

# WORLD'S LEADING FINANCIAL & TRUST CENTRES

## IRELAND CHAPTER

(A SWEET & MAXWELL PUBLICATION\*)

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# IRELAND



Source: US State Department, June 2010, <http://www.state.gov>

## 21.1 GENERAL OVERVIEW

### 21.1.1 Introduction

Ireland is situated in Western Europe, occupying five-sixths of the island of Ireland in the North Atlantic Ocean, west of Great Britain. Ireland is a

sovereign and independent state governed by a parliamentary democracy and is also a full member of the European Union since 1973 and the Organisation for Economic Co-operation and Development (“OECD”) since 1961. Ireland is a full on shore regulated jurisdiction which has a low corporate tax regime and a pro business environment and is a member of the Financial Action Task Force (“FATF”). Ireland has one of the lowest rates of corporation tax in Europe at 12.5% and has a comprehensive double tax treaty network having signed tax treaties with 56 countries and this makes it an increasingly popular location for asset management. It is in the London time zone and is geographically close to Europe but also has extensive direct transport links to the US. It has a sophisticated infrastructure and professional expertise including extensive choice of experienced financial services professionals capable of implementing the most sophisticated deals in a cost competitive environment.

Ireland is recognised as a global financial services centre and has been exceptionally successful in attracting international financial services companies to locate here including banking, asset financing, fund management, corporate treasury management, investment management, custody and administration and specialised insurance operations. Ireland has become Europe’s leading financial services centre in the fields of investment funds and structured finance. A significant factor in Ireland’s attractiveness is the informed and pragmatic approach adopted by the Irish Financial Services Regulatory Authority in relation to the regulation of investment funds which has led to the development of a wide range of product opportunities. Ireland’s attractiveness is further enhanced by Irish Stock Exchange (ISE) which in respect of investment funds has been granting listings since 1989 and it is currently a world leader for such listings.

Ireland has one of the fastest growing and youngest populations in Europe and the Irish economy has been one of the world’s outstanding success stories over the last decade with rates of economic and employment growth well above that of the EU and the OECD average. For the period from December 1998 to December 2007 Ireland has consistently topped the 30 member OECD economic growth tables, often by substantial margins. More recently Ireland has been adversely affected by the global economic crisis which coincided with a downturn in the domestic property and construction sectors and in 2008 the Irish economy entered into recession.

The principal factors leading to Ireland's economic success since the early 1990's have included a young population which remains one of the youngest in Europe with 35% of people under the age of 35, a modern and comprehensive education system with over 900,000 people in full-time education, competitive labour costs by international standards where work permits are not required for the employment of other European Union nationals, substantial inward investment inflows, a social partnership approach to economic development, an openness to international trade in goods and services and the pursuit of pragmatic and innovative government policies.

### **General Overview:**

#### **Location**

Location – Western Europe, occupying five-sixths of the island of Ireland in the North Atlantic Ocean, west of Great Britain.

#### **Time zone**

GMT

#### **Population**

4,239,848

#### **Capital**

Dublin

#### **Airport**

Dublin International Airport

#### **Language**

English, Gaelic

#### **Political system**

Republic, parliamentary democracy

#### **International dialing code**

00 353

### **21.1.2 Government and Constitutional Arrangements**

Ireland is a parliamentary democracy and is defined as a sovereign, independent and democratic state in the Irish Constitution which was adopted by referendum in 1937. Ireland enjoys almost a century of democracy having gained independence from the United Kingdom in 1922. The national parliament is defined as the Oireachtas and consists of

the President and two houses named the Dáil (The House of Representatives) and the Seanad (the Senate) which derive their powers from the Constitution. The government is responsible to the Dáil and is collectively responsible for the Departments of State administered by its members.

The principal political parties are Fianna Fáil, Fine Gael, The Labour Party, The Green Party, the Socialist Party and Sinn Féin. Fianna Fáil has been in power for over 50 years of the State's 88 year history. Both Fianna Fáil and Fine Gael (the other principal party) are largely considered to be centre-right parties with a business friendly agenda and outward looking in terms of international investment markets.

Ireland's membership of the European Union also carries an obligation to transpose EU legislation into Irish law which has harmonised the laws of membership countries particularly in the provision of financial services.

### **21.1.3 Political and Economic Stability**

After Ireland achieved independence in 1922, the institutions of the State were consolidated and a tradition of political stability has been firmly established. Ireland does not belong to any military alliance, maintains a neutral stance on military matters and has been an independent and democratic state since its foundation over 80 years ago. Ireland belongs to most major international organisations and the political environment is stable with parties of a centre to centre right persuasion dominating the political landscape over recent decades.

Since joining the European Community in 1973 rapid growth and development has transformed Ireland from a primarily agricultural society into a modern, high-technology economy and leading financial centre. Economic growth between 1990 and 2000 had an annual average rate of 7.2%. This rapid growth of exports, output and employment has led market analysts to describe Ireland as the 'Celtic Tiger'. From 2000 to 2007 the annual growth rate has been maintained at between 4–6%. Since 2007 house prices have fallen and there has been a sharp adjustment in the value of the Irish housing market. The downturn in the property sector was accompanied by a fall in employment in the construction sector and other economic sectors. The global financial crisis exacerbated the problems of the Irish economy and in 2008 the Irish economy entered recession. The domestic banking sector which was heavily exposed to the Irish property sector and which depended upon

foreign wholesale funding is now dealing with impaired assets and their attention is focused on improving their balance sheets.

The Irish government's response has been to increase domestic taxes (but not the rate of corporation tax which remains at 12.5%) and to cut overall public expenditure which culminated in national budget for 2010. The National Asset Management Agency ("NAMA") has been set up to purchase impaired assets from Irish banks in order to revive commercial banking operations, it is expected such measures will enhance the flow of credit to Irish businesses and the Irish economy.

Notwithstanding the current economic downturn, the legacy of the period of economic growth has transformed Ireland from being one of Europe's poorest economies to becoming one of Europe's wealthiest countries. The measures taken by the Irish government most recently the budget for 2010 have been commended by international bodies, such as the European Central Bank and European Commission, the IMF and the ODEC. Economic forecasts indicate the Irish economy should start to re-grow from 2011 onwards.

#### **21.1.4 Business Environment**

The policy of the Irish government is to assist in the creation of a healthy financial environment and to foster conditions that will stimulate business and enterprise. Ireland has a sophisticated pro-business environment assisted by proactive all-party political support and a world-class professional services sector underlying Ireland's growth as a financial centre.

Ireland's membership of the European Union has a crucial influence on Irish policy making. The EU's role in economic policies in particular create an inextricable link between activity at European Union level and the business goals of Irish governmental policy decisions. The Irish legislature has been proactive in identifying and responding to new policy directions and in developing sound and effective negotiating strategies, including the building of alliances with other members of the EU.

##### **21.1.4.1 Currency and exchange controls**

The currency of Ireland is the Euro. There are no exchange controls in Ireland.

#### **21.1.4.2 *Employment and immigration***

The Economist's quality of life survey "World in 2005" voted Ireland as the best place to live in the world from a survey rating 111 countries. Ireland was held to have a favourable combination of factors such as low unemployment and political liberties with a desirable family and community life. Ireland's labour market is renowned for having a flexible, as well as highly educated workforce with experts comparable in skill and experience to that available in other major centres such as Frankfurt, London or New York.

Nationals of other European Union members (with the exception of Romania and Bulgaria) do not require work permits. In the case of non-EU nationals work permits are required which are usually issued for one year and may be extended by the employer on application. In certain situations work permits are not required where the position is that of a secondment for up to a period of four years. It is usually a formality in securing a work permit for managerial personnel.

#### **21.1.4.3 *Establishing a business in Ireland – requirements***

The Companies Acts 1963–2009 ("Companies Acts") is the principal body of legislation governing the requirements for the establishment of a business in Ireland. Specific requirements are laid out below in respect of different types of company structure available to investors.

(i) Incorporation of a company

To incorporate a company in Ireland it is a necessary requirement to show that the company will carry on business in Ireland. There is no requirement for the company to appoint an Irish resident director provided however that one of the directors must be a resident of a member state of the EEA. Incorporation of a company in Ireland can take from three working days up to three weeks depending on the particular circumstance of the company. An Irish tax resident company will be subject to corporation tax on its worldwide profits.

(ii) Branch

Overseas companies have the option of establishing a branch in Ireland as opposed to establishing an Irish company. An Irish branch may be established as a trading or non-trading branch depending

upon the circumstances and activities of the branch. A non-resident company which carries on a trade in Ireland through a branch or agency will be subject to Irish corporation tax.

(iii) Value Added Tax (“VAT”)

In general the supply of most goods and services will be subject to VAT and will require the supplier to register for VAT with the Revenue Commissioners where certain threshold limits are expected to be exceeded. In general the supplier is responsible for both charging and accounting for VAT (although there are exceptions to this general rule).

The supply of certain goods and services are exempt from VAT and are commonly referred to as exempt supplies. The categories of exempt supplies are specifically outlined in Irish VAT legislation and would include for example financial services consisting of operating a current, deposit or savings account and negotiating or dealing in payments, transfers and debts.

(iv) Pay As You Earn (“PAYE”)

First time employers must notify the Revenue Commissioners and apply PAYE deductions to salaries, wages and benefits payable to employees. The PAYE system is effectively the method of collecting income tax on employment income at source and it is the employer who is responsible for both the operation of the system and for accounting for the tax due to the Revenue Commissioners.

(v) Corporation Tax

Irish resident companies and non-resident companies carrying on a trade in Ireland through a branch or agency are liable to Irish corporation tax. There are effectively two rates of corporation tax in Ireland. The 12.5% rate applies to trading income whereas a 25% rate applies to passive income. The 25% rate for example would be applied to a business which falls short of a “trade”. The term “trade” is specifically defined in Irish tax law to include “*every trade, manufacture, adventure or concern in the nature of a trade*” and the term has been considered judicially in a number of cases. In the majority of cases it will be evident whether or not a “trade” is in fact being carried on or not. However certain cases may require careful consideration of the particular facts and circumstances in light of the

relevant case law and guidance available from the Revenue Commissioners in order to determine whether or not a “trade” is in fact being carried on.

#### **21.1.4.4 Confidentiality**

Ireland is not a “secrecy” jurisdiction and is a member of FATF and has fully compliant domestic anti-money laundering legislation. As recognised under common law, banks and financial institutions have a contractual duty of confidentiality to clients and customers. The duty is subject to exceptions where disclosure of information is required by law.

Companies incorporated in Ireland and branches registered in Ireland are obliged to publicly file audited accounts with the Companies Registration Office (“CRO”) which are accessible to the public for a nominal fee. Directors are legally obliged to ensure that certain other documents which are available for public inspection are filed with the CRO such as notice of increase in nominal (authorised) capital and Notification of the creation of a mortgage or charge. Directors are required to disclose certain other personal information in the register of directors and secretaries such as name, date of birth, address, nationality, occupation and details of any other directorships and interests in shares of the company or related companies in the register of directors’ interests.

The substantive body of legislation dealing with the privacy of individuals is the Data Protection Acts 1988 and 2003 and Directive 95/46/EC of the European Parliament which sets out the legal position involving the disclosure of personal data to a third party without the consent of the person.

New obligations on financial institutions to assist in the detection and prevention of money laundering and terrorist financing will be implemented by the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 which will implement the EU’s Third Anti-Money Laundering Directive into Irish law and is to come into operation on 15 July, 2010.

#### **21.1.5 Legal System**

##### **21.1.5.1 General**

Ireland is often described as the “first adventure of the common law”. Ireland operates a common law legal system based on English common law as modified by subsequent legislation and by the Irish Constitution

which is both highly developed and universally well regarded. Ireland's own precedent common law and that of the higher English courts has a persuasive authority in Irish courts. Irish higher courts tend to hold precedent as binding although this is not an unalterable rule. The regulatory framework governing economic activity is also affected by the Constitution, European Union law and international law such as World Trade Organisation agreements. As a Member State of the European Union, European community law forms part of the law of the State.

In Ireland the District Court is a court of summary jurisdiction for minor criminal offences and for smaller civil claims. The Circuit Court has jurisdiction to try all but the most serious of criminal offences and deals with civil claims up to the amount of EUR38,092.14. The High Court and the Supreme Court constitute the superior courts established by the Constitution. The High Court has original jurisdiction in all matters civil or criminal law. The Supreme Court is the court of final instance and sits with either three or five judges.

#### **21.1.5.2 *Treaties***

Ireland is a member of the European Union and the European Free Trade Association and as such enjoys the benefit of being a member of the world's largest free trade bloc. Ireland has also been a party to the various European Union treaties implementing the single European market.

Ireland is a low tax onshore European Union jurisdiction. A key factor in Ireland's success as a leading financial centre in recent years has been an attractive and highly regarded local taxation policy together with an efficient taxation system administered by the Revenue Commissioners. These factors combined with a competitive corporation tax rate and comprehensive double taxation treaty network make Ireland an extremely attractive destination of choice. The double taxation treaties generally cover income tax, corporation tax and capital gains tax.

#### **21.1.5.3 *Taxation***

In general a company which is incorporated in Ireland is regarded as Irish tax resident (subject to certain exceptions). A company not incorporated in Ireland may be regarded as Irish tax resident under the management and control test. The management and control test looks at the highest level of control in the company and the question of whether a

company is resident under the management and control test would depend upon the circumstances and the facts of the case. An Irish resident company is subject to Irish corporation tax on its total profits (income and gains) save for certain exceptions (e.g. an Irish regulated investment funds – See Section 4 below). A non-resident company carrying on a trade in Ireland through a branch or agency will effectively be subject to Irish corporation tax on any trading income arising directly or indirectly through or from the branch, any income from property or rights used by, or held by or for, the branch or agency and certain chargeable gains arising on specified assets.

As noted previously the rate of corporation tax applicable to trading profits is 12.5%, with a 25% rate applying to passive income.

In general an Irish resident individual is subject to Irish income tax on their worldwide income. Taxation of employment income is generally based upon earnings of all kinds arising from the employment including bonuses, overtime and non-cash pay benefits known as benefits-in-kind. The standard rate of income tax is currently 20%, with the higher rate of 41% applying to income in excess of the standard rate band. The standard rate band is currently set at EUR36,400 in the case of a single individual and will vary depending upon personal circumstances. There are also tax credits of varying amounts available for individuals which are again dependent upon personal circumstances. An income levy is also payable on gross income. This levy is applied to income received before the deduction of losses, capital allowances etc. The levy is payable on income above EUR15,028 and the rate applicable ranges from 2%, 4% and 6% depending on the level of income.

#### **21.1.5.4 Stamp duty**

Stamp duty is a one-off tax on documents or instruments and generally arises on instruments that actually transfer (or are deemed to transfer) assets from one person to another. The rates of stamp duty vary depending on the property that is being transferred. Generally an instrument (document) will be liable to Irish stamp duty if the instrument is executed in Ireland, or if executed outside Ireland it relates to Irish property or it relates to any matter or thing done or to be done in Ireland.

Stamp duty at a rate of 1% may arise on the transfer of shares in Irish companies. Transfers of commercial property may attract duty at rates up to 6%. Irish stamp duty law also provides a group relief which can

eliminate duty on transfers between directly or indirectly related (essentially 90%) companies. This relief is commonly referred to as “associated companies relief”. There are a number of conditions that need to be met to avail of this relief including a 90% association between the transferor and transferee.

There are also various reliefs and exemptions available in respect of the acquisition of intellectual property, dealings in certain financial instruments, and group re-organisations. Where a charge to stamp duty does arise it is payable within 30 days of the execution of the relevant documents.

#### **21.1.5.5 Capital gains tax**

Generally companies resident in Ireland for tax purposes are subject to corporation tax on their worldwide chargeable gains. Non-resident persons are only chargeable to capital gains tax on disposals of certain specified assets (e.g. land in Ireland and unquoted shares deriving their value or the greater part of their value directly or indirectly from land in Ireland).

The rate of capital gains tax is currently 25%. Where a company has related companies that are tax resident in Ireland and where certain criteria are met, assets may be transferred between companies without tax arising on any resultant chargeable gains. Irish tax legislation also provides for a number of reliefs from capital gains tax for company reconstructions and amalgamations. An exemption from capital gains tax may also be available in the case of a disposal of a shareholding in a subsidiary by a parent company subject to certain conditions being satisfied (commonly referred to as the Participation Exemption).

#### **21.1.5.6 Dividend withholding tax**

Dividend withholding tax applies to dividends and other profit distributions made by Irish resident companies. There are significant exemptions under domestic law from this withholding tax in relation to payments made to companies resident in EU Member States and tax treaty countries and payments made to companies resident outside the EU or a non-tax treaty country provided the foreign company is ultimately controlled by persons resident in a treaty country or EU treaty state (other than Ireland). Dividends paid to certain categories of shareholders including Irish resident companies, charities, pension funds

and certain collective investment undertakings are also exempt from dividend withholding tax. The current rate of dividend withholding tax is 20%.

#### **21.1.5.7 Value added tax**

In common with all EU countries, Ireland operates a consumption tax known as Value Added Tax (“VAT”). VAT is charged on the supply of most goods and services effected within Ireland. The standard rate of VAT is currently 21% (although other VAT rates of 0%, 4.8% & 13.5% may also apply).

In general VAT, being a consumption tax, should not be a cost for most businesses but rather a cost to the end consumer. Furthermore the VAT suffered on the purchase of goods and services by businesses engaged in making supplies of goods and services (and other qualifying activities) may be reclaimed from the Revenue Commissioners (subject to certain restrictions) subject to the requirement that such costs are directly attributable to activities/qualifying activities.

#### **21.1.5.8 Import duties**

Customs duties arise on goods that are imported from outside the European Union at a rate specified in the EU’s common customs tariff. Goods imported into Ireland from within the EU are not subject to customs duties. An excise duty on a limited number of goods such as beer, spirits, wine, tobacco, petrol and diesel is charged. Vehicle Registration Tax applies to all road vehicles.

#### **21.1.5.9 Transparency and international co-operation**

Ireland is a member of the European Union which is itself a unique and highly sophisticated form of international co-operation between Member States and as a member, Ireland is also a consistent supporter of strong effective international institutions. Irish revenue and Department of Finance officials along with officials from France, the US and Japan served on the steering group of the OECD’s Forum on Harmful Tax Practices which was set up to strengthen international cooperation against harmful tax competition and tax practices. As a direct consequence of the project, 33 jurisdictions (formerly described as “tax havens”) have committed to the principles of transparency and effective exchange of information.

Ireland has consistently achieved international recognition and positive assessments through independent reviews of the Financial Regulator's performance. The following bodies identify Ireland's position:

- (i) The International Monetary Fund (IMF) reported that the regulatory system in Ireland works well with an appropriate approach taken to various sectors;
- (ii) FATF published positive findings on the examination of the Irish system to combat money laundering and terrorist financing; and
- (iii) An IMF Research Paper ranked the Irish system and structure of financial regulation first in the world amongst the world's single financial regulators in terms of its independence and accountability.

## **21.2 LEGAL ENTITIES**

The most common type of businesses structures available in Ireland are a private limited company, public limited company, single member company, partnership, trusts, limited partnership, sole trader, collective investment schemes, building societies and co-operative societies.

Shelf companies are not available in Ireland. A company is required to carry on an activity in Ireland and on registration a declaration to this point must be made and filed with the CRO along with the incorporation documents.

### **21.2.1 Branch**

To set up a branch in Ireland a foreign company must within one month of establishment of the branch file certain basic information with the CRO which will include registered office details, details regarding company directors and individuals responsible for the operation of the Irish branch. Certified copies of the company's memorandum and articles of association or constitution, certificate of incorporation and the latest audited accounts are also required to be filed. The audited accounts of the company, although not the branch, must be filed annually with the CRO.

### **21.2.2 Companies**

#### ***21.2.2.1 Private limited company***

A private limited company is the most common type of vehicle used in

Ireland and in particular for inward investment. There is a minimum of one member required and the maximum number of members allowable is 99 members. There are no minimum capitalisation requirements and member's liability is limited to the amount of capital contributed. Invitations to the public to subscribe for shares in the company are prohibited under the Companies Acts.

Private limited companies in Ireland are not required to appoint an Irish resident director, however it is necessary to show that the company will carry on an activity in Ireland. Annual accounts and a directors report is required to be submitted to the CRO. It will depend upon the size of the company whether the accounts are required to be audited.

There are three systems of company incorporation in Ireland taking between usually five to 15 days. The CRO has a renowned reputation for consistent and timely delivery of incorporation of companies. Filing fees to the CRO are between EUR50 to EUR100 which do not include incorporation agent's or solicitors fees. There is an annual filing fee of EUR40. An annual levy payable to the Financial Regulator applies to regulated entities only.

A company must maintain a registered office in Ireland which requires certain principal items required to be kept there such as the minute book (comprising all minutes of Members' meetings and written resolutions (including class meetings/resolutions) by the Members); the register of debenture holders; the register of Directors and Secretary; the register of interests of Directors and Secretary, copies of any contract entered into by the company to purchase its own shares and other specified registers. The register of members is not required to be kept at the registered office but must be kept within Ireland.

Fully paid shares may be redeemed or repurchased if the Articles of Association so provide, and repayment of par value or premium may be made out of profits available for distribution or the proceeds of a further issue of shares subject to compliance with certain conditions. There are restrictions on a company's ability to purchase its own shares and financial assistance for such purpose is generally unlawful under the terms of the Companies Acts. This is subject to a number of exceptions, such as in relation to employee share schemes, dividend payments and, in the case of private companies only, where authorised by prior special resolution and subject to solvency tests.

### **21.2.2.2 Public limited company**

The minimum number of shareholders required for a public limited company (“plc”) is seven shareholders with no maximum limit. A plc is the most common vehicle used to obtain a stock exchange listing due to the lack of restrictions relating to the number of shareholders and the transferability of shares. The minimum capitalisation requirement for a plc is EUR38,100 paid up to one quarter. It is less usual for inward investors to choose to use a plc due to the minimum number of shareholder requirements and the presence of a minimum capitalisation requirement.

Other formations not typically used by inward investors include companies limited by guarantee not having a share capital which would be more usually used by charitable organisations and unlimited companies which have no limit on investor’s liabilities, accordingly, creditors would have recourse to the shareholders in liquidation.

### **21.2.3 Partnerships**

A partnership is a relationship between people or entities carrying on a business with the goal of making profit. The partnership itself does not have a separate legal personality to that of its partners. Typically the partners will enter into a partnership agreement which will set out the distribution of profits or losses and the allocation of partnership assets arising out of the partnership. Partnerships are not obliged to file accounts in the CRO or any other public registry. The Partnership Act 1890 is the default legislation for partnerships in Ireland however its provisions in many respects are not suitable for commercial business arrangements and therefore partnership agreements should always be drafted where a partnership is to arise.

#### **21.2.3.1 Limited partnership**

A limited partnership consists of a minimum of one general partner which has unlimited liability and one or more limited partners. Limited partners are liable only to the extent of the assets which they have contributed to the partnership. There is a maximum of fifty partners allowable in a limited partnership (subject to certain exceptions most notably for accountancy and law firms). Where the general partner is a limited company, the partnership is required to file accounts with the CRO.

### **21.2.3.2 *Investment limited partnership***

The Investment Limited Partnership Act 1994 introduced a new form of partnership into Irish law namely the Investment Limited Partnership. An Investment Limited Partnership is a form of collective investment scheme and requires authorisation from the Financial Regulator and must comply with ongoing requirements set out by the Financial Regulator. An advantage to the Investment Limited Partnership is that it is not subject to the size restrictions imposed on a Limited Partnership. Investment Limited Partnerships have tax transparency which can allow certain investors to obtain double tax relief.

### **21.2.4 Trusts**

Ireland recognises the legal concepts of trusts and the principal legislation governing trusts is the Trustee Act 1893.

In general a trust is a legal device created by a person to deal with the management of property on behalf of another person. The most basic structure of a trust is that it is set up by a person, the settlor, giving property to one or more persons, the trustees, to hold for the benefit of others, the beneficiaries. Trusts should be principally driven by the requirements of the beneficiaries and the wishes of the settlor, however there can also be tax advantages to the establishment of trusts. For example in the case of family trusts or settlements, a trust may be established by parents to purchase or transfer assets to a trustee who is required to hold such assets for the benefit of the named beneficiaries, typically the parents' children. The increase of future value will belong to the trust and ultimately the beneficiaries. Trusts can assist in planning a person's estate to minimise inheritance tax.

Trustees typically fall into two categories namely professional and non-professional trustees. Non-professional trustees are usually family members or close associates of the settlor who agree to act out of a sense of duty. Professional trustees are usually banks or financial institutions undertake the role of trustee on the basis that they will be adequately remunerated and are often more suitable depending on the value of trust assets and intentions of the settlor. There is an extensive range of options available in choosing experienced professional trustees and trust companies in Ireland.

Ireland can be an attractive jurisdiction from a taxation perspective for the establishment of trusts by non-resident, non-domiciled persons with

no connection to Ireland. A trust, established by foreign settlors for the benefit of foreign beneficiaries, may be referred to a “foreign trust”.

Foreign trusts have these key features:

- The settlor is a non-Irish resident, non-Irish ordinarily resident and non-Irish domiciled;
- The beneficiaries are non-Irish resident and non-Irish ordinarily resident;
- The trust assets do not contain Irish property; and
- The trustees are Irish-resident and professional trustees.

Irish tax rules for trusts established by foreign settlors are favorable notwithstanding that their trustees are Irish resident.

The principle considerations with regards taxation of trusts under Irish tax rules relate to capital gains tax, income tax, capital acquisitions tax and stamp duty.

Where the trustees are resident in Ireland it is usually the case that those persons are subject to Irish capital gains tax on their world-wide assets from capital gains made by the trust fund. Trustees are deemed to be tax resident in Ireland unless

- (i) administration of the trust is ordinarily carried out abroad; and
- (ii) the majority of the trustees are not resident or ordinarily resident in Ireland.

There is an exception to this tax liability where foreign trusts are managed by professional trustees. In short the benefits of this exception, where certain criteria are met ensures that where trustees of a foreign trust do not hold Irish assets, although resident in Ireland for tax purposes, the trustees are not subject to any capital gains tax in Ireland.

There is no exemption in respect of income tax for trustees as exists for capital gains tax set out above. However it is possible to address this potential tax liability by other means.

In respect of capital acquisitions tax (a form of Irish gift or inheritance tax) foreign trusts if structured correctly should not give rise to such a tax. No tax liability should arise where the settlor and beneficiaries are non-Irish resident. In relation to stamp duty, exemptions exist in the Irish stamp duty code for the acquisition of foreign property and shares in

foreign companies.

Anti-avoidance legislation in Ireland is well developed with a significant role played by the Revenue Commissioners ensuring full compliance. Anti-avoidance legislation can affect non-resident trusts where the liabilities of these trusts can be attributed to beneficiaries in certain circumstances. An exit charge may become payable on the termination of a settlement.

## **21.3 REGULATION**

### **21.3.1 Banking**

The Financial Regulator is the competent authority for the granting of authority to act as a credit institution for the carrying on of banking business in Ireland. To carry on banking business in Ireland, subject to limited exemptions, the bank must hold a license from the Financial Regulator or be authorised in a European Union Member State.

The Financial Regulator will need to be satisfied that the applicant bank has appropriate policies and procedures in relation to the funding of their banking activities, in particular as regards the reserve of the proposed banks assets. The Financial Regulator will also apply rigorous investigation into the structure and composition of senior management and the board of directors. There is a minimum capitalisation requirement of EUR6,348,690. A preliminary meeting will first be called with the Financial Regulator. The Licensing and Supervision Requirements and Standards for Credit Institutions published by the Financial Regulator sets out the criteria which credit institutions must meet to gain authorisation to act as a credit institution.

The EU Banking Consolidation Directive allows for credit institutions authorised by a supervisory authority in a Member State to carry out business in another Member State. To avail of this passport system the credit institution will still be required to lodge certain information with the Financial Regulator.

### **21.3.2 Insurance Business**

#### **21.3.2.1 General**

Authorisation from the Financial Regulator is required before an insurance company is eligible to establish in Ireland. The EU's Single

Market Directive allows Irish insurance companies to write business directly into other Member States. A minimum guarantee fund of at least EUR3.5 million and paid up share capital of at least EUR635,000 is required to set up a head office insurance company in Ireland which intends to write insurance business. The nature of the business being transacted will also be subject to minimum solvency margins and guarantee funds requirements. There are rules set out which must be adhered to in relation to maintaining technical reserves and the admission of assets representing technical reserves.

#### **21.3.2.2 *Life companies***

Ireland has proven an ideal location for the setting up of both life and non life insurance companies in the EU. Life companies are exempt from the payment of Irish tax on the share of profit payable to policyholders and liable to corporation tax at the very competitive rate of 12.5% on the balance of profits and benefit from the tax advantages discussed in general above. An annual actuarial investigation is required to be carried out for life companies.

#### **21.3.2.3 *Non-life companies***

Non life companies are subject to corporation tax at the rate of 12.5% on profits and investment income. There is typically no withholding tax payable on most interest and dividends paid and access to Ireland's extensive network of double taxation treaties means that in many cases it is possible to repatriate the 12.5% taxed profits without the parent company being charged tax. There are no stamp duties or premium taxes levied on policies issued by Irish insurance companies relating to risks located outside of Ireland.

#### **21.3.2.4 *Reinsurance***

An insurance company involved in reinsurance is subject to minimal regulation by the Financial Regulator such as notifying that a business has been established in Ireland and filing annual reports with the CRO. Any engagement in direct insurance requires the full approval of the Financial Regulator.

### **21.3.3 *Investment Firms***

The introduction of the Markets in Financial Instruments Directive (MiFID) which replaces the Investment Services Directive (ISD) requires

firms that engage in specified investment services and activities such as investment banks, portfolio managers and securities dealers (investment firms) to be authorised by the competent authorities of the EU Member State in which they have their registered office.

As such the Financial Regulator is responsible for the regulation of investment management firms, investment intermediaries, mortgage intermediaries, stockbrokers, and moneylenders. The activities regulated include broking activities, securities trading, discretionary portfolio management and investment advice and the instruments include equities, bonds and ranging to complex derivative products.

MiFID prescribes the organisational and operational requirements of investment firms in providing for a more uniform set of rules across EU Member States. There is further simplification of the passporting regime and provisions that where a firm passports specified investment services into another Member State by providing services from its home state, the governing rules will be those of the home state. However, if it operates as a branch in another Member State, the conduct of business rules of the host state will apply to activities carried out in the host state's territory.

Irish and EU law requires that the directors and managers of a firm engaging in investment services meet the required standards of competence and probity, such standards being commonly referred to as the "fit and proper standards". The entity seeking authorisation will be required to complete an Individual Questionnaire attesting to these standards being met by the proposed directors or managers.

The detail and type of information required by the Financial Regulator will depend upon the nature of the investment service being authorised. There are also in many instances ongoing reporting requirements *i.e.* all investment firms are required to submit annual audited financial statements within six months of the firm's financial year-end and stockbrokers being required to submit a standard weekly return, which consists of information on the firm's holdings of client money, exposures to clients and counterparties and issuers. An authorisation may be revoked either at the request of the firm or in certain circumstances by the Financial Regulator without the investment firms consent.

#### **21.3.4 Anti-Money Laundering**

The primary anti-money laundering legislation (the "AML") in Ireland is the Criminal Justice (Money Laundering and Terrorist Financing) Act

2010. This legislation obliges institutions to carry out customer due diligence on clients in order to confirm the identity of their clients (previously referred to as the “know your customer” requirements) and to report suspicious transactions.

Designated bodies for the purposes of the AML are defined to include not only financial institutions and investment business firms, but also UCITS companies, management companies of both UCITS and non-UCITS unit trusts, investment companies or the general partner of an investment limited partnership. The Financial Regulator has issued specific guidance notes for the financial industry with regard to the applicable obligations under AML.

## **21.4 FINANCIAL SERVICES**

### **21.4.1 Investment Funds**

#### ***21.4.1.1 A leading international centre for investment funds***

Key facts regarding the Irish Investment Funds Industry:

- Ireland is largest hedge fund administration centre in the world<sup>1</sup>.
- Ireland has largest number of stock exchange listed investment funds<sup>2</sup>.
- Ireland is a leading European domicile for exchange traded funds<sup>3</sup>.
- Ireland is fastest growing European and UCITS fund administration centre over the past five years<sup>4</sup>.

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<sup>1</sup> Ireland services an estimated EUR 799bn in HF assets as of Dec 2008, representing approximately 41% of global hedge fund assets, Source: Ireland Funds Industry Association (IFIA) & HFM week.

<sup>2</sup> 1,605 investment funds (2,209 sub-funds) listed as of December, 2008, Source: Irish Stock Exchange (ISE).

<sup>3</sup> Irish ETFs were valued at EUR 31.5bn as of October, 2008, Source BGI Global Investors.

<sup>4</sup> Irish domiciled net assets grew by 49% between 2004-2008; the European average for

- Ireland is a leading European domicile for money market funds.

Ireland is a mature funds market with over 20 years of experience. There are over 358 fund promoters from over 50 countries have set up Irish domiciled funds which are distributed to shareholders over 60 countries across Europe, the Americas, Asia and the Pacific, the Middle East and Africa. Including non-domiciled assets, over 780 fund promoters use Ireland as a servicing centre for investment funds. (Source: Lipper Ireland Fund Encyclopedia 2009).

#### **21.4.1.1(a) Memoranda of Understanding (“MoU”)**

Ireland has entered into bilateral MoUs with China; Dubai; Hong Kong; Isle of Man; Jersey; South Africa; Switzerland and USA. Within the EU, Ireland cooperates with all relevant authorities on basis of the provisions of the European directives.

#### **21.4.1.2 General**

The Irish Financial Services Regulatory Authority (the “Financial Regulator”) regulates the operation and provision of services to investment funds pursuant to the Central Bank and Financial Services Authority of Ireland Act, 2003. The terms “fund” and “collective investment scheme” are often used interchangeably and have the same meaning for the purposes of this Chapter. Funds are generally established either as Unit Trusts or Investment Companies which are the principal forms of mutual fund encountered.

One of the primary reasons for Ireland’s attractiveness as a funds domicile and a location from which to provide services to funds is that Irish domiciled funds are not subject to tax on their profits or gains. There are no Irish capital, stamp or other duties applicable to the issue, transfer, exchange or repurchase of shares or units in a fund.

Furthermore in relation to investment services (as opposed to taxation at the level of the fund itself) such as provision of fund administration or custody services, Ireland has one of the lowest rates of corporation tax in Europe at 12.5% and has a comprehensive double tax treaty network with 56 countries and this makes it an increasingly popular location for asset management hubs for UCITS management companies, asset

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the same period 15%, Source: Central Bank of Ireland & EFAMA.

managers and services providers.

### **21.4.1.3 Overview of regulation and licensing**

Funds which are domiciled in Ireland may be authorised by the Financial Regulator as Undertakings for Collective Investment in Transferable Securities (“UCITS”) or Non-UCITS funds. In terms of assets under management approximately 80% of the funds authorised in Ireland are comprised of UCITS funds. Ireland is also Europe’s leading domicile for money market funds and has become the largest administration centre for exchange traded funds in Europe.

The Financial Regulator is the competent authority for the purposes of the regulation of funds whether established as authorised unit trusts, investment companies, common contractual funds or investment limited partnerships.

The Financial Regulator publishes its supervisory requirements in the form of notices in relation to funds and their service providers. From time to time, the Financial Regulator also publishes guidance notes intended to assist in the interpretation of their requirements.

Pursuant to these requirements, a management company, investment company, general partner and trustee/custodian are obliged to furnish to the Financial Regulator such information, and to file such returns, as the Financial Regulator may require.

Auditors are required to report to the Financial Regulator any irregularities in a fund’s affairs which they have reason to believe exist. The annual audit and report of the auditors is a key element in the supervisory regime. The trustee/custodian is under a similar obligation to report to the Financial Regulator any discrepancies in compliance with a fund’s obligations which come to their attention. It is also required to prepare a separate annual report containing the information specified in the Financial Regulator notices, which must be included in the annual report circulated to the unitholders/shareholders.

In addition, a fund must submit monthly, half-yearly and annual reports to the Financial Regulator (the content requirements of which are set out in Financial Regulator notices) and any other reports that the Financial Regulator may request from time to time. The annual report must be published within four months of the end of the period to which it relates, and the half-yearly report within two months.

Half-yearly financial and annual audited reports of a management company or general partner and annual audited accounts of an investment adviser must be submitted to the Financial Regulator.

Review meetings will be held by the Financial Regulator with the management of an investment company or a management company, or a general partner and a trustee/custodian, as required by the Financial Regulator.

The Financial Regulator works closely with the Irish Fund Industry Association to maintain Ireland's competitiveness and to facilitate business innovation and is very willing to discuss new products with fund promoters and where possible to accommodate such products in the legal and regulatory structures.

The place of substantive administration and control of a fund must be in Ireland. The Financial Regulator's authorisation requires that certain minimum activities be undertaken in Ireland.

#### **21.4.1.4 Legal structures**

A fund (or collective investment scheme) may be structured under Irish law as an investment company, unit trust, or common contractual fund, each of which may be authorised as a UCITS, under the terms of the UCITS Regulations, or a non-UCITS, under the appropriate separate legislative basis detailed below. A fourth structure, an investment limited partnership is also available, but this may only be used for non-UCITS funds.

##### **21.4.1.4(a) Investment company**

The investment company is the most common type of fund structure used in Ireland. They are incorporated entities with their own legal capacity, as provided in their memoranda of association. They have the capacity to enter into contracts and to sue and be sued. Their day-to-day management and control is provided by a board of directors. At least two of whom must be Irish resident, with ultimate control resting with shareholders.

Part XIII of the Companies Act 1990 is the relevant chapter of the Irish companies legislation which provides for the establishment of variable capital companies. Importantly, the shares of investment companies have no par value and the value of which will fluctuate with the value of the

company. In relation to investment companies structured as umbrella funds, since 2005 it is possible under statute for investment companies to be established with segregated liability between sub-funds.

Investment companies established under the Companies Act, 1990 may be authorised as designated or non-designated companies. Non-designated companies may not be marketed to the public and are subject to a specific Notice issued by the Financial Regulator.

#### **21.4.1.4(b) Unit trust**

Unit trusts may be established in Ireland pursuant to the Unit Trusts Act 1990. They are contractual-type fund vehicles created by a trust deed between a manager and a trustee. Unit trusts do not have a separate legal existence, do not have the capacity to contract, and cannot sue or be sued, but instead are legally represented by the manager and trustee.

The assets of a unit trust are held by its trustee and are managed by the manager, who may appoint one or more investment managers/advisers to assist it. Contracts in relation to the management and administration of the trust fund will be entered into by the manager, whereas the trustee will enter into contracts in relation to the assets themselves, such as bank deposits, security agreements, etc.

A unit trust is not a separate legal entity, as such, any borrowings that need to be incurred will be entered into by the trustee on behalf of the unit trust. Authorised unit trusts are tax exempt in Ireland. This and the fact that most counterparties to double tax treaties with Ireland regard unit trusts as tax transparent, and therefore taxed at the level of the unitholders, means that there may be uncertainty as to the entitlement to the benefits of any double tax treaty.

#### **21.4.1.4(c) Common contractual fund**

The common contractual fund, (the most recent type of investment structure to become available in Ireland), is a contractual arrangement enabling participants to share in the property of a collective investment scheme as co-owners. CCFs are broadly similar to Funds Commun de Placement, or "FCP", available in Luxembourg and may be established under the UCITS Regulations or, as non-UCITS, under the Investment Funds, Companies and Miscellaneous Provisions Act, 2005.

A CCF is formed by means of a deed of constitution entered into between a management company and trustee. The primary advantage of CCFs is

that they are transparent for tax purposes but in order for this favourable treatment to apply investment in them must be limited to institutional investors.

#### **21.4.1.4(d) Investment limited partnerships**

This is a partnership based structure provided for under the terms of the Investment Limited Partnerships Act, 1994. A general partner is appointed under a limited partnership agreement (the fund's constitutive document), and this entity has responsibility for operating and managing the fund and has unlimited liability with respect to the fund. Investors subscribe to the fund as limited partners and are generally only liable to it to the extent of their investment. Investment Limited Partnerships ("ILPs") are only available as non-UCITS and to date have not proven to be a popular structure.

#### **21.4.1.4(e) New initiative – Re-domiciling investment funds to Ireland**

With the enactment of the Companies (Miscellaneous Provisions) Act 2009 (the "2009 Act"), Ireland has introduced a streamlined process through which non-Irish investment fund companies domiciled and operating in other jurisdictions can re-domicile to Ireland.

In order to re-domicile a migrating fund to Ireland it will be necessary to amend the memorandum and articles of association of the migrating fund to ensure its compatibility with Irish legislation and the requirements of the Financial Regulator and the migrating fund must apply to the Financial Regulator to be authorised. Once a successful application has been made to the Financial Regulator, the Companies Registration Office (the "CRO") will register the migrating fund in Ireland. At this point it will be necessary for the migrating fund to de-register its operations in its originating jurisdiction and to notify the CRO and Financial Regulator when such de-registration has been completed. The migrating fund will continue in existence and will be transformed into a company registered under Irish law.

The advantage of re-domiciling under the 2009 Act is that there should be no investor capital gains tax issues due to the continuation of migrating fund; the migrating fund will not be required to liquidate its portfolio or engage in asset for share swap arrangements. In addition, it is expected that the re-domiciling of a migrating fund will provide time and costs savings compared to setting up a new fund company from scratch.

### **21.4.1.5 Types of collective investment schemes**

#### **21.4.1.5(a) Distinction between UCITS funds and Non-UCITS**

##### *UCITS*

UCITS are collective investment schemes established and authorised under a harmonised European Union (EU) legal framework under which a UCITS established and authorised in one EU Member State can be sold cross border into other EU Member States without a requirement for an additional authorisation. This so-called “European passport” is central to the UCITS product and 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.

UCITS have become the gold standard EU investment fund product and are recognised not only in Europe but also further afield. Many non-EU jurisdictions such as Hong Kong, Singapore, Taiwan, and countries of Latin America have opened up their markets to the registration of UCITS, thereby permitting UCITS to be sold and distributed in such markets to the retail public.

UCITS are subject to detailed rule in relation the assets that are eligible for investment, risk diversification requirements, liquidity requirements and are also required to appoint an independent depositary to provide for the safekeeping of the assets of the UCITS. Regarding eligible investments, UCITS may only invest in transferable securities, money market instruments, units of other UCITS or eligible collective investment schemes, derivatives, deposits with credit institutions and ancillary liquid assets. UCITS must adhere to diversification rules so that not more than 10% of the net assets of a UCITS is held in any one issuer, subject to they requirement that aggregate investments of more than 5% of net assets do not exceed 40% of the funds net asset value.

##### *Non-UCITS*

Non-UCITS are established pursuant to domestic Irish legislation. The public sale of non-UCITS in other jurisdictions is subject to the domestic securities laws of the jurisdiction where the offer is being made which may restrict or indeed prohibit the public offer of non-UCITS products. Non-UCITS funds may be open or closed-ended. Irish domiciled Non-UCITS structures can be broken down into three sub-categories:

- Retail Investor Funds;

- Professional Investor Funds (“PIFs”); or
- as Qualified Investor Funds (“QIFs”).

The principal characteristics of each category of fund are detailed below.

#### **21.4.1.5(b) Retail investor funds**

If an investment fund has no minimum subscription or, if it imposes a minimum subscription of less than EUR125,000, it will be considered to be a retail investor fund. This type of investment fund is regularly used where the principal target market is retail investors outside the EU although it can of course be used within the EU but will not benefit from any European UCITS passport. Even though its investment and borrowing restrictions are quite stringent (quite similar to UCITS), it is a very popular vehicle.

A retail scheme’s investment restrictions prohibit it from investing more than 10% of its NAV in securities which are not listed or traded on an approved market, no more than 10% of NAV may be invested in the securities of any one issuer, no more than 10% of its NAV may be invested in any class of security issued by a single issuer and borrowings may not exceed 25% of NAV. There are no Irish regulatory requirements dictating minimum investment amounts to be subscribed by investors. Minimum investment limits may be applied and included in the prospectus at the discretion of the promoter. It is usual for a minimum subscription, holding and subsequent investment amounts to be provided for in the prospectus. They are often included with a provision to permit management to waive these at their discretion.

#### **21.4.1.5(c) Professional Investor Funds (“PIF”)**

Funds authorised as PIFs are required to have a minimum subscription amount of EUR125,000 or its equivalent in other currencies. The aggregate level of subscriptions by an investor into the sub-funds of a fund can be used for the purposes of meeting this minimum investment requirement and once the minimum investment has been reached additional subscriptions can be of a lesser amount.

The Financial Regulator will generally permit investment in listed and unlisted securities subject to a general maximum of 20% of NAV in any one issuer. As a rule of thumb the Financial Regulator will relax the investment restrictions to enable a Professional Investor Fund invest an amount of twice the limits/restrictions applicable to retail funds

(summarised above).

#### **21.4.1.5(d) Qualifying Investor Funds (“QIF”)**

Funds authorised as QIFs are required to have a minimum subscription amount of EUR250,000 or its equivalent in another currency. In addition, marketing of such funds is required to be confined to natural persons with a minimum net worth (which excludes main residence and household goods) in excess of EUR1,250,000, or any institution:

- (a) which owns or invests on a discretionary basis at least EUR25,000,000 or its equivalent in other currencies; or
- (b) the beneficial owners of which are qualifying investors in their own right.

Again the aggregate level of subscriptions by an investor into the sub-funds of a fund can be used for the purposes of meeting the minimum investment requirement and once the minimum investment has been reached additional subscriptions can be of a lesser amount.

The Financial Regulator disapplies virtually all investment and borrowing restrictions for Qualifying Investor Funds. There are no material limits or hard diversification requirements, although corporate funds are required by Irish company law to “spread” investment risks, and there are no limits on the amount of borrowing or leverage which may be used subject to disclosure of anticipated limits.

Qualifying Investor Funds are authorised by the Financial Regulator on a filing only basis and can be authorised within 24 hours. A qualifying investor scheme meeting the pre-agreed parameters of the Financial Regulator can file for authorisation on a business and authorisation will issue by the Financial Regulator on the following business day.

#### **21.4.1.5(e) Specialised fund types**

The Financial Regulator has issued specific rules for a range of such specialist categories of fund, including Property Funds, Venture Capital Funds Futures and Option Funds, Fund of Funds, Funds of unregulated Funds, Feeder Funds, Hedge Funds and Fund of Hedge Funds as set out under the Financial Regulators’ Non-UCITS Notices. It should be noted that funds structured as PIFs or QIFs are entitled to seek derogations or exemptions from some or all of the conditions.

#### **21.4.1.6 Investment policies and restrictions**

The Financial Regulator requires a clear disclosure of the proposed investment objective and policy to be included in any offering document.

QIFs, the most flexible structure, are only restricted in that they may not acquire shares carrying voting rights that would enable them to exercise significant influence over the management of an issuing body. PIFs are generally subject to additional restrictions but may apply to the Financial Regulator to request that some or all of these be disapplied, so that they can be treated similarly to QIFs. Retail and UCITS funds are subject to more extensive restrictions.

#### **21.4.1.7 Taxes**

As mentioned above one of the primary advantages of choosing Ireland as a domicile for funds is that there is a tax exemption at fund level *i.e.* Irish domiciled funds are not subject to any taxes which would generally apply (e.g. corporation tax and capital gains tax) in respect of their income/profits or any gains arising on their underlying investments. (A tax charge can arise on the happening of a “chargeable event” *i.e.* on the encashment, redemption, cancellation, transfer or deemed disposal of units. It should be emphasised that a tax charge will not arise for the fund if the unitholders are neither Irish resident nor ordinarily resident in Ireland at the time of the chargeable event provided the relevant revenue declaration is in place and the fund is not in possession of any information which would reasonably suggest that the information contained in the declaration is no longer materially correct.)

Service providers located in Ireland will generally be subject to Irish corporation tax on their profits or gains at the current rate of 12.5%.

A fund established in Ireland as a unit trust will generally be Irish resident where the trustee is resident in Ireland or a majority of the trustees (if more than one) are resident in Ireland.

In the case of funds structured as investment companies it is important to ensure that the management and control of the company is exercised in Ireland (*i.e.* to ensure that the effective management and control of the company is located in Ireland) particularly where treaty benefits are important. This is generally achieved by ensuring that all the major decisions of the company are made and approved by the directors of the company at board meetings which are regularly held and chaired in Ireland. As noted previously establishing residence under the management and control test will depend upon the facts and

circumstances of the company concerned.

#### **21.4.1.7(a) Stamp duty**

No stamp duty is payable in Ireland on the issue, transfer, repurchase or redemption of Shares in the Company. Where any subscription for or redemption of Shares is satisfied by the in specie transfer of securities, property or other types of assets, Irish stamp duty may arise on the transfer of such assets.

No Irish stamp duty will be payable by the Company on the conveyance or transfer of stock or marketable securities provided that the stock or marketable securities in question have not been issued by a company registered in Ireland and provided that the conveyance or transfer does not relate to any immovable property situated in Ireland or any right over or interest in such property or to any stocks or marketable securities of a company (other than a company which is an investment undertaking within the meaning of Section 739B (1) of the Taxes Act) which is registered in Ireland.

#### **21.4.1.7(b) VAT**

Funds are not subject to VAT on their investment activities. However, to the extent they are in receipt of taxable cross border business to business services (e.g. foreign legal advices) they will be required to register for VAT in Ireland and self account for VAT in relation to such cross border services. There are wide ranging VAT exemptions for funds as management services provided to funds are exempt. The term "management" is defined in the context of the activity of collective portfolio management as defined within Annex II of Directive 2001/107/EC. That states that functions included in the activity of collective portfolio management are Investment management, administration and marketing. Custody and distribution services are also generally regarded as a VAT exempt service. In addition, a fund may be able to recover all or a percentage of any VAT costs (as well as VAT on local Irish fees e.g. Irish auditing & legal fees) depending on where the underlying assets are located. For example, if the fund is only invested in non-EU assets, it should be able to recover 100% of any VAT input costs.

#### **21.4.1.8 Promoter approval**

The promoter is the entity that is responsible for the launch of the new fund and it must be approved in advance by the Financial Regulator.

Frequently it will also act as the investment manager to the fund once authorisation is received, or be an affiliated company. The Financial Regulator requires promoters to have a minimum capitalisation of EUR635,000 in net shareholder funds which can be fulfilled (depending on local audit requirements) either by equity, subordinated loans or commitments. The approval process involves consideration of the ownership, experience and regulatory status of the promoter by the Financial Regulator and will involve submission of an application form and requisite documentation (including audited accounts etc). Promoters are generally obliged to be authorised in advance of the fund which they wish to launch.

#### **21.4.1.9 Marketing of funds**

The marketing of Irish domiciled funds into other jurisdictions and the inward marketing of funds authorised in other jurisdictions into Ireland is subject to regulation. UCITS funds authorised in Ireland may be sold elsewhere in the EU without any further authorisation. This is subject only to a requirement to notify the local regulator of the intention to carry out such marketing in their jurisdiction and to comply with any applicable local marketing rules, such as a requirement to appoint a local facilities or payment agent, abide by a local code of marketing practice etc.

Where it is intended to market an Irish fund, which is not authorised as a UCITS, to investors in another jurisdiction (or to market a UCITS to investors outside the EU) it will be necessary to comply with the local offering rules (or to seek to avail of an exemption from such requirements). In either case it will be necessary to obtain detailed local advice.

#### **21.4.1.10 Regulation of service providers**

The provision of services to collective investment schemes in or from Ireland is subject to regulation by the Financial Regulator. Administrators, custodians and investment managers are all obliged to be authorised or approved by the Financial Regulator and while authorised will be subject to continuing obligations, for example in relation to capital adequacy etc. The approval of the Financial Regulator is required in respect of any significant change in ownership or in significant shareholdings of authorised service providers.

#### **21.4.1.11 Administrators**

The provision of administration services to collective investment schemes, regardless of where the fund is authorised is a regulated activity in Ireland and entities seeking to carry on this function are required to be authorised by the Financial Regulator.

In addition entities appointed to act as administrators to Irish domiciled funds (both UCITS and Non-UCITS) must perform certain key aspects of the administration function in Ireland. These activities include performing NAV calculations, preparation of accounting records, maintenance of investor registers, sending correspondence to investors and are detailed in the Notices of the Financial Regulator.

Obtaining authorisation to act as an administrator will require compliance with the requirements of the Financial Regulator such as including maintenance of the requisite capital and adoption of compliance systems.

#### **21.4.1.12 Custodians**

The custodian or “trustee” of a unit trust is the entity responsible for holding and safe-keeping the assets of the fund. This is a highly regulated function and entities seeking to fulfil this role for Irish domiciled funds must be located in Ireland to ensure that they can be subject to adequate supervision. Only entities with the appropriate expertise and experience will be authorised for this role with restrictions on the types of entity that are eligible for authorisation.

Details of the duties and obligations of a trustee/custodian are set out in the Financial Regulator’s Notices. A custodian must have a minimum paid-up share capital equivalent to EUR6.5 million or must be guaranteed by a parent bank or credit institution having a minimum paid-up share capital of this amount.

#### **21.4.1.13 Investment managers**

Investment managers are the entities that are appointed with responsibility for performing discretionary asset management of the assets of a fund. It is a requirement of the Financial Regulator that only an entity that is authorised for the purpose of asset management and subject to prudential supervision to be appointed discretionary asset manager to an Irish domiciled fund.

#### **21.4.1.14 Directors**

Irish authorised investment companies or the managers of unit trusts must have at least two Irish resident directors. Administrators and custodians to Irish funds are similarly required to have two Irish resident directors. Appointment of individuals to the boards of any of these entities is subject to the prior approval of the Financial Regulator. An individual may not be on the board of both the administrator and custodian of any given fund. Approval to act as a director for any of these entities can only be obtained following submission of a detailed “Individual Questionnaire” to the Financial Regulator.

#### **21.4.1.15 Listing on the Irish Stock Exchange**

There are no requirements for Irish authorised funds to be listed on the ISE, or elsewhere, but many funds (whether established in Ireland or elsewhere) do seek to obtain such a listing in order to enhance the marketability of the fund and to ensure that it qualifies as an eligible investment for institutional investors. Funds seeking to obtain a listing on the ISE are required to initially appoint a Listing Sponsor. This entity reviews the fund’s existing documentation and advises on amendments necessary to ensure compliance with the relevant requirements of the ISE. It assists in preparing draft listing particulars in accordance with the ISE’s listing rules. It will typically take three to four weeks to obtain a listing on the ISE once the initial review has been completed and listing particulars prepared.

### **21.4.2 Structure Finance/Capital Markets**

#### **21.4.2.1 General**

Ireland is the leading European onshore jurisdiction for establishing Special Purpose Vehicles in conducting structured finance transactions. The principal reason for this is the favourable tax treatment as set out in Section 110 of the Taxes Act (“Section 110”). Companies satisfying the conditions for the favourable tax treatment under Section 110 are commonly referred to interchangeably as SPV’s or qualifying companies and can provide for tax neutrality.

The categories of transactions in particular utilising SPVs include repackagings, synthetic and non-synthetic CDOs, asset backed note programmes, credit card receivables, asset backed commercial paper programmes and a wide range of other tailored receivables transactions.

Private equity funds and hedge funds are also utilising SPVs to invest indirectly in underlying assets (particularly where tax treaty benefits are important).

Significant factors in Ireland's attractiveness for conducting structured finance transactions include its membership of the EU and OECD, the fact it is a common law jurisdiction similar to England, its full range of skilled service professionals (auditors, tax advisors, lawyers) delivering cost efficient structures with a commitment to short specified timeframes, the continued support of the Irish government and tax authorities which consult and engage constructively with the Irish structured finance market, successive legislative changes to facilitate structured finance transactions, favourable domestic tax legislation, an extensive double taxation treaty network and various domestic withholding tax exemptions allowing for tax neutral structuring.

#### **21.4.2.2 Taxation of SPV**

As outlined above in general Irish companies must pay corporation tax on their income at the rate of 12.5% in relation to trading income and 25% in relation to non-trading or passive income. However, Section 110 provides for special treatment in relation to qualifying companies. If a company is a qualifying company for the purposes of Section 110, then profits arising from its activities will be treated as annual profits and gains within Schedule D and will be chargeable to corporation tax under Case III at a rate of 25%. However, for that purpose the profits will be computed in accordance with the provisions applicable to

Case I of Schedule D. On this basis, the interest on the notes/securities issued should be deductible in determining the taxable profits of the company thereby the company's profits can be reduced to zero hence the rate of tax is essentially academic.

SPVs must carry on in Ireland the business of the holding and/or management of qualifying assets. A "qualifying asset" means an asset which consists of, or of an interest (including a partnership interest) in, a "financial asset" which includes shares, bonds and other securities, futures, options, swaps, derivatives and similar instruments, invoices and all types of receivables, obligations evidencing debt (including loans and deposits), leases and loan and lease portfolios, hire purchase contracts, acceptance credits and all other documents of title relating to the movement of goods, and bills of exchange, greenhouse gas emissions

allowances, contracts for insurance and contracts for re-insurance, commercial paper, promissory notes and all other kinds of negotiable or transferable instruments. The value of the qualifying asset(s) (for the initial transaction ONLY) must be EUR10m or greater.

#### **21.4.2.2(a) Withholding tax**

In general an Irish company must operate a 20% withholding tax on all payments of annual interest. However interest payments made by the SPV may be made free of Irish withholding taxes provided the recipient of the interest is tax resident in a country with whom Ireland has a double taxation agreement or is tax resident in a Member State (other than Ireland) of the EU.

#### **21.4.2.2(b) Value added tax**

SPV's will not be subject to Irish VAT on their securitisation activities. However, to the extent an SPV is in receipt of taxable cross border business to business services (e.g. foreign legal advices) it will be required to register for VAT in Ireland and self account for VAT in relation to such cross border services. There is a relatively wide ranging VAT exemption for many types of financial services provided to SPVs such as investment management fees, corporate service provider fees, custody fees, portfolio administration fees, collateral administration fees etc. In addition, the SPV may be able to recover all or a percentage of any VAT costs (as well as VAT on local Irish fees e.g. Irish auditing & legal fees) depending on where the securitized assets are located. For example, if the SPV is only invested in non-EU assets, it should be able to recover 100% of any VAT input costs.

#### **21.4.2.2(c) Stamp duty**

There is a specific exemption from Irish stamp duty on the issue or transfer of securities issued by an SPV, where the money raised by such securities is used in the course of its business. Stamp duty considerations will apply to the acquisition of assets by an SPV especially if those assets are Irish situate however, stamp duty is no longer payable on any instrument creating security over Irish situate assets.

It should be noted that there are also specific exemptions from stamp duty on the issue and transfer of certain loan capital and on debt factoring agreements subject to certain conditions being satisfied.

#### **21.4.2.2(d) Profit extraction**

A crucial component of the structured finance transaction will be the utilisation of certain tax-deductible profit extraction mechanisms available to an SPV. In addition to profit participating loans etc as outlined above total return swaps may also be used to extract profit in a tax deductible form.

### **21.4.2.3 Listing**

It is often attractive from a securities and tax law analysis to have the SPV list the notes on the ISE or on another recognised stock exchange. Many arrangers, managers and law firms favour listing in Ireland due to the commercial nature of the ISE and their commitment to delivering on committed timeframes.

### **21.4.2.4 Cost of an SPV**

*Incorporation.* An SPV company can be incorporated as a public limited company (“plc”) or a private limited liability company (“limited”). It costs approximately EUR100 to incorporate an SPV (being a private limited company excluding legal fees).

*Capitalisation.* The minimum capitalisation of a plc is EUR38,100 of which a quarter must be paid up and the minimum share capital of a limited is EUR1. The plc needs to be capitalised in order to obtain its certificate of trading. It is also worth noting that there are no “thin capitalisation” rules for SPV’s in Ireland and therefore no limit to the value of assets which can be securitised.

*Timeframe.* It can take approximately two weeks to incorporate a plc and one week to incorporate a limited (prior approval of the constitutional documents is required by the Irish Registrar of Companies). The plc is required to obtain a certificate of entitlement to commence business which can take an additional three days to obtain.

*Licenses.* On most structured finance transactions, it is not necessary for the SPV to obtain any licenses or government approvals.

### **21.4.2.5 Bankruptcy remoteness**

To assist the bankruptcy remoteness and asset ring-fencing analysis, in particular for rating agency requirements, the shares of the SPV are typically held under bankruptcy remote vehicles. It is possible to segregate different pools of assets for each deal and limited recourse and non-petition provisions should be contained in each of the relevant

transaction documents.

Appropriate restrictions should be incorporated into the constitutional documents and the transaction documents to ensure that the business of the SPV is restricted to acquiring, holding and managing “qualifying assets”. In addition, the SPV will undertake in the transaction documents and the share trustee will covenant in the declaration of trust that it will not take any action to wind up the SPV. It is important to achieve bankruptcy remoteness for the SPV and that the administrator’s role is clearly outlined, that the directors are responsible for the management and control of the SPV and that all business decisions are made by them in Ireland.

#### **21.4.2.6 Regulatory authorisations**

Collateral managers based in the EU and authorised by a competent authority in a member state or who have their registered or head office in the US and who do not have a branch in Ireland are not required to be authorised in Ireland to provide portfolio management services to the SPV.

#### **21.4.3 Captive Insurance**

Ireland has the eight largest number of captive domiciles globally or almost 5% of the global market share of captive insurance companies. A captive insurance company is an insurer formed as a limited company and established for the purpose of reducing insurance risk and costs for the parent company or within a group of companies. It may also be the case that there is no availability of conventional insurance companies to cover certain risks for which a captive will be required to be established.

There has been a steady and constant growth in the captive insurance market over the past three decades with 75% of the market share originating from six countries – the United States, the United Kingdom, France, Sweden, Australia and Japan.

The advantages of choosing to use a captive insurance company include:

- (a) Premiums otherwise paid to conventional insurance companies are retained by the captive insurance company and investment income generated from the income will benefit the shareholders of the group.

- (b) Some risks are not insurable by conventional insurance companies and the use of a captive can be formulated to cover such risks.
- (c) The insurance market is a cyclical industry and in recent years has experienced increasingly frequent and shortened hard and soft cycles. Establishing a captive will allow for a smoothing of the costs over the insurance period.
- (d) A captive insurance company is positioned to access the reinsurance market. According to a 2008 global benchmarking report by Marsh, 41% of captive insurance companies in the United Kingdom were purchasing reinsurance.
- (e) The utilisation of a captive insurance company can lead to a cost reduction. The captive controls its own investment profile and the group can ensure premiums paid reflect the true position of the group as opposed to being grouped with the cost of insurance of other companies in a conventional insurance model.

There are a number of particular advantages that Ireland offers to potential captive insurance companies.

#### **21.4.3.1 Taxation**

Ireland has an extremely competitive corporation tax of 12.5% for trading profits as compared to other EU Member States. In relation to policies where the risk is not located in Ireland there is no Irish stamp duty or tax payable on premiums. There is also a specific VAT exemption for entering into insurance and reinsurance transactions, and supplying related services, by insurance brokers and insurance agents.

#### **21.4.3.2 Double taxation treaties**

As noted previously Ireland has a comprehensive double taxation treaty network which can in certain circumstances eliminate withholding tax to the extent that an exemption is not already available under Irish domestic tax law (please see Summary Fact Sheet table at the end of this chapter for list of current tax treaty partners).

#### **21.4.3.3 Common law jurisdiction**

Ireland is a common law jurisdiction like the United States and has a legal system similar to that of England and as such the legal concepts will be familiar to the various insurance entities.

#### **21.4.3.4 US Federal excise tax**

Ireland's double taxation treaty with the US provides an exemption from Federal Excise Taxes that can lead to significant savings on high value deals.

#### **21.4.3.5 European union membership**

A captive insurance company regulated by the Financial Regulator can be utilised in other member states without the requirement for further regulation in the other EU country.

#### **21.4.3.6 Financial regulator**

A highly regarded financial regulator with a robust compliance culture of laws and regulation which is also cooperative and responsive to the needs of the captive insurance industry.

#### **21.4.3.7 Availability of experienced professionals**

The Irish market has a rich source of legal, insurance, banking and accounting expertise. There is a well established captive insurance industry with local and international captive insurance managers based in Ireland.

A reinsurer captive insurance company is required to notify the Financial Regulator prior to incorporation of certain key features relating to its business such as the identity of the directors and shareholder and the management and business proposed by the captive. Reinsurance companies are required to have a paid up share capital of EUR635,000. The company will not be subject to ongoing supervision by the regulator and will comply with the usual provisions for incorporated as set out under the Companies Acts.

Where the captive insurance company will be engaging in the direct writing of insurance business an authorisation will be required by the Financial Regulator. The principal requirement that the Financial Regulator will seek is that the company will have sufficient resources to meet its financial obligations, to adhere to certain guidelines as well as comply with the ongoing supervision such as filing annual returns with the Financial Regulator and more frequent returns for newly incorporated companies.

#### **21.4.3.8 Catastrophe bonds**

In recent times Ireland has proven successful at attracting catastrophe bond transactions, often referred to as ‘cat bonds’ and known as special purpose reinsurance vehicles (“SPRV”). They provide an alternative to reinsurance whereby a Section 110 SPV of the form discussed above is established to issue catastrophe bonds to transfer to the capital markets potential exposure to insurance claims resulting from catastrophic events. Ireland is an ideal location for the domicile of the SPV in such structured finance transactions for the same reasons as discussed above in relation to securitisations.

## 21.5 SUMMARY FACT SHEET

Location	Western Europe, European Union in the North Atlantic Ocean, west of Great Britain
Time zone	GMT
Population	4,239,848
Capital	Dublin
Airport(s)	Dublin International Airport, Shannon Airport, Belfast City Airport, Belfast International Airport, Cork Airport and regional airports
Language	English predominant, Gaelic
Currency	Euro
Political system	Republic, parliamentary democracy

International dialing code	00353
Legal system	Common Law, based on English common law.
Centre's expertise	Investment Funds, Structured Finance, Captive Insurance, Holding Companies
Personal income tax	20% up to certain threshold and 41% on excess with certain personal tax credits potentially available depending upon personal circumstances. Income levy on gross income the rate of which ranging from 2%, 4% and 6% depending upon earnings.
Corporate income tax	12.5% on trading income or 25% on non-trading income, with some exceptions
Exchange restrictions	None
Tax treaties	Extensive network of 56 treaties. Ireland has Double Taxation Agreements with the following countries: Australia, Austria, Bahrain, Belarus, Belgium, Bosnia Herzegovina, Bulgaria, Canada, Chile, China, Croatia, Cyprus, Czech Rep., Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, India, Israel, Italy, Japan, Korea (Rep), Latvia, Lithuania, Luxembourg, Macedonia, Malaysia, Malta,

	Mexico, Moldova, Netherlands, New Zealand, Norway, Pakistan, Poland, Portugal, Romania, Russia, Serbia, Slovak Rep., Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, UK, United States, Vietnam, Zambia and the U.S.S.R.
Permitted currencies	No restrictions
Minimum authorised capital	Plc – EUR38,100, one quarter paid up. Private limited company – none.
Minimum share issue	Nominal one share.
Shelf companies	Private Limited Company
Time taken to register new entity	Approximately five days.
Incorporation fees	Approximately EUR50 to EUR100.
Annual fees	Approximately annual return filing fee of EUR40.
Minimum number	One
Residency requirements	No residency requirement for directors,

	however directors meetings should be held in Ireland to ensure Irish tax residency of the vehicle.
Corporate directors	Corporate directors not permitted.
Meetings/frequency	Annually unless otherwise prescribed in the Articles of Association.
Disclosure	Share register open to the inspection by public.
Bearer shares	Permissible for public companies.
Minimum number	Plc – a minimum of seven shareholders. Private companies and investment companies generally a minimum of two shareholders (single member private companies are permitted).
Meetings/frequency	AGM – Annual. Not more than 15 months between meetings (or 18 months in first year). Single member private companies do not need to hold an annual general meeting.
Audit requirements	Company accounts must generally be audited, subject to minor exceptions for small companies etc.

Registered office	A company must maintain a registered office in Ireland.
Company naming restrictions	Certain restrictions such as the words "bank", "banker", "banking", words suggesting state sponsorship, offensive words etc and certain other restrictions.



**Conor Durkin**

*Conor Durkin is an Irish qualified lawyer working in Dechert's Dublin office. Conor specialises in the field of investment funds and asset management. He regularly advises leading international asset managers on carrying on business in Ireland and in particular on the establishment, structuring and operation of all types of collective investment schemes.*

*Conor has significant experience in advising investors, promoters, fund managers and investment banks on the ongoing operation of traditional and alternative investment funds including UCITS, hedge funds, funds of funds, and private equity funds.*

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**Joe Durkin**

*Joe Durkin is a corporate and banking lawyer based in the Abu Dhabi office of Davidson & Co. He is qualified to practice in three jurisdictions and acts regularly for banks and companies in a wide range of matters including corporate, energy, private equity, aviation, Sharia investments and international transactions.*

*Joe has advised companies including private enterprises, investment banks and funds on the regulatory environment of setting up new businesses in Ireland.*

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