DILLON EUSTACE

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May 2016

Corporate Bulletin

Welcome to the Dillon Eustace corporate bulletin. We have set out some of the recent legal developments which we feel may be of interest to you and/or your business.

In this edition we discuss the effect of the **revised Payment Services Directive** which came into force in January 2016.

We also review recent **developments in the area of Anti-Money Laundering** and provide an update on **Data Protection issues and developments**.

We assess the **Irish Stock Exchange's Review of 2015**. We also discuss the recent ruling of the High Court which limits **the statutory powers of the Irish Competition Authority Regulator**.

We review the **European Commission's Recommendation on reinforcing their tax treaties** against abuse by aggressive tax planners. Finally, we discuss further upcoming **changes in the area of company law and the Companies Act 2014**.

If you wish to discuss anything contained in this bulletin please contact us.

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Companies Act 2014 – Transition Period for Conversion to a Designated Activity Company Expires on 31 August 2016

All companies which are required, or wish, to convert to a designated activity company under the Companies Act 2014 (the "Act") need to do so before 31 August 2016.

Under the Act, all private limited companies need to make a decision whether to convert to:

1. a company limited by shares (LTD); or
2. a designated activity company (DAC); or
3. another type of company (public limited company, Societas Europaea).

The Act provides for an 18 month transition period, commencing on the commencement date (1 June 2015). The Act goes on to provide that an existing private company may re-register as a designated activity company by passing an ordinary resolution, not later than 3 months before the expiry of the transition period, resolving that the company be so registered. Therefore companies which intend to convert to a DAC must do so before 31 August 2016.

Thereafter, should the company fail to convert, it will be deemed to be a LTD and may only re-register following the re-registration procedure under Part 20 of the Act or following a court order under section 57.

Is the Company engaged in lending money or extending credit?

If a company believes the LTD option is the more appropriate form of company for it, it should first consider whether it is in the business of lending money or extending credit? As you may be aware, certain companies such as insurance undertakings and credit institutions are required to convert to a DAC under the Act. The requirement for credit institutions to convert to a DAC was aimed at banks and lending institutions.

However the definition of credit institution under the Act is very broad and, as a result, appears to catch any private limited company which lends money in the ordinary course of business ("*a company or undertaking engaged in the business of accepting deposits or other repayable funds or granting credit for its own account*").

This is acknowledged as an error in drafting and is expected to be rectified in an upcoming Bill. However we have no way of knowing when this will be.

In the meantime, while a company may not be a credit institution from the perspective of the Central Bank, it could be classed as a credit institution for the purposes of the current definition in the Act where it is engaged in the activity of lending.

This would mean that it would be obliged to convert to a DAC and should do so before 31 August 2016. There are different views as to whether this catches all lending of any nature (no matter how ad hoc) by a company or whether it should be interpreted less strictly as catching more systematic type lending activity (such as by a treasury company within a group). If you think this may be an issue, we can discuss further.

Payment Services Directive

(i) Revised Payment Services Directive (the "PSD2") comes into effect and the European Banking Authority (the "EBA") Discussion Paper on future Draft Regulatory Technical Standards (the "RTS") on strong customer authentication and secure communication under revised PSD2

Following its publication in the Official Journal of the EU on 23 December 2015, the PSD2 entered into force on 12 January 2016. Member States have 2 years from that date to transpose it into national law.

- Introduction of strict security requirements for the initiation and processing of electronic payments and the protection of consumers' financial data;
- Opening the EU payment market for companies offering consumer or business oriented payment services based on the access to information about the payment account – the so called "payment initiation services providers" and "account information services providers";
- Enhancing consumers' rights in numerous areas, including reducing the liability for non-authorised payments, introducing an unconditional ("no questions asked") refund right for direct debits in euro; and

- Prohibition of surcharging (additional charges for the right to pay e.g. with a card) whether the payment instrument is used in shops or online.

The EBA is mandated to provide RTS under the PSD2 by January 2017. The RTS will specify the requirements of strong customer authentication, exemptions from the application of these requirements, requirements to protect the user's security credentials, requirements for common and secure open standards of communication and security measures between the various types of providers in the payment sector.

To assist in drafting the RTS, the EBA published a discussion paper in December 2015 with responses to have been submitted up until 8 February 2016. No update on the RTS has been provided as of yet by the EBA since this deadline passed.

Fourth Anti-Money Laundering Directive

(ii) Department of Finance and the Department of Justice and Equality publish consultation paper on Member States discretions in transposing Fourth Anti-Money Laundering ("AML") Directive

On 29 January 2016, the Department of Finance and the Department of Justice and Equality (the "**Departments**") issued a consultation paper on the transposition of the Fourth AML Directive into Irish law and the discretions available to Ireland (the "**Consultation Paper**").

Some of the areas where the Consultation Paper requested feedback included:

- *Beneficial ownership registers (corporate)* – The Fourth AML Directive requires Member States to ensure that corporate entities obtain and hold accurate information on their beneficial ownership which can be made available when due diligence is being undertaken on them. The information on beneficial ownership is required to be held in a central register and Member States are obliged to ensure that the information on beneficial ownership is accurate, adequate and current. Member States must also ensure that the beneficial ownership information register is readily accessible to competent authorities without restrictions, obliged entities within the due diligence framework and any person or organisation who can demonstrate a legitimate interest. The Consultation Paper asked for feedback on the level of access to the register for corporate and other entities and further asked whether access should be extended to the public at large. It

also asked for views as to whether beneficial owners should be required to apply, on a case-by-case basis, to restrict access to certain information and, if so, what circumstances and information could be restricted.

- *Beneficial ownership register trusts* – Under the Fourth AML Directive Member States are required to hold trust-related information in a central register where the trust generates tax consequences, with the Revenue Commissioners indicating its openness to being the body to maintain such a register. The Consultation Paper suggested that evidence of the generation of a tax consequence could be the receipt by the trustees of income or capital gains, disposal of income or capital assets by the trust and/or the movement of funds by the trust. The Consultation Paper asked for feedback on the registration requirements for trusts and on the list of tax consequences, as well as any other views on how this article may be transposed.

The Consultation Paper also asked for views on other areas of the Fourth AML Directive such as the ability to exempt certain gambling services from AML/CFT laws, the discretion to allow certain obliged entities not apply customer due diligence measures, the discretions available in relation to due diligence carried out in high risk jurisdictions by wholly owned subsidiaries of entities established in the EU and the appointment of a central contact point for e-money issuers.

The Consultation Paper can be accessed at the following link:

http://www.finance.gov.ie/sites/default/files/AMLD National Discretions Consultation Paper.pdf

The deadline for responses to the Consultation Paper was 4 March 2016. The responses are currently being considered by the Departments.

(iii) Commission establishes Action Plan for strengthening the fight against terrorist financing

On 2 February 2016 the Commission published its action plan aiming to strengthen the fight against terrorist financing (the "**Action Plan**"). The Action Plan seeks to prevent the movement of terrorism-derived funding and aims to target the sources of terrorist funding. It also comments on the international dimension to terrorism and the need for the EU to be an active player on the international scene in the fight against terrorist financing to include closer

cooperation with third countries in identifying terrorist entities and being at the forefront of international forums on the issue of terrorist financing.

In order to better prevent the movement of funds and identify terrorist financing, the Action Plan proposes certain amendments to the Fourth AML Directive, as follows:

- *Concrete effect to the EU "list of high risk third countries*" – Under the Fourth AML Directive, where a country is listed as having strategic deficiencies in the area of AML or CTF, EU obliged entities will have to apply enhanced due diligence measures, however the exact nature of these measures is not currently specified. The Action Plan recommends clarifying the obligation in respect of applying the enhanced due diligence measures.

- *Virtual currency exchange platforms* – Virtual currencies are not currently regulated at EU level and lack the reporting mechanism currently found in the mainstream banking system to report suspicious activity. On this basis, the Action Plan seeks to bring the anonymous currency exchanges under the control of competent authorities by extending the scope of the Fourth AML Directive to include virtual currency exchange platforms.

- *Prepaid instruments* –The Commission is currently considering how to address the concerns raised by the anonymity of such general purpose cards without eliminating the benefits that they offer in their normal day-to-day use. The Commission stated that it will present further changes to the Fourth AML Directive, which could focus in particular on reducing existing exemptions such as thresholds below which identification is not required, notably for cards used face-to-face, and requiring customer identification and verification at the time of online activation of the prepaid cards. The Commission is currently exploring the detailed design of such measures, taking into account their impact and the need for proportionality.

- *Centralised bank and payment account registers and central data retrieval systems* – The Commission proposes amending the Fourth AML Directive to ensure that each Member State must establish centralised bank and payment accounts registers or electronic data retrieval systems as, currently, Member States are not bound by EU legislation to maintain such registers or retrieval systems.

The Commission has also said in the Action Plan that it will adopt an EU blacklist to identify high risk third countries with strategic deficiencies in their AML/CTF by the second quarter of

2016 at the latest. It also said that it will publish a report on a supranational assessment of ML and TF risks and recommendations to Member States on measures suitable to address those risks by the second quarter of 2017.

The full Action Plan can be found by accessing the following link: https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-50-EN-F1-1.PDF

Data Protection

(i) European Data Protection Supervisor: EU Institutions making steady progress

A report was published on 21 January 2016 by the European Data Protection Supervisor (the "**EDPS**"), entitled "*Measuring compliance with data protection rules in EU institutions*", (the "**Report**") on the levels of compliance by EU institutions with data protection obligations and privacy principles across EU services. In general, the Report found evidence of high levels of compliance among the EU institutions.

The Report is based on a survey conducted by the EDPS, issued to 61 EU institutions, on the state of registers and inventories which contain information on each operation involving the processing of personal data. Other areas addressed by the survey included data transfers to non-EU countries and how data protection officers are involved in the development of new processing operations.

The full Report can be accessed at the following location:

https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Inquiries/2016/16-01-21_Report_Survey_2015_EN.pdf

(ii) Data Protection Commissioner (the "DPC") outlines priorities for 2016

At the National Data Protection Conference held on 28 January 2016, the DPC outlined the priorities for the upcoming year. These priorities build on the work completed in 2015 and address the challenges which the DPC expects to face in 2016.

The priorities for 2016 include:

- *Resource expansion* – A key issue for the DPC is the expansion of resources, involving the recruitment of more staff such as lawyers, audit staff, a new communications director and call centre staff. It also includes moving the office of the DPC to new premises within Dublin city centre. The aim with the expansion of resources is to improve the performance and quality of response by the DPC.

- *Guidance and DPC website* – A new DPC website and more streamlined guidance were listed as two areas which will be focused on by the office of the DPC in 2016.

- *Challenges faced by big data* – The DPC highlighted the need to ensure that the development of big data was matched with adequate monitoring to ensure that the collection and processing of data would not breach the rights of the subjects. Health data was also highlighted by the DPC as a new area requiring monitoring, due to the growth in wearable health technology and mobile applications.

- *Social media* – An area which has been the subject of focus over the past number of years, the DPC mentioned the consultation carried out with Facebook and the recommendations which followed, including cross-device opt-outs and data subject access requests.

- *WiFi tracking* – Noting that guidance from the Article 29 Working Party was imminent, the DPC discussed the area of WiFi tracking which involves data subjects connecting to WiFi networks and providing data which can then be combined with smart video analysis to allow for high level analytics to be carried out.

- *Special Investigations Unit* – Within the office of the DPC, a new special investigations unit has been established to investigate and prosecute for data legislation breaches. It also assists the Office of the Information Commissioner in the United Kingdom.

- *Security* – The DPC talked about security and the necessity of having effective security surrounding the processing of data. It was highlighted that encryption is not solely the answer to resolving security issues, but it must be used in the right manner, at the right time and during the entire course of the data retention.

- While the above were the specific issues highlighted as areas on which it would focus during 2016, the DPC also spoke of the General Data Protection Regulation (5455/16) and the work being carried out by the office of the DPC in preparation for its

implementation, once it has been adopted by the Council and approved by the European Parliament.

(iii) Notice 2016/C 33/01

On 28 January 2016, a notice from the European Data Protection Supervisor (the "**EDPS**") on establishing an external advisory group on the ethical dimensions of data protection (the "**Notice**") was published in the Official Journal of the EU.

The Notice establishes an external advisory group on the ethical dimensions of data protection (the "**Advisory Group**") whose tasks shall include:

- An analysis of the ethical dimensions of data protection;
- Submitting recommendations to the EDPS upon request;
- Producing at least two public reports;
- Submitting research suggestions;
- Including experts in its work where experts can bring additional knowledge and experience; and
- Presenting assumptions to a critical audience in order to receive feedback on the research it carries out.

The Advisory Group will sit for a two year period from 1 February 2016 to 31 January 2018 and will consist of six members with considerable background experience in the area of the ethical dimension of data protection, appointed by the EDPS, with a chair appointed from the six members. No remuneration will be received for carrying out the work of the Advisory Group except for certain expenses and members of the public have access to the documents produced by the Advisory Group in accordance with Regulation (EC) 1049/2001.

A copy of the Notice can be found at the following link:

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:033:FULL&from=EN

(iv) The European Commission Releases EU-US Privacy Shield

Following the European Court of Justice ruling in October 2015, that the Safe Harbour framework was invalid, the Commission published the texts of the replacement EU-US Privacy Shield (the "**Privacy Shield**") on 29 February 2016. The Commission also made public a draft adequacy decision (allowing for the transfer of EU citizens' data outside of the EU) including the Privacy Shield Principles companies have to abide by, as well as written commitments by the US Government (to be published in the US Federal Register) on the enforcement of the arrangement.

The main aim of the new Privacy Shield is to safeguard the data on EU citizens by providing greater transparency in the transfer of their data to the US as well as placing stronger obligations on US companies to protect the data. The US Department of Commerce (the "**DoC**") and Federal Trade Commission (the "**FTC**") are required to carry out stronger monitoring on US entities and work more closely with European Data Protection Authorities to ensure that the Privacy Shield is being properly implemented.

The Privacy Shield involves US companies registering to be on the Privacy Shield list, following which they will self-certify annually that they comply with the relevant data protection requirements. They will also display their privacy policies prominently on their websites. The DoC monitors the compliance of US companies with the Privacy Shield on an ongoing basis and can remove companies from the Privacy Shield list should it find that companies are not complying in practice with the Privacy Shield, for example, where privacy policies displayed on US companies' websites are not in line with the Privacy Shield principles. The FTC has a civil law enforcement authority to promote consumer protection and competition across the US so will be in charge of enforcement of the Privacy Shield.

A key benefit to EU citizens under the Privacy Shield is in respect of redress which they can seek, both cost and ease benefits. Under the Privacy Shield, any EU citizen has the following redress options available to them:

- *Complain directly to the company* – Companies will then have 45 days within which they must respond to the complaint.

- *Alternative Dispute Resolution* – Available free of charge to complainants, companies which register to be on the Privacy Shield list must designate a body either in the US or the EU to handle and resolve any complaints made against them.

- *Ombudsman mechanism* – An ombudsman mechanism, independent but located within the US Department of State, will follow-up complaints and enquiries by individuals and inform them whether the relevant laws have been complied with. This follows the US government giving the EU written assurance from the Office of the Director of National Intelligence that any access of public authorities for national security purposes will be subject to clear limitations, safeguards and oversight mechanisms, preventing generalised access to personal data.

- *Arbitration* – As a last resort, where other means have failed to resolve the dispute, complainants can engage the arbitration mechanism. This consists of a Privacy Shield Panel who can take binding decisions against US companies self-certifying on the Privacy Shield list.

The Judicial Redress Act passed on 10 February 2016, together with the Privacy Shield, provides an additional redress option for EU citizens. It allows for non-US citizens to take private action in US courts for alleged misuse of their personal data.

An annual review of the functioning of the Privacy Shield will take place between the Commission and the DoC, including the commitments and assurance as regards access to data for law enforcement and national security purposes. A public report will then be presented by the Commission to the European Parliament and Council on foot of the joint review. It is also envisaged to hold a privacy summit on an annual basis with NGOs and relevant stakeholders on developments in US privacy law and the impact it has on EU citizens.

The next step in the implementation of the Privacy Shield involves an Article 29 Working Party, consisting of representatives of EU Member States' data protection agencies, reviewing the legal texts of the Privacy Shield and assessing whether they meet the requirements of EU data protection law. On the US side, the necessary preparations are currently being made for the framework to implement the Privacy Shield.

For more information on the EU-US Privacy Shield, please see the following link:

http://europa.eu/rapid/press-release_IP-16-433_en.htm

(v) European Commission publish EU-US Privacy Shield FAQ document (the "FAQ")

On 29 February 2016, in conjunction with the publication of the EU-US Privacy Shield, the Commission issued the FAQ to assist stakeholders understanding and to address any queries arising in respect of the Privacy Shield.

The FAQ addresses, inter alia, the following issues:

- The main differences between the old Safe Harbour arrangement and the Privacy Shield;
- How the Privacy Shield will operate in practice;
- How Europeans can get redress in the US in the event their data is misused by commercial companies
- The role of the Ombudsperson mechanism;
- The role of the Judicial Redress Act; and
- The EU-US data protection "Umbrella Agreement".

A copy of the FAQ is available at the following link:

http://europa.eu/rapid/press-release_MEMO-16-434_en.htm

Irish Stock Exchange ("ISE")

(i) ISE publish review of 2015

On 20 January 2016 the ISE published a review of the year 2015 (the **"Review"**). The Review highlighted a successful year for the ISE and its markets. There are currently in excess of 34,300 securities listed from over 80 countries on its markets, and the ISE is now ranked first for listing bonds and investment funds worldwide with 551 new issuers joining the ISE's debt markets in 2015.

Companies trading on the ISE raised €3,124 million in equity funds from international investors during 2015. Four initial public offerings ("**IPOs**"), from a range of sectors including life sciences, retail, banking and technology, raised in excess of €980 million.

Additionally, equity trading experienced growth of 26% in 2015 with in excess of 5.6 million equity trades carried out on the ISE's Main Securities Market and Enterprise Securities Market.

The ISEQ Index stood at 6,792, up 30% during the year and was one of the best performing indices in Europe, having doubled in value over the past three years. The ISEQ 20 (representing the 20 most liquid and largest companies on the ISE) rose by over 30.7% throughout the year and has experienced a growth of 105% over the previous three years.

A copy of the Review is available at the following link:

http://www.ise.ie/Media/News-and-Events/2016/Irish-Stock-Exchange-year-in-review-2015-infographic-pdf.pdf

Dawn Raid Powers of the Competition and Consumer Protection Commission ("CCPC") restricted by the High Court

(i) Statutory Powers of CCPC limited in High Court Decision

The powers of the CCPC to carry out dawn raids have been limited in a decision handed down by the High Court, on 6 April 2016. It was found that the CCPC had unlawfully seized material during a dawn raid which was carried out in 2014. The CCPC breached their warrant when they seized the contents of entire email accounts of an employee of the raided company, with the Court finding that irrelevant records were likely to have been seized. Judge Barrett granted an injunction restraining the CCPC from accessing some of the documents and files that were seized in the dawn raid.

While the power of the CCPC to seize material is somewhat extensive, Judge Barrett found that there was an obligation on the CCPC to seize only relevant documents. This injunction is pending an independently supervised agreement between the parties involved in relation to deciding which documents are relevant or not.

The legislature may have to examine the legality of such broadly drafted legislation regarding investigative powers.

European Commission Anti-Tax Avoidance Package Recommendation

(i) European Commission Recommendation on Tax Treaties

The European Commission introduced its anti-tax avoidance package in January 2016 with the aim of implementing fairer, simpler and more effective corporate taxation in the EU. This included a recommendation advising EU Member States on reinforcing their tax treaties against abuse by aggressive tax planners, in an EU-law compliant way.

The Recommendation states that where Member States, in tax treaties, include a principal purpose test ("PPT") based general anti-avoidance rule in application of the template provided for in the OECD Model Tax Convention, Member States are encouraged to insert in them the following modification:

"Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that ***it reflects a genuine economic activity*** or that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention."

It should be noted that the recommendation does not require Member States to include a PPT in their double tax treaties.

The Recommendation also encourages Member States, in their tax treaties, to implement and use the proposed new provisions to Article 5 of the OECD Model Tax Convention in order to address artificial avoidance of permanent establishment status as drawn up in the final report on Action 7 of the Action Plan to address Base Erosion and Profit Shifting ("BEPS").

The Recommendation is not legally binding and thus its relevance is largely unclear at this point.

Company Law and the Companies Act 2014

(i) Further Changes in the area of Company Law and the Companies Act 2014

While the Companies Act 2014 has been in force since 1st June 2015, a number of further changes in the area are set to be implemented over the next year or so. The proposed changes include:

- *Companies (Accounting) Bill 2016* – the purpose of this legislation is to transpose Directive 2013/34/EU (the Accounting Directive) into Irish law. The Directive contains some amendments, but largely consolidates and restates existing EU accounting law. It is understood that the new Bill will make a number of corrections to technical errors of the Companies Act 2014. There will also be changes particularly to the accounting requirements for small companies in relation to audit exemptions.

- *4th Anti-Money-Laundering Directive* – the deadline for transposition of the Directive is 26th June 2017 and as mentioned above, new disclosure requirements relating to the beneficial ownership of shares in Irish companies will be introduced. While the extent of these changes is currently not clear, there is growing concern about the onerous obligations stemming from the creation of a central register in Ireland.

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