Corporate Quarterly Legal Update

Period covered:
1 April 2014 – 30 June 2014

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Companies Bill 2012 Update

On 17 June 2014, the Seanad Committee Stage of the Companies Bill was completed and all of the 170 amendments tabled by the Department of Jobs, Enterprise and Innovation were agreed. The Bill will now be considered by the Seanad at the Report Stage, however a date has not yet been fixed for this stage.

It is anticipated that the Companies Bill will be enacted towards the end of 2014 and will be effective some time in 2015. Private companies limited by shares will be given an 18 month transitional period to take certain action as a result of the introduction of the Act. The Minister for Jobs, Enterprise and Innovation may choose to extend this by a further 12 months. The transitional period will give directors and shareholders the time to decide between registering as a new-form company ("**CLS**") and registering as a designated activity company ("**DAC**"). Where a company takes no action, it will be deemed to have become a CLS on the expiry of the transition period. It is to be noted that many of the changes will, however, come into effect immediately.

Further information relating the technical amendments of the Companies Bill are available accessing the following link:

http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/seanad2014061000040?opendocument

Credit Rating Agencies Regulation

(i) FSB Published Thematic Review of its Principles for Reducing Reliance on CRA Ratings

On 12 May 2014, the Financial Stability Board ("**FSB**") published its results from the thematic review of the FSB Principles for Reducing Reliance on CRA Ratings.

This final report focuses on the action plans developed by national authorities to implement the Roadmap which was agreed in October 2012. The first stage of the review, published in August 2013, comprised a structured stock-taking of references to CRA ratings in national laws and regulations. The final report found that, although good progress has been made toward removing references to CRA ratings from laws and regulations, mechanistic reliance can also come from market practices and contracts.

The FSB want authorities to encourage market participants to review provisions within their private contracts which represent mechanistic reliance on CRA ratings (e.g. ratings triggers).

The Review published by the FSB is available at the link set out below:

http://www.financialstabilityboard.org/publications/r_140512.pdf

(ii) ESMA Published Updated Q&A on CRA Regulation

On 2 June 2014, ESMA published its second updated questions and answers ("**Q&A**") on the Credit Rating Agencies Regulation ("**CRA Regulation**"). The update affects the following Q&As:

- Question 2, relating timing of publication of sovereign ratings;
- Question 3, referred to deviations from the sovereign ratings calendar; and
- Question 4, regarding investments in credit rating agencies.

The purpose of this document is to provide clarity on the requirements and practice in the application of the CRA Regulation.

All the Q&As may be viewed at the following link:

http://www.esma.europa.eu/system/files/2014-578_qas_on_cra3.pdf

(iii) ESMA Publishes Final Report on Draft Regulatory Technical Standards Under CRA III

On 24 June 2014, ESMA published its Final Report on draft Regulatory Technical Standards ("**RTS**") required under the CRA Regulation, which covers the following areas:

- Disclosure requirements on structured finance instruments;
- The European Rating Platform; and
- The periodic reporting on fees charged by credit rating agencies ("**CRAs**").

The draft RTS focuses on the information that the issuer, originator and sponsor of a structured finance instrument must publish. The draft RTS incorporates, where possible, existing disclosure and reporting requirements adopted by the European Central Bank and Bank of England to avoid duplication and overlap. The disclosure obligations also provide for standardised investor reporting and disclosure of transaction documents.

The draft RTS on the new European Rating Platform defines the content and presentation of rating information, including structure, format, method and timing of reporting that credit rating agencies should submit to ESMA for credit ratings that are not exclusively produced for and disclosed to investors for a fee. The European Rating Platform website will be set up and run by ESMA.

The draft RTS on fees charged by CRAs to their clients defines the content and the format of periodic reporting on such fees for the purpose of on-going supervision by ESMA. The information collected under this RTS will allow ESMA to undertake effective oversight of fees charged by CRAs. This will enable ESMA to verify whether pricing practices are discriminatory and ensure compliance with the principle of fair competition and further mitigate conflicts of interest.

A copy of the Final Report is available here:

http://www.esma.europa.eu/system/files/2014-685_draft_rts_under_cra3_regulation.pdf

Directive on the Disclosure of Non-financial and Diversity Information by Large Companies and Groups

On April 15 2014, the European Parliament adopted a Directive on disclosure of non-financial and diversity information by large companies and groups which will require such companies to disclose information in their management report on policies, risks and results on matters such as respect for human rights, environmental matters, diversity, social and employee related issues, anti-corruption and bribery issues and diversity on boards of directors. The Directive amends Directive 2013/34/EU, which addresses the disclosure of non-financial information but which in that respect has proved to be unclear and ineffective and applied in different ways in different Member States.

The objective of the new proposed Directive is to increase companies' transparency on environmental and social matters and therefore, to contribute to long term economic growth and employment. The European Commission believes that transparent companies perform better over time, have lower financing costs, have better employee retention levels and are more successful in the long run.

The Directive will apply to large public-interest entities with more than 500 employees. Public interest entities include listed companies and some unlisted companies, such as banks, insurance companies and other companies that are designated as such by Member States because of their activities, size or number of employees.

The Directive gives companies significant flexibility to disclose relevant information in the way that they consider most useful, or in a separate report. Companies may use international, European or national guidelines which they consider appropriate.

The Directive provides for further work by the European Commission to develop guidelines in order to facilitate the disclosure of non-financial information by companies, taking into account current best practice, international developments and related EU initiatives.

As regards diversity on company boards, large listed companies will be required to provide information on their diversity policy, such as, age, gender, educational and professional background. Disclosures will have to set out the objectives of the policy, how it has been implemented, and the results. Companies which do not have a diversity policy will have to explain why not. This approach is in line with the general EU corporate governance framework and is described by the European Commission as complementing its recent initiative on improving gender balance among non-executive directors of listed companies, referred to in our April 2014 edition of Legal and Regulatory Update.

In order to become law, the Commission's proposal needs to be adopted jointly by the European Parliament and by the EU Member States in the Council. The Council of EU is expected to formally adopt the proposal in the coming weeks.

Shareholder's Rights Directive

On 9 April 2014, the European Commission published a proposal to amend the Shareholders' Rights Directive (Directive 2007/36/EC), (the "**Directive**"). The proposals aim to tackle corporate governance shortcomings related to listed companies and their boards, shareholders (institutional and asset managers), intermediaries and proxy advisors (i.e. firms providing services to shareholders, notably voting advice). The overall aim of the Directive is to enhance the long term sustainability of EU companies. The measures proposed in the Directive can be summarised as follows:

- Proposals to increase transparency on executive pay;
- Proposals to increase transparency on transactions between a company and its management, directors, controlling shareholders or companies of the same group;
- Proposals which would enable listed companies to identify their investors; e.g. intermediaries holding shares on behalf of investors would be required to disclose the contact details of investors to companies if requested; and
- Proposals to impose rules on proxy advisors such that they must adopt and implement adequate measures to guarantee that their voting recommendations are accurate and reliable and are not affected by any existing or potential conflict of interest or business relationship.

The Department of Jobs, Enterprise and Innovation sought the views of interested parties on the measures proposed in the Directive and in this regard the closing date for submissions was 13 June 2014.

The Directive is due to be submitted to the European Council and the European Parliament for their consideration and adoption. Once adopted, Member States would be obliged to transpose the Directive into national law.

Statutory Audit Directive and Regulation

On 27 May 2014, the Directive of the European Parliament and of the Council (dated 16 April 2014) amending the Directive on statutory audits of annual accounts and consolidated accounts and the Regulation of the European Parliament and the Council (dated 16 April 2014) on specific requirements concerning statutory audit of public-interest entities were published in the Official Journal.

The revised Directive includes measures to strengthen the independence of statutory auditors, to make the audit report more informative and to strengthen audit supervision throughout the European Union. The Regulation introduces stricter requirements on the statutory audits of public-interest entities, such as listed companies, credit institutions, and insurance undertakings, to reduce risks of excessive familiarity between statutory auditors and their clients and to limit conflicts of interest.

The Directive and the Regulation will apply to 'public-interest entities', which will include listed entities (including listed AIFs, listed AIFMs and listed UCITS), undertakings the business of which is to take deposits or other repayable funds from the public and to grant credit for its own account and entities designated by individual Member States as public-interest entities.

The key provisions of the package include:

- A prohibition on audit firms providing certain non-audit services (such as tax services, valuation services, services relating to the internal audit function and services promoting, dealing in, or underwriting shares) to their audit clients;
- Where an audit firm has provided permitted non-audit services to an audit client for three years or more, a limit on the total fees to no more than 70 per cent of the average of the fees paid by the audit client in the previous three years;
- A prohibition on restrictive 'Big Four only' auditor clauses in certain circumstances; and
- Increased responsibilities for the Audit Committee.

Both the Directive and the Regulation shall be applicable as of 17 June 2016. While the Regulation shall be directly effective, the Directive will need to be transposed into national law in each Member State. Given the new regime will not be applicable until mid-2016 it is expected that Member States have sufficient time to put in place the necessary provisions to comply with the Directive.

The texts of the same are available below, respectively:

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0056

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014R0537

The press release published by the European Commission on the 16 June 2014, announcing the entering into force of these new rules is available below:

http://europa.eu/rapid/midday-express-16-06-2014.htm?locale=en

Transparency Directive

On 30 May 2014, the European Fund and Asset Management Association ("**EFAMA**") issued its comments in response to questions raised in ESMA's Consultation for Draft Regulatory Technical Standards on major shareholdings and indicative list of financial instruments subject to notification requirements under the revised Transparency Directive.

Aside from providing specific comments on the questions of the ESMA's Consultation, EFAMA also highlights two aspects that should be taken into account in the implementation of the revised Directive as follows:

- Firstly, the application of the Directive must be harmonised throughout all Member States. EFAMA supports the use of Regulatory Technical Standards as an appropriate mechanism to ensure that all Member States implement similar obligations.
- Secondly, proportionate standards are necessary in order to deliver the desired level of transparency and avoid the imposition of undue burden on market participants.

The specific remarks provided by EFAMA, in relation to the questions raised by ESMA, may be accessed through the following link:

http://www.efama.org/Publications/Public/Corporate_Governance/EFAMA_ESMA_Consultation_TD.pdf

Market Abuse

(i) Council of EU Adopts the Market Abuse Regulation and the Directive on Criminal Sanctions for Insider Dealing and Market Manipulation

On 14 April 2014, the Council of the European Union announced that it has adopted the Market Abuse Regulation ("**MAR**") and Directive on Criminal Sanctions for Insider Dealing and Market Manipulation ("**CSMAD**") (together "**MAD II**").

The European Commission has issued a press release welcoming the Council of the European Union's adoption of the MAD II legislative package and setting out the consequences of the adoption of MAD II.

The adoption of the MAR means that:

- Existing market abuse rules will be broadened to include abuse on the electronic trading platforms that have proliferated in recent years;
- Abusive strategies enacted through high frequency trading will be clearly prohibited;
- Those who manipulate benchmarks such as LIBOR will be guilty of market abuse and face tough fines;
- Market abuse occurring across both commodity and related derivative markets will be prohibited, and cooperation between financial and commodity regulators will be reinforced;
- The deterrent effect of the legislation will be far greater than today, with the possibility of fines of at least up to three times the profit made from market abuse, or at least 15% of turnover for companies. Member-States could decide to go beyond this minimum.

The effects of the adoption of the CSMAD are as follows:

- There will be common EU definitions for market abuse offences such as insider dealing, unlawful disclosure of information and market manipulation;
- There will be a common set of criminal sanctions including fines and imprisonment of at least four years for insider dealing/market manipulation and two years for unlawful disclosure of inside information;
- Legal persons (companies) will be held liable for market abuses;
- Member States need to establish jurisdiction for these offences if they occur in their country or the offender is a national;
- Member States need to ensure that judicial and law enforcement authorities dealing with these highly complex cases are well trained.

On 12 June 2014, both MAR and CSMAD were published in the Official Journal of the EU.

Member States are required to have transposed the provisions of the Directive by 3 July 2016, while the Regulation will apply for the most part from 3 July 2016 with the remaining provisions relating to MiFID II provisions to apply from 3 January 2017.

The press release issued by the Council of EU may be accessed via the following link:

http://europa.eu/rapid/press-release_IP-14-424_en.htm

The press release published by European Commission is available here:

http://europa.eu/rapid/press-release_IP-14-424_en.htm?locale=en

(ii) ESMA Published a Request for Technical Advice from the European Commission on Implementing Acts relating to MAR

On 2 June 2014, ESMA published a request for technical advice from the European Commission on implementing acts relating to the Market Abuse Regulation ("**MAR**").

Article 32 of MAR addresses the reporting of infringements of MAR. Under Article 32(5) of MAR, the Commission is empowered to adopt implementing acts relating to this.

The Commission invited ESMA to provide technical advice on the specification of procedures to enable reporting of actual or potential infringements of MAR to competent authorities. This includes:

- The arrangements for reporting and for following up reports;
- Measures for the protection of persons working under a contract of employment; and
- Measures for the protection of personal data.

The request also provides guidance on what information the technical advice should take into account.

ESMA is requested to deliver the advice within eight months of MAR entering into force.

A copy of the request for technical advice is available at the link below:

http://ec.europa.eu/internal_market/securities/docs/abuse/140528-esma-mandate_en.pdf

Data Protection

(i) EU and US Remain Dedicated to the Continued Operation of the Safe Harbour Framework

On 26 March 2014, the EU and the US issued a joint statement committing to comprehensively strengthening the Safe Harbour Framework "to ensure data protection and enable trade through increased transparency, effective enforcement and legal certainty when data is transferred for commercial purposes" The European Parliament had previously threatened to veto any future trade

agreement between the EU and US, unless safeguards for EU citizens' privacy rights are improved by the US.

The Safe Harbour Framework provides for a set of principles which means that any transfer of personal data to companies in non-EEA countries that have signed up to the Safe Harbour principles may take place without any additional condition over and above those for the transfer to a third party or to a data processor located within the EU/EEA.

(ii) The Data Protection Commissioner 2013 Annual Report

On 12 May 2014, the Data Protection Commissioner ("**DPC**") launched his annual report for 2013 (the "**Annual Report**"). The Annual Report summarises activities of the Office of the DPC during 2013 by reference to specific investigations and audits undertaken as well a summary of policy matters and EU/international activities.

During 2013, the Office of the DPC opened 910 complaints for investigation. Complaints from individuals in relation to difficulties gaining access to their personal data held by organisations accounted for almost 57% of the overall complaints investigated during 2013. With 517 complaints in this category, this represents a record high number of complaints concerning access requests.

The Annual Report highlights that individual complaints relating to data access requests are primarily being driven by poor customer service standards by commercial entities. The findings of the Office of the DPC indicate that individuals who consider that they are not receiving adequate customer service from commercial entities resort to exercising their data protection right to request a copy of all personal data held by that entity, which may not have become necessary had the customer's initial queries been dealt with by the entity in a timely and comprehensive fashion.

The Annual Report also provides that the vast majority of complaints in 2013 were resolved without the need for a formal decision under Section 10 of the Data Protection Acts or without enforcement action being required.

The Annual Report provides useful reading for data controllers and data processers. It may be accessed via the following link:

http://www.dataprotection.ie/docimages/documents/Annual%20Report%202013.pdf

Anti-Money Laundering/Counter-Terrorism Financing

(i) Council of EU Publishes Compromise Proposal on the Fourth AML Directive and Revised Wire Transfer Regulation

On 15 June 2014, the latest compromise text for both the Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (the "**4th Anti-Money Laundering Directive**") and the Regulation on Information on the payer accompanying transfers of funds ("**Wire Transfer Regulation**") was published by the European Presidency.

The Permanent Representative Committee has now called on the Italian European Presidency to commence trialogue negotiations with the European Parliament once it has resumed work following the recent elections, with a view to adopting the latest proposed text

For a copy of the compromise text of the 4th Anti-Money Laundering Directive please see the link below:

http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010970%202014%20INIT

(ii) Financial Action Task Force Published Documents on its Activities

On 27 June 2014, the Financial Action Task Firce ("**FATF**") published:

- A summary of its plenary meeting held in Paris from 25 to 27 June 2014; and
- A report on virtual currencies, which focuses on key definitions and potential anti-money laundering ("**AML**") and combating the financing terrorism ("**CFT**") risk.

The summary and the report can be accessed via the following links, respectively:

http://www.fatf-gafi.org/documents/news/plenary-outcomes-jun-2014.html

http://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf

Irish Taxation Update

(i) Revenue Commissioners Finalises Relevant Regulations on FATCA

On 27 June 2014, the Irish Revenue Commissioners (in conjunction with the Department of Finance) finalised the relevant Regulations (S.I. No. 292 of 2014) with respect to FATCA (the "**FATCA Regulations**"), which came into operation on 1 July 2014.

The Irish and US Governments signed an intergovernmental agreement ("**Irish IGA**") on 21 December 2012 with respect to FATCA and legislation was subsequently included in Finance Act 2013 for the implementation of the Irish IGA. The legislation (Section 891E of the Taxes Consolidation Act, 1997 ("**TCA 1997**")) specifically permitted Regulations to be made by the Irish Revenue Commissioners with regard to the various requirements arising under the Irish IGA (such as, the potential registration, due diligence and reporting obligations that may arise).

A consultation period followed to ensure that relevant stakeholders would have an opportunity to review / comment on the draft Regulations and Guidance Notes as issued by the Irish Revenue Commissioners. In this regard, draft Regulations and Guidance Notes were initially issued on 3 May 2013 with revised drafts of same being issued on 16 January 2014.

The consultation period has now ended with the publication of the FATCA Regulations.

The FATCA Regulations along with the Irish IGA, Section 891E TCA 1997 and draft Guidance Notes set out the framework for Irish Financial Institutions to implement and comply with the provisions of FATCA.

While the Guidance Notes are still currently in draft, it is envisaged that these will also to be finalised in the near future.

(ii) The IFIA's FATCA Working Group Drafts Self-certification Forms

On 30 June 2014, the Irish Funds Industry Association ("**IFIA**") published on their website an information update mentioning that the FATCA Working Group of the IFIA has been working with the Revenue Commissioner in relation to the obligations that FATCA imposes, with a view to obtaining clarity on fund specific issues. It is expected that these issues will be dealt with in the revised Guidance Notes.

One of the new requirements from 1 July 2014 is the need to confirm the status of investors from a US tax perspective. In this regard the Working Group has drafted appropriate self-certification forms for both individuals and entities which formed part of our discussions with Revenue.

Copies of the forms (for entities and for individuals) are available below, respectively:

http://www.irishfunds.ie/fs/doc/publications/ifia-fatca-self-certification-for-entities-27-6-14-final.PDF

http://www.irishfunds.ie/fs/doc/publications/ifia-fatca-self-certification-for-individuals-27-6-14-final.PDF

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This Corporate Quarterly Legal Update is for information purposes only and does not constitute, or purport to represent, legal advice. It has been prepared in respect of the current quarter ending 30 June 2014, and, accordingly, may not reflect changes that have occurred subsequently. If you have any queries or would like further information regarding any of the above matters, please refer to your usual contact in Dillon Eustace.

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