WILLIAM FRY

LEGAL NEWS

Welcome

Welcome to the January issue of Legal News. For further information on any of the topics covered in this issue, please call or email any of the key contacts or your usual William Fry contact person.

Claire Waterson

Partner

Public Health Alcohol Bill

The Public Health Alcohol Bill was published on 9 December 2015 and provides for the introduction of minimum pricing for alcohol at around €1 per unit and restrictions on the advertising of alcohol.

As a result of the Bill the advertisement of alcohol will be very restricted. Among the places where a blanket ban on advertising will apply are schools and early-years services; local authority playgrounds; train stations; and bus and Luas stops. The Bill also requires shops to store alcohol away from other products as another element to advertising restrictions.

The Broadcasting Authority of Ireland General Commercial Communications Code will include a broadcasting watershed of 9pm for alcohol-related advertisements and the Broadcasting Act 2009 will be amended to ensure the Minister for Health is consulted on all health-related aspects of the code. The Bill also involves a requirement for advertisements to include warnings about the harmful effects of alcohol consumption, in particular during pregnancy.

However, the introduction of minimum pricing for alcohol may face a setback after the recent European Court of Justice judgment that similar plans in Scotland would breach EU law if less restrictive tax measures could be introduced instead. In response to that ruling Minister for Health, Leo Varadkar, confirmed the Government would drive ahead with the introduction of minimum pricing as planned as the Bill was framed with the benefit of the similar views expressed in the opinion of the Advocate General in the same case.

The proposed legislation, which is expected to be passed by the middle of 2016, is set to face considerable lobbying from concerned parties making it an interesting development to follow throughout 2016.

Contributed by Brian McElligott

Key Contacts: David Cullen, Leo Moore & Brian McElligott

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New EU Data Protection Regulation Finally Agreed

The text of the EU General Data Protection Regulation (GDPR) was agreed on 15 December 2015, marking the biggest overhaul of privacy laws in the EU since 1995. This reform has been a work in progress since 2012 and the EU Parliament and Council have finally reached an agreement.

While much of the devil will be in the detail, the following are some of the key points to note:

1. Fines: organisations breaching the new rules could face penalties of up to 4% of global turnover or €20 million (whichever is higher).

2. One-Stop-Shop: organisations with operations in more than one Member State will be regulated by the Data Protection Authority in the Member State where they have their "main establishment", meaning that organisations will generally only have to deal with one supervisory authority.

3. Territorial Scope: organisations operating and processing personal data in the EU market, regardless of whether the organisation is physically in the EU, will be subject to the GDPR. The same will apply to any data controllers or data processors established in the EU regardless of where the personal data they process is located.

4. Data Protection Officer: it will be mandatory for organisations to have a data protection officer (DPO) in certain circumstances including where:

- processing is carried out by a public body; or
- core activities of the controller or processor involve regular monitoring of data subjects on a large scale; or
- the controller or processor handles a large scale of a special category of data and data relating to criminal convictions and offences.

SMEs are exempt from this obligation to appoint a DPO, unless data processing is core to their business.

5. Consent: it will be mandatory for consent to be freely given, specific, informed and unambiguous. Silence, pre-ticked boxes or inactivity will not constitute consent. The validity of consent will expire once the purpose for which it was sought ceases.

6. Age of Consent for Data Processing: the GDPR sets this age at 16, but Member States can lower this to 13.

7. Extension of Liability: responsibility for privacy breaches extends to data processors so both the data controller and data processor will be jointly liable for any damages.

8. Right to be Forgotten: individuals will have the right to request the deletion of data relating to them which is inaccurate, irrelevant or outdated.

While the text of the GDPR has been agreed, it still must be formally adopted by the European Parliament and Council. It is envisaged that this will take place at the beginning of 2016 and the GDPR will come into full effect two years later.

This regulation paves the way for greater data protection harmonisation throughout the EU, putting an end to the patchwork of data protection rules while significantly increasing the penalties for non-compliance. Organisations will have two years to get themselves up to speed on the requirements and obligations under the GDPR.

Contributed by David Cullen & John Magee

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Pre-incorporation Contracts

Section 45 of the Companies Act 2014 deals with "pre-incorporation" contracts, i.e. contracts purported to be entered into by or on behalf of a company before it is incorporated. It provides, amongst other things, that prior to such ratification (if any) by the company, the agent who purported to act in the name or on behalf of the company shall, in the absence of express agreement to the contrary, be personally bound by the contract and entitled to the benefit of it. The UK High Court in *Royal Mail Estates Ltd v Maple Teesdale Borzou Chaharsough Shirazi* considered the UK equivalent of section 45 which also provides that any agent who acts on behalf of the company pre-incorporation will be personally bound, unless there is a contrary agreement.

The Court considered whether a person purporting to act as a pre-incorporation company's agent (in that case, in a contract to purchase property) had a valid agreement to the contrary, so that the agent would not be personally liable on that contract.

The Court held that the law firm which signed on behalf of the company was liable to the third party seller for the contract. The relevant clause stating "*the benefit of this Contract is personal to the Buyer*" was held to be insufficient for the parties to have intended that the contract would not take effect as one made with the agents.

To complicate matters, neither the purchaser's solicitor nor the third party seller knew that the purchasing company had not been incorporated. Therefore it would appear to be a prerequisite that the parties know the company is not incorporated for them to expressly agree that the relevant section does not apply.

As a result of this, any agent should ensure that the company is incorporated before executing any documents on that company's behalf. Otherwise, specific references to the non-incorporation of the company must be made where the agent knowingly decides to proceed with execution before the company is incorporated to ensure that the counterparty explicitly foregoes the protection of section 45. A subsequent agreement releasing the agent from liability may also be used.

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2015 - A Busy Year for Financial Regulatory Enforcement

The Central Bank of Ireland brought its enforcement year to a close with four settlement agreements in December 2015 under its Administrative Sanctions Procedure (ASP).

- Octagon Online Services Limited was fined €105,000 for trading in financial instruments on its own account in breach of its MiFID authorisation (Octagon's authorisation was limited to the reception and transmission of orders). The Central Bank said that the primary cause of Octagon's breach was its loss of institutional memory. In making the settlement, the Central Bank took into account that this was a particularly serious breach and it was the second time Octagon had engaged in unauthorised business.
- Lambay Capital Limited t/a MKW Futures was fined €49,000 for failing to implement adequate accounting procedures and internal control mechanisms in breach of its obligations under the MiFID Regulations. The Central Bank took into account that Lambay had engaged in prior conduct of a similar type, and the breach was only resolved after the commencement of enforcement action.
- H&P Car Sales Limited was fined €1,540 for failure to hold professional indemnity insurance, which is a requirement for insurance intermediaries.
- Computershare Investors Services (Ireland) Limited was fined €322,500 for breach of Client Asset Requirements (CAR) imposed under the MiFID Regulations. The breaches related to the principle of certainty of ownership of client assets as set out in the CAR, and access to client assets in the event of the insolvency.

The above settlements brought to nine the total number of settlements entered into by the Central Bank in 2015, down from eleven in 2014. The maximum fine imposed in 2015 was €5 million on Irish Nationwide Building Society (INBS).

2015 also saw the Central Bank initiate its first ever inquires under the ASP. The first Inquiry was commenced in July 2015 against INBS and persons concerned in its management. In November, another Inquiry was initiated against persons concerned in the management of Quinn Insurance Limited.

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High Court Reaffirms Arbitrator's Right to Rule on Own Jurisdiction

The High Court recently confirmed the competence-competence doctrine that an arbitrator may rule on his or her own jurisdiction. The applicant, Mayo County Council, sought a declaration that the arbitrator had no jurisdiction to arbitrate a dispute in relation to the final sum payable under a contract for works between it and the respondent, Joe Reilly Plant Hire Limited.

The UNCITRAL model law, adopted in Ireland in 2010, expressly recognises an arbitrator's right to rule on his or her own jurisdiction. An arbitrator's decision in this regard is not final as the parties are entitled to appeal to the High Court.

The applicant in this case did not dispute that there was a valid arbitration clause in the contract and did not argue that the dispute in question was beyond the scope of the arbitration clause. The applicant's argument was that the arbitration clause was no longer operative due to the fact that the respondent had accepted payment under the contract and therefore there had been accord and satisfaction.

McGovern J stated that the issue of accord and satisfaction was not a basis to challenge the arbitrator's jurisdiction but may instead constitute a defence to the claim made by the respondent in the arbitration.

McGovern J noted that the courts are very reluctant to interfere with arbitrators' rulings unless there is a dispute as to the existence of an arbitration clause.

The Court held that the arbitrator did have the right to rule on his own jurisdiction and it was for the arbitrator and not the court to determine the issues before him.

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Water Charges – New Obligations on Sale

Owners of dwellings (typically private residences) have new obligations in respect of water charges prior to the sale of such dwellings. Legislation commenced on 1 January 2016 requires that owners prior to the sale of a dwelling:

1. Pay to Irish Water the water charges in respect of the dwelling.
2. Provide to their solicitor:

    a. a certificate of discharge from Irish Water confirming that the water charges have been paid; or
    b. a statement from Irish Water that any charge payable is not the liability of the owner.

Solicitors for such owners also have new obligations:

1. If the owner fails to provide the required certificate or statement, the solicitor is required to request an Irish Water statement of charges payable from the owner client in the first instance and if not forthcoming from Irish Water.
2. The solicitor is required to withhold the amount set out in such statement from the net proceeds of sale and to pay that amount to Irish Water.

Although unpaid water charges will not result in a charge on the property, unlike unpaid local property tax, the new legislation makes it very difficult for sellers to avoid paying water charges.

Contributed by Tara Rush

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High Court Recognises Swiss Corporate Insolvency and Restructuring Proceedings

The Irish High Court recently, for the first time, recognised and gave effect to a Swiss law insolvency and restructuring process that had been commenced in Switzerland in respect of a Swiss company.

Within the European Union the recognition of international and cross-border insolvency processes has been harmonised and regulated by the EU Insolvency Regulation for well over a decade. However, neither the EU Insolvency Regulation nor the Recast Insolvency Regulation (that will come into effect in 2017) applies to insolvency processes that are commenced in jurisdictions located outside the EU such as Switzerland. In such cases, it is necessary for the relevant parties to apply to the High Court for recognition of the foreign process and to rely upon the High Court's inherent common law jurisdiction to recognise equivalent personal and corporate non-EU insolvency processes.

This particular case involved Valartis Group AG (the "Company"), which is the parent company of an international banking and finance group. In November 2015, following an earlier Swiss law provisional restructuring process, the court in Switzerland granted the Company a Swiss law definitive six month moratorium (the "Definitive Moratorium") and appointed an administrator to the Company for the purpose of facilitating a potential composition or arrangement with its creditors.

The effect of the Definitive Moratorium was to prohibit any enforcement action against the Company by its creditors during its six month duration and to stay any existing legal proceedings. Such protection is similar to the protection afforded to a company in examinership under Irish law. In addition, the Swiss law insolvency and restructuring process enjoyed other similarities with examinership, including a similar overarching purpose and the appointment of a third party to administer the process.

Due to the Company's links to Ireland, the Company applied to the High Court in December 2015 to have the "Swiss Order" granting the Definitive Moratorium and appointing the Administrator recognised and given effect under Irish law. Following an application to the High Court that was founded upon the similarities between the Swiss law process and examinership, the High Court recognised the Swiss Order. In particular, the High Court recognised and gave effect to the protection afforded by the Definitive Moratorium to the Company including the restriction on any creditor issuing any debt recovery proceedings or excising any legal rights against the Company under Irish law.

The decision is an important illustration of the High Court's jurisdiction to recognise non-EU insolvency and restructuring proceedings. In particular, it also addresses a degree of uncertainty regarding the recognition of Swiss insolvency law matters in Ireland following upon the 2012 Supreme Court judgment in the *Flightlease (Ireland) Limited* liquidation.

William Fry acted for the Company in the application.

Contributed by Ruairi Rynn

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Jurisdiction of the Circuit Court to Hear Repossession Proceedings Upheld by the High Court

In the recent decision of the High Court (on appeal) in *Bank of Ireland v Hanley*, the jurisdiction of the Circuit Court to determine repossession proceedings was confirmed where the property in question was not separately rateable. This decision was in direct contrast to another recent High Court decision on the same issue.

The bank had obtained a Circuit Court Order for possession of an investment residential property. The Order was appealed to the High Court by the Defendants on the grounds that the Circuit Court did not have jurisdiction to determine the proceedings where the Bank had not established that the rateable valuation of the property fell within the Circuit Court's statutory jurisdiction.

The relevant legislation provides that the Circuit Court has original jurisdiction to determine ejectment or repossession proceedings subject to certain jurisdictional thresholds, one of which relates to rateable valuation. The legislation further provides that where the rateable valuation of the property in question exceeds the amount of €254, the High Court enjoys jurisdiction (in the absence of agreement between the parties). As a consequence, a practice had emerged whereby plaintiffs bringing applications for repossession in the Circuit Court would typically provide evidence (for example a valuation certificate) that the rateable valuation of the property in question was less than €254.

In this case, the bank had sought to adduce evidence from the rating authority that although the relevant property was not separately rated, if it had been, the rateable valuation of the property would be significantly less than the €254 threshold. The defendants on appeal argued that this did not establish that the Circuit Court had jurisdiction with regard to the rateable valuation and therefore the Order should be quashed.

The High Court on appeal held that, although the bank had failed to provide satisfactory evidence regarding the rateable valuation of the property, the Circuit Court had jurisdiction to determine such proceedings unless evidence was provided to establish that the rateable valuation of the property was in excess of the statutory Circuit Court threshold of €254. The High Court specifically held that the relevant legislation "*does not require that the property in issue has a rateable valuation in order to confer jurisdiction on the Circuit Court. However, absent such proof being adduced by the plaintiff, he takes the risk that the Circuit Court or the High Court on appeal may be deprived of jurisdiction if the defendant establishes that there is a rateable valuation and it exceeds the statutory limit*".

This decision is in contrast to another recent decision of the High Court which had found that the Circuit Court only had jurisdiction once it had been established that the rateable valuation fell within the statutory threshold. The High Court judge noted that this is an unsatisfactory situation and it remains to be seen if the Court of Appeal will have the opportunity in the future to determine this issue.

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In Short: New EU Public Procurement Thresholds

New thresholds for the application of the EU public procurement rules came into force on 1 January 2016. The thresholds have been marginally increased and are as follows:

	New threshold	Previous threshold
Public Sector Works contracts	 €5,225,000	 €5,186,000
Public Sector Supplies and services - Central government departments and offices - Other public contracting authorities outside the utilities sector	 €135,000 €209,000	 €134,000 €207,000
Utilities Works contracts Supplies and services	 €5,225,000 €418,000	 €5,186,000 €414,000

Contracts valued at the above amounts or more are subject to EU public procurement rules and must normally be advertised in the Official Journal of the EU.

New directives to reform the public procurement rules, plus a new directive on concession contracts, were adopted in 2014 and are due to be implemented into Irish law by April 2016.

Contributed by Claire Waterson

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In Short: Redaction of Directors' Residential Address from Company Registers

We previously reported here that Regulations came into effect on 1 June 2015 prescribing the procedure to be followed by an officer of a company who wishes for his/her residential address to be exempted from inclusion in the register of companies.

These Regulations have recently been amended to clarify that, where an exemption is granted, the usual residential address of the company officer can be removed not just from the register kept by the Companies Registration Office (CRO), but also the company's own register of directors and secretaries and the company's register of members. The usual residential address is to be replaced with the registered address of the company.

The original Regulations dealing with this matter failed to make provision for the removal of the residential address from the company's own registers. This meant that, even in circumstances where an officer's address was removed from the CRO register, a member of the public could still request to inspect the company's registers and so obtain the residential address of the company officer in that way.

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In Short: Reduction of Bankruptcy Term from 3 Years to 1 Year

The Bankruptcy (Amendment) Bill 2015 has been passed without amendment and was signed by the President on Christmas Day 2015. The headline amendment in the Bill is the reduction of the term of Bankruptcy from 3 years to 1 year which mirrors the term of bankruptcy in the UK. In addition to certain procedural amendments, the key amendments are summarised as follows:

- A reduction in the duration of bankruptcy from 3 years to 1 year (where the bankrupt has co-operated fully in the process)
- A reduction in the maximum period of income payments from a bankrupt to creditors from 5 years to 3 years
- An extended bankruptcy term (up to 15 years in serious cases) where the bankrupt has not co-operated or given full disclosure
- The home of a bankrupt will re-vest in the bankrupt (subject to any mortgage) after 3 years if it has not been sold as part of the bankruptcy process

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