurance contracts which provide limited biometric risk coverage (less than 5%) and whose performance is fully linked to income from debt claims or equivalent income from securities of any kind.

Where the Life Assurance Company makes interest payments on such unit linked contracts and the beneficial owner is resident in another Member State, the Life Assurance Company will be required to provide details of the payment to the Irish Revenue Commissioners. The proposed amendment to the ESD states that it will apply to life assurance contracts written on or after 1 December, 2008, however this date is likely to be revised once the proposal is accepted and revised legislation is put in place.

On the 2 December, the European Council of Finance Ministers (ECOFIN) expressed support for proposals by the European Commission to tighten up the ESD and have called for this proposal to be progressed quickly so that new legislation can be put in place to expand the scope of the ESD to include a wider array of financial instruments and vehicles.

Investment Funds – How the Taxation Environment in Ireland Continues to Lead the Way

Introduction

Ireland has long been recognised as a destination of choice for investment funds. As an international fund domicile, Ireland ranks amongst the most flexible and advantageous in the onshore world due in no small part to the wide variety of investment fund vehicles which may be established under the Irish regulatory system. Ireland has in its favour; a developed national infrastructure, a highly competent and skilled workforce, political stability, the regulatory system and most importantly the willingness on the part of the Irish regulatory and tax authorities specifically the Irish Financial Regulator (FR), the Irish Stock Exchange (ISE) and the Irish Revenue Commissioners (IRC) to adapt and develop regulations to keep pace with international developments.

Ireland now services over $1.7 trillion in investment fund assets and is a fund domicile of choice for over 350 fund promoters. It is also a leading jurisdiction for money market funds and a leading exchange traded funds administration centre. As at June 30, 2008, 3,124 investment funds with an estimated Net Asset Value of US$1,468 billion were being serviced in Ireland. It is estimated that over 30 percent of global hedge funds are serviced in Ireland, making it the largest hedge fund administration centre in the world. This represents in excess of one third of global alternative investment fund assets and over half of European hedge fund assets.

Ireland – Investments Funds

Fund types

Ireland's regulatory regime provides for the establishment of a plethora of investment fund types (referred to herein as "fund" or "funds"). Fund categories can be broadly split between UCITS and non-UCITS funds. UCITS operate on the basis of their availability to the "man in the street" and their investment and borrowing restrictions are generally not negotiable. However, UCITS III[2] extended the range of assets that can be invested in by a UCITS by allowing investments in money market instruments, derivatives, funds of funds, bank deposits and index tracker funds. UCITS III was transposed into domestic law in late May 2003 by the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations, 2003 (as amended).

On the other hand, Ireland has non-UCITS funds, which include retail schemes, professional investment funds (PIFs) and qualifying investment funds (QIFs), the latter as the name suggests only available to qualifying investors i.e. in the case of individuals any individual with a minimum net worth in excess of Euro 1.25 million (excluding principal private residence/contents) or in the case of institutions any institution which owns or invests on a discretionary basis at least Euro 25 Million or the beneficial owners of which are qualifying investors in their own right. The FR and indeed the ISE dis-apply their general investment restrictions to varying degrees depending on the type of non-UCTIS fund, the QIF incurring the least restrictions.

Non-UCITS can be further broken down into their respective categories e.g. feeder funds, fund of funds, money market funds, private equity funds, venture capital funds, hedge funds, real estate funds, emerging markets funds etc.

New Irish QIF Regime

In 2007 the FR introduced a new authorisation process for QIFs. This is a prime example of how the FR and the Funds Industry are actively working to maintain the competitive edge which Ireland currently enjoys. QIFs are the vehicles which are most frequently used in the alternative space – hedge funds, fund of hedge funds, venture capital/private equity, etc – and are a mainstay of the non-UCITS Irish domiciled product offering. The new authorisation regime provides that, subject to meeting pre-agreed parameters, a QIF is now capable of being authorised by the FR on a filing only basis so that once a complete application for authorisation is received by the FR on Day X, a letter of authorisation for the QIF can be issued by the FR on Day X +1. There will no longer be a prior review process.

Fund Legal structures

There are various structures that funds may take, from units trusts to corporate funds (variable or fixed capital), investment limited partnerships to common contractual funds (CCF's). Although from an administrative point of view each vehicle (other than the fixed capital product, which is rarely used) functions in a similar way, with the value of its shares/units/participations fluctuating in line with the value of its underlying assets, each vehicle is subject to different legislative provisions.

- *Corporate Funds* – A fund which is structured as a variable capital investment company may be established pursuant to (i) the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations, 2003 (as amended) (the "UCITS Regulations") (for UCITS vehicles); or (ii) the provisions of Part XIII of the Companies Act, 1990 (for non-UCITS vehicles). A fund which is structured as a variable capital investment company must be incorporated as a public

limited company. Such corporate funds are incorporated entities with separate legal personality. They have the capacity to enter into contracts and to sue and be sued. Their day-today management and control is provided by a board of directors with ultimate control resting with shareholders.

- *Unit Trusts* may be established in Ireland pursuant to the Unit Trusts Act, 1990 (for non-UCITS vehicles) and pursuant to the UCITS Regulations (for UCITS vehicles). A Unit Trust is a fund vehicle created by a written agreement between a manager and a trustee known as a trust deed. A unit trust does not have a separate legal existence, does not have the capacity to contract and cannot sue or be sued. The assets of a unit trust are held by its trustee (in its capacity as custodian) and are managed by its manager who may appoint one or more investment managers/advisers to assist it. Contracts in relation to the management and administration of the trust fund are entered into by the manager whereas the trustee will enter into contracts in relation to the assets themselves such as bank deposits, security agreements etc.

- *Investment Limited Partnership* - is a partnership between one or more general partners and one or more limited partners. The principal business of an investment limited partnership is expressed in the partnership agreement. It should be noted however that this type of structure is rarely used.

- Common Contractual Fund – See below.

Taxation of Irish Investment Funds

Fund Level Taxes

The taxation treatment of regulated funds in Ireland is one of the key factors to the success of the Irish funds industry. Funds are not subject to any taxes on their income (profits) or gains arising on their underlying investments.

While dividends, interest and capital gains which a fund receives with respect to its investments may be subject to taxes, including withholding taxes, in the countries in which the issuers of investments are located, these foreign withholding taxes may nevertheless be reduced or eliminated under Ireland's network of tax treaties to the extent applicable.

Similar to other jurisdictions, the qualification of funds under double tax treaties between Ireland and other countries is ambiguous. Indeed, depending on the jurisdiction of the investments a distinction is sometimes made between funds having a legal personality of

their own (e.g. corporate funds) and common law trusts (e.g. unit trusts). While a detailed discussion of treaty accessibility for funds is not within the ambit of this article, from practical experience corporate funds as opposed to trusts have typically been more successful in accessing treaty benefits due to the very nature of their structure (i.e. opaque). In addition, there is evidence of Irish funds (including perhaps surprisingly unit trusts) obtaining treaty benefits either at source or more commonly through a refund procedure.

Ireland obviously welcomes the work currently been undertaken in relation to the accessibility of collective investment vehicles (worldwide) to treaty benefits.[3]

Treaty Access

Nevertheless, where treaty access is important there are structuring solutions that may be used to facilitate treaty benefit claims for investment funds. One such innovative structure combines the favourable investment funds regime with the favourable Irish securitisation regime (for which Irish tax neutrality can be effectively achieved through the use of profit strip securities). Essentially, the fund finances the securitisation vehicle ("SPV") (which will be a 100 percent subsidiary of the fund) by taking up a profit participating security issued by the SPV and the SPV uses the monies raised through the issue of the profit participating security to purchase the investments (in the normal manner) as set out in the investment funds' policies documentations. As the SPV is a fully taxable vehicle in Ireland (albeit it's taxable profits can be managed to a desired level including taxable profits of zero if so desired - through the use of the profit participating securities) and the SPV is the entity making the investments, it typically removes one of the obstacles to tax-exempt regulated funds obtaining treaty benefits, which is whether the fund is "liable to tax" . In many treaties (including the standard OECD Model Treaty) liable to tax is used to define a resident of the Contracting States for the purposes of the relevant tax treaty.[4]

An additional benefit of this structure is that it should eliminate any chance of a foreign tax exposure for the fund as a result of being deemed resident or to have a PE in a foreign jurisdiction by the very reason that the Irish investing vehicle, the SPV, should clearly be liable to tax in Ireland and a resident thereof for the purposes of the relevant treaty.

Common Contractual Funds (CCF's)

Another example of Ireland's innovative fund's industry was the introduction of the bespoke vehicle, the CCF in 2003 to enable pension funds and trustees or custodians of pension funds to pool their investments (asset pooling) in a tax efficient manner. Originally devised as a UCITS structure limited to pension funds (or trustees or custodians of such pension funds), the CCF was further enhanced in 2005 by the Investment Funds, Companies and Miscellaneous Provisions Act, 2005, which provided for the establishment of a non-UCITS

CCF and allowed for an expansion in the investor base (essentially to include all pension funds, institutional investors and corporate entities).

A CCF is constituted under contract law by means of a deed of constitution executed under seal by a management company. The deed provides for the safekeeping of assets of the CCF by a custodian who is also a party to the deed and specifies the fiduciary responsibilities of the Custodian which are equivalent to those of custodians of other UCITS and Non-UCITS schemes.

Importantly, the CCF is an unincorporated body and does not have legal personality. Because a CCF does not have legal personality, it may act only through the manager (or investment manager, if authority is delegated to an investment manager). Participants in the CCF hold their participation as co-owners and each participant holds an undivided co-ownership interest as "tenant in common" with other participants.

The central rationale for establishing a CCF is the capacity to provide participants with a tax transparent vehicle, where participants should be treated as investing directly in the pool of assets, and which benefits from all of the advantages of investing via a pooled arrangement including:

- economies of scale:
  - larger pools are able to negotiate lower custody fees;
  - larger pools increases capacity to net flows and reduce transaction costs;
  - large pools reduce administration costs
- centralised investment approach;
- centralised deal placing;
- centralised risk management/compliance.

Central to the CCF offering is that it is more than just entity (as opposed to virtual) pooling, it is *transparent* entity pooling, the CCF having been designed with a number of features to support transparent treatment quite apart from express provisions of Irish tax law.

Some of the many advantages of the CCF include:

- As a tax transparent vehicle, a CCF should facilitate direct access to tax treaty relief in the investor's home country. As a result there should be no tax drag arising from the

application of withholding taxes, with each investor in the position to benefit from home country treaty benefits.

- It is a fund domiciled in Ireland where the standard of service provided by managers, custodians, administrators, legal and tax professionals is high;
- Multiple unit classes can be included in the CCF;
- No capital duty or subscription tax generally applicable to the CCF;
- No VAT is applied to key services received by the CCF including investment management, administration, etc (i.e. treated from a VAT perspective in a similar manner to other regulated funds – see Section C below) generally applicable to the CCF;
- No withholding taxes.

Subscription Tax and Capital Duty

No stamp or capital duty - (subscription tax) is payable in Ireland on the issue, transfer, repurchase, redemption, etc of units/shares in a fund.

Value Added Tax ("VAT")

From a VAT point of view, VAT Directive 2006/112/EC provides an exemption applicable to the "management of special investment funds as defined by Member States". There is no legal definition of what is meant by this exemption however, from an Irish VAT perspective, the VAT exemptions are wide ranging with regard to the provision of services to funds (e.g. administration, transfer agency, investment management). Indeed, the long held view of the IRC with regard to various services was reinforced by the decision of the European Court of Justice (ECJ) in the *Abbey National* case (C-169/04) on the scope of the VAT exemption for management of special investment funds. The ECJ held that the VAT exemption for management of special investment funds may apply to services performed by a third-party manager in respect of investment management and the administrative management of the fund. This is consistent with other ECJ decisions on outsourcing in the financial services sector, such as *Sparekassernes Datacenter* (C-2/95) and *CSC Financial Services (C/235/00)*, in that it is the nature of the service being provided which is crucial to its VAT treatment, not the characteristics of the person providing it. However, in order for the supply of outsourced management services of special investment funds to fall within the VAT exemption, the services supplied *"must, viewed broadly, form a distinct whole, fulfilling in effect the specific, essential functions"* of the exemption (i.e. management of the fund). The

supply of IT services or other *"mere material or technical supplies"* does not fall within the exemption. This overturned the position of the European Commission and the UK government that the supply by a third party of purely administrative services which do not include investment management does not fall within the exemption.

Another relevant judgment was that of the ECJ in the *JP Morgan Fleming Claverhouse Investment Trust* case (C-363/05) where it was confirmed that investment trusts were special investment funds for the purposes of the aforementioned VAT exemption.

The provision of custodian (trustee) services to funds are also typically VAT exempt. While there is no exact statutory exemption from Irish VAT for custodial fees (unlike for management fees) the IRC have agreed the significant component parts of such a service are fundamentally VAT exempt and while some of the component services provided by a fund custodian may be taxable, they typically constitute a negligible part of the total cost of supplying the custody service.

Although investment funds are generally seen as taxable persons from an Irish tax perspective, from a practical perspective such funds are relieved from registering for Irish VAT purposes unless they are liable for self-assessing Irish VAT on the receipt of certain taxable services (*e.g.* tax and legal services rendered by suppliers established outside Ireland). In the specific case of unit trusts, the investment fund cannot obtain a VAT number. The VAT registration is achieved by the management company.

Nevertheless, regardless of whether the funds are registered for Irish VAT or not, the funds can still offset/recover Irish VAT on the purchase of services from suppliers based on the funds recovery rate. The recovery rate is based on either (i) the extent that securities of the fund are invested outside the EU or (ii) the extent that the investors in the fund are located outside the EU. The generally preferred route of the IRC is (i) location of investment (because of the practical difficulties of determining the location of investors who invest for example via intermediaries etc). Furthermore, on a similar basis the fund can also look to recover Irish VAT suffered on fees such as Irish legal and audit (where VAT will automatically have been imposed on the invoice).

Taxation of Investors from the perspective of the Investment Funds

Non-Residents

No Taxes – As outlined above Irish investment funds are not subject to any taxes on their income (profits) or gains arising on their underlying investments. In addition, there are no Irish withholding taxes in respect of a distribution of payments by investment funds to investors or in relation to any encashment, redemption, cancellation or transfer of

units/shares in respect of investors who are neither Irish resident nor ordinarily resident in Ireland and who have provided the fund with the appropriate relevant declaration of non-Irish residence.

Irish Residents

a) Exempt Investors

No Taxes – Again, no Irish withholding taxes in respect of a distribution of payments by funds to such investors (which would include approved pension schemes, charities, other investment funds, etc) or any encashment, redemption, cancellation or transfer of units/shares in respect of investors and who have provided the fund with the appropriate relevant declaration .

b) Non-Exempt Investors

If an investor is Irish resident and not an Exempt Irish investor, tax at 23 percent will be required to be deducted by the fund on distributions (where payments are made annually or at more frequent intervals) and tax at 26 percent will have to be deducted by the fund on any other distribution or gain arising to the investor on an encashment, redemption, etc of units/shares by an investor who is Irish resident or an ordinary resident in Ireland. While this tax will be a tax liability of the fund, it is effectively incurred by investors out of their investment proceeds.

This taxation component can prove useful when a fund is trying to obtain treaty benefits.

Units held in a Recognised Clearing System

Any payments to an investor or any encashment, redemption, cancellation or transfer of units/shares held in a Recognised Clearing System (as defined in Irish tax legislation) will not give rise to a chargeable event in the fund. Thus the fund will not have to deduct any Irish taxes on such payments regardless of whether they are held by investors who are Irish Residents or Ordinarily Resident in Ireland, or whether a non-resident investor has made an appropriate relevant declaration. Nevertheless, investors who are Irish Resident or Ordinarily Resident in Ireland or who are not Irish Resident or Ordinarily Resident in Ireland but whose units/shares are attributable to a branch or agency in Ireland may still have a liability to account for Irish tax on a distribution or encashment, redemption or transfer of their units/shares.

1 Source IFIA www.irishfunds.ie.
2 UCITS III Directive (Directive 85/611/EEC as amended by Directives 2001/107EC and 2001/108/EC).
3 For more information on this please see http://www.oecd.org/dataoecd/34/26/41974553.pdf.
4 This structure works in the majority of treaty partner jurisdictions, however one treaty jurisdiction where this structuring would not be of any additional benefit is the US due to the complexity of Article 23 (Limitation of Benefits clause) of Ireland/US DTA

Holding Companies in Ireland

Ireland has long been a destination of choice for holding companies because of its low corporation tax rate of 12.5%, its participation exemption and the general ability to pay and receive dividends free of withholding tax.

The recent decisions of Shire and UBM to re-locate to Ireland from the UK and the surge in interest from other UK based companies in re-locating their holding company operations to Ireland can be seen as proof of the continuing international appeal of Ireland as a holding company regime.

Ireland is of particular interest in the following circumstances:

- as a location for global or regional headquarters;
- to avail of the extensive exemptions from dividend withholding tax on dividends paid by an Irish company;
- to hold subsidiaries that have scope for significant capital appreciation;
- to access Ireland's treaty network and the EU Parent-Subsidiary Directive in order to reduce the tax burden on dividends received from foreign subsidiaries;
- where a jurisdiction is required that does not have controlled foreign corporation legislation;
- where a jurisdiction is required which does not have thin capitalisation or transfer pricing rules;
- where it may be important to achieve a tax free unwind of the holding company at some stage in the future;

Although tax considerations may not be the overriding factor when deciding on a location for the establishment of a holding company, they would certainly feature prominently in such a decision.

While from a taxation perspective no one location is going to be the optimal holding company location for all groups in all scenarios, Ireland should certainly feature strongly in the large majority of shortlists when holding company locations are being considered. This document focuses solely on the Irish tax considerations which may be relevant in the decision to establish a holding company in Ireland. It should be borne in mind that there are other legal considerations to bear in mind; these include the availability of grants and other fiscal incentives, applicable employment legislation, and general corporate law to name but a few.

The Irish tax issues associated with establishing an Irish holding company are reviewed under the following headings:

- establishment of an Irish holding company;
- disposition of shares in an Irish holding company;
- taxation of Irish holding companies;
- tax treaty network;
- ceasing operations in Ireland.

Establishing of an Irish Holding Company

A holding company incorporated in Ireland must take one of the forms provided for by Irish corporate law. The most commonly used structure for a holding company is a private limited liability company or a private unlimited company. There are no minimum equity requirements for an Irish private company.

Financial statements must be prepared in accordance with accounting standards (Irish GAAP or IFRS) generally accepted in Ireland and with Irish corporate law comprising the Companies Acts, 1963 to 2006.

Disposition of Shares in an Irish Holding Company

Capital Gains Tax

Capital Gains Tax for non-Irish tax residents arises on the disposition of shares only where those shares derive the greater part of their value from Irish situated minerals or mining rights or Irish real property.

Stamp Duty

Stamp duty is a one-off tax on documents implementing certain transactions.

The transfer of shares attracts stamp duty at a rate of 1% (based on the fair market value of the shares). There are, however, various relief's and exemptions available in respect of the acquisition of intellectual property, dealings in certain financial instruments, transactions involving associated companies and group re-organisations. Where a charge to stamp duty does arise it is payable within 30 days of the execution of the relevant documents.

Transfers of Irish land attracted stamp duty at rates of up to 9%. The Finance (No.2) Act 2008 has reduced the top rate of stamp duty for transfers of Irish land to 6%.

Irish Gift and Inheritance Tax

If shares are transferred by way of gift or inheritance, capital acquisitions tax, may arise on the value of the shares which form the gift or inheritance. The Finance (No.2) Act 2008 has increased the rate of capital acquisitions tax from 20% to 22%.

Taxation of Irish Holding Companies

General taxation regime

Ireland has an extremely favourable corporation tax rate of 12.5% on profits earned in the course of an active business (a trade). Passive income earned by a company is taxed at a rate of 25%. The Revenue Commissioners have established a process whereby they will give an opinion as to a taxpayer's entitlement to the 12.5% Corporation Tax regime.

Controlled Foreign Corporation ("CFC") Legislation

Ireland does not currently have CFC legislation.

Thin Capitalisation

Irish tax legislation does not contain thin capitalisation rules, but it does re-characterise certain interest payments in certain cases as non-deductible interest.

Deduction of cost

- Generally the expenses of management are deductible against a holding companies taxable profit.

- Furthermore, an Irish holding company will generally obtain (on a paid basis) a deduction for interest on loans relating to the acquisition (or lending) of shareholdings subject to certain restrictions.

Although interest payments made outside the EU to non-resident parent companies or to other non-resident companies where there is 75% common control are treated as distributions (and consequently not tax-deductible) interest will in most cases be deductible where it is paid to a company resident in a country with which Ireland has concluded a double tax treaty (pursuant to the Finance (No.2) Act 2008 treaty countries now include those countries with which a double tax treaty has been signed but not yet ratified) or EU Member States. There are restrictions on financing intra-group acquisitions with debt from a related party which would need to be considered in the relevant circumstances.

Tax Consolidation

There are no express provisions in Irish tax law for the consolidated filing of tax returns by related companies. However excess management expenses of investment companies (which may include holding companies), trading losses and excess deductible interest expenses may be offset against the Irish profits of other members of the group for the same financial period.[1]

Relief will also be available to Irish companies in respect of trading losses incurred by their non-Irish resident subsidiary companies (provided that the surrendering company is a direct or indirect 75% subsidiary of the claimant company) that are resident either in an EU Member State or alternatively an EEA State with which Ireland has a double tax treaty provided certain conditions are met.

[1] A group means a parent company together with its 75% subsidiaries that are resident in Ireland another Member State of the EU or an EEA Member State with which Ireland has a treaty.

Close Companies

The close company legislation is designed to prevent proprietary directors and shareholders avoiding or deferring income tax through the use of closely held (usually family owned) companies. In determining whether or not a company is a close company, the principal test is one of control. Control by five or fewer participators or by participators who are directors whatever the number, is the basic determinant of close company status. These provisions may impact on holding companies (where such companies come within the definition of a close company) by subjecting dividends received from Irish companies which are not further distributed as a dividend to the holding company shareholders within 18 months of the financial year end to an additional corporation tax surcharge of 20%. In addition passive income on other investments not qualifying for participation exemption is liable to additional tax at 15%.

The Finance (No.2) Act 2008 provides an option where a close company pays a dividend to another close company for both companies to jointly elect for the dividend not to be treated as a distribution. The effect of this change is that a dividend received from an Irish subsidiary by an Irish holding company will not be treated as part of the holding company's surchargeable income and will allow, for example, the holding company to pay down debt instead of being obligated to distribute such dividends to its shareholders in order to avoid the surcharge. This change amends the law so as to bring the treatment of Irish dividends in line with that of foreign dividends received by a holding company which are not subject to the close company surcharge.

This change however will not allow the subsidiary to avoid the close company surcharge as the election will mean that the dividend is not treated as a distribution, hence, where a subsidiary dividends surchargeable income to its holding company and makes the election, it will still be liable for the surcharge as the election means that no dividend is deemed to have been paid by the subsidiary. This is a very welcome measure for holding companies that come within the definition of close company as where the option is exercised, the close company surcharge will not apply to dividends received from its Irish subsidiaries.

Taxation of Dividend Income

Dividends and other profit distributions received by an Irish resident company from another Irish resident company are exempt from tax.

Prior to the introduction of the 2008 Finance Act dividends paid to an Irish company from non-Irish resident companies were subject to corporation tax at a rate of 25%, regardless of whether the dividends had been paid to the Irish company from passive or trading profits.

The 2008 Finance Act changes this position by providing that dividends paid by a company located in the EU or in a country with which Ireland has a double tax treaty, or, pursuant to the Finance (No.2) Act 2008, in a country with which Ireland has signed but not yet ratified a double tax agreement, to an Irish company will be chargeable to corporation tax at the rate of 12.5% (as opposed to 25%) to the extent that the dividend is paid out of "trading profits". In the majority of cases the application of the 12.5% rate of corporation tax and double tax relief should ensure that no further Irish tax arises on such dividends.

The 12.5% rate will also apply where the dividend is paid out of dividends received by the foreign company from the trading profits of its subsidiaries.

If only part of the dividend is derived from "trading profits" then the requisite part of the dividend will be liable to tax at 12.5% with the balance taxable at 25%.

The 2008 Finance Act. also provides for a de-minimis rule which, when applicable, provides that the whole of the dividend is to be charged to corporation tax at the 12.5% rate despite the fact that part of the dividend received by the Irish company may not have been received from trading profits. The de-minimis rule applies when 75% or more of the profits of the dividend paying company are trading profits of that company or dividends received by it out of trading profits of lower tier companies that are resident in a EU Member State or a tax treaty country (the Finance (No.2) Act 2008 has extended this relief to countries with which Ireland has signed but not yet ratified a double tax agreement) and the aggregate value of the trading assets of the dividend recipient company and all of its subsidiaries (at the end of accounting period is which the dividend is received) is more than 75% of the aggregate value of all of their assets.

Foreign Tax Credit on Income received by an Irish Company

Dividends paid to an Irish company may be liable to a withholding tax on payment in the country of origin.

Foreign taxes on dividends received by an Irish company may be relieved in Ireland in three ways:

- under unilateral provisions of Irish tax law, which includes a system of tax credit "pooling";
- in accordance with the EU Parent-Subsidiary Directive;
- under bilateral treaty provisions.

A company receiving a foreign dividend may set the foreign tax on the dividend against Irish tax on that dividend. In certain circumstances where the foreign tax related to a dividend

exceeds the Irish tax on that dividend the excess may be offset against Irish tax on the remaining foreign dividends received in the same accounting periods. In respect of dividends received on or after 31 January 2008, two pools of tax credits are available; one for foreign dividends subject to tax at 12.5% and one for dividends subject to tax at 25%. Where the unrelieved foreign tax credits in an accounting period exceed the aggregate amount of corporation tax payable, the excess may be carried forward for offset in subsequent periods. This 'pooling' regime can result in an effective exemption from tax.

Research and Develoment Tax Credit

In certain circumstances Irish tax legislation provides for a tax credit for research and development expenditure. The credit is equal to 20% of incremental expenditure incurred by a company on qualifying research and development ("R&D"). The credit for incremental expenditure has being increased to 25% in the Finance (No.2) Act 2008 and will apply to accounting periods commencing on or after 1 January 2009. The credit, where applicable, may be set against the corporation tax liability of the accounting period in which the R&D expenditure is incurred. Any unused credit may be carried forward by the company. Increasing the tax credit to 25% sends a very clear signal that Ireland is open to R&D business.

A company's R&D tax credit is calculated based on its incremental R&D spend over and above its qualifying R&D spend in its base year. The Finance (No.2) Act 2008 also sets 2003 as the base year for all future accounting periods. It should be noted that the Finance (No.2) Act 2008 reduces the time limits in which R&D credit claims must be made to 12 months from the end of the accounting period in which the qualifying expenditure was incurred. This amendment will apply to claims made on or after 1 January 2009.

The Finance (No.2) Act 2008 has relaxed the requirements in relation to claiming tax credits for expenditure must be incurred on a building or structure used "*wholly and exclusively"* for the purpose of R&D activities has been removed and effectively replaced with a requirement that the building or structure has a minimum of 35% use which is attributable to the R&D activities carried on by the company for a defined 4 year period. The full tax credit will be available for offset against the corporation tax liability of the company for the accounting period in which the relevant expenditure is incurred (as opposed to being spread over 4 years as is currently the case).

These changes have provided increased certainty for investor companies wishing to carry out qualifying R&D and highlights Ireland's commitment to continuing to attract direct foreign investment in the area of R&D.

Capital Gains Tax Participation Exemption on Disposal of Shares

The legislation provides that the disposal of shares in a subsidiary company by an Irish holding company will be exempt from Irish capital gains tax provided the following conditions are met;

- The holding company must have held at least 5% of the ordinary share capital (including the rights to profits and assets on a winding up) for a continuous 12 month period and the disposal must take place during or within 2 years after the date of meeting the aforementioned holding requirement. Therefore if a disposal is made which brings the shareholding below 5% the remaining shareholding will still qualify for the participation exemption provided the remaining shares are disposed of within 2 years.

- The shares being disposed of must be in a company resident in the EU (including Ireland) or in countries with which Ireland has concluded a double tax treaty or pursuant to the Finance (No.2) Act 2008 in a country with which Ireland has signed but not yet ratified a double tax treaty.

- At the time of disposal, the shares being disposed of must be in a company whose business consists wholly or mainly of the carrying on of a trade or trades, or if taking together, the businesses of the holding company and that of the companies in which it has a direct or indirect 5% or more holding, consist wholly or mainly of the carrying on of one or more trades.

The Irish tax authorities have issued guidance in relation to the "wholly or mainly" test. The guidance confirms that "wholly or mainly" means greater than 50%. It also outlines that the primary tests to determine whether a company or group is wholly or mainly trading are the proportion of net trading profits and the proportion of net trading assets, though other factors may be taken into account.

If the holding company is unable to meet the minimum holding requirement, but is a member of a group (comprising a parent company and its greater than 50% worldwide subsidiaries), and the holding requirement can be met by including holdings of other members of the group, then the gain arising on the disposal will still be exempt from capital gains tax. Therefore, an Irish resident company may be exempt from capital gains tax on a disposal of shares even if it does not directly hold a significant shareholding.

The exemption may apply to a disposal of assets related to shares, such as options and convertible debt, but will not apply to the disposal of either shares or related assets that derive the greater part of their value from Irish real property or Irish situated minerals or mining rights.

In determining whether the exemption conditions are met, it should be noted that

- the holding company need not hold its entire shareholding for the minimum holding period of 12 months; the disposal of shares will be exempt provided it holds 5% of the shares for that period.

- Furthermore, the holding company is not required to dispose of its entire shareholding to obtain the participation exemption; once the prescribed holding requirements as outlined as above are met, the gain arising on any piecemeal disposal will be exempt.

- In the case of stocklending and repo transactions, for the purposes of determining the holding period, the period during which the shares have been temporarily lent or sold will be regarded as a period of ownership of the original holder.

- On liquidation, a liability to capital gains tax may arise on the disposal of assets by the liquidator, however gains or losses that arise on liquidation are deemed to be gains or losses of the company. In this regard, the exemption should apply (once the necessary conditions are met) to the extent there is a disposal in the context of the liquidation.

Repatriation of Dividends from Ireland

Withholding tax of 20% must be applied in respect of dividends paid and other profit distributions made by companies resident in Ireland. The obligation to withhold tax is placed on the company making the distribution.

Exemption from dividend withholding tax is available to non-resident shareholders in the following circumstances

- under domestic law, where the dividend is paid to individual recipients resident in the EU or in a country with which Ireland has a tax treaty;

- under domestic law, where the dividend is paid to a company resident in the EU or in a country with which Ireland has tax treaty or pursuant to the Finance (No.2) Act 2008 in a country which Ireland has signed but not yet ratified a double tax agreement and which is not controlled (more than 50%) by Irish residents;

- under domestic law, where the dividend is paid to a company that is under the ultimate control of persons resident in another EU Member State or in a country with which Ireland has tax treaty or pursuant to the Finance (No.2) Act 2008 in a country which Ireland has signed but not yet ratified a double tax agreement;

- under domestic law, where the dividend is paid to non-resident company, the principal class of whose shares is listed and regularly traded on a recognised stock exchange in a treaty country or another Member State, or on another stock exchange approved by the Minister for Finance. This exemption also applies where the recipient of the dividend is a 75% or more subsidiary of such a listed entity;

- under domestic law, where the dividend is paid to a non-resident company that is wholly owned (directly or indirectly) by two or more companies, the principal class of each which is listed (and regularly traded) on a recognised stock exchange approved by the Minister for Finance;

All of the foregoing persons must make a declaration in a specific format laid down in the legislation and if there are no changes in circumstances the exemption should last for five years.

- in accordance with the EU Parent-Subsidiary directive, where the dividend is paid by a subsidiary company to its EU parent (for this purpose, the Irish requirement is a 5% minimum holding).

Stamp Duty

Stamp Duty at a rate of 1% (based on fair market value) may arise on the transfer of shares in Irish companies. Stamp duty law provides a group relief which can eliminate duty on transfers of shares within a group of companies. This relief is known as “associated companies relief”. To qualify for associated companies relief the companies in question have to be 90% associated. For two companies to be associated one must have in relation to the other;

- beneficial ownership of 90% of its ordinary share capital; and

- beneficial entitlement to 90% of the profits available for distribution; and

- beneficial entitlement to 90% of the assets in a winding up.

  OR

- a third company must have these rights in relation to both the companies in question.

If either the buyer or the seller leaves the group within two years of the date of the transfer, the relief will be recaptured.

Irish stamp duty is not payable on the transfer of shares in a company which is not registered in Ireland except where:

- the shares relate to immovable property situated in Ireland or any interest in such property or;
- the shares in the non-Irish registered company are transferred in consideration for the issue of shares in an Irish registered company.

On liquidation, stamp duty should not arise if the liquidator transfers the assets to the shareholders in specie in respect of their shares.

VAT

VAT operates as a turnover tax on all relevant supplies up to a point of final consumption or deemed consumption. Ireland's VAT regime is dictated by EU legislation with the result that Ireland's VAT regime is broadly in line with the pan-European harmonised system. VAT will not arise if the holding company's activity is limited to the holding of shares as the company will not be deemed to be a taxable person for VAT purposes. Consequently pure holding companies are not required to register for VAT. This means that any VAT incurred (in Ireland or elsewhere) on costs attributable to the holding activities are not recoverable by the holding company. However if the holding company takes a direct or indirect role in the management of subsidiaries and charges a fee in respect of this, such companies are engaged in an economic activity, are considered to be taxable persons and therefore are entitled to deduct VAT incurred (in Ireland or elsewhere) on costs relating to this economic activity only. General costs are eligible for partial VAT recovery by reference to a suitable apportionment calculation.

Other Taxes

There are no other (significant) taxes to be taken into account for holding companies.

Tax Treaty Network

Ireland has a large tax treaty network which is continually expanding. The signing of new treaties in 2008 brings to 45 the number of tax treaties signed by Ireland. It is envisaged that more treaties will be signed during 2009 with countries such as Argentina, Singapore, Egypt, Tunisia and the Ukraine. A list of countries with which Ireland has ratified tax treaties and with whom Ireland has signed but not yet ratified tax treaties is included in Appendix A. Pursuant to the Finance (No.2) Act 2008 companies resident in countries with which Ireland have signed but not yet ratified tax treaties will be entitled to avail of any of the exemptions

available to companies resident in countries with which Ireland has fully ratified tax treaties. This welcome amendment greatly expanding Irelands network of tax treaties.

Ceasing Operations in Ireland

Migration of residence

A company which is incorporated in Ireland will be regarded as tax resident in Ireland unless;

- the company is treated as resident in a country by virtue of a double tax treaty entered into between that country and Ireland; or
- if the company or a related (50% or more) company has trading operations in Ireland and either
    - the company is ultimately controlled (more than 50%) by tax residents of an EU Member State or a country with which Ireland has a double tax treaty, or
    - the company or a related company is quoted on a recognised stock exchange of an EU Member State (including Ireland) or a country with which Ireland has a double tax treaty.

For companies which fall within one of the above exceptions and for companies which are not incorporated in Ireland, tax residence is determined by reference to where the central management and control is exercised.

Thus, it may be possible to "migrate" an Irish resident company to another jurisdiction by changing the location of its central management and control. There is no statutory definition of "management and control" and the courts generally place considerable emphasis on where the board meeting of directors are held.

It is important to note that an Irish incorporated company must have a minimum of two directors and at least one Irish resident director (in the case of a company regulated by IFSRA this number increases to two), unless it holds a bond, in the prescribed from, to the value of €25,400.

Exemption from capital gains tax exit charge for companies migrating from Ireland

Irish legislation provides for a charge to capital gains tax for companies ceasing to be Irish resident which own assets at the time of the cessation of residence. The legislation deems the company to have disposed of all its assets, other than assets situated in Ireland and used for the purposes of an Irish trade or used or held for the purposes of an Irish branch or

agency, whether at that time or subsequently. The disposal is deemed to take place at market value. The participation exemption is not available to the deemed disposal on migration, however there is an exclusion from capital gains tax for companies of which not less than 90% of the issued share capital is held by a foreign company, which is effectively defined as a company resident in a country with which Ireland has a double taxation agreement.

Liquidation of holding company

On liquidation gains and losses are deemed to be gains and losses of the company and it should therefore be possible for gains arising on the disposal by the liquidator of shareholdings (which meet the necessary conditions) to benefit from the participation exemption and therefore be exempt from capital gains tax.

Distributions to shareholders made on liquidation

Where a shareholder receives a distribution on liquidation such a distribution may be subject to capital gains tax in the hands of the shareholder. It is unlikely that such a distribution to a non-resident shareholder would attract a liability to capital gains tax given the fact that a liability to such only arises on shares deriving their value from Irish minerals or mining rights or from Irish real property.

Conclusion

An Irish resident holding company will be subject to the Irish corporation tax system as well as to Irish VAT and withholding taxes. The Irish corporation tax system is recognised as uncomplicated and is associated with low compliance costs. On the tax side the main factors are therefore; the absence of controlled foreign company legislation and transfer pricing rules, the absence of thin capitalisation rules, the availability of a deduction from interest on monies borrowed to acquire certain shareholding, the capital gains tax participation exemption, the taxation regime for foreign dividends and the extensive tax treaty network.

Furthermore there are many favourable non-tax factors to be considered when examining Ireland as a location for a holding company. These include factors such as Ireland being English speaking, having a flexible labour market, being a common law jurisdiction and being a long established member of the EU. In addition, the Irish government and regulators have both adopted a business friendly approach to Irish holding companies. These factors make Ireland a destination of choice for many holding companies.

APPENDIX 1

List of Countries with whom Ireland has a Tax Treaty that has been signed and are therefore in effect[2].

- Australia
- Austria
- Belgium
- Bulgaria
- Canada
- Chile (effective from 1 January 2009)
- China
- Croatia
- Cyprus
- Czech Republic
- Denmark
- Estonia
- Finland
- France
- Georgia (signed 20th November 2008 - not yet in effect)
- Germany
- Greece
- Hungary
- Iceland
- India
- Israel
- Italy
- Japan
- Korea
- Latvia
- Lithuania
- Luxembourg
- Malaysia
- Malta (Signed 14th November 2008- not yet in effect)
- Mexico
- Macedonia (Signed 14th April 2008-not yet in effect)
- Netherlands
- New Zealand
- Norway
- Pakistan
- Poland
- Portugal
- Romania
- Russia
- Slovak Republic
- Slovenia
- South Africa
- Spain
- Sweden
- Switzerland
- The Republic of Turkey (Signed on 24 October-not yet in effect)
- United Kingdom
- United States
- Vietnam (Effective from 1 January 2009)
- Zambia

Negotiations for new agreements with Albania, Azerbaijan, Bosnia Herzegovina, Moldova, Serbia, and Thailand have been concluded and are expected to be signed shortly.

Negotiations for new agreements with the following countries are at various stages; Argentina, Armenia, Egypt, Kuwait, Morocco, Singapore, Tunisia and Ukraine. It is also planned to initiate negotiations for new agreements with other countries during 2009.

[2] The Finance (No.2) Act 2008 extends the definition of a “relevant territory” (as applied by a number of withholding tax and exemption provisions) to include not only those countries which are members of the EU and countries with which we have concluded a double tax treaty which is currently in force but also to include countries with which we have signed a double tax treaty although not yet ratified. This measure is of use for companies as the mere existence of a treaty with Ireland will be sufficient to avail of the available exemptions and reliefs e.g. the relief for withholding tax on certain payments made to overseas companies. This amendment enhances Ireland’s attractiveness as a holding company location.

LISTINGS

In this issue:-

- **Funds Listing – Quarterly report January to March 2009**
- **Debt Listing – Quarterly report January to March 2009**

Funds Listing – Quarterly report January to March 2009

Key listings include:

AIG Global Funds, which is a UCITS umbrella unit trust comprising of 34 sub funds, listed three of its sub funds. AIG Emerging Europe Equity Fund will invest primarily in emerging European markets such as the Czech Republic, Hungary and Poland. AIG Latin America Fund will make equity and equity-related investments in companies operating in the economies of Latin America such as Brazil, Mexico and Chile and AIG Latin America Small & Mid Cap Fund will invest in smaller to medium sized companies also operating in the economies of Latin America. All of the sub funds are managed by AIG Investments Fund Management Limited.

Rudolf Wolff Global Strategies Fund Limited, a Bermuda Feeder Fund listed two sub funds, each of which invests into separate segregated portfolios of a master fund. The investment objective of the A Sub Fund is to achieve portfolio returns of 2 to 3 times short term interest rates while not exceeding a 15% cumulative sensitivity to major market declines as measured on a month end basis by reference to the MSCI World Index. The B Sub Fund seeks to replicate the same performance with additional leverage of up to three times the equity of the B Shares.

RCM Global Series Fund Plc a UCITS umbrella unit trust listed RCM Global Equity High Alpha. The investment approach being to invest in a diverse portfolio of equities, comprising of the best performing companies in the world selected from a cross section of both geographical areas and economic sectors.

Lyxor listed one new fund. Lyxor/Acorn Ultra ARS Fund Limited aims to achieve high returns with moderate volatility by investing in a combination of Standard & Poor's 500 index options.

Debt Listing – Quarterly Report January to March 2009

Key listings include:

The first of the JP Morgan arranged deals this year was Puccini Jersey Limited, which listed EUR 34,150,000 Portfolio Credit Linked Notes which are due to mature 2019, on the 20th January, 2009. This deal was closely followed by the second Puccini Jersey Limited deal listing EUR 32,500,000 Portfolio Credit Linked Notes which are also due to mature on 2019, on the 18th March 2009.

JP Morgan also acts as arranger on our latest programme, Rayo Finance Ireland (No 1) Limited, which listed its Base Prospectus Programme for the Issuance of Notes and Other Secured Obligations on the 24th March, 2009. Subsequent to Base Prospectus listing, Rayo Finance Ireland (No 1) Limited, listed Series 3 EUR 269,308,720 Floating Rate Secured Notes due 2021 linked to a Spanish 2005 Electricity Tariff Deficit Surcharge, on the 26th March, 2009.

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