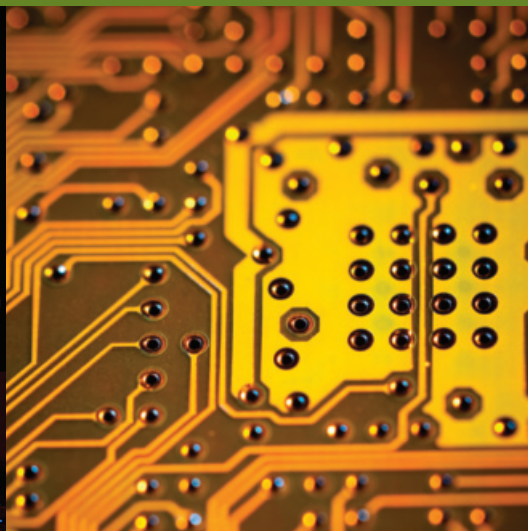


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Why Ireland?



A guide to doing business in Ireland

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ByrneWallace is one of Ireland's largest law firms. Our clients are leading, innovative and growing public and private enterprises active in all key industry sectors.

Driven by client needs

Over the years we have earned a reputation within Ireland and internationally as a leading business law firm with an award-winning approach to client service. We offer clients more than excellent transactional and specialist advice. We want to be recognized as "Your Legal Business Partners", delivering the full benefits of a trusted legal business partnership. This means that we challenge ourselves to find ways of adding business insight as well as legal excellence.

Delivering solutions

We look to devise solutions and uncover opportunities, not just point to problems. Our job is to understand our clients, their markets and their business goals and objectives – and to tailor our services accordingly. In addition to first-rate legal expertise, we apply commercial knowledge, insight and a practical understanding of the totality of the issues to all our client work.

Resourced for success

With 40 partners and a total staff of 250 people in our main offices in Dublin, we have the scale and experience to ensure that we deliver on our promises in a timely, efficient and cost-effective manner. We are accessible, approachable and properly resourced to deliver the level of service you require.

Expanding

We recently opened our New York office to cater for the legal needs of our US clients looking to expand into Ireland and the rest of the EU. Through our association with leading Northern Ireland law firm Mills Selig, we meet the needs of our clients throughout the island of Ireland.

Providing focused expertise

We are a full service practice with our services divided into the following areas:

- Banking and Financial Services
- Capital Markets
- Corporate
- Corporate Restructuring and Insolvency
- Data Protection
- Dispute Resolution (litigation)
- Employment Law
- EU and Competition/Regulatory
- Green Economy
- Health Services
- ICT, Software & Digital Media
- Inward Investment
- Life Sciences
- Outsourcing
- Projects, Energy and Natural Resources
- Property
- Tax

Award-winning

- First Irish law firm to achieve ISO 14001 (2010)
- First Irish Law firm to win Professional Services Green Award (2010)
- Client Service Law Firm of the Year (Chambers & Partners, 2008)

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Why Ireland?

Over several decades Ireland has become a magnet for foreign direct investment (FDI). Ireland is the global base of choice for some of the world's largest corporations. FDI generates more jobs per capita in Ireland than in any other country. So what are the principal reasons why Ireland is so successful in attracting investment?

MARKET ACCESS

Ireland is a member of the European Union (EU), with over 500 million consumers. Within Europe, Ireland is the only English speaking country which uses the euro, apart from Malta. The European mainland is readily accessible through Ireland's main ports and airports. Therefore more and more international companies use Ireland as their base to expand from here into the rest of Europe, while availing of the benefits a leading foreign direct investment location has to offer.

12.5 % TAX RATE

Ireland offers one of the lowest corporation tax rates in Europe. The National Recovery Plan 2011-2014 and the Budget 2011 both confirm Ireland's position on maintaining the 12.5% corporate tax rate as a cornerstone of Irish taxation policy. Irish tax resident companies benefit from a corporation tax rate of 12.5% on trading profits and certain distributions received from foreign trading subsidiaries. The scope of activities which may be considered to be trading is quite broad and can include the development and exploitation of intellectual property. A company is tax resident in Ireland if it is incorporated in Ireland or if Ireland is the place of central management and control of the company. Irish tax law also contains extensive reliefs for expenditure in relation to intellectual property and research and development.

FOREIGN TRADE

The 2010 Index of Economic Freedom rates Ireland as Europe's most economically free country and the fifth in the world in this regard.

One of the main export items are agricultural products, but information & communications technology, chemical components and pharmaceutical products, medical and healthcare devices are also very important. Ireland is also beginning to emerge as a leading economy in the renewable energy sector.

The World Competitiveness Yearbook 2010 ranked Ireland 19th out of 58 countries worldwide for goods exported as a percentage of GDP.

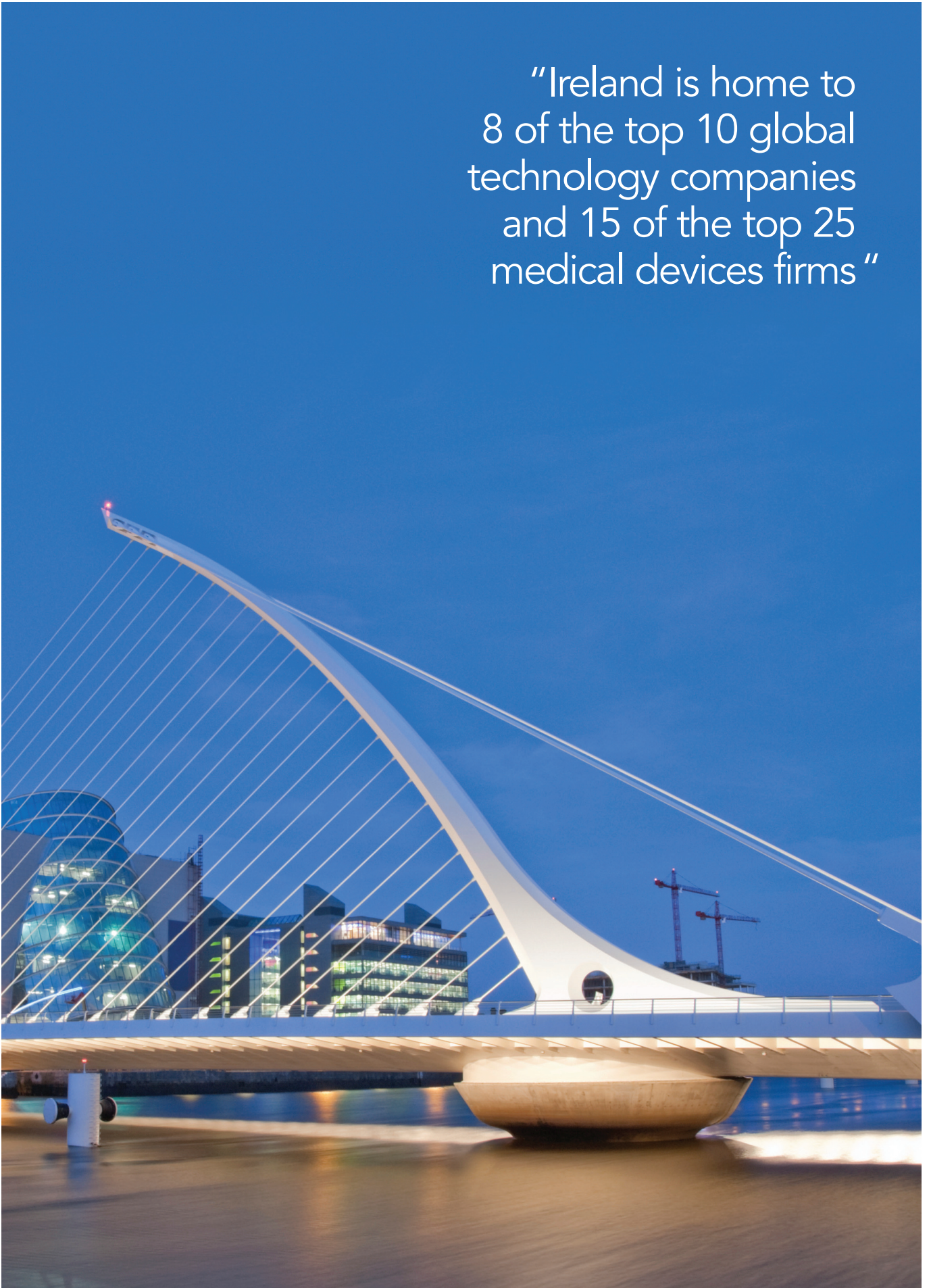
US investment has been particularly important to the growth and

modernisation of Ireland providing a multiplier effect with new technology, export capabilities, and employment opportunities. As of Q2 2011, the stock of US foreign direct investment in Ireland stood, at \$190 billion, more than the total for Brazil, Russia, India and China – the BRIC countries – combined. There are approximately 600 US subsidiaries currently in Ireland employing around 100,000 people and supporting work for a further 250,000 out of a working population of 2 million spanning activities from manufacture of high-tech electronics, computer products, medical supplies, and pharmaceuticals to retailing, banking, finance, and other services. Ireland is also an important European research and development center for US firms in Europe.

THE HOLDING COMPANY REGIME

The principal benefits of locating a holding company in Ireland are the exemption from the charge to Irish capital gains tax in respect of the disposal of qualifying shareholdings in subsidiaries and the beneficial regime for the taxation of foreign dividends. While there is no specific participation exemption, to the extent that dividends are received from companies resident in the EU or in a tax treaty country such as the US and are payable out of the trading profits of such subsidiaries, those dividends are taxed in the hands of an Irish holding company at the lower 12.5% rate. Although Ireland imposes a dividend withholding tax and withholding on interest payments (both at 20%), domestic law provides for wide exemptions from these obligations, particularly for dividend payments.

“Ireland is home to
8 of the top 10 global
technology companies
and 15 of the top 25
medical devices firms”



“According to the latest IBM Global Trends report 2010 Ireland is placed 9th globally for estimated total jobs in Research and Development”

RESEARCH AND DEVELOPMENT (R&D)

Ireland offers a very competitive Research and Development Tax Credit system. In 2010 50% of IDA Ireland supported Foreign Direct Investment were in research and development, valued at over €500 million. According to the latest IBM Global Trends report 2010 Ireland is placed 9th globally for estimated total jobs in Research and Development. Ireland offers a tax credit of 25% of incremental expenditure by a company, or group of companies incurred wholly and exclusively on research and development.

EXTENSIVE TAX TREATY NETWORK

Ireland has signed double taxation treaties with 62 countries. New treaties with Turkey, Serbia, Georgia and Moldova are in force since January 2011. New treaties were signed with Hong Kong, Singapore and the United Arab Emirates among others and will have to be ratified. Updated treaties with Germany, Belgium and Switzerland will be signed shortly.

THE NATIONAL RECOVERY PLAN 2011-2014

The Irish Government's National Recovery Plan 2011-2014 announced on the 24th of November 2010 aims to deal with Ireland's current fiscal challenges but will continue to improve Ireland's attractiveness to overseas investors and help to sustain Ireland's projected levels of economic growth. Key measures in the plan are aimed at overseas investors, supporting Research and Development and focusing on job creation.

BUSINESS ENVIRONMENT

Ireland offers a pro business attitude, this is apparent when looking at successive Governments policies, the approach taken by Government Agencies and the working culture. Ireland has a stable constitution based parliamentary democracy, an excellent transport network and a very advanced telecommunication network. Ireland was ranked third within the EU for its ease of doing business according to the *World Bank Doing Business 2011 Report*.

HIGHLY SKILLED WORK FORCE

Almost 50,000 graduates leave Irish colleges every year. A large percentage of these with degrees in business studies, science and engineering and most speak a second language. According to the *Eurostat Yearbook 2010* Ireland has the third highest proportion of science, maths and computer graduates in the 20-29 age group within the EU. Also according to the *IMD World Competitiveness Yearbook* Ireland ranks fourth regarding the availability of skilled labour. This makes Ireland a very attractive place to locate.

COST COMPETITIVE

One of the few good things to come out of the global economic downturn has been a pressure on costs. With rents, both office and private and salaries falling dramatically in the last two years, Ireland has becoming increasingly cost competitive. As a consequence Ireland was ranked 10th worldwide for the number of jobs created in business support services, including call centers, shared services centers and business outsourcing in a study undertaken by IBM highlighting the role of foreign direct investment.

IDA AND ENTERPRISE IRELAND

Ireland has recognised for a number of years the need to assist foreign companies who wish to invest here. Several agencies were founded. The main agencies today are the IDA and Enterprise Ireland. ByrneWallace has a very good working relationship with both the IDA and Enterprise Ireland and can facilitate relevant introductions.

The IDA provides foreign companies with help and guidance for setting up operations in Ireland and can also help companies who have already set up operations here. Various grants and financial assistance to companies locating here are available and it is advisable to get into contact with the IDA from the start of the planning process in order to avail of all possible assistance.

The IDA's strategy *Horizon 2020* is focused on employment intensive services and R&D. There may be capital grants available for example for site development, or grants for training of the work force and the IDA also has a number of business parks where companies can locate.

Enterprise Ireland is assisting Irish companies and foreign companies in the food, drink and timber sector who wish to set up in Ireland.

Ireland is a very attractive location for business and we hope that this guide will help you and your company to fully appreciate Ireland's offering. Any queries, we are happy to assist.

Ireland's tax advantages

The favourable tax environment is a cornerstone of Ireland's inward investment success. Utilising this advantage is a valuable tool for tax-efficient overseas investment and Ireland is increasingly being chosen as the home of the low tax "principal" company in several significant international corporate structures.

CORPORATION TAX

The scope of Irish corporation tax is largely dependent on the residence status of a company. Broadly speaking, an Irish tax resident company is liable to Irish corporation tax on its worldwide income and gains, no matter what their source or nature, though specific exemptions do exist for certain types of income such as distributions from other Irish resident companies and patent income.

A non-Irish resident company can also come within the scope of Irish corporation tax where it carries on activities in Ireland through a branch. Such non-resident companies are subject to Irish corporation tax on the profits of that branch. However, as Irish tax law treats a branch and its parent company as one and the same entity for legal purposes, no withholding taxes are imposed on the repatriation of branch profits to its parent.

In general, a company is tax resident in Ireland if it is incorporated in Ireland, which is known as the place of incorporation test. However, the general rule is not followed in certain circumstances:

- If the company is under the ultimate control of a person resident in an EU Member State or in a country with which Ireland has a double tax treaty,

or which itself is, or is related to, a company whose principal class of shares is substantially and regularly traded on a stock exchange in an EU country or treaty country

- If the company carries on a trade in Ireland or is related to a company that carries on a trade in Ireland.

In these circumstances, a company is deemed to be tax resident where its central management and control resides. There is no statutory definition of what constitutes management and control and instead case law is relied upon to provide guidance. The available body of case law on the subject indicates that many factors need to be considered but the most important and overriding of these are the place where the directors of the company are resident and the place where board meetings are held.

Rates of corporation tax

The rate of corporation tax charged is dependent on the nature of the profits. In general, trading profits and certain distributions received from foreign trading subsidiaries are liable to corporation tax at 12.5%. All other income is liable to corporation tax at 25%.

There is no definition provided in Irish tax law as to what constitutes trading for

corporation tax purposes other than to say that the following activities are specifically excluded:

- dealing in or developing land;
- working minerals; and
- petroleum activities.

Profits from these activities are therefore liable to corporation tax at 25%.

In addition, despite pressure being exerted by other EU member states, the Irish Government, as part of the *National Recovery Plan 2011-2014*, reaffirmed its commitment to maintaining the 12.5% corporation tax rate.

What constitutes a trade?

As mentioned above, under Irish tax law there is no guidance as to what constitutes trading profits for the purposes of the 12.5% corporation tax rate. There are however a number of other non-statutory sources of guidance as to what constitutes a trade for these purposes:

- a list of factors, known as the "badges of trade" and published by the UK Royal Commission on the Taxation of Profits in 1955, which are generally accepted as being indicative of trading activity;
- available case law; and
- guidance published by the Irish Revenue Commissioners.

“ The 2010 Index of Economic Freedom rates Ireland as Europe's most economically free country and the fifth in the world in this regard”



Perhaps the most useful of these sources is the guidance published by the Revenue Commissioners. In this guidance, as well as the more traditional activities which they deem to constitute trading, the following are also included:

- activities relating to the development and exploitation of intellectual property rights;
- corporate treasury functions;
- investment management activities;
- distribution activities; and
- activities relating to the carrying out of research and development.

HOLDING COMPANY REGIME

One of the key facets of the favourable tax regime in Ireland is its attractiveness as a holding company location for multinational groups. This attractiveness is supported by a number of incentives:

- exemption from the charge to Irish capital gains tax in respect of the disposal of qualifying shareholdings in subsidiaries;
- 12.5% rate of corporation tax on dividends received from companies resident in the EU or in a country with which Ireland has a tax treaty and are payable out of the trading profits of such subsidiaries;
- limited transfer pricing rules and no relevant thin capitalisation or controlled foreign corporation rules for foreign income;
- significant exemptions from withholding tax on dividend and interest payments made by an Irish holding company; and
- an extensive and very favourable network of 62 double taxation treaties.

INTELLECTUAL PROPERTY REGIME

Over the past number of years Ireland has emerged as the pre-eminent jurisdiction for multi-nationals to locate their intellectual property and the management and development activities associated with it. This is not only due to the favourable corporation tax rate for trading profits but also as a result of a suite of other tax incentives surrounding intellectual property and intangibles.

Tax relief on acquisition cost of intellectual property and intangibles

Tax relief is available in respect of capital expenditure on the acquisition of a wide range of intellectual property and intangible assets, including patents, trade marks, brand names, know how, domain names, scientific processes and goodwill (to the extent that it is related to any of the above intangible assets).

The tax deduction may be claimed either in line with the accounting depreciation charge included in the company's financial statements or by electing for a 15 year write down period. However, the deduction is restricted such that it cannot exceed 80% of the profits associated with the exploitation of the relevant intellectual property or intangibles for which the deduction is claimed.

Research and Development Tax Credit

Under Irish tax law, a tax credit is available to companies in relation to certain expenditure on research and development (R&D) activities. The key features of the credit are as follows:

- 25% credit for incremental qualifying expenditure on R&D over the amount of expenditure incurred in the "base year", now 2003;
- the credit is granted in addition to the regular tax deduction available for R&D expenditure;
- in order to qualify, expenditure on

R&D activities must seek to achieve scientific or technological advancement and involve the resolution of technological uncertainty;

- expenditure incurred on subcontracted R&D activities undertaken by a third party can also qualify for the credit to the extent that:
 - the expenditure subcontracted does not exceed 10% of the overall expenditure on R&D by the group; and
 - the subcontractor does not claim a credit for the expenditure.
- expenditure that is subcontracted to a qualifying third level institution can also qualify so long as it does not exceed 5% of the group's overall expenditure on R&D;
- the credit can also be refundable in certain circumstances where there is an insufficient corporation tax liability to utilise the full credit for the accounting period in which the expenditure was incurred. In this situation, the credit can be:
 - surrendered to other group companies;
 - carried back for offset against the preceding period corporation tax liability; or
 - claimed as a cash refund spread over three years (subject to certain limitations).

For companies claiming the credit, net tax relief of 37.5% of the qualifying spend can be available when the credit is combined with the regular tax deduction available for the expenditure.

Allowance for Expenditure on Know-how

Expenditure incurred in relation to the acquisition of know-how purchased from a third party and not as part of a trade is tax deductible. However, unlike the deduction for expenditure on scientific research, a deduction for expenditure on know-how is not available where it is not related to the trade being carried on by the company in question.

Know-how purchased from a related party or acquired as part of a purchase of a trade may qualify for book depreciation treatment.

Expenditure on Scientific Research

A deduction is available for revenue and capital expenditure on scientific research. This deduction is available even where the expenditure on the research is not related to the trade of the company in question. A deduction against profits is also allowable for payments, whether capital or revenue in nature, to a body carrying on scientific research that is approved by the Minister of Finance or to an Irish university in order to undertake scientific research.

REGULATED FUND REGIME

Leveraging its favourable tax and regulatory regimes, Ireland has emerged as a world leading location for the regulated funds industry.

From a tax perspective regulated funds are subject to what is known as a "gross roll-up" regime whereby income or gains are generally not taxed immediately and instead tax (known as exit tax) only becomes chargeable on payments or distributions out of the fund to investors. Furthermore, non-resident investors are exempt from any charge to Irish tax

(including exit tax) in respect of an investment in an Irish regulated fund.

STRUCTURED FINANCE REGIME

Over a number of years, Ireland's structured finance legislation has been steadily enhanced such that Ireland is now one of the pre-eminent locations for the establishment of vehicles used in structured finance transactions.

Irish tax law ensures that structured finance vehicles established in Ireland (known as S.110 companies) suffer minimal Irish tax leakage in relation to their activities and also minimise withholding tax on payments of interest to investors in the vehicles.

In particular, Ireland has emerged as the location of choice for US life settlements securitisations due to our favourable tax treaty network which can minimise tax leakage in relation to US exit taxes.

TAX ON INDIVIDUALS

Income Tax

Ireland has a progressive system of income tax which is levied at two rates.

As of 2011, an individual is subject to income tax at 20% on their first €32,800 of income, though this is typically amended each year by the Minister for Finance. This threshold is increased when the individual is married. An individual is then liable to a rate of 41% on the balance of their income over and above the threshold.

In addition to income tax, individuals are also subject to two social contributions, known as the Universal Social Charge (c. 7%) and PRSI (c. 4%), on their income.

Scope of Income Tax

In order to be within the charge to Irish income tax, a person must either be

resident, ordinarily resident or domiciled in Ireland.

A person will be deemed to be tax resident in Ireland if they spend:

- a total of 183 days in Ireland in any tax year; or
- a combined total of 280 days over two tax years (assuming a minimum of 30 days in each tax year).

If a person is resident in Ireland for three consecutive tax years, they then become ordinarily resident for tax purposes.

An individual is deemed to be domiciled in the country in which they have their permanent home. Domicile is generally determined initially by an individual's domicile of origin (generally the country where their father is domiciled when they are born) and will be regarded as domiciled in that country unless a domicile of choice is acquired.

Influence of domicile and residence

An Irish resident, ordinarily resident and domiciled person is liable to Irish income tax on worldwide income.

A resident and domiciled, but not ordinarily resident, person is liable to Irish income tax on Irish source income and on any other income to the extent remitted.

A resident but not domiciled person is liable to Irish income tax on Irish source income and on any other income to the extent remitted.

The investment vehicle

BUSINESS STRUCTURES

Foreign direct investors may choose various legal entities to establish a presence in Ireland including private limited companies, unlimited companies, public limited companies and branches. ByrneWallace can advise on the suitability of each of these to the particular investor but the most commonly used foreign direct investment vehicle is the private limited company. Similar to the US Corporation, its chief advantage is that each shareholder's liability is limited to the amount it agreed to pay for its shares.

INCORPORATION

The incorporation process is generally quick and inexpensive, taking between 5 - 20 days and involving the filing of certain information with the Companies Registration Office. The Memorandum and Articles of Association (similar to the US Charter or Articles) set out the company's parameters and regulations and are filed with the incorporation papers. ByrneWallace Corporate Secretaries Limited, our Firm's company secretarial division, provides a range of company incorporation and secretarial services to help make the incorporation and administrative process as smooth as possible.

REQUIREMENTS

On incorporation, a private company must have at least one shareholder, two directors, a company secretary, and an Irish registered office and be able to demonstrate that it will conduct business in Ireland. Shareholders are not required to be Irish but at least one director must be an Irish resident unless an insurance bond is in place. The management of the company is generally entrusted to a Board of Directors. An auditor must be appointed and the accounts must be publicly filed each year.

The nominal share capital of a private company can be as large or as small as the founders wish and can be in any currency denomination. There must be at least one issued share.

Every company must appoint an auditor and must publicly file audited accounts each year. The detail required in these accounts varies according to the size of the company.

BRANCHES

An alternative to incorporation which foreign direct investors may choose is to establish a branch operation. Although generally not as advantageous as incorporation, branches may serve a particular purpose. A branch has a separate management structure which enables it to negotiate contracts with third parties, and has an element of financial independence. Foreign corporations establishing a branch in Ireland are obliged to register certain information with the Companies Registration Office within one month of establishment. Foreign corporations with branches in Ireland are required to publicly file their accounts each year.

Labour

THE IRISH EMPLOYMENT ENVIRONMENT

Employment law in Ireland is a combination of Irish and EU legislation complimented by common law jurisprudence and Irish Constitutional law. Parties to an employment relationship are free to negotiate and conclude agreements between themselves, subject to compliance with certain minimum requirements as set by law.

THE EMPLOYMENT RELATIONSHIP IN IRELAND

The employment relationship may be broken down into three distinct stages, each involving its own specific legal issues, as follows;

Pre-Employment

Potential employers must ensure to exercise care from the outset of the employment relationship, beginning with advertising and recruitment. The most common pitfall in this area relates to non-compliance with equality legislation. Employers must ensure that all processes involved in the recruitment process, including advertising, interview and selection, are transparent and fully compliant with equality legislation. Where possible, interview panels must contain a gender balance, questions should be appropriate and contemporaneous notes must be taken outlining the reasons why a candidate is ultimately successful or unsuccessful. In addition, caution must be exercised in the drafting of advertisements as they may subsequently be found to have formed part of the employment contract.

Regulation of the Employment Relationship

Contracts of Employment:

Employers are obliged by law to provide employees with a written statement of specific terms of their employment within two months of the commencement of the employment. While this may be regarded as being the irreducible minimum in terms of required documentation, the reality is that the employment relationship will generally be governed by a more expansive contract of employment. This contract will include both express terms and implied terms. Implied terms cover rights and obligations which are imposed on the contracting parties;

- (a) by common law and which have been found by the Courts to apply to every contract (e.g. the duty of mutual trust and confidence);
- (b) by Statute (e.g. minimum notice periods);
- (c) by the Irish Constitution (e.g. the right to join a trade union)
- (d) by collective agreements (e.g. levels of overtime for a specific class of workers as negotiated by a recognised trade union); and
- (e) by custom and practice in a particular workplace (i.e. the practice of awarding a bonus on meeting targets notwithstanding that there is no contractual right to a bonus).

Implied terms are automatically incorporated into an employee's contract of employment, regardless of whether or not they are expressly included.

Minimum Requirements:

Irish law provides for a minimum wage, minimum notice period, maximum

working time allowances and minimum annual leave entitlement of 20 days a year (with an additional entitlement to 9 public holidays a year). In addition, employees are entitled to a variety of other forms of leave, albeit on an unpaid basis, including maternity leave, parental leave, adoptive leave, carer's leave, force majeure leave and health and safety leave. There is no entitlement to paid sick leave under Irish law.

Policies and Procedures:

In addition to the written statement/contract, an employer is obliged to put various policies and procedures in place, such as grievance and disciplinary procedures. Such policies must be drafted carefully in order to ensure that they encompass fairness, transparency and the principles of natural justice. Such policies must be given to the employee within 28 days of the commencement of employment.

Health and Safety:

Finally, under health and safety legislation, employers are obliged to prepare a report confirming how they intend to safeguard the health, safety and welfare of its employees in the workplace (known as a 'safety statement'). This statement should cover issues such as victimisation, bullying and stress in the workplace.

Pensions and Benefits:

In terms of pensions, employers who do not provide access to an occupational pension scheme for their employees within six months of the commencement of employment are obliged to provide access to a Standard Personal Retirement Savings Account and to facilitate employee participation therein by making deductions from the payroll, on the

The total US investment
into Ireland is greater
than into

Brazil,
Russia,
India &
China
combined

employee's request, in respect of the employee's contribution to the PRSA. There is no obligation on the employer to contribute to such PRSA.

Where an employer wishes to extend additional benefits to its employees in the form of bonus schemes, health/life insurance and share option schemes, this should also be dealt with by way of contract.

Protection of the Employer's Interests:

Where an employer is concerned to protect its business and goodwill in the event that key personnel decide to leave their employment, a restraint of trade/non solicitation clause should be included in the employment contract. Caution must be exercised in the drafting of such clauses however as the Courts will only uphold such clauses insofar as they are necessary to protect the legitimate business interests of the employer.

Our employment law team has a wealth of experience in the drafting of contracts of employment, workplace handbooks, policies and procedures and will be happy to advise you on any of your drafting requirements.

Post-Employment

Data Protection and Retention of Records:

Following the termination of employment, employers are obliged to retain certain personnel records of the departed employee for a specified period of time. Any information which is collected, processed and/or retained by or on behalf of an employer on its employees is protected by Data Protection legislation and employers must ensure that it is held in a safe and secure manner and processed in compliance with the Data Protection Acts.

Aggrieved Employees:

The termination of an employment relationship may be amicable or acrimonious. A plethora of fora is available to an aggrieved former, and at times existing, employee under Irish law, including the Rights Commissioner Service, the Equality Tribunal, the Labour Court, the Employment Appeals Tribunal as well as the Courts system itself. Generally speaking, the keys to ensuring a secure defence against such actions are workplace policies and procedures which have been properly drafted, fully implemented and correctly utilised by the employer.

At ByrneWallace, we have extensive experience in advising and representing clients at all levels of litigation. We can also offer advice in relation to alternative dispute resolution and the various mechanisms which may be utilised to settle disputes where parties wish to avoid contentious litigation.

OTHER ISSUES

Equality

Employment in Ireland is subject to equality legislation and discrimination on the grounds of age, gender, disability, race, religious belief, sexual orientation, marital status, family status or status as a member of the Traveller community is prohibited throughout all stages of the employment relationship.

Trade Unions and Industrial Relations

While the Irish Constitution enshrines the right of the employee to join a trade union, there is no corresponding obligation on an employer under Irish law to recognise that trade union, save in very specific circumstances where it has either been the established practice of the employer to recognise a trade union or where a business transfer has occurred which falls within the remit of the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003.

In a non-unionised workforce, it is recommended that some mechanism is put into place to facilitate the resolution of disputes directly between employer and employees. Either party to a dispute may request the assistance of the Labour Court which may provide guidance on the matter as well as offer various services including mediation and conciliation. Depending on the size of the workforce, employers may be obliged to consult with, and inform, employees about various issues which may impact on their employment.

At ByrneWallace, our employment partners possess expertise in the areas of equality law and industrial relations law and can offer proactive and practical advice in these areas to any entity considering the establishment of an operation in Ireland.

Atypical Employees

Irish law also provides for atypical working arrangements such as part-time employment, fixed term employment, agency/relief work and outsourcing. In addition, some employers facilitate flexible working arrangements including job sharing and e-working.

Immigration, Work Permits and Secondment

An entity wishing to set up an operating base or branch in Ireland may wish to transfer employees from an already established company for the purposes of establishing the new Irish base. In the case of employees who are not Irish citizens, Irish immigration law must be complied with and applications for residency and/or work permits may be required. Various types of work permits are available and, for companies wishing to transfer employees between offices, an Intra Company Transfer Permit is usually the most suitable, providing the qualification criteria have been met. In addition, employers may wish to establish a secondment policy to facilitate the temporary transfer of employees between operations.

Protection of Employees on Transfer of Undertakings Regulations

Where it is intended to invest in, or purchase, an established Irish business, consideration must be given to the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003. Pursuant to this legislation, a transfer of undertaking occurs where (i) there is a change in employer as a result of a legal transfer or merger; (ii) following the transfer, the business of the operation is continued on by the new employer; and (iii) the business is transferred as a 'going concern'. Where these criteria are satisfied, the legislation provides that the new employer is legally obliged to take on the existing employees of the business. The terms and conditions under which those employees are engaged transfer automatically to the new employer (with the exception of pension entitlements) and there is no break in continuity of service from the employees' point of view.

ByrneWallace can help an individual or company intending to invest in Ireland to identify the full extent of issues which will require addressing in order to ensure a smooth transition. We can assist with the processing of immigration documentation and work permits and also provide in house training and seminars to HR teams who may be new to the Irish employment market as well as those simply wishing to improve on their knowledge in the area.

Real estate

Ireland is a common law jurisdiction. The acquisition, development and occupation of real estate in Ireland is governed by legislation, case law and contract law principles. There are no particular restrictions on non-Irish or EU persons or bodies acquiring or leasing real estate in Ireland.

There are two main activities: (a) buying and selling property; and (b) occupational leasing. Neither of these transactions are effected electronically although work is presently underway to establish a system of e-Conveyancing in the short to medium term.

BUYING AND SELLING PROPERTY

Title and Ownership

Title to Irish real estate can either be acquired outright by acquiring the freehold interest or by acquiring a long leasehold interest with a term usually in excess of 200 years subject to a nominal rent with a capital premium paid at the outset and subject to certain limited covenants on the part of the "tenant". Title insurance is rarely used save where title is investigated and found to be defective.

Registration

Two systems of registration of real estate exist namely: (a) the Property Registration Authority (formerly Land Registry) titles ("Registered"); and (b) the Registry of Deeds titles ("Unregistered").

Title to Registered land is evidenced by one document issued by the Land Registry known as the "folio" which is State guaranteed (save in respect of mapping) as the Property Registration Authority investigate title to the property prior to registering same.

Title to Unregistered land is evidenced by title deeds showing the devolution of title from one party to another over a number of years. At least fifteen years good and marketable title must be evidenced.

Title in urban areas tends to be unregistered with the majority of rural property being registered. All counties of Ireland – other than Dublin and Cork – are within areas of compulsory registration.

It is hoped that all land will be Registered in the coming years, a necessary precursor to the introduction of e-conveyancing.

Due Diligence and Contract for Sale

The commercial terms of the sale of property are usually negotiated by real estate agents and once settled referred to real estate lawyers acting for the vendor and purchaser. It is the obligation of the vendor's solicitor to draw up the Contract for Sale and demonstrate the ability of their client to deliver "good and marketable title" to the subject property.

The Contract for Sale will not only deal with title matters but also planning, taxation and the condition of the property.

Before the Contract for Sale is signed the real estate lawyer acting for the purchaser will carry out a due diligence designed to ensure that not only does the vendor have title to the subject property but also that there has been compliance with statute and that there are no liabilities attaching to the property which would pass with the title to the purchaser.

While the vendor will usually disclose any imperfections, the principle of "caveat emptor" (let the buyer beware) applies with the obligation on the purchaser to make adequate enquiries in relation to both legal and regulatory matters and to physically inspect the subject property.

The transfer of the title usually occurs within six weeks of the execution of the Contract for Sale. In certain cases completion of the transaction is postponed or conditioned upon the occurrence of certain events (eg) the purchaser procuring planning permission for the property, development finance to construct a building or procuring statutory body (e.g. IDA) or bank consent to the disposal of the asset.

On execution of the Contract for Sale a 10% deposit is paid with the balance payable on the closing date. The deposit is usually held as stakeholder by the lawyer acting for the vendor and it is usually refundable in nature where the transaction does not proceed for reasons other than the default, neglect or delay of the purchaser.

OCCUPATIONAL LEASING

Businesses in all sectors occupy lands and buildings in pursuance of occupational leases with a large number of retail, office and industrial developments constructed in the past ten years. It is unusual for buildings to be occupied under licence save for very limited purposes (e.g. seasonal trade) or in retail outlet parks.

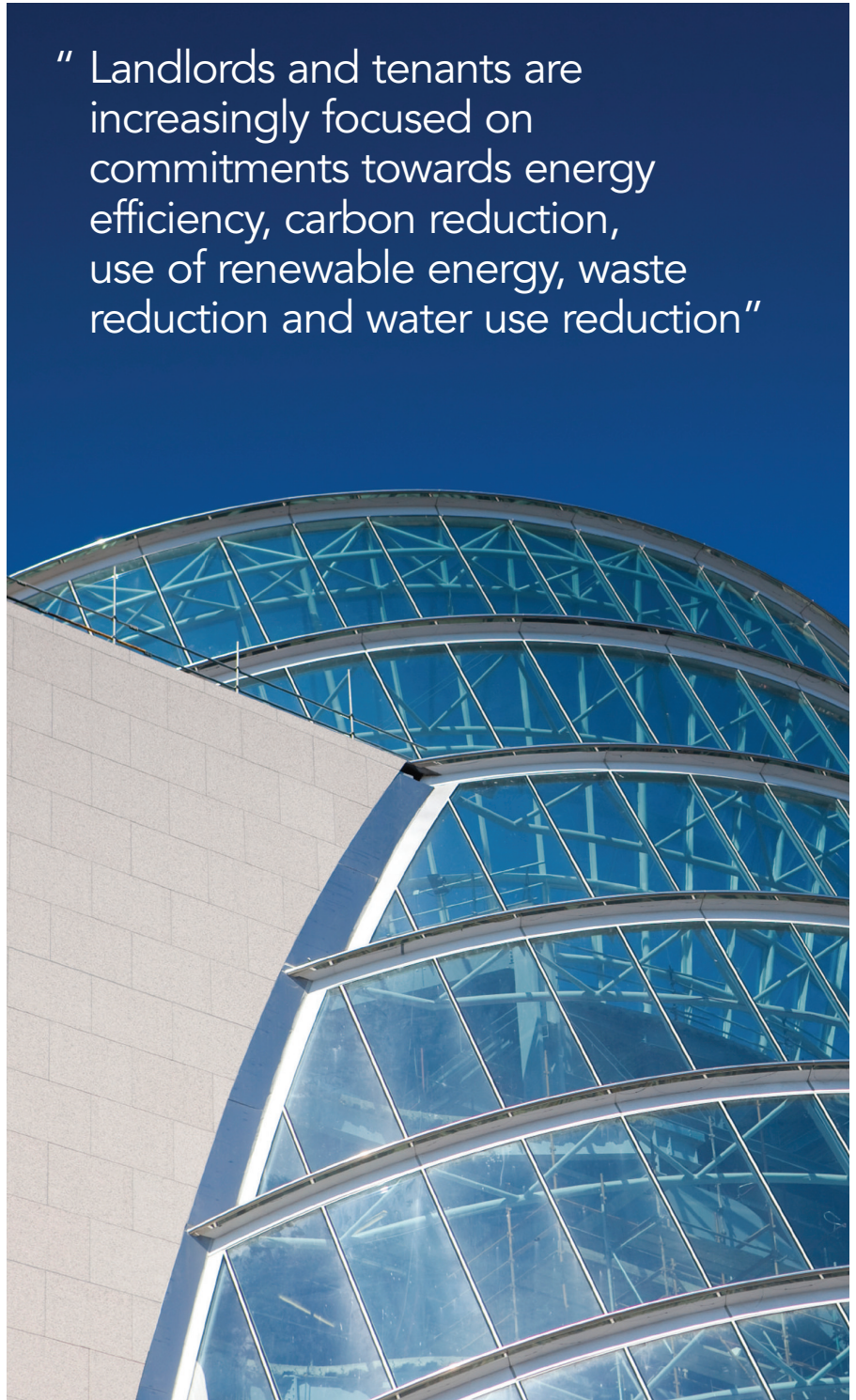
Term

Occupational leases terms are typically between five and twenty five years. Recent statutory changes (both VAT and Landlord and Tenant rights) and increased tenant bargaining power in a depressed market has created greater flexibility for prospective occupiers. Ireland has not yet adopted the European model of short lease terms. Irish business leases often give both landlords and tenants security of tenure and an opportunity for both to recover their respective capital investments. Increasingly, tenants are negotiating "break clauses" giving them the option to terminate their leases after the fifth, tenth or fifteenth years, depending on the duration of the initial term.

Obligations

The typical Irish occupational lease is what is known as an "FRI" or full repairing and insuring lease with the obligation on the Tenant to repair and to pay for the insurance in respect of the premises and also containing a lengthy list of positive and

“ Landlords and tenants are increasingly focused on commitments towards energy efficiency, carbon reduction, use of renewable energy, waste reduction and water use reduction ”



negative covenants on the part of the tenant including: the obligation to pay rent; maintain and repair the premises; limitations on the permitted use; restrictions on alienation and alterations; agreement on the condition to which the premises must be restored on determination of the lease.

Rents and Service Charges

Rental levels have fallen in recent years and rents are negotiated and agreed by real estate agents. Turnover rents are increasingly prevalent in high-turnover retail locations. In multi-occupied developments service charge and insurance contribution are typically payable in addition to rent and calculated on a pro-rata basis.

Rent Review

Since the 1960's practically every Irish commercial lease for a term in excess of five years contained a five yearly "upwards only" rent review clause. Such clauses provided that the rent first reserved would be reviewed every five years to the higher of the rent payable immediately before the review or the open market rent at the date of the review.

Section 132 of the Land and Conveyancing Act 2009 provides that rent review clauses in leases granted after the 28 February 2010 be interpreted as reviewing rents to open market value introducing the possibility of downward movement on review for the first time in many years. The provision is not retrospective in as much as it does not apply to existing arrangements on that date, thus creating a two tier system.

Green Leases – landlords and tenants are increasingly focussed on commitments towards energy efficiency, carbon reduction, use of renewable energy, waste reduction and water use reduction as the cost of such items escalates and it would not be unusual to see leases addressing these issues.

TAXATION

Stamp Duty

A tax on deeds and instruments, Stamp Duty is payable by the purchaser of property on the purchase price of the property. The top rate of Stamp Duty on commercial property is currently six per cent of the consideration paid or the market value whichever is higher. Stamp Duty is also payable on occupational leases by the tenant at a rate of one percent of the annual rent.

Value Added Tax (VAT)

In certain circumstances VAT is payable when purchasing property and is also charged in many cases on rents payable pursuant to commercial leases.

The VAT regime was extensively overhauled in 2008. Where chargeable on an acquisition the current relevant rate of VAT is 13.5% of the purchase price. Whether or not VAT is chargeable will depend on the age of the property, whether it has been developed or redeveloped (as defined in the VAT Acts) and the use to which it is put.

In relation to commercial rents, if the landlord "opts to tax" the Lease then VAT is payable at the current rate of 21% on the rents payable. It is unusual for a landlord not to opt to tax as he most likely will have reclaimed VAT in the course of development giving rise to a potential claw back if he does not opt to tax.

VAT registered entities can reclaim VAT paid and it is important for any new enterprise to process its VAT registration in a timely fashion.

PLANNING AND ENVIRONMENTAL

Planning Permission is required before buildings can be constructed, significantly altered or the use of same changed. Applications are made to the relevant Local Authority with a right of appeal to An Bord Pleanála (the appeals board). A planning application is a public process affording members of the public a right to make observations and objections. Planning Permission will take at least three months to procure; however this process can take significantly longer if there is a third party objection and/or an appeal or review.

Each Local Authority is required to devise a Development Plan at regular intervals in which areas are zoned for particular uses to facilitate the orderly development of regions and ensure that adequate infrastructure is available to support such development. Planning Permissions must be in accordance with the Development Plan.

All works (including internal non-structural works) must be carried out in accordance with the Building Regulations which regularise construction standards, energy efficiency, fire safety requirements and disabled access to premises amongst other matters.

EU legislation

An extensive and ever-increasing number of EU directives now form part of Irish domestic law. The Environmental Protection Agency of Ireland (EPA), the Department of the Environment and Local Authorities all play a role in sanctioning and controlling activities likely to impact on the environment through assessment of environmental impact statements, planning conditions and IPC licences.

Intellectual property

Intellectual property (IP) is often an organisation's most valuable asset. For companies with an extensive IP portfolio, Ireland is an ideal location for their intellectual property, both from a regulatory / legal perspective as well as a tax perspective. The Irish legal and tax regimes offer a highly effective and efficient means of enhancing research and development opportunities for IP and for exploiting and protecting this intangible asset.

The key areas of IP protection available in Ireland are generally considered to be patents, trademarks, copyright and designs. However, in addition to these areas, Irish law also effectively protects other forms of intellectual property, such as domain names, databases, customer lists and computer software. Ireland also has a well developed data protection and e-commerce regime.

ACQUISITION OF INTELLECTUAL PROPERTY RIGHTS

Patents

Patent protection is a very strong form of protection for inventions, as it offers monopoly rights to owners of inventions in a defined territory. The Irish patent system is governed by the Patents Act 1992 and there are two types of patent protection available under that Act: (1) a full-term patent and (2) a short-term patent. The duration of the full-term patent is 20 years from the date of filing, provided that annual renewal fees are paid and the patent is not revoked at any stage. The term of a patent can be extended via a supplementary protection certificate for a maximum of five years where the patent is for a medicinal product for human or animal use or for plant production

products. The period of protection for a short-term patent is 10 years and as with full-term patents supplementary protection certificates may be obtained.

Ireland is also a member of the European Patent Organisation and has ratified the Patent Co-Operation Treaty (PCT). When granted, a European Patent has the effect of a national patent in each of the countries designated. A European Patent designating Ireland therefore has the same effect as if it were a full-term patent granted by the Irish Controller of Patents.

The PCT provides a system whereby a single international application allows for the designation of some or all the contracting countries. A PCT application requesting patent protection in Ireland is deemed to be an application for a European patent for Ireland.

Trade Marks

Trade marks are protected under Irish law under the Trade Marks Act 1996 and also at common law by way of action for passing off. A trade mark registered under the 1996 Act confers on the proprietor exclusivity of rights and there is no requirement to prove a reputation in order to obtain registration.

Registration is initially for a period of ten years (from the date of filing of the application) and it can subsequently be renewed every ten years on payment of the renewal fee, with the potential to last indefinitely.

Ireland is party to the Community trade mark system, and an applicant may apply through the Irish Patents Office for a Community trade mark which, if registered, will take effect throughout the 27 EU Member States. Ireland has also ratified the Madrid Protocol which governs international trade mark registrations. An international registration produces the same effects as a separate application for national registration of the mark made in each of the Countries designated by the applicant.

Designs

Ireland has implemented European harmonising legislation in relation to registered industrial designs via the Industrial Designs Act 2001. Registration confers an exclusive right to authorise others by means of licensing to use the design. The legislation provides that a design that is new and has individual character may be registered. Manufacturers are allowed a 12 month

grace period within which they can make a design available to the public without destroying its 'novelty' and thereby the prospects of registering it at a subsequent date. This allows designers to test the success of products on the market before embarking on the registration process.

When a design is registered, protection is granted initially for 5 years. Protection can then be renewed for four further periods of five years each (on payment of the prescribed fee), giving a maximum of 25 years' protection from the date of registration.

The Community unregistered design right regime came into effect in Ireland on 6 March 2002. This unregistered right is similar to copyright in that no registration requirement must be satisfied and the right comes into existence automatically. The Community unregistered design right lasts for 3 years from the date on which the design is first made available to the public within the EU.

Copyright

The Irish Copyright and Related Rights Act, 2000, is recognised as one of the most sophisticated pieces of legislation in this field in Europe. Copyright protects original literary, dramatic, musical and artistic works, as well as film, sound recordings, broadcasts and the typographical arrangement of published editions, moral rights in such work, computer software and original databases, and performances and performer's rights.

There is no system of registration for copyright protection in Ireland and this form of protection arises automatically on the creation of an original work, provided that it has resulted from the creator's skill and effort and is not simply copied from another work.

In most cases, copyright lasts for the creator's lifetime plus 70 years, although the duration of protection does depend on the nature of the work for which protection is sought. Ireland is a signatory to the Berne Convention for the Protection of Literary and Artistic Works which requires its signatories to recognise the copyright of works of authors from other signatory countries (known as members of the Berne Union) in the same way as it recognises the copyright of its own nationals.

Database Rights

Copyright subsists in original databases and the period of protection lasts until 70 years after the death of the author. The Copyright and Related Rights Act, 2000, introduced a new form of copyright protection available where there has been a substantial investment made in obtaining, verifying or presenting the contents of a database. This database right expires 15 years from the end of the calendar year in which the making of the database was completed. However, a database which is continually updated could have the benefit of protection under this new database right indefinitely.

EXPLOITATION OF INTELLECTUAL PROPERTY RIGHTS

From a legal perspective, owners of IP rights are generally free to exploit these rights under the principle of freedom to contract, although Irish and European Community competition law will be relevant in certain circumstances.

ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

One of the most attractive features of Ireland's IP regime is the dispute resolution mechanism available to owners of intellectual property rights who wish to enforce those rights. The Irish High Court has a dedicated forum, the Commercial Court, for resolving commercial disputes, including IP disputes. The Commercial Court was established in 2004 and is one of the most innovative developments in the Irish IP legal landscape in recent times.

This Court provides a condensed procedure for enforcement of IP rights. For parties wishing to expedite matters and obtain an early and informed decision, it is advantageous to enter the case in the Commercial Court list. The efficiency of disposal of cases and the quality of judgments of our Commercial Court have been recognised internationally. The threshold of €1 million that a case must normally meet in order to be eligible for the Commercial Court does not apply to cases involving IP rights, meaning that the court has jurisdiction over the majority of IP disputes.

The EU-wide directive on enforcement of intellectual property rights was implemented in Ireland in 2006, and complements the comprehensive range of enforcement tools and reliefs available to those seeking to enforce their IP rights that were previously generally available under Irish law.

Technology

Some of the world's leading technology companies such as Microsoft, Dell, Google and Facebook have chosen to locate operations in Ireland due to the favourable conditions for investment. Ireland has succeeded in attracting such technology companies not only due to the attractive tax benefits but also due to the access to an educated and skilled workforce and a favourable regulatory regime for the creation and exploitation of intellectual property.

DATA PROTECTION

Ireland had one of the earliest data protection legislative regimes in Europe. The Data Protection Acts 1988 and 2003 are the principle pieces of legislation governing the area of data protection in Ireland. The Acts specify the data protection principles which must be complied with when personal data is being processed. Different provisions apply depending on whether the personal data being processed is classed as sensitive or non-sensitive data. Duties of data controllers and data processors are also set out in the Acts.

Certain rights are conferred on data subjects including the following: the right to be informed of data being kept; the right to prevent data being used for the purpose of direct marketing; the right to access personal data; the right to change or remove details; and the right to prevent use of personal details.

The Acts also contain restrictions on the transfer of personal data by a data controller to a country outside of the European Economic Area (the "EEA") and provides that such a transfer may not take place unless that particular country or

territory ensures an adequate level of protection for the privacy of its data subjects in relation to the processing of their personal data. There are also a number of ways to transfer data to "unapproved states" such as using the Safe Harbour Principles or using a special EU approved model contract.

E-COMMERCE

Ireland was one of the first countries in the EU to pass legislation providing for a framework to encourage and facilitate the growth of electronic commerce and electronic transactions in Ireland. The Electronic Commerce Act 2000 provides for the recognition of electronic contracts, electronic signatures and also gives admissibility to electronic information generally. The Act also addresses electronic originals, the retention of electronic documents and the admissibility of electronic evidence in courts. In addition, the Act provides for the accreditation and supervision of certification service providers and also contains provisions dealing with their liability.

Ireland has a comprehensive legislative e-

commerce regime derived from EU law and Ireland has implemented numerous EU Directives in this area, including the following:

- (i) Electronic Signatures Directive (1999/93/EC);
- (ii) Electronic Commerce Directive (2000/31/EC);
- (iii) Distance Selling Directive (97/7/EC);
- (iv) Electronic Money Institutions Directives (2000/28/EC and 2000/46/EC).

The Electronic Commerce Regulations 2003 implemented the remaining provisions of the Electronic Commerce Directive which had not been implemented by the Act. It applies to almost all organisations who offer commercial services to customers online. It provides that certain information must be provided by an online service provider in a manner which is easily, directly and permanently accessible to recipients of a service.

The Distance Selling Directive aimed to harmonise laws in respect of distance contracts for consumers throughout the EU, substantially increasing protection for

consumers. The Distance Selling Directive provides that certain prior information must be supplied by the supplier and it also provides details of the cooling off period and confirmation of the contract terms. The requirements of the Electronic Commerce Regulations and the Distance Selling Directive can be met by having appropriately drafted terms and conditions.

CLOUD COMPUTING

Ireland is home to a high concentration of data centres through which technology giants such as Microsoft, Vodafone, Google, EMC, Yahoo! and Amazon Web Services drive most of their traffic and host the majority of their services for Europe. The key factor for choosing to locate here is Ireland's ambient climate which means that many data centres do not have to use their cooling equipment for much of the year, which results in a substantial saving for the data centre owners. Other influential factors are Ireland's geological stability, proximity to high-speed fibre optic communications networks and affordable energy rates. As a result Ireland is ideally placed as a European base for cloud computing activities of companies.

Data Protection and Data Security

Two of the most important issues arising from the fact that cloud computing transcends national borders concern compliance with national data protection laws and the security of the data that is placed in the cloud. As detailed above there is a well established body of law at European and domestic level setting out the data protection obligations of companies in relation to personal data they control and process. Generally the

customer will be responsible for compliance with the Data Protection Acts (as the data controller), but should ensure that:

- the supplier takes appropriate technical and organisational measures to protect the data and to keep it secure;
- the contract with the supplier includes appropriate terms controlling what the supplier may and may not do in respect of the data; and
- any transfer of data outside the EEA is dealt with appropriately.

Where the cloud computing model involves passing personal data to a third party, the Data Protection Acts prohibit companies from doing so unless there are adequate measures in place to protect personal data. Many data centres that are used to host services are located outside the EEA and as mentioned above personal data cannot be transferred outside of the EEA unless strict conditions are met. Many international cloud computing service providers are now publicising their moves to establish data centres within Ireland because the onus on the customer to comply with data protection legislation is reduced.

Other legal issues with regard to cloud computing which need to be addressed are data security, liability for service failure, licensing issues, jurisdictional issues and the ability to recover data stored or processed in the cloud.



"ByrneWallace provides a one stop shop for all legal aspects of the foreign direct investment project. The advice, support, service and attention from ByrneWallace has played a big part in the smooth success of our operation." **Bentley Systems**



Competition and antitrust

Ireland's competition, or anti-trust, regime is governed by the Competition Acts 2002 and 2006. The Act provides for both civil and criminal sanctions against both businesses and executives, where they breach competition law. The Irish Competition Authority is responsible for the enforcement of both Irish and EU competition law in Ireland, with EU competition law applying to practices which have an effect on inter-state trade, within the European Union.

Enforcement and administration of the Competition Acts, 2002 and 2006 (Act) is the responsibility of the Competition Authority. Whilst the ICA can investigate anti-competitive conduct and secure undertakings from businesses to desist with anti-competitive conduct, only the Irish Courts may award damages or impose fines for anti-competitive practices.

ANTI-COMPETITIVE AGREEMENTS

Section 4 of the Act governs anti-competitive arrangements and is modelled on Article 101 of the Treaty on Functioning of the European Union (TFEU). Both the Competition Authority and Irish Courts apply EU competition law, as well as domestic competition law, in Ireland, where the result of any agreement or practice has an affect of trade between Member States (of the EU).

Section 4 prohibits anti-competitive arrangements between undertakings, decisions by associations of undertakings and concerted practices involving undertakings which prevent, restrict or distort competition in Ireland or any part of Ireland, unless they comply with certain specific conditions set out in Section 4 of the Act or are the subject of a declaration (see Vertical Restraints below at Sect 7, for an example of a declaration).

Section 4(5) of the Act sets out the conditions which must be fulfilled for an individual agreement to benefit from the exemption. These are:

- the arrangement must contribute to improving the production or distribution of goods or the provision of services or to promoting technical or economic progress

- the arrangement must allow consumers a fair share of the resulting benefit
- the arrangement must not impose on the undertakings concerned any terms which are indispensable to the attainment of those objectives
- the arrangement must not afford undertakings the possibility of eliminating competition in respect of a substantial part of the product or services in question.

ABUSE OF DOMINANCE

The provision of the Act relating to abuse of dominance is primarily based on Article 102 of the TFEU. The Act prohibits the abuse of dominance by any undertaking having a dominant position in Ireland or in any part of Ireland. The Act does not seek to define an abuse of a dominant position, but it does indicate that the following matters may be regarded as an abuse:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions
- limiting production, markets or technical development to the prejudice of consumers
- applying dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage
- making the conclusion of contracts subject to the acceptance by other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contract.

Examples of abuse of dominance include predatory and discriminatory pricing, refusal to supply, margin squeeze, and tying /bundling, amongst others.

RIGHT OF ACTION & IMPOSITION OF PENALTIES

In serious cases, such as price fixing, where an agreement is found to breach competition law, it will be void (i.e. legally unenforceable) as a matter of law. Other penalties include (a) fines of up to the greater of 4 million or 10% of world-wide turnover on the undertakings in breach of either of these provisions and on the officers of such undertakings (e.g. directors, managers); as well as (b) civil sanctions on undertakings and the executives of undertakings in breach of the Act. In addition, a finding of the existence of an anti-competitive arrangement may result in criminal sanctions, with potential imprisonment of officers of the undertaking for up to five years in the event that cartel offences have been committed (e.g. price fixing). Criminal actions for breaches of the Act are taken by the Director of Public Prosecutions, with a number of successful convictions having been secured in recent years.

An aggrieved party, who has suffered as a result of any action prohibited under the Act, has a right of civil action for relief. Under the Act, a Court may grant either an injunction restraining the continuance of the matter complained of or impose a declaration, along with granting damages (including exemplary damages). Where the court has decided that an undertaking has abused its dominant position contrary to the Act, it may also require the dominant position to be discontinued or adjusted, for example, by ordering the dominant undertaking to divest assets.

ENFORCEMENT BY THE AUTHORITY

The Competition Authority enjoys far-reaching enforcement and investigative powers under the Act, including the ability to conduct dawn raids on companies in Ireland, where it has reason to believe that evidence may exist in relation to anti-competitive practices. As part of the dawn-raid process (covered by an appropriate search warrant), the Authority may search executives' homes and cars, in addition to business premises, with the ability to seize documentation. The Authority may also summon executives / individuals to provide evidence on oath and produce documents relating to alleged anti-competitive practices.

IRISH MERGER REGIME

A notifiable merger arises once control (essentially the capability of exercising decisive influence) over an undertaking is acquired, regardless of how such control is acquired. Asset acquisitions, as well as full function joint ventures, are also notifiable.

It is mandatory under the Act for undertakings to notify the Competition Authority of any merger or acquisition which exceeds the relevant thresholds.

Those thresholds being:

- the world-wide turnover of each of two or more of the undertakings involved in a merger must be not less than €40 million; and
- each of two or more of the undertakings involved in the merger must carry on business in any part of the island of Ireland (including Northern Ireland); and
- the turnover in Ireland of any one of the undertakings involved in the merger must be not less than €40 million.

The Authority has issued a guidance note, clarifying the term "carrying on business" to mean either where: a) the company has a physical presence on the island (such as a registered office, branch or agency) and sales and/or supply of services to customers on the island of Ireland; or, b) where the company has sales into the island of Ireland of at least €2 million in the most recent financial year.

Where the above thresholds are not met, but the merger gives rise to serious competition concerns, the parties may voluntarily notify the transaction to the Authority, for its assessment. This gives the parties legal comfort that, once cleared by the Authority, the transaction will not be investigated under either Section 4 or 5 of the Act, if implemented.

The test applied by the Authority is whether the merger or acquisition would substantially lessen competition in Irish markets for goods or services.

Failure to notify a notifiable merger is an offence, punishable by a fine of up to €250,000. Where a notifiable merger is implemented without being cleared by the Authority, the merger is void as a matter of Irish law.

COMPETITION AUTHORITY DECLARATION ON VERTICAL AGREEMENTS

The Competition Authority's Declaration in Respect of Vertical Agreements and Concerted Practices of 1 December 2010, provides a safe-harbour for vertical agreements, including exclusive and selective distribution agreements, that gives legal comfort to suppliers and buyers that relevant vertical agreements do not breach the prohibition of Section 4(1) of the Act, subject to certain conditions being met, including:

World Leaders with Operations in Ireland... 8 of the top 10 in Information and Communications Technology 8 of the top 10 in Pharmaceuticals 15 of the top 25 in Medical Devices More than 50 per cent of the World's leading Financial Services firms.

- 1) That the market share of the supplier does not exceed 30% of the relevant market on which it sells the contracted goods / services, and that the market share of the buyer does not exceed 30% of the relevant market on which it purchases the contracted goods;
- 2) That the agreement does not restrict the buyer's ability to determine its sale price (Resale Price Maintenance), without affecting the supplier's ability to recommend a sale price or impose a maximum sale price;
- 3) That the agreement does not impose territorial restrictions on the buyer's ability to sell the contract goods or services, subject to certain exemptions such as;
 - allowing the restriction of active sales into the exclusive territory or to an exclusive customer group reserved for the supplier or allocated by the supplier to the another buyer;
 - restricting sales to end users by a buyer operating at the wholesale level of trade;
 - restricting sales by members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate the system;
- 4) That the agreement does not restrict active or passive sales to end users by members of a selective distribution system operating at retail level of trade;
- 5) That any direct or in-direct non-compete obligation, is not of indefinite duration and does not exceed five years.

A "non-compete" obligation is defined as any direct or indirect obligation causing the buyer not to manufacture, purchase sell or re-sell goods or services which compete with the contract goods or services, or any an obligation on the buyer to purchase from the supplier more than 80% of the buyer's total purchases of the contract goods or services (and their substitutes). A non-compete which is tacitly renewable beyond a period of 5 years is deemed to be of "indefinite" duration.

In the Authority's opinion, vertical agreements, that meet the conditions of its Declaration, comply with the conditions of Section 4(5) of the Act (as per Section 2 above).

Credit institutions and banking

OVERVIEW

The Central Bank of Ireland (the Central Bank) is the entity with overall responsibility for the regulation and supervision of financial services providers, such as banks, insurers and investment firms, operating in Ireland. In addition to its supervisory and oversight roles, the Central Bank is tasked with ensuring the stability of the Irish financial system overall. The regulatory provisions applicable at national level are, to a large extent, driven by European Union measures which are designed to enhance the concept of the single market and facilitate cross-border establishment and provision of services within the European Union.

AUTHORISATION AND OWNERSHIP OF CREDIT INSTITUTIONS/BANKS

In order to provide banking services in Ireland an undertaking must, subject to certain exemptions, be the holder of a licence from the Central Bank of Ireland or be authorised in a member state of the European Union pursuant to the applicable banking directives and have passported its services into Ireland.

The application process is detailed and can take in excess of twelve months from inception, depending on the track record of the applicant institution. An undertaking must establish appropriate policies and procedures relating to funding their activities relative to the size and the nature of its assets in order to obtain a licence from the Central Bank. An undertaking must also meet minimum capital requirements and ensure appropriate levels of liquidity. Particular emphasis will be placed on the structure and composition of the board and senior

management. In this regard, a new Corporate Governance Code for Credit Institutions and Insurance Undertakings was introduced in 2010 which sets out prescriptive measures for the minimum standards that Irish banks, among others, are expected to satisfy.

INVESTMENT FIRMS

The Markets in Financial Instruments Directive (the MiFID Directive) came into effect in November 2007. The MiFID Directive introduced the concept of a harmonised set of rules across the European Union governing the organisation of the business of an investment firm necessary to obtain an authorisation, and rules governing the conduct of an investment firm's investment business activities. The MiFID Directive has been transposed into Irish law by the European Communities (Markets in Financial Instruments) Regulations, 2007 (as amended) (the MiFID Regulations). The Central Bank is responsible for the regulation and supervision of MiFID firms (investment firms) in Ireland.

Investment firms offering financial services to clients or customers located within the EEA are potentially affected by the MiFID Directive, either directly or indirectly. The MiFID Regulations provide that any party that proposes to act as an investment firm in Ireland must be either authorised by the Central Bank to do so or authorised to do so under the MiFID Directive by the competent authority in another Member State (by way of passport).

If an undertaking's occupation or business is the provision of one or more investment services to third parties on a professional basis, or the activity of dealing on own account on a professional basis, relating to

financial instruments then that undertaking will be considered to be an investment firm for the purposes of the MiFID Regulations.

Broadly speaking, the types of firm likely to fall within MiFID's scope include:

- retail banks;
- investment banks;
- portfolio managers (excluding firms acting as managers of collective investment schemes);
- stockbrokers and broker-dealers;
- many futures and options firms;
- corporate finance firms;
- wholesale market brokers;
- operators of Regulated Markets and Multi-lateral Trading Facilities;
- providers of custody services; and
- commodities and venture capital firms.

The MiFID Regulations exempts a variety of entities from the requirement to obtain authorisation under the MiFID Regulations (including insurers, entities who provide services exclusively to group entities, investment funds and pension funds and their managers and depositories, various public bodies etc.) There are other exemptions for investment firms which carry on certain own account dealing activities.

INVESTMENT INTERMEDIARIES ACT, 1995

While the MiFID directive replaced and repealed, at European Union level, the provisions of the Investment Services Directive (ISD), the Investment Intermediaries Act 1995, as amended (IIA), which implemented the ISD into domestic Irish legislation, has not been repealed. An entity considering transacting business



“ Ireland was ranked 10th worldwide for the number of jobs created in business support services, including call centers, shared services centers and business outsourcing in a study undertaken by IBM highlighting the role of foreign direct Investment”

in Ireland must therefore consider the potential application of both the MiFID Regulations and the IIA to its business.

A different regulatory regime will apply to a firm depending on whether it offers an IIA service or a MiFID service and it is most important to note that the definitions of "investment services" and "financial instruments" under MiFID are of "investment business services" and "investment instruments" under the IIA.

If your business involves the provision of "investment business services" or provision of services relating to "investment instruments" under the IIA, further authorisation as an investment business firm under the IIA will be required.

THE PASSPORT CONCEPT

Directive 2006/48/EC provides that any credit institution authorised by the relevant supervisory authority of an EU member state (the Home State), can do business in any other Member State without obtaining a licence/authorisation from the supervisory authority of that member state (the Host State). The licence/authorisation issued by the Home State essentially constitutes a "passport" to operate within specified parameters in the Host State.

Having passported in, the bank may (i) set up a branch in the Host State; or (ii) provide banking services in the Host State without formally establishing a branch in the Host State, depending upon the scope of their application. The authorisation must address all the of the applicant's relevant proposed activities.

The credit institution must lodge certain information with the national supervisory authority of its Home State, which will be notified to the Host State regulator. The position of the Central Bank is that the relevant institution should not carry on business in Ireland (as the Host State) until the Central Bank has received notification from the Home State. Once the notification is received, the relevant credit institution is placed on a list of authorised entities and can start to do business in Ireland.

In addition, the MiFID Directive improved the operation of the 'passport' for investment firms by more clearly delineating the allocation of responsibilities between Home State and Host State for passported branches and generally clarifying some of the jurisdictional uncertainties that arose under the ISD.

Investment funds

1.4 trillion of funds are administered from Ireland

OVERVIEW

Ireland is recognised globally as one of the leading jurisdictions for the establishment and administration of investment funds. The range and flexibility of the legal structures which are available has facilitated the growth of funds aimed at investors with varying investment criteria in a multiple of jurisdictions. Ireland enjoys a reputation as a centre of excellence both for promoters looking to establish funds and for the servicing of investment vehicles domiciled in other jurisdictions.

THE REGULATORY AUTHORITIES

The Central Bank is responsible for the authorisation and ongoing regulation of investment funds in Ireland. It is also the supervisory authority for the authorisation and regulation of providers of investment services in Ireland which services include giving of investment advice, provision of fund administration and custodial services and receiving, transmitting and executing orders in relation to securities.

The Irish Stock Exchange Limited (the ISE) is responsible for the listing of investment funds in Ireland. In order to list, a fund must first appoint a Sponsor, which is registered with the ISE. The Sponsor is responsible for ensuring that the fund is suitable for listing and for dealing with the ISE in relation to all aspects of the fund's listing. Many promoters choose to list their funds on the Irish Stock Exchange as their target institutional investors may be constrained to invest only in listed securities or securities which are listed on a recognised and regulated stock exchange.

TYPES OF FUNDS

The principal forms of funds under management in Ireland are:

- UCITS funds constituted in the form of (i) unit trusts, (ii) investment companies with variable share capital, and (iii) common contractual funds; and
- Non-UCITS funds constituted in the form of (i) unit trusts, (ii) investment companies with variable share capital, and (iii) common contractual funds

Funds may also be established in other forms such as investment limited partnerships, although these are very rare in practice.

UCITS

Undertakings for Collective Investment in Transferable Securities (UCITS) are collective investment schemes established and authorised under a harmonised EU (EU) legal framework. A UCITS established and authorised in one EU Member State can be sold or "passport" cross border into other EU Member States without a requirement for an additional authorisation. This "European passport" enables fund promoters to create a single product for the entire EU rather than having to establish an investment fund product on a jurisdiction by jurisdiction basis.

NON-UCITS

Non-UCITS funds are established pursuant to domestic law rather than EU law and, as such, do not qualify for a passport in order to be marketed in other EU Member States. It follows, therefore, that the Central Bank has more flexibility regarding the imposition or relaxation of conditions generally. In developing its regulatory

regime for non-UCITS, the Central Bank has drawn a distinction between different categories of investors, in terms of level of 'sophistication' (i.e. whether retail or professional). In addition, certain specialist funds (for example, real estate and private equity funds) which are not permitted under the UCITS rules are permitted as non-UCITS.

Non-UCITS funds can be established in broadly three regulatory categories: (i) retail, (ii) professional investor; and (iii) qualifying investor. Retail non-UCITS are subject to similar conditions and restrictions in relation to investment and borrowing as UCITS funds. These conditions and restrictions are relaxed somewhat for professional investor funds. The conditions and restrictions relating to investment and leverage do not apply almost in full in respect of funds which are marketed solely to qualifying investors. The investors themselves must also meet a qualifying investor test.

TAXATION OF FUNDS

Unless an investor in an Irish fund is resident or ordinarily resident in Ireland, generally there is no tax payable in Ireland on either a fund's income and gains or in respect of any payments received from the fund by the investor.

Irish regulated funds, however they are constituted, are not subject to tax on their income and gains but instead operate an exit tax regime where a potential tax liability only arises in respect of certain chargeable events such as a payment of any kind to an investor, or a transfer of units. In certain circumstances, the fund may elect not to operate the exit tax on such a deemed chargeable event, in which



case it must report certain investor details to the Irish Revenue and the tax liability arises on the investor on a self assessment basis. However, such an exit charge tax only arises to the extent and only in respect of Irish resident or ordinarily resident investors.

Many categories of Irish resident investors are entitled to an exemption from this exit tax including pension schemes, insurance companies, other funds, charities, approved retirement funds, approved minimum retirement funds, special savings, incentive accounts and PRSAs and credit unions.

SERVICE PROVIDERS

Funds established in Ireland are required to appoint (i) an Irish-based custodian to act as a custodian/trustee of Irish

authorised funds for the safe keeping of the funds assets and (ii) an Irish based administrator responsible for maintaining the accounts and records of the fund. Custodians and administrators must be approved by the Central Bank. The investment manager for an Irish fund is not required to be located in Ireland but must seek the approval of the Central Bank. A fund set up as an investment company must have at least two Irish resident directors. The management company of unit trust or a CCF must also have at least two Irish resident directors.

REDOMICILE OF FUNDS TO IRELAND

The Companies (Miscellaneous Provisions) Act 2009 enables non-Irish fund companies to redomicile into Ireland on

the basis that the migrating fund company will continue its existence as a company registered under Irish law. This is likely to be of particular interest to promoters of alternative investment funds such as hedge funds, real estate funds and private equity funds who wish to redomicile their offshore funds to a regulated, well-served OECD and EU jurisdiction. In particular, the legislation will benefit the many hedge fund managers seeking to avail of the distribution opportunities afforded by the UCITS Directive and for these preparing for the introduction of the proposed Alternative Investment Fund Managers Directive, which currently contemplates the granting of an EU marketing passport to EU domiciled funds only.

Our inward investment expertise

Our Foreign Direct Investment Team draws on the technical expertise of lawyers from across the firm's practice areas. We pool our diverse and complementary skills in an integrated, practical and innovative manner according to client needs. This dynamic and flexible approach has enabled us to develop and maintain a leading position in the provision of focused advice to multinationals in Ireland.

Corporate and commercial

Our team has dedicated foreign direct investment lawyers and is fully integrated with our Company Secretarial team which can provide company secretarial services to multinationals. Our Corporate and Commercial department advises on the establishment of the Irish operation, mergers and acquisitions, restructuring and contracts. Our New York office facilitates US clients needing Irish advice in an as efficient a manner as possible.

Regulatory and anti-trust

Our team advises on a broad range of regulatory issues including foreign direct investment grants, executive visas and industry specific licences.

Tax

Our tax team, a full service tax practice, serves a broad range of domestic and multinational clients in all major business sectors. We advise on all tax aspects of establishing operations in Ireland and tax issues arising for established operations. We also have extensive experience in cross-border and international tax matters.

Intellectual property

Our Intellectual Property Group provides expert advice on both commercial and contentious intellectual property matters. The team brings together a wealth of experience in advising clients on intellectual property, ICT and industry specific matters and regularly advises on intellectual property rights (patents, trademarks, design rights and copyright) and related issues – including registrations, exploitation (licenses and assignments), IP due diligence and IP

enforcement. Our lawyers focus on providing pragmatic solutions to the domestic and international IP issues faced by our clients.

In relation to contentious IP matters, the firm has a unit headed by a specialist intellectual property litigation partner with experience in all areas of hard and soft IP litigation, including obtaining search orders and using all forms of ADR from arbitration to mediation and co-mediation

Labour

Our labour unit provides tailored legal advice on all aspects of EU and Irish labour issues including employment contracts, trade union recognition, disputes and transfer of undertakings

Real estate

Our property unit uses its strong working relationship with Irish commercial agents to help negotiate favourable commercial terms as efficiently as possible.

Outsourcing

Our outsourcing unit draws together the extensive experience, industry knowledge and business acumen of experienced lawyers from each of the key practice areas within the firm to ensure that our clients receive a seamless and comprehensive service in what can be a sensitive sector.

We recognise the importance of contracts which are sufficiently detailed to govern the relationship on a day to day basis but also sufficiently flexible and practical to anticipate and facilitate change.

Our lawyers have advised the following multinationals on their Irish operations



Our team

Paul McGennis

Managing Partner

Paul is the firm's Managing Partner. He specializes in FDI, banking and commercial property. He is a member of the Council of the Dublin Chamber of Commerce. He has been instrumental in extending the firm's international reach, particularly with US based investment clients.



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Darren advises on both general corporate law matters and also provides specialist advice on intellectual property, ICT, e-commerce, data protection and technology issues with a particular emphasis on advising technology clients in the health services, pharma, and medical device sectors.



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Dennis is a corporate transactional lawyer who heads the firm's Foreign Direct Investment team and acts for a broad range of US and Irish companies. Based in our New York office, Dennis' role is to provide Irish legal advice and know-how to US companies in as efficient a manner as possible.



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Catherine has been a partner in the firm's Property Division since 1998. She works with a wide range of clients, acting in all types of property acquisition and investment and development proposals. This includes land acquisition and sales, mixed commercial and residential development schemes, significant commercial development schemes and tax driven investments.



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Michael has practised exclusively in the area of employment and administrative law since qualifying as a solicitor in 1987. Michael advises a wide range of clients including corporations, public bodies, professional organisations and individuals on both contentious and non-contentious issues. He is Secretary of the Irish Society for Labour Law and is a member of the Law Society's Employment and Equality Committee. He is a co-author of the Law Society's Employment Law manual (published by Oxford University Press, 2003).



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