

Group Briefing
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Ireland as a Location for Your Intellectual Property Trading Company

Ireland offers many advantages to companies seeking to establish a base in Ireland to exploit intellectual property.

There is a low corporation tax rate in Ireland and it has what is considered to be a business-friendly taxation regime. In certain circumstances a company carrying on a trade of exploiting intellectual property which it has acquired can achieve a very low effective tax rate. Ireland is a common law jurisdiction with an independent and efficient court system, a wide range of legal protections for the creators/owners of Intellectual Property Rights and the possibility of obtaining generous state grant assistance with research and development projects.

Ireland's highly educated, English-speaking workforce provides a wealth of human capital. A long-standing member of the European Union, it has strong trading links both in Europe and with the rest of the world. It also boasts a unique relationship with the USA, which has resulted in significant rates of foreign direct investment and research and development over recent decades.

We have set out below a brief overview of some of the tax, legal and funding advantages that Ireland has to offer companies looking at locating in Ireland to exploit or develop intellectual property.

TAX ISSUES

THE RATE OF CORPORATION TAX

One of the primary advantages that Ireland has to offer is its low rate of corporate tax. The standard rate of corporation tax on trading profits in Ireland is 12.5%.

In order to avail of the 12.5% rate of corporation tax a company must derive income from a trade that is actively carried on in Ireland. It is generally essential therefore that the profit making apparatus of the trade is located in Ireland and that the activity is controlled in Ireland. It is generally feasible for a company established in Ireland to exploit intellectual property to avail of the 12.5% rate if the company has sufficient personnel located in Ireland with the appropriate expertise and skills required to be in a position to manage the relevant portfolio of intellectual property.

Whilst company capital gains are generally subject to corporation tax, the gains are re-worked to ensure that the tax is charged at an effective 33% rate. Ireland has a participation exemption which exempts disposals of shares in certain companies provided certain conditions are met.

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This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

**TAX RELIEF FOR CAPITAL EXPENDITURE ON
INTANGIBLE ASSETS**

Capital allowances can be claimed on capital expenditure incurred by companies on the provision of certain “specified intangible assets”. The definition of specified intangible assets is widely drafted and includes, inter alia, the acquisition of or the licence to use:

- » patents and registered designs;
- » trademarks, brands, brand names, domain names and services marks;
- » copyright or related rights;
- » know-how, generally related to manufacturing or processing, secret information concerning industrial, commercial or scientific experience whether protected or not;
- » goodwill to the extent that it is directly attributable to specified intangible assets;
- » computer software or a right to deal in or use such software;
- » applications for grant or registration of patents, trademarks, copyrights etc; and
- » certain other rights.

The tax write off is granted as a capital allowance and the write off is available in line with the depreciation or amortisation charge for accounting purposes.

Alternatively, a company can elect to take the write off against its taxable income over a 15 year period. A clawback of the capital allowances claimed arises if the intellectual property is sold within five years of its acquisition (or 10 years in respect of capital expenditure incurred before 13 February 2013).

The capital allowances that are available can only be offset against income generated from exploiting intangible assets or as a result of the sale of goods or services that derive the greater part of their value from the intangible assets (referred to as a “relevant trade”). Furthermore, the aggregate amount of allowances that can be claimed was previously capped at 80% of profits from the relevant trade in a given accounting period. This cap has been removed with effect from 1 January 2015 so the aggregate amount of allowance is now 100%.

This relief can reduce the effective rate of corporation tax on intellectual property related income and helps to provide a valuable incentive to companies looking at locating their intellectual property operations in Ireland.

RESEARCH & DEVELOPMENT EXPENDITURE

Ireland also offers significant incentives to companies looking at locating their research and development (“R&D”) activities in Ireland. There are two major incentives granted to companies that incur expenditure on R&D within Ireland and within the EEA generally (subject to certain conditions and limitations).

A company that incurs expenditure on R&D may avail of a tax credit of 25% on all R&D expenditure incurred on or after 1 January 2015.

The R&D credit reduces a company’s corporation tax liability for the current year. The tax credit is in addition to the corporation tax deduction available at 12.5% for qualifying expenditure. The combined effect of these provisions is that it is possible to obtain tax relief at an effective rate of up to 37.5% of expenditure on R&D. The tax credit is available for offset against the current year corporation tax liability of the company or to be paid as ‘tax free’ remuneration to certain ‘key employees’ and any unused credit can be carried forward indefinitely to future periods. Excess credits can also be carried back against corporation tax paid in the previous period. Alternatively, a company may, provided certain conditions are satisfied, claim to have any remaining excess credit paid to it by the Revenue. The maximum repayment which can be claimed is limited to the greater of:

- a) the corporation tax paid by the company for the preceding 10 accounting periods; or
- b) the payroll liabilities (i.e. PAYE, PRSI and levies) accounted for by the company in the accounting period in which the qualifying R&D expenditure was incurred.

The tax credit is available on a group basis in respect of group expenditure on R&D. Relief is also available for a

company that has not carried on all of the R&D itself:

- » A company which incurs expenditure on R&D can claim credit for certain amounts paid to a university to carry out R&D activities on its behalf. Relief in this case will be restricted to so much of the payment to the university as does not exceed the greater of €100,000 or 5% of the expenditure incurred by the company itself on R&D activities; and
- » A company which incurs expenditure on R&D can claim credit for certain amounts paid to another unconnected person (a person other than a university) to carry out R&D activities on its behalf. Relief in this case will be restricted to so much of the payment to the other person as does not exceed the greater of €100,000 or 15% of the expenditure incurred by the company itself on R&D activities.

Irish tax legislation also allows for a tax credit for capital expenditure on buildings or structures used for the purpose of carrying on R&D activity. Expenditure in this context extends to spending on the construction or refurbishment of a building or structure to be used to facilitate R&D. The tax credit amounts to 25% of the cost of the construction or refurbishment and is available on a proportional basis if at least 35% of the building is used for R&D facilities. The full R&D credit of 25% may be claimed in the year in which the expenditure was incurred. A 10 year claw back exists where the building or structure is sold or ceases to be used by the company for the purposes of R&D or for the purposes of the same trade.

There are a number of other features of Irish tax legislation which may be of benefit to companies seeking to establish a base in Ireland to exploit intellectual property.

CREDIT RELIEF FOR FOREIGN ROYALTY INCOME

Unilateral credit relief in respect of foreign withholding taxes on royalty income from non-treaty countries is available to companies in respect of royalties which are taxable as trading income.

WITHHOLDING TAX ON PATENT ROYALTY PAYMENTS

Patent royalties are the only form of royalty payment potentially subject to Irish withholding tax. A company can make patent royalty payments to a foreign company free of withholding tax if the recipient is:

- » not resident in Ireland; and
- » resident for the purposes of tax in a relevant territory (another EU Member State or in a country which has entered into a double taxation agreement with Ireland) which imposes a tax that generally applies to royalties receivable in that territory from outside sources.

In addition, royalties paid in respect of foreign registered patents can be paid to recipients outside of a relevant territory if certain conditions are met and with the prior approval of Irish Revenue.

DIVIDEND WITHHOLDING TAX (DWT)

Dividends paid by Irish resident companies are subject to a 20% withholding tax. However, there are a number of exemptions to enable dividends to be paid free from DWT. For example, dividends paid to any of the following persons are exempt from DWT:

- » a company or person resident in an EU/treaty country (other than Ireland) and not under the control of Irish residents;
- » a company that is not resident in an EU/treaty country but is controlled by a person(s) who is/are resident in an EU/treaty country (other than Ireland) and which person(s) is/are not under the control of a person(s) not resident in an EU/treaty country (other than Ireland); or
- » a listed company or a 75% subsidiary of a listed company.

In each case, in order to avail of the exemption a declaration must be filed with the dividend paying company before the dividend is paid.

As a result of these exemptions it is generally possible to extract profits from an Irish resident company by way of dividends free from Irish tax.

STAMP DUTY

Transfers of intellectual property are exempt from stamp duty in Ireland. This exemption makes it feasible to transfer intellectual property to an Irish resident company without incurring a documentary tax.

TRANSFER PRICING

Provisions for the application of international transfer pricing norms apply in Ireland which require that transactions between associated entities be entered into "at arm's length." The provisions largely implement the OECD Transfer Pricing Guidelines and are relevant to IP trading companies to the extent that they are licensing IP to group companies or connected persons.

The regime only applies to trading transactions and there is an exemption for small and medium sized enterprises, specifically companies with fewer than 250 employees and either turnover of less than €50 million or assets of less than €43 million.

CONTROLLED FOREIGN COMPANY ("CFC") AND THIN CAPITALISATION RULES

Unlike many jurisdictions Ireland does not have any CFC or thin capitalisation rules.

IRISH INTELLECTUAL PROPERTY PROTECTION LAWS

The distribution of products/services that depend upon Intellectual Property Rights for a significant proportion of product value (books, film/video, music, software for example) from an Irish distribution base is a business activity that will enjoy significant and practical protection from Irish law. Indeed, the provisions of the Irish Trade Marks Act 1996 and the Copyright and Related Rights Act 2000 can be said to be "State of the Art" legislation. Owners of Intellectual Property will find that Irish law is better than the laws found in many of our major European partners. Better both in the sense that Irish law is up to

date and in the sense that because Irish law is also based on the common law tradition it will be more familiar to North American, British and Commonwealth Businesses. Irish law meets the requirements of leading international texts such as the Berne Convention, the TRIPS Agreement and the 1996 Geneva Copyright treaties, as well as all relevant IP E.U. Directives. Ireland is one of the world's largest exporters of computer software and appropriate protections have been enshrined in Irish law to protect Intellectual Property Rights. Copyright laws in Ireland are currently under review to identify and, to the extent permissible under EU copyright directives, remove any barriers to innovation.

THE IRISH COPYRIGHT LANDSCAPE

The Irish copyright laws are informal; there is no need to register that a copyright exists. Protection for original literary and artistic works normally vests in the author and copyrights are freely transferable through licence agreements and assignments.

Irish copyright law now gives protection to original databases and, combined with the 15 year protection against unauthorised copying of the contents, the creators of multimedia works enjoy greater protection under Irish law than under most other copyright regimes.

The publishers of works in electronic format enjoy copyright protection in the form of film, sound recording and cable programme copyrights and broadcast organisations enjoy copyright protection for all kinds of distribution (cable, satellite). Internet distribution of works is specifically protected in the form of the "making available" right. Performers of works - musicians, actors, singers - enjoy copyright protection through a balanced system that involves contractual arrangements between performers and film, recording, and broadcasting industries.

Irish right holders operate within a well established and sophisticated network of collecting societies that have international links with similar organisations worldwide.

IRELAND AND COPYRIGHT ENFORCEMENT

A right holder seeking to enforce copyright in Ireland enjoys the benefits of a very sympathetic enforcement regime. A few of these features are worth highlighting:

- » self-help powers of search and seizure;
- » presumptions in court proceedings that the work is original and that the plaintiff is the owner of copyright in the work “unless the contrary is proved”;
- » the ability to protect whistleblowers by concealing the identity of a source;
- » admissibility of hearsay evidence in certain circumstances;
- » criminal penalties of up to five years imprisonment and/or a fine of up to €127,000;
- » extensive court powers of search, seizure, confiscation and destruction of pirated copies;
- » wide powers to order payment of damages based upon conversion principles as well as the power to award punitive damages; and
- » speedy injunctive reliefs, including injunctive relief against internet service providers.

PATENTS

Under the Irish Patents Act 1992 (the “1992 Act”), full and short-term patents can be sought by registering an application with the Irish Patents Office. Alternatively, a patent may also be registered with the European Patents Office (EPO), provided the applicant has elected Ireland as a designated jurisdiction. In addition to setting out the application procedure, the 1992 Act enunciates the statutory prohibition against direct/indirect infringement of a patent and/or contributory infringements.

A full-term patent lasts for 20 years, while a short term patent has a duration of 10 years. In late 2012/early 2013, Ireland signed the necessary agreements to enable it to participate in the unitary patent system. This system is subject to a number of additional steps before it can come into effect. Once in effect (which is likely to be

late 2016, early 2017), an applicant may apply to the EPO for a patent with unitary effect in the participating EU Member States and such a patent shall enjoy protection in Ireland.

In a development that will be of interest to pharmaceutical companies operating, or intending to invest in Ireland, the ‘Bolar’ exemption in Irish patent law was broadened in late 2014 through the Intellectual Property (Miscellaneous Provisions) Act 2014. This exempts certain acts done with a view to satisfying the application requirements for a marketing authorisation for a product prior to the expiration of a patent.

Among the amendments made to the scope of the exemption are the following:

- » The exemption now covers applications for any marketing authorisation or similar instrument (rather than the previous wording that limited it to marketing authorisations set out in the underlying Directives 2004/27/EC and 2004/28/EC (i.e applications for marketing authorisations for generics and biosimilars)). The exemption should now be broad enough to cover applications in respect of new active substances.
- » The exemption clarifies that it extends to applications for a marketing authorisation in any third country (including outside the EU) as well as in the State; and
- » The use of the terminology in the legislation relating to a marketing authorisation that is required under Irish or foreign law “in order to sell or supply or offer to sell or supply” should cover a range of regulatory requirements that might arise under the laws of Ireland or of a third country.

REGISTERED DESIGNS

While Irish design law meets international standards in all respects, it has been specifically tailored to encourage inward investment and innovation in manufacturing (specifically spare parts) by limiting protection for functional, ‘must-fit’ and ‘must-match’ designs.

TRADE MARKS

The area of Trade Marks is regulated in Ireland by the Trade Marks Act 1996. In addition to domestic legislation, Ireland is also a party to the Community Trade Mark System, which provides for the registration of EU wide trade marks.

**RESEARCH, DEVELOPMENT
AND INNOVATION (RD&I)
SUPPORT PROGRAMME**

The Irish Government offers a range of financial support/grants for R&D carried out in Ireland.

The two state agencies (IDA Ireland and Enterprise Ireland) offer a full range of programmes to assist companies with research and innovation activities including funding, support for in-house R&D, sourcing new technologies and partnerships with other companies and third level institutions. Enterprise Ireland supports companies through the provision of grants dependant on the specific nature of the R&D required. A Technical Feasibility Study Grant will assist a company in investigating the viability of manufacturing a new product or process or to develop a new internationally traded service and is available to companies with more than ten employees and that engage in an eligible service activity or manufacturing in Ireland. The grant funding available is restricted to 50% of eligible expenditures up to a maximum of €35,000.

R&D funding is also available in the form of Small Project Grants and Standard Project Grants for manufacturing or internationally traded services companies that can show adequate cash resources to implement the proposed project.

For large companies, the grant is restricted to 25% of the costs of the project, if the research is considered innovative and technically challenging and involving significant risk. This can be increased by 15% where there is collaboration between two companies, subject to a maximum grant of 50%. RD&I support is

subject in all cases to an upper limit in respect of a particular industrial undertaking depending on the nature of the expenditure. Applications for support of up to €650,000 should be made to the R&D Fund Committee, and for amounts greater than that to the Investment Committee of Enterprise Ireland. While generally, the maximum R&D grant a company can receive is €650,000, projects in excess of this amount are evaluated on a case by case basis and higher grants are capable of being awarded.

OTHER RESEARCH SUPPORT PROGRAMMES

The IDA provides support for research, development and innovation operations, while the Enterprise Ireland Innovation Partnership Programme provides financial support to encourage companies to undertake collaborative projects with Irish third-level institutions.

See: <http://www.idaireland.com/businessin-ireland/activities/research-development-and-innovation/> for further detail on IDA Ireland RD&I Grant assistance;

<http://www.enterprise-ireland.com/en/Research-Innovation> for further detail on Enterprise Ireland RD&I assistance; and

<http://www.sfi.ie/funding/funding-calls/open-calls> for further detail on grants available from Science Foundation Ireland.

KEY CONTACTS

For further information please speak to your usual Arthur Cox contact or one of the following lawyers:



JOHN MENTON
PARTNER, HEAD OF CORPORATE
+353 1 618 0558
john.menton@arthurcox.com



CONOR HURLEY
NEW YORK RESIDENT PARTNER
+1 212 782 3299
conor.hurley@arthurcox.com



CAROLINE DEVLIN
PARTNER, CO-CHAIR, TAX GROUP
+353 1 618 0585
caroline.devlin@arthurcox.com



AILISH FINNERTY
PARTNER
+353 1 618 0561
ailish.finnerty@arthurcox.com



FINTAN CLANCY
PARTNER, CO-CHAIR, TAX GROUP
+353 1 618 0533
fintan.clancy@arthurcox.com



OLIVIA MULLOOLY
ASSOCIATE
+353 1 618 1160
olivia.mullooly@arthurcox.com

arthurcox.com

Dublin

+353 1 618 0000
dublin@arthurcox.com

Belfast

+44 28 9023 0007
belfast@arthurcox.com

London

+44 207 823 0200
london@arthurcox.com

New York

+1 212 782 3294
newyork@arthurcox.com

Silicon Valley

+1 650 943 2330
siliconvalley@arthurcox.com