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LAW FIRM

Corporate Round-Up 2015

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Welcome to the ByrneWallace Corporate Round-Up 2015.

Introduction

This publication outlines a summary of key developments in corporate law that have occurred during 2015 and provides you with tips and guidance on how to manage their potential impact on you and your business.

We also provide an overview of market trends, noteworthy transactions and corporate activity during 2015 and cast our eye to 2016 and what the future might hold.

In summary, our Round-Up includes the following:

- Knowledge Development Box – What's it all about? we address the frequently asked questions on the first OECD compliant patent box in the world.
- Regulation of Lobbying Act 2015: we explain the key measures introduced, who it will impact and what steps should be taken if you engage in lobbying activity.
- M&A Update and Trends: we discuss the key trends and reference some noteworthy transactions by sector during 2015. We also provide an outlook for 2016 on likely M&A trends.
- Technology and Life Sciences Update: we review the main fundraising activity in these sectors during 2015, address the hot topic of inversions and outline new regulations to be introduced which will impact the safety and timely introduction of medical devices and in-vitro diagnostic medical devices.
- Company Law/Corporate Governance: we highlight key actions to be taken to comply with the new Company Law regime introduced by the Companies Act 2014 including company conversions and new requirements for directors compliance statements. We also outline new upcoming changes that will mark the end of an era of unlimited non-filing structures.

1. Knowledge Development Box – What's it all about?

One year after the Knowledge Development Box ("KDB") was first announced, the Finance Bill 2015 outlined details of the scheme and of the qualifying activities which can avail of the newly introduced corporation tax rate of 6.25%.

What is it?

The purpose of the KDB is to encourage companies to develop intellectual property in Ireland and thereby engage in substantive operations that have a high 'value-add' for the Irish economy.

The KDB is the first OECD compliant patent box in the world and offers certainty to those who see the KDB as an important new dimension to Ireland's best in class tax offering.

How it works?

The KDB will apply a corporation tax rate of 6.25% to profits arising from certain intellectual property assets which are the result of qualifying research and development activity carried out in Ireland.

The assets which qualify include patented inventions (including patents pending), copyrighted software, plant breeders' rights and supplementary protection certificates for medicinal products and for plant protection products.

Who can avail of it?

The KDB will be relevant for all companies that acquire or develop qualifying intellectual property assets, namely patented inventions or copyrighted software programmes.

The KDB framework also allows certain assets termed "intellectual property for small companies" to qualify for the KDB tax rate and additional legislation is required to activate this. This element of the KDB is aimed at small companies that would be less likely to patent intellectual property due to cost or other factors.

When can you apply the rate?

It is available to companies for accounting periods commencing on or after 1 January 2016 and before 1 January 2021.

A claim must be made in a company's corporation tax return within 12 months of the end of the relevant accounting period.

2. Regulation of Lobbying Act 2015: registration and disclosure requirements for those carrying out lobbying activities

The Regulation of Lobbying Act ("RLA") came into effect on 1 September 2015 and introduced registration and disclosure requirements for those carrying out lobbying activities.

The RLA aims to make the process of lobbying more transparent and to publically identify those communicating with the government and senior civil and public servants on specific policy, legislative matters or prospective decisions.

It provides for the establishing and maintaining of a web-based register of persons who carry on lobbying activities and also includes restrictions and conditions on the taking up of employment by certain designated officials for a specified period of time where a possible conflict of interest arises.

How will it impact you?

Anyone lobbying on or after 1 September 2015 is required to keep a record of their activities and to make a return within 21 days of the end of every four month period (the first period begins on 1 September 2015).

The first return date is 21 January 2016 and this is also the first deadline for registering as a lobbyist (if a person carried out lobbying activities during the period from 1 September 2015 to 31 December 2015).

Who is affected by the Act?

A person may be carrying out lobbying activities if they are a professional lobbyist being paid to communicate on behalf of a client, if they are lobbying on behalf of themselves, their business or organisation or they are lobbying about the development or zoning of land.

To be lobbying a person must be communicating either directly or indirectly with certain designated officials in relation to a matter which relates to:

(a) the initiation, development or modification of any public policy or of any public programme;

(b) the preparation or amendment of any law (including secondary legislation such as statutory instruments and bye-laws); or

(c) the award of any grant, loan or other financial support, contract or other agreement, or of any licence or other authorisation involving public funds;

other than the implementation of any such policy, programme, enactment or award or any matter of a technical nature only.

What should you do if you or your business engages in lobbying?

Businesses and other organisations should review their contact with public officials to determine whether they would be considered "relevant communications" under the RLA. Internal policies may need to be adopted to ensure that employees or members of an organisation are aware of their disclosure and registration obligations. Businesses should also be acutely aware that their lobbying position will become public information and they should ensure that they are satisfied to be publically associated with it.

3. M&A Update and Trends

Overview

After positive signs in 2014, the improved confidence in the Irish economy has given rise to an increase in M&A activity in 2015 and it has been reported that the first half of the year was ahead of 2014 in both deal volume and value.

Enhanced access to capital including an increase in the availability of debt and equity finance via alternative lending is fuelling growth; and this has been evidenced by the broad range of deals across a range of industries in 2015.

In fact, it has been reported that by the end of the second quarter of 2015 Ireland had the third largest alternative lender market in the EU.

Although there has been strong interest from overseas in the Irish market, a significant percentage of purchasers in deals involving Irish firms were domestic companies.

Key Sectors & Transactions

The health and pharmaceutical sector was the most active during the first half of 2015 and it is expected that this trend will continue for the remainder of 2015. However, a number of other sectors notably, the Technology Media & Telecommunications (TMT) sector and the industrial and leisure sectors, have also performed strongly:

Life Sciences, Health & Pharmaceutical

A transaction of note was the acquisition of Waterford-based pharmaceutical company EirGen by US drugs company OPKO Health for $135 million which would have been dwarfed by what had been expected to be one of the largest deals of the year, being the failed hostile takeover bid of Perrigo by Mylan for $26 billion. Mylan's bid failed when only approximately 40 per cent of Perrigo shares were tendered, short of the required 50 per cent necessary to move the takeover forward. The developments around the proposed acquisition by Pfizer of Allergan are anticipated to remain in the spotlight for the time being and if successful would make Ireland home to the world's largest drugs business.

Natural Resources

In the industrial sector, Emirates National Oil Company took control of Irish exploration company Dragon Oil, receiving sufficient acceptances of its €5.7 billion offer to compulsorily acquire any remaining Dragon Oil shares.

TMT

In one of the largest technology deals of the year, US-based online payment processing company, Global Payments purchased Ireland's Realex Payments for €115 million.

Separately, ByrneWallace advised Clavis Insight, the industry leader in providing ecommerce store analytics for global consumer goods brands, on a US$20 million equity investment from private equity firm Accel-KKR and existing investors. In recent years there have only been a handful of venture capital and development capital transactions in excess of US$20 million in Ireland and the Clavis Insight deal was Accel-KKR's first venture capital investment in Ireland showing the interest of foreign capital in looking to Ireland for quality opportunities.

Hotel, Tourism & Leisure

There has been resurgence in the hotel and leisure market with it being reported that more hotel sales occurred in Q1 2015 than in the whole of 2014 and our leisure and property teams all report very strong levels of activity.

Q1 2015 saw the purchase of the Jury's Hotel Group by US private equity group Lone Star Funds for €900m following approval by the Competition and Consumer Protection Commission.

The high profile takeover of Aer Lingus by International Consolidated Airlines Group (IAG) for €1.36 billion is also to be noted.

M&A Outlook for 2016

We are optimistic that the coming year will see increasing activity levels in the M&A landscape. With more finance options available, very benign currency and interest rate conditions, and continuing economic growth, buyers and sellers are transacting with a greater degree of confidence in the market.

4. Technology and Life Sciences Update

Fundraisings

The technology, health and pharmaceutical sectors have had a very buoyant year and were the most active sectors in the market in the first half of 2015. The recently published Irish Venture Capital Association (IVCA) Venture Pulse Survey Q1-Q3 (which tracks funding raised from domestic and international venture capital funds) shows that Irish SMEs in this space raised €415 million during the first nine months of 2015, an increase of 32% on the same period last year.

As shown in the survey, ByrneWallace advised in transactions representing approximately one quarter of the total funds raised during this period, a number of which ranked amongst the top ten largest fundraisings for 2015 year to date - for example Altan Pharma (€41.3 million), 3D4Medical (€15 million), and Heart Metabolics (€13.5 million). The firm also advised Clavis Insight on its US$20 million fundraising by Accel-KKR and existing investors. The fundraising by Altan Pharma ranks as one of the largest fundraisings by an Irish SME in 2015 according to the survey.

Hot topic: Inversions

Tax inversions, which mainly consist of the movement of the tax domicile of a corporate group away from one jurisdiction in the context of an acquisition or of a corporate re-organisation, have been a key element of many transactions in the last two years.

Inversions remain a topical issue for Ireland, particularly following the recent news of the proposed acquisition by Pfizer of Allergan, which would make Ireland home to one of the world's largest drugs businesses if Pfizer complete a tax inversion by re-domiciling to Ireland.

However, inversions are increasingly becoming a hot political issue in the US and during both last year and this year the Obama administration took steps to try to impede the inversion process for companies. The proposed Pfizer/Allergan deal has come under the spotlight and Pfizer is already facing political pushback. This is only likely to intensify with the US presidential campaign underway.

One to watch - New regulations updating EU rules on medical devices and in-vitro diagnostic medical device

In October 2015, three years after they were first published, the European Council reached a general agreement on two draft regulations to replace the current directives aimed at modernising the European regulatory framework on medical devices and in-vitro diagnostic medical devices ("IVDs").

The main objective of the two draft regulations is to ensure the safety of medical devices introduced to the market and to develop an adequate legislative framework which allows new innovative devices to reach patients in a timely manner.

The goal is to achieve this aim by strengthening the rules on placing devices on the market and tightening surveillance once they are available.

These regulations are expected to be finalised, adopted and published in 2016, with a further transition period of several years. For IVDs it is uncertain whether the transition period will be three or five years, meaning the final implementation date could be 2018 or 2020.

5. Company Law/Corporate Governance

Conversion Requirements & Key Deadlines

The Companies Act 2014 (the "Act") entered into force on 1 June 2015. While its main purpose is to consolidate and streamline Irish company law, it has also modernised and amended the current law and all companies need to be aware of how it impacts on them including in relation to corporate structure, corporate governance and future re-organisations and transactions.

Most of the key changes in the Act are aimed at existing private companies ("EPCs") and some of those changes require practical steps in the short term:

- Directors of all EPCs are required to convert their companies either to:
    - the new model of private company limited by shares (the "LTD") before 30 Nov 2016,

or to

- - the alternative company type, the designated activity company (the "DAC") before 31 Aug 2016.

Failure to convert by the statutory deadlines will result in an EPC automatically converting to the LTD company form.

- As part of the conversion process, there is a requirement to replace the current memorandum and articles of association of each EPC with a new form of constitution which is compliant with the Act.
- For any EPC which converts to a DAC, they need to consider the practical knock-on effects of the related name change (to include the suffix DAC in the company name), including:
  - changes to letterhead;
  - name plate;
  - signage;
  - company seal;
  - website;
  - business cards etc; or
  - any third party consent or notification requirements on a change of name.

It is expected that the majority of EPCs will choose to convert to the LTD company type which benefits from a number of innovations under the Act including unlimited corporate capacity, a one-document constitution, the option not to hold physical AGMs and the option to have only one director.

Directors of EPCs are strongly advised to convert well in advance of the statutory deadline as automatic conversion may lead to uncertainty as to a company's constitution and the LTD company form may not be the appropriate corporate structure for all EPCs.

New requirements: Directors Compliance Statements

One of the key corporate governance changes to be introduced by the Act is a requirement for companies which meet certain stated criteria to comply with the new directors' compliance statement (the "DCS") regime for financial periods beginning on or after 1 June 2015.

The new DCS regime will apply to "in scope" companies namely all public limited companies (except investment companies) and all other large private limited companies with a balance sheet total of more than €12,500,000 and turnover of more than €25,000,000. Unlimited companies are not subject to the DCS regime.

The directors of "in scope" companies must make an annual statement in the directors' report forming part of the company's audited financial statements (a Compliance Statement):

- acknowledging that they are responsible for securing the company's compliance with its relevant obligations on indictable offences under the Act as well as obligations under tax law; and
- with respect to each of three specified assurance measures, confirming on a comply or explain basis either that they have been implemented, or, if not, specifying the reason why this is not the case.

Failure by an "in scope company" to include a Compliance Statement in its directors' report, will constitute a criminal offence under the Act and each director in default will be guilty of a Category 3 Offence (i.e. liable on summary conviction to a €5,000 fine or imprisonment for 6 months, or both). However, the desire to avoid reputational damage is likely to be an equal or greater deterrent.

Directors of "in scope" companies need to develop a compliance policy statement and, behind that, put in place appropriate policies, arrangements and structures designed to secure that company's material compliance with its relevant obligations and regularly monitor the effectiveness of those arrangements and structures.

End of an era - Unlimited non-filing structures

A change to Irish company law is on the horizon which will mean the end of unlimited non-filing structures in their current form.

Unlimited non-filing structures are popular with Irish SMEs and work by utilising an exception under EU accounting directives to the categories of companies which are required to publicly file financial statements.

The Act retained the current law permitting non-filing structures but the new EU Accounting Directive (Directive 2013/34/EU) (the "Directive") appears to spell the end of this filing exception.

The usual structure involves re-registering the relevant Irish limited company as an unlimited company and ensuring that its members are a non-EU registered limited company (+99% holding) and a non-EU registered unlimited company (usually holding 1 share).

The presence of a non-EU registered limited company and unlimited company in the membership of the Irish unlimited company takes it out of the scope of Irish unlimited companies which are required to publicly file financial statements.

Companies in jurisdictions where there is no requirement to publicly file financial statements under applicable local laws are usually used, as this ensures that financial information remains confidential right through the corporate chain.

Ireland did not transpose the Directive by the deadline of 20 July 2015. The transposing legislation, the Companies (Accounting) Bill, 2015 is currently under preparation and while we understand that the intention is to publish before year end, that has not occurred yet and there has been no recent update on timing. Government sources have indicated that the new rules may apply to financial year 2016 financial statements but the Directive appears to leave some flexibility as to the first financial year to which the rules are applied. We await publication of the transposing legislation in order to clarify the situation for affected Irish companies.

For further information or advice on any of the matters outlined in this publication, please contact a member of our Corporate team.

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