Welcome to the July 2019 issue of Legal News. For further information on any of the topics covered in this edition, please call or email any of the key contacts or your usual William Fry contact person.

Upgrade of Irish Investment Limited Partnership Product

Background

The Irish investment limited partnership product (the "ILP") was originally established pursuant to the Investment Limited Partnerships Act 1994 (the "1994 Act"). It was envisaged that the ILP would be used as an investment vehicle for private equity, private debt, real estate and infrastructure investments. However, because the 1994 Act was not updated to keep pace with regulatory and market developments, the ILP has not proven to be an attractive fund structure when compared with other limited partnership vehicles, such as the Luxembourg RAIF.

Proposed changes

To remedy the problems with the existing ILP regime, a number of significant enhancements to the 1994 Act have been proposed in the Investment Limited Partnerships (Amendment) Bill 2019 (the "Bill") which was published on 20 June 2019. These enhancements aim to put the ILP on an equal footing with the regulated limited partnership vehicles that may be established in other jurisdictions.

The Bill proposes to:

- **Permit** an ILP to be established as an umbrella fund, i.e. an ILP which is divided into one or more sub-funds together with a statutory ring-fencing regime similar to that in corporate fund structures such as the ICAV.
- **Expand** the range of white-listed activities for limited partners so as to align with other regulated limited partnership domiciles. In addition to the existing white-list, a limited partner will not be regarded as taking part in the conduct of the business of an ILP solely by doing any of the following:
    - voting as a limited partner on a decision to approve an alteration in the partnership agreement;
    - appointing, electing or otherwise participating in the choice of a representative or any other person to serve on any board or committee of the ILP; or
    - acting as a member of any such board or committee either directly or by or through any representative or other person, including giving advice in respect of, or consenting or refusing to consent to, any action proposed by the general partner on behalf of the ILP and exercising any powers or authorities or performing any obligations as a member of any such board or committee in the manner contemplated by the partnership agreement.

- **Streamline** the process for alteration of the limited partnership agreement which currently requires all partners to agree to a change. The Bill permits a partnership agreement to be altered with the majority approval of the limited partners or where the depositary of the ILP has certified in writing that the alteration does not prejudice the interests of the limited partners, subject to the following conditions:
    - the alteration is not one which the Central Bank of Ireland has stated may only be made by means of an instrument in writing signed by or on behalf of every partner to the partnership agreement; and
    - the partnership agreement confers a power on the depositary of the ILP to so certify that the alteration does not prejudice the interests of the limited partners.
- **Provide** that if the partnership agreement of an ILP contains remedies for, or consequences of, a failure by a limited partner to comply with his or her obligations or a breach by a limited partner of the agreement then those remedies or consequences will not be unenforceable or rendered inapplicable solely on the basis that they are penal in nature. A non-exhaustive list of such remedies or consequences is set out, which includes a sale or forfeiture of the defaulting partner's partnership interest.
- **Allow** a partnership agreement to provide for circumstances in which a limited partner may receive out of the capital of the ILP a payment representing the return of any part of his or her contribution to the ILP.

Timeline

As is the case with any draft legislation passing through the Oireachtas (the Irish parliament), it is possible that changes will be made to the Bill during the committee stage of the legislative process. This committee stage is expected to take place during Autumn 2019 and it is hoped that the Bill will be enacted into Irish law before the end of this year.

We will be monitoring the progress of the Bill as it moves through the legislative process and will provide further updates as they arise.

Contributed by: Niall Crowley

Inexpert Experts

A recent UK trial involving a multi-million-pound carbon credit fraud against eight defendants collapsed after an expert witness was found to be inadequately qualified upon cross-examination by defence counsel. It is a useful reminder of the risk of instructing an inexpert expert. The collapse of this criminal trial could potentially result in over 20 additional fraud trials being declared unsafe.

The expert was engaged by the prosecution to act as an expert witness in the trial of eight men accused of committing a carbon credit fraud. His lack of academic qualification, the fact that he had never read a book on carbon credits, his inadequate storage of sensitive documents which were damaged by a leak and the fact that he had cut and pasted witness statements from previous trials became clear during his cross-examination.

The trial judge stated that the expert: *"… is not an expert of suitable calibre. He had little or no understanding of the duties of an expert. He had received no training and attended no courses. He has no academic qualifications. His work has never been peer-reviewed".*

Position in Ireland

An expert witness' role is to assist the court in making its decision and not to act as a hired gun. The Irish courts have addressed the issue on multiple occasions, most recently by the Supreme Court in *O'Leary v Mercy University Hospital Cork Ltd* [2019] IESC 48 where Mr. Justice MacMenamin referenced expert witnesses' duties, including the duty to only address areas within the expert's expertise. Whilst the expert in those proceedings was judged to have acted independently, objectively and in an unbiased fashion, MacMenamin J. did comment that the duties of expert witnesses should be further outlined in Practice Directions, which indicates some concern about the current specificity of expert standards. The Law Reform Commission have also made recommendations about the duties of expert witnesses which we previously considered here.

The Supreme Court considered the principles for experts as set out in *'Ikarian Reefer'*[1], a 1993 UK case, which has previously been cited in Ireland. One factor (amongst others) is that an expert should make it clear when a particular question or issue is outside their expertise – therefore, if the entire issue is outside their expertise, they should refuse all instructions.

Expert Witness Immunity

This begs the question as to what happens if an expert witness proceeds to address a question or issue outside their expertise. In the UK expert witnesses' automatic immunity has been dispensed with, which we previously discussed here. In Ireland, expert witness immunity still applies. However, there is a growing consensus that this may change and the Law Reform Commission report[2] supports that consensus. The report also suggested that the existing expert immunity should be abolished and replaced with a statutory provision that an expert can be sued if it is established that they acted with '*gross negligence*' when giving their evidence or in preparing their expert report. Generally, "*gross negligence*" means falling far short of the standard expected or a very high degree of negligence but this will be dependent on the circumstances in each case. Indeed, the UK Supreme Court has stressed that in practice, liability of experts ought to be "*highly exceptional*".

Key Considerations

The Irish courts will render negative findings in respect of purported expert evidence where the expert is clearly inexpert. In addition, whilst immunity prevails, the judiciary have shown an inclination to take corrective actions where an expert acts contrary to requirements. Those actions include notifying the purported expert's regulatory authority of negative findings against an expert's evidence. Experts, instructing solicitors and, most importantly, inexpert(s) should bear this in mind.

For further information, please contact any member of the William Fry Litigation & Dispute Resolution team or your usual William Fry contact.

[1] National Justice Compania Naviera SA. v. Prudential Assurance Company Limited [1993] 2 Lloyd's Rep 68

[2] LRC 117-2017, 'Consolidation and Reform of Aspects of the Law of Evidence'.

The Future of Irish Funds is Greener: European Union Action Plan on Sustainable Finance & Asset Management

The EU Action Plan on Sustainable Finance is an ambitious package of measures aimed at directing private sector finance towards the mitigation of climate change and other environmental threats.

With its measures set to impact all UCITS management companies, AIFMs and MiFID-authorised investment firms, this briefing outlines the key elements of the Action Plan for asset managers.

Please click here or on the image below to download our briefing '*The Future of Irish Funds is Greener: European Union Action Plan on Sustainable Finance & Asset Management*'.

Central Bank Publishes Second Insurance Quarterly Newsletter for 2019

On 28 June 2019, the Central Bank of Ireland (the "Central Bank") published its Insurance Quarterly Newsletter (the "Newsletter") for Q2 2019.

Overview

In the foreword to the Newsletter, the Central Bank highlights the importance of diversity in the insurance sector, noting that in its 2018 demographic analysis of pre-approval controlled function ("PCF") roles, 22% of PCF applicants in the insurance sector were female, a decrease on the 2017 figure of 23%. The Central Bank also notes the importance of operational resilience within Irish regulated firms, reminding Irish insurance undertakings that they are obliged to demonstrate that they have the appropriate safeguards and processes in place to manage operational risk relating to outsourcing arrangements and IT failure. The foreword also states that the Central Bank expects Brexit-related activities to increase in the coming weeks and that regulated firms are expected to continue to plan for all plausible contingencies, including the possibility of a hard Brexit.

Evolutions in (re)insurers' asset allocations

Solvency II requires that (re)insurance undertakings invest assets in accordance with the prudent person principle. Figures for Q4 2018 demonstrate that the overall asset allocations for the insurance industry show a landscape of investment well-aligned to the prudent person principle with fixed income exposures (c.60%) and cash (c.20%) dominating the overall portfolio.

However, recent Solvency II returns demonstrate a slow but noticeable shift towards a riskier asset allocation at industry level. There has been a marginal shift from sovereign debt towards corporate debt while the overall level of fixed income investments has been stable at c.60% of non-linked investments. The Central Bank notes that the shift from sovereign to corporate debt is understandable as it allows undertakings to meet their profitability aim. However, the Central Bank emphasises the important role that boards and executive management play in ensuring that the shift towards a risker asset allocation does not come at an undue cost to the security, quality or liquidity of the undertaking's asset portfolio.

Public Disclosures under Solvency II

The Central Bank notes that the Solvency and Financial Condition Report ("SFCR") is an important element of a transparent market. The increased use of public disclosures facilitates a heightened confidence and trust in individual undertakings and across the sector. The Central Bank created a dedicated repository for all SFCRs in 2017 and this will be updated during Q3 2019 to include SFCRs from year-end 2018. The on-going confidence that the information within the SFCR is accurate is critical to the Central Bank's ability to host the SFCR depositary. To facilitate the validation of SFCRs, the Central Bank reminds firms that it is imperative that the SFCR is in a machine-readable format.

Funding the Cost of Regulation

The financial services industry has moved from paying approximately half of the costs of financial regulation to two-thirds of the costs over the last three years. The Central Bank, with the approval from the Minister for Finance and Public Expenditure and Reform, Paschal Donohue TD, recently published the expected path towards 100% industry funding over the next five years.

2020 Review of Solvency II

EIOPA and National Competent Authorities continue to work on the review of Solvency II in advance of the deadline for the submission of technical advice to the European Commission on 30 June 2020. The Central Bank urges stakeholders to engage with the consultations and stakeholder events that are taking place during the second half of 2019 with the first consultation scheduled for July.

Contributed by Claire O'Connor

Pension Authority Proposals for Master Trusts

The Pensions Authority (the Authority) recently published its response to the consultation it carried out last year on trustee obligations for DC Master Trusts (MTs). Arising from that consultation, it has revised some aspects of its proposed standards for MTs. While the intention is to incorporate these revised proposals into more formal codes of practice at a later date, they strongly signpost the terms of the proposed regulatory regime for MTs in Ireland.

We have set out below a high-level summary of some of the key elements of that proposed regime.

Trustees

The Authority has retained its requirement that the trustee entity for a MT must act solely as trustee of one named MT. This will have implications for existing MT providers whose trustee entity also operates as trustee of other pension vehicles.

The requirement that a majority of the trustee's directors must be independent has been replaced with a simple requirement that the chair must be independent. Independence here is understood to mean that the chair must not be a beneficiary of the trust and must not be connected or associated with the trustee's shareholders or the MT's service providers.

How this independence requirement will be interpreted in practice remains to be seen but it could potentially exclude a wide category of individuals from acting as chair where they have connections with a MT's service providers.

The Authority will require all directors to satisfy the requirements for a qualified trustee or an experienced trustee.

This goes beyond what the IORP II Directive requires where "collectively" the trustee board must meet fit and proper standards. It is a clear indication that the Authority will expect a higher degree of professionalism from trustees of MTs.

Detail on what will be regarded as a qualified trustee or an experienced trustee is still awaited.

Continuity Plan

The Authority expects to see a continuity plan for MTs that is *"sufficiently detailed and comprehensive so that the Authority can be satisfied as to its reasonableness and robustness"*. It must cover income and expenditure projections over a three-year period or, if greater, the period until the MT is projected to be self-sustaining.

The Authority is focused on the plan demonstrating the viability of the MT and it will pay particular attention to differences between forecasted projections and actual outcomes. However, what response the Authority will take where it is on notice of any material differences between projections and outcomes is not set out.

Capitalisation

The Authority has now set out detailed information on the capitalisation requirements that will apply to MTs.

They will have to maintain cash reserves on deposit of €70 per member to cover wind up costs and a minimum capital reserve requirement of €100,000 will apply regardless of membership numbers. The reserves for ongoing running costs must meet the maximum need projected in the continuity plan.

These figures will be reviewed regularly to ensure they remain appropriate.

Trustees will be required to immediately notify the Authority of any breach of these capital requirements and take steps to remedy the situation.

Although the level of capital reserves MTs will be required to hold is less onerous than equivalent UK requirements, it is likely to limit the number of providers who would otherwise enter this market.

Conflicts

The Authority will require MTs' governing documentation to contain provisions which do not bind the MT to a particular provider or restrict choice of providers.

This is something that will affect many established MTs as their governing documentation would often make the appointment of administrators, investment managers and other key service providers subject to the founder's agreement.

Charges

On charges, the Authority will need to be satisfied that charges are understandable from a member perspective. The Authority has proposed that no charges would apply on transfers in or out of a MT. It has also reduced from 12 months to 6 months the proposed notice period applicable to any increases in charges. Complying with this requirement could prove difficult in practice.

What's missing?

While there is a lot more detail in these revised proposals there are certain key issues that are left unaddressed.

The Authority's proposals are directed at the trustee of the MT rather than the founder/promoter. This may be explained by the fact that the Authority's remit under the Pensions Act is to regulate trustees. However, given that the party designing and establishing the MT will be the founder/promoter, the absence of any requirements directed at such a central stakeholder is surprising.

We have not seen any details on what formal authorisation process new MTs will have to go through once the codes of practice come into force, or what "*grandfathering*" arrangements will apply to existing MTs.

The regulatory burden of complying with IORP II, once transposed, is likely to force many existing DC schemes and their sponsors to consider consolidation into a MT. One of the practical challenges facing any scheme considering a move to a MT is how to seamlessly transition assets out of that scheme into the MT. At present, any scheme considering this route will have to comply with disclosure and bulk transfer regulations on wind up and transfer into a MT. This is a cumbersome, time-consuming and costly process and legislative change here to streamline that transition process would be welcome.

Next Steps

Existing MTs will need to review the Authority's proposals carefully to assess their practical implications. At a minimum, they will need to review, and in some cases, restructure the corporate entity and board composition of their trustee companies. The headline issue for most MTs will be the proposed capitalisation requirements and what impact this will have on existing business models. That said, these proposals won't be adopted into formal codes of practice until IORP II is transposed, and when that is likely to be remains uncertain.

For further information, please contact any member of the William Fry Pensions Group or your usual William Fry contact.

Reasonable Accommodation – How Far Do Employers Need To Go?

Background

Two recent decisions of the Workplace Relations Commission (the WRC) serve as a useful reminder to employers on how best to provide for an employee or candidate for employment who may require accommodation and guidance to employers on what 'reasonable accommodation' really means.

The Employment Equality Acts 1998 – 2015 (the 'EEA') outlaw discrimination based on 9 grounds, including the disability ground. Under the Act employers are obliged to make reasonable accommodation for staff with disabilities which includes the provision of access to employment. Aggrieved employees/ potential employees can bring a claim to the WRC and can be awarded up to 2 years' remuneration by way of compensation or a maximum of €15,000 for employee candidates.

Case 1 – Research must be grounded on facts, not google searches

This case involved a complainant who had dyspraxia, who commenced employment as an Aircraft Service Agent. Although he did not disclose that he had dyspraxia in the course of his first medical assessment, he was brought in for a second medical assessment when it was noticed that he was walking with a slight limp. In the second assessment, the complainant disclosed that he had dyspraxia. He was subsequently recommended for employment with 'task restrictions' but his position was terminated shortly after this.

Following his dismissal, a report was written by the Health and Safety Officer on the complainant. The Health and Safety Officer stated that his research was based on a Google search on dyspraxia. The report was compiled without any input from the complainant.

The Adjudication Officer ('AO') held that employers have a duty to make adequate enquiries to establish fully the factual position in relation to an employee's capacity. At a minimum, an employer should ensure that it is in full possession of the facts concerning the employee's condition and that, where relevant, the employee is given fair notice that the question for his/ her dismissal due to capacity is being considered. The employee must also be allowed an opportunity to influence the employer's decision and to participate in the process.

In this case, the AO was satisfied that the report was grounded on assumptions and generalisations about persons with dyspraxia and not grounded on actual facts about the complainant's specific condition. Employers must be alert to the possibility that a person with a disability may suffer discrimination not because they suffer from a disability per se, but because they are perceived to be less capable than a person without a disability. Employers must always be alert to the possibility of unconscious or inadvertent discrimination.

The complainant was awarded €15,000.

Case 2 – Employers must demonstrate openness to candidates at interview

In this case the complainant submitted that his interviewer had chosen to focus on the fact that he was deaf instead of on his skills and experience. The complainant also submitted that the immediate focus on his disability was grossly discriminatory and, in his opinion, the remainder of the interview was tainted as a result. The complainant felt he was being asked to defend his belief that he could work safely in the workplace during the hearing, the respondent conceded that the complainant was the only candidate whom she asked how he would work safely in the workplace.

The AO accepted that the issue of reasonable accommodation was not discussed and/or explored in the course of the interview. There was a 'staggering gap' between the employer's proposition that she was 'intrigued' to know how a deaf person could be assimilated into the workplace and the actual steps she took to appraise how this would work in the workplace.

The AO found that the employer had shown no actual intention of providing reasonable accommodation for the worker's disability and held that "there is an obligation on employers to demonstrate an openness to candidates of all abilities" so that all candidates of equal merit have a fair opportunity to compete.

The complainant was awarded €5,500.

Lesson for Employers

These two recent cases serve as a reminder to employers that best practices must be both in place and put into practice at all stages of the recruitment process. An employer must be proactive in considering the forms of suitable reasonable accommodation where a candidate or employee has a disability. Irish case law recommends a two-stage enquiry. First, an employer must look at the factual position concerning the employee's capability. Secondly, if it is apparent that the employee is not fully capable, the employer must consider what, if any, special treatment or facilities or accommodation may be available by which the employee can become fully capable. The employee concerned should be allowed a full opportunity to participate at each level of this review and present medical evidence and submissions, where relevant.

These cases also serve to highlight the importance of involvement from the employee with regards to how best to accommodate for disability. In the first case, the complainant was afforded no opportunity to be involved in the assessment and reporting process, to the extent that a report was compiled without the author even having met the complainant. In the second case, the complainant was involved in the process but evidence was submitted that the employer had come to a pre-determined conclusion and was simply involving the complainant in a box ticking exercise. Therefore, mere involvement with no real intent of providing reasonable accommodation for the potential employee will not suffice.

For further information please contact Catherine O'Flynn or your usual William Fry contact.

Contributed by: Therese Chambers

Neymar Jr Secures Invalidation of Trade Mark Registration of his Name

In a recent judgment, the General Court of the European Union (the EU General Court) has held that a trade mark application for "NEYMAR" made in 2012 was filed in bad faith and ruled in favour of its invalidation.

Background

In December 2012 Mr Carlos Moreira (the Applicant) filed an application to register the word "NEYMAR" as a European Union Trade Mark (EUTM) for goods in class 25 (clothing, footwear and headgear) (the Application). The Application subsequently proceeded to publication without objection and was ultimately registered in 2013.

In 2017, the Brazilian soccer star Neymar Da Silva Santos Junior (Neymar Jr) filed an application for a declaration of invalidity under Article 59(1)(b) of the European Union Trade Mark Regulation (EUTMR) arguing that the Application was filed in bad faith.

Neymar Jr's application for a declaration of invalidity was reviewed and assessed by the Cancellation Division of the European Union Intellectual Property Office (EUIPO) and subsequently by the Second Board of Appeal, both of which agreed that the Application for the EUTM had been made in bad faith. This decision was appealed to the EU General Court with the Applicant arguing that the Board of Appeal had incorrectly assessed:

- his knowledge of the fact that Neymar Jr was a rising soccer star; and
- his motive, namely that the Application had been filed to exploit Neymar Jr's renown.

The concept of bad faith

The EU General Court considered recent case law on the concept of bad faith and Article 52(1)(b) of the EUTMR which requires that account must be taken of all relevant factors specific to the case, in particular whether:

1. the applicant knows that a third party in another Member State is using an identical or similar sign;
2. the intention of the applicant at the time of registration is to prevent a third party from continuing to use such a sign; and
3. the degree of the legal protection enjoyed by the third party's sign and by the sign for which registration is sought.

The EU General Court found that (a) – (c) were non-exhaustive and served only to provide examples of factors that could be taken into account when deciding whether an application was made in bad faith. The Court made it clear that account must also be taken of the commercial logic underlying the filing (i.e. the subjective motivation of the applicant).

EU General Court decision

Knowledge of the Applicant

In support of his case, the Applicant argued that Neymar Jr was not a rising soccer star in Europe at the date of the filing of the EUTM Application and had only commenced playing in Europe in 2013.

The EU General Court was unconvinced by this argument and concluded that there was sufficient evidence to establish that Neymar Jr was in fact well recognised as a promising talent in 2012 in France, Spain and the United Kingdom and had already drawn the attention of top-flight clubs (leading to his ultimate transfer to FC Barcelona in 2013). Accordingly, the EU General Court held that the

Applicant was incorrect in arguing that Neymar Jr was "unknown in the world of football" at the date of the Application. In fact, by 2013 Neymar had already been nominated for three separate FIFA Puskas Awards, finishing third in 2012 and 2013 but having won the award outright in 2011 for his goal for Santos against Flamengo in the Brasileiro Serie A, which attracted huge global attention.

Motive of the Applicant

The Applicant argued that he did not intend to benefit from Neymar Jr's renown and that the name NEYMAR was chosen purely as a mere coincidence and on the basis of the phonetics of the word. The EU General Court found that no evidence existed to establish this, noting that that Neymar Jr's renown was already established in 2012. The Applicant, who had demonstrated a knowledge of the sport (having filed an application for CASILLAS concurrently) could not argue that he did not know who Neymar Jr was at the relevant date.

In light of the above, the EU General Court upheld the decision of the Board of Appeal that the commercial logic of the Application was to "free ride" on and take advantage of Neymar Jr's reputation.

Implications

From an image rights perspective, athletes are increasingly seeking to register and rely on trade marks as a means through which to prevent unauthorised use of their name. As previously reported by us, Lionel Messi was successful in 2018 in securing protection for MESSI in a wide range of products including sporting equipment. However, the extent to which any such athletes will be able to successfully register personal brands as trade marks will depend on how well known that individual is to the average consumer. While global superstars such as Neymar Jr, Messi and Ronaldo can easily argue that their names are famous enough to dispel the likelihood of any confusion, this threshold remains very high.

In circumstances such as those in the current case, where no registered rights are held by the athlete, it is reassuring that a bad faith application can nonetheless be filed to prevent third parties exploiting the athlete's reputation and popularity. This is particularly helpful for athletes whose names and reputation may not meet the threshold for registration of an EUTM. The emphasis placed by the EU General Court on the subjective motivation of the applicant rather than simply the global renown of the individual, will encourage athletes to take steps to prevent opportunists cashing in on their sporting success.

Contributed by: Anna Ní Uiginn

Ireland: Restrictions on Zero-Hour Contracts Amongst Areas Addressed by New Legislation

Our Employment & Benefits team were delighted to contribute to the Irish section of the Ogletree Deakins International Employment Update this month. Please see the article in full below.

The Employment (Miscellaneous Provisions) Act 2018 went into effect on March 4, 2019, having been the subject of considerable publicity by the Irish government.

The act requires employers to provide employees with a written statement of basic terms and conditions of employment within five days of starting employment and provides employees with a right to minimum payment where an employee is obligated to be available for work but is not asked to come in to work. In addition, the act prohibits the use of zero-hour contracts, save in limited circumstances, and introduces banded working hours on a statutory basis.

Written Statement of Core Terms

In addition to the existing requirement to provide terms of employment within two months of an employee's start date (normally done by issuing a contract of employment for agreement and signature), the act introduces a new requirement for an employer to provide the following basic terms in a written statement to an employee within five days of commencing employment:

1. Full names of the employer and employee;
2. The Address of the employer and the principle place of business or registered office;
3. Where the contract is temporary, the duration of the contract, or if it is for a fixed term, the date on which the contract expires;
4. The rate or method of calculation of the employee's remuneration and pay reference period; and
5. The number of hours per day and per week that the employer reasonably expects the employee to work.

A statement of core terms must be provided to an employee who is required to work outside Ireland for at least one month prior to his or her departure. An employer must also notify an employee of any change to these core terms within one month from the date the change takes effect.

An existing employee may request a statement of core terms from his or her employer. The employer must provide the statement of core terms within two months of the request.

Zero-Hour Contracts

Zero-hour contracts require employees to be available for a certain amount of hours in a week. However, an employer is not required to provide them with any work — hence "zero hours" being guaranteed by the employer.

The act prohibits the use of zero-hour contracts, save where either the work involved is casual in nature or the employee is essential for providing coverage in emergency situations or for short-term absences.

Where zero-hour contracts are used, the employer is essentially required to guarantee at least 25 percent of the potential hours will be paid, even if not worked. This is because if an employer does not provide an employee with at least 25 percent of the working hours outlined in his or her zero-hour contract of employment, the employee is entitled to a payment for the lesser of 25 percent of his or her contracted hours or 15 hours of work. In either case, the minimum payment that an employee receives must be three times the national minimum wage, which is currently €9.80.

An employee shall not be entitled to such a payment where the reason for the reduced working hours is because of:

1. The employee being laid-off or on short-time;
2. Exceptional or emergency circumstances outside the employer's control; or
3. The employee being unavailable to work due to illness or some other reason.

Banded Hours

Employees will be entitled, under the act, to make a written request to their employer to be placed on a particular band of weekly working hours in cases where their employment contract does not reflect their weekly working hours. The reference period that employers must consider is the 12 months immediately preceding the date of request.

Employers may only refuse to place an employee on a band in four prescribed circumstances, where:

1. There is no evidence to support the request;
2. There have been significant adverse changes to the business, profession or occupation during or after the reference period;
3. The average hours calculated during the reference period were affected by a temporary situation that no longer exists; or
4. The employer is unable to comply due to exceptional circumstances or an emergency, the consequences of which the employer could not avoid, or the occurrence of unusual or unforeseeable circumstances outside the employer's control.

Employers are not required to offer hours of work to an employee during a week when the employee is not expected to work or where the employer's regular occupation, profession or trade is not being carried out.

Once an employee is placed on a band, his or her employer must, for the following 12 months, provide that employee with working hours that on average fall within that band.

Penalties and Redress

An employee may bring a complaint to the Workplace Relations Commission (WRC) in cases where his or her employer breaches any of the obligations in respect to a statement of core terms as outlined above. However, an employee must have one month's continuous service before he or she may bring any such complaint. Employees may be awarded up to four weeks' remuneration where a complaint is upheld.

Criminal offences have also been introduced where employers:

1. Fail without reasonable cause to provide an employee with his or her statement of core terms within one month of his or her start date; or
2. Deliberately or recklessly provide an employee with a false or misleading statement of core terms.

Employers may be liable for a Class A fine of €5,000 or imprisonment for a term of up 12 months or both. Personal liability is also provided for company officers in certain circumstances.

Where an employee believes his or her employer has failed to place the employee on a band within four weeks from the date of request, or has unreasonably refused to place the employee on a Band, he or she may bring a complaint to the WRC.

While an Adjudication Officer of the WRC (AO) can require the employer to place the employee in the relevant band of working hours should the AO believe that a complaint is well founded, the AO may not award compensation to the employee.

Written by Aoife Gallagher-Watson and Richard Smith William Fry and Roger James of Ogletree Deakins

Central Bank Publishes Second Newsletter for Insurance Intermediaries in 2019

Background

The Central Bank of Ireland (the "Central Bank") has recently published the second issue of its Intermediary Times for 2019 (the "Newsletter"). The Newsletter contains updates relevant to insurance intermediaries including the latest on Brexit preparations, an important reminder on compliance with the Central Bank's Fitness & Probity regime as well as highlighting changes to the Investment Intermediaries Act 1995 (the "IIA") affecting the authorisation of certain insurance intermediaries.

Brexit preparations

In the Newsletter, the Central Bank emphasises the need for insurance intermediaries which are involved in cross-border mediation activity to ensure they are sufficiently prepared for a "no deal" Brexit. The Central Bank states that insurance intermediaries must carefully assess their obligations to both existing and prospective customers and take the necessary action to mitigate any potential risk. The ongoing requirement to provide clear information to affected customers as soon as it is available is also highlighted.

The Newsletter refers to the publication in February 2019 by the European Insurance and Occupational Pensions Authority (EIOPA) of its Recommendations for the insurance sector in light of the United Kingdom withdrawing from the European Union (the “Recommendations”). In particular, the Central Bank highlights Recommendation 9 which includes the requirement that where UK insurance intermediaries intend to continue or commence distribution activities to EU27 policyholders and for EU27 risks post-Brexit, they must be established and registered in the EU27 in line with the relevant provisions of the Insurance Distribution Directive (IDD).

The Central Bank also draws attention to Regulation 9(9) of the European Union (Insurance Distribution) Regulations 2018 (IDR) which provides that intermediaries and (re)insurers must only use the (re)insurance distribution services of EU-registered (re)insurance intermediaries or ancillary insurance intermediaries.

Important reminder regarding the Fitness & Probity regime

The Newsletter contains an important reminder from the Central Bank regarding its 'Dear CEO' letter (the "Letter") recently issued to all regulated firms, including insurance intermediaries, relating to their legal obligations under the Central Bank's Fitness & Probity regime (the "F&P Regime"). The Letter includes details of specific shortcomings which the Central Bank has identified concerning compliance by regulated firms with the F&P Regime. The Central Bank is very clear in the Letter that it expects the CEO of insurance intermediaries, in conjunction with the board of directors, to consider the contents of the Letter carefully and take any action required to address shortcomings in compliance with the F&P Regime. For more information on this important topic, please see our previous briefing here.

Review of IIA authorisation

The Central Bank reminds insurance intermediaries which currently hold an authorisation under the IIA to review the activities that it currently undertakes to determine if the authorisation is still required in light of recent changes introduced by the IDR. With effect from 1 October 2018, the IDR removed "insurance policies" from the scope of the IIA. Accordingly, in circumstances where an intermediary is carrying on insurance distribution activity only, as defined under the IDR, the Central Bank states that it should seek the revocation of its IIA authorisation by completing the relevant form available on the Central Bank website. If you are unclear whether the activities performed by your firm fall within the scope of the IIA and/or the IDR, please contact us.

Annual returns

The Newsletter also contains a reminder to all retail intermediaries to ensure a Retail Intermediary Annual Return (RIAR) is filed with the Central Bank no later than 6 months following the firm's financial year-end. The Central Bank warns intermediaries to ensure that all figures entered in the Financial Information Form of the RIAR are based on documentary evidence available to authorised officers of the Central Bank in the event of an inspection.

Finally, the Central Bank confirms that it will host the Retail Intermediary Annual Roadshow in November 2019 with dates, times and location to be confirmed in the coming months. This is an important opportunity for insurance intermediaries to hear directly from the Central Bank across a range of relevant topics.

If you would like to discuss any aspect of the above, please contact any member of the Insurance team at William Fry.

Contributed By: Catherine Carrigy

In Short

Asset Management & Investment Funds Update July 19

Each month our Asset Management & Investment Funds team write a 'Legal & Regulatory Update'. Welcome to the July edition.

The topics covered in this months edition are listed below. For further information on any of these items, please email or phone any member of our Funds Team.

- Central Bank outlines inspections timetable for asset management sector 2019/2020 themed inspections
- Upcoming consultation on framework for investment fund errors
- New Central Bank UCITS Regulations 2019 published
    - Changes to the Irish UCITS regime introduced by 2019 Regulations
    - Share Classes
    - Performance Fees
    - Financial Accounts
    - Treatment of cash held as ancillary liquid asset
    - Suspension notifications
    - Money Market Fund Regulation (MMFR)
- Timeline is fixed for introduction of Cross-Border Fund Distribution measures
    - Key measures
    - Transitional arrangements
- Market makers permitted to short sovereign debt to hedge long corporate bond positions
- Central Bank updates its Brexit FAQ for Firms
- ESMA issues new Q&As for depositaries of UCITS and AIFs
- EMIR Refit – FCs permitted to use netting in clearing threshold calculation
    - Q&A on clearing threshold calculations
- ESMA consults on SFTR Reporting Guidelines
- Publication of draft legislation to amend Investment Limited Partnership Act 1994
- JP Morgan fined €1.6m by the Central Bank for regulatory breaches relating to outsourcing activities

Click here for our full update.

Ireland : Netherlands Double Taxation Agreement

Ireland and the Netherlands signed a new double taxation agreement (DTA) on 13 June 2019. Procedures are now underway to ratify the new DTA.

This new DTA will replace the existing DTA between Ireland and the Netherlands which has been in place since 1969.

The DTA demonstrates Ireland's approach and commitment to the 'Multilateral Convention to implement Tax Treaty related measures to prevent Base Erosion and Profit Shifting (BEPS)' (the 'Multilateral Instrument' or 'MLI'). Some notable inclusions in the DTA are:

- The provisions in respect of Dual Resident Entities included in Article 4 of the DTA which are in accordance with the Best Practice Rule in BEPS Action 6.
- A Principal Purpose Test (PPT) in Article 22 in accordance with BEPS Action 6 – Preventing the Granting of Treaty Benefits in Inappropriate Circumstances.
- The Permanent Establishment (PE) Article includes an anti-fragmentation rule to prevent corporate groups from fragmenting a cohesive operating business into several small operations to avoid creating a PE.
- The dividends article now includes a minimum holding period to access the reduced rates of dividend withholding tax (DWT). Interestingly, the old DTA pre-dated the introduction of DWT in Ireland.
- An Arbitration Article (Article 25) has been included in accordance with BEPS Action 14 – Improving Dispute Resolutions.

In line with Ireland's newest DTA's, the protocol to the DTA confirms that Irish Common Contractual Funds (CCFs) shall be treated as fiscally transparent for the purposes of granting tax treaty benefits.

For further information, please contact any member of the William Fry Tax Advisors team.

FIFA Women's World Cup

Ruth Fahy, a Trainee Solicitor in our Sports Law department, has been a vocal advocate of Women's football in Ireland and a regular media commentator.

Ruth is a co-commentator for RTÉ Sport with George Hamilton during the FIFA Women's World Cup 2019 and had put together her thoughts from the first week of the tournament.

As a player, Ruth played for Castlebar, Galway United and Wexford Youths and represented Ireland at the World University Games. While playing she studied law at the University of Limerick and Nottingham Trent University as well as earning a Degree in Human Nutrition at Dublin Institute of Technology.

Ten days into the FIFA Women's World Cup 2019 and there is much to discuss.

The Football

Football-wise, it has been close to what was predicted prior to the tournament kicking off. The favourites remain Corinne Diacre's formidable French along with Jill Ellis' goal machines USA. Running them close will be England, the Dutch, Canada, Norway and Germany. Lest we forget dark horses Australia and Italy. 2015 World Cup finalists Japan won't be sidling out in the last sixteen knockout round either.

Yes, this long list of contenders is for real. The elite quality of women's football has diluted amongst the multiple and we no longer have a superpower running adrift early on. Come Thursday and the post-match analysis of impending battles such as England-Japan, USA-Sweden and Netherlands-Canada... and we shall know a whole lot more about who is exiting this tournament when and how.

Goalkeeper's Union

One of the greatest elements of World Cup football is the emergence of new heroes on the pitch, with little known names acquiring global familiarity overnight. The biggest stars are often those slowly climbing the golden boot chart but it is the palms of the net minders who have been scribing their names into history with some huge performances against the odds.

Phil Neville will forever remember Vanina Correra, the 35-year-old Argentinian keeper who seemed destined to dash English dreams with her scintillating display in their second group game. A penalty save amongst several other world class stops saw her earn player of the match. It later emerged that she had actually quit the game in 2012, given birth to twins, returned to football in 2017 and continues to work another day job in order to maintain her family's livelihood. Incredible.

Chile and PSG's Christiane Endler followed quickly in her footsteps, earning another GK POTM for her side with successive saves to limit the USA to three goals only. Sydney Schneider, 19 years old and still a university student, is another keeper who has etched her name onto the star player list with her native Jamaica.

Off Field Culture Shock

While this tournament is unprecedented in terms of the levels of dedicated resources, fanbase and coverage, the knock-on effects are the stories that are trickling through of fraught conditions regarding federation cooperation and support.

Argentina went without any game for almost one thousand days in recent years when their federation refused to support the women's team after lacklustre performances in the 2007 and 2011 World Cups. Chile has experienced similar treatment from their governing body. As have Nigeria who, despite winning nine of the past eleven African Cup of Nations, has struggled year after year to secure solid backing.

The very existence of these teams in this tournament, with this much coverage, will generate justification for the attention they seek in their home country.

This is only week one. Three more weeks to come.