The Real Estate M&A and Private Equity Review

Second Edition

Editors

Adam Emmerich and Robin Panovka

The Law Reviews

THE Real estate M&A and private equity Review

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Editors
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IRELAND

Paul Robinson, Ailish Finnerty and Sophie Frederix[1]

I OVERVIEW OF THE MARKET

The Irish M&A and real estate markets remained steady in 2016 and marked a return to more normalised trading after the blockbuster years of 2014 and 2015.

While real estate investment trusts (REITs) have been a feature of international property markets for many years, Irish legislation allowing the establishment of REITs was only enacted in 2013.[2] Three REITs are currently in operation under the Irish regime: Green REIT plc (Green REIT), Hibernia REIT plc (Hibernia REIT) and Irish Residential Properties REIT plc (IRES REIT). Green REIT and Hibernia REIT both launched in 2013, while IRES REIT, a subsidiary of Toronto-based Canadian Apartment Properties REIT, launched in April 2014. The three REITs initially raised €1.56 billion of debt and equity to buy up property in a market where commercial property prices had slumped by more than two-thirds from their 2008 peak.

Irish REITs are predominantly held by international investors. Against this background, it is unsurprising that almost one-third of all Dublin prime office space has changed hands in little more than four years since the beginning of 2013[3] (the proportion of space traded in the central business district was even higher, at 42 per cent). The high turnover rate reflects the acceleration in recovery from 2013 onwards. The volume of commercial investment asset transactions for 2016 reached €4.5 billion, comprising about 296 sales of more than €1 million. The institutional share of market turnover has risen from zero in 2012 to 74 per cent in 2016, and institutional investors and listed REITs were behind nine of the top 10 deals in 2016.[4]

Post-recession Ireland has unquestionably provided significant opportunities for REITs and their institutional investors. A host of multinational technology and life sciences companies (Google, Facebook, LinkedIn, Pfizer, etc.) have substantial operations in

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1 Paul Robinson and Ailish Finnerty are partners and Sophie Frederix is an associate at Arthur Cox.

2 To qualify as a REIT in Ireland, a number of conditions must be met, including that it must:
- *a* be listed on the main market of a recognised EU stock exchange;
- *b* conduct a property rental business with a minimum of three properties (none of which have a market value in excess of 40 per cent of all assets held by the REIT), with at least 75 per cent of its income coming from such a business and assets of that business representing at least 75 per cent of its total assets;
- *c* meet a ratio of 1.25:1 of property income to property financing costs; and
- *d* distribute at least 85 per cent of its property rental income every year.

3 Investment Report 2017 – Savills World Research – Ireland Investment – March 2017.

4 www.irishtimes.com/business/commercial-property/property-syndicates-almost-eliminated-from-recovering-market-1.3013760.

Ireland, and require prime office and commercial space. There is significant competition for commercial space in Dublin, evidenced by large letting transactions to Google, Oracle and Citrix. Take-up of office space in Dublin was 11 per cent higher in the first quarter of 2017 compared with the same period in 2016.[5]

At the end of 2013, Ireland exited the external assistance programme from the EU, the European Central Bank (ECB) and the International Monetary Fund. Overseas investors and private equity groups ramped up investment in Irish real estate amid confidence that the economy had stabilised and returned to growth. Prime assets previously held by the National Asset Management Agency (NAMA) (the state 'bad bank') and other credit institutions have now transferred to investors. Reflecting this, only one receivership sale, One Spencer Dock, traded in the €50 million-plus category in 2016, and the share of turnover accounted for by receivership sales has continued to fall. Research suggests a slowdown in the amount of commercial property product coming on the investment market as the phase of large portfolio sales comes to an end.[6] Ireland's economic recovery has re-established the country as an investable core market.

Following on from the flurry of secured loan portfolio and property acquisitions in 2013 to 2015, certain investors have recently signalled their intention to focus on development and asset management. Private equity players are partnering with local property developers: for example, Chartered Land's high-end residential development, Lansdowne Place, is backed by Abu Dhabi Investment Authority. Private equity players' continued presence in the Irish market has led to the emergence of funding arrangements in the past 12 months. For example, Irish Life has announced its decision to pre-fund a €125 million development of an office block in the Dublin docklands that has been pre-let to Grant Thornton, and ownership of the property will be transferred to Irish Life on completion.

The sale of retail investments exceeded office turnover in 2016. The exceptional spend on retail investments stemmed from the sale of the Blanchardstown and Liffey Valley Shopping Centres for a reported €950 million and €630 million respectively, which accounted for 35 per cent of the year's total turnover. Davidson Kempner paid about €170 million for circa 1.1 million square feet of retail space in largely provincial shopping centres, and the market expects that a new Irish retail REIT may emerge over the coming 12 months. It is a very busy time for Irish property lawyers.

II RECENT MARKET ACTIVITY

i M&A transactions

2016 and 2017 have also see a series of transactions in which properties are structured as a transfer of an undertaking. One recent example is the sale by Bristol-Myers Squibb of its manufacturing plant in north Dublin to South Korean company SK Biotek. However, since the recession began in 2008, there have been no large-scale pure M&A property transactions, such as had been a feature of 'Celtic Tiger' Ireland. In the past, M&A real estate transactions were driven by a significant 5 per cent differential between the rates of stamp duty (i.e.,

5 JLL Research (April 2017).

6 www.irishtimes.com/business/commercial-property/cbre-reports-fall-off-in-volume-of-investment-properties-coming-to-market-1.2633367.

transfer tax) on commercial real estate and stamp duty on shares (6 per cent real estate versus 1 per cent shares), resulting in certain large real estate transactions being structured as share deals. This differential has now closed to 1 per cent. Transactions of note include the following:

a Becbay Limited in 2008, a company that owned a large site in South Dublin with development potential (the Irish Glass Bottle site), was sold for €412 million.

b Listed company Jurys Doyle Hotel Group plc was acquired in a public takeover in 2005 valuing the company at €1.25 billion. Subsequent to the acquisition, various large real estate assets were disposed of by the privately held company.

c Following on from an unsuccessful management buyout proposal, which put the company in play, Irish Continental Group plc (a ferry operator with large city centre port property with possible development potential) became the subject of a protracted high-profile public takeover battle in 2007, with one of Ireland's then-largest property developers taking a 29.3 per cent position in the public company. In the end, the competing bidders, who held large stakes in the company, did not reach a deal and no takeover took place.

Recent deals completed by REITs and Irish public companies include the following:

a On 13 June 2017, the state broadcaster, RTÉ, accepted a bid of €107.5 million from Cairn Home plc (Cairn) for 8.64 acres of land in Dublin. Cairn plans to seek permission to build 500 apartments and nine houses on the site. The deal closed on 17 July 2017.

b In October 2015, UK-listed property company Hammerson acquired a portfolio of loans from NAMA for a reported €1.85 billion. The loans were connected with Chartered Land, an Irish privately owned property development company, and included the Dundrum Town Centre, Ireland's largest shopping centre. The loans were acquired through a 50:50 joint venture with Allianz. In July 2016, a consensual agreement was reached with Chartered Land to take control of the underlying assets.[7]

c In early 2014, Green REIT and then-joint venture partner Kennedy Wilson (PIMCO) bought 50 per cent of a large development at Central Park in Dublin for €310 million. The development comprised five substantial office blocks, a retail building and a multi-family complex with 272 apartments. The complex was previously owned by Treasury Holdings, a former high-profile Irish private property development company that became insolvent and was wound up in October 2012 after coming under the control of NAMA. In November 2015, Green REIT acquired Kennedy Wilson's 50 per cent interest in Central Park for €155 million. In June 2014, Green REIT acquired a property portfolio from Cosgrave Property Group for €375 million. The company's portfolio comprises 23 properties, 95 per cent of which are located in Dublin, and is valued at €1.2 billion.

ii Private equity transactions

Blackstone acquired the Blanchardstown Shopping Centre in Dublin in June 2016 for €950 million. The seller, Green Property, was one of the few listed Irish real estate companies before it was taken private in 2002. It remains privately held.

7 www.irishtimes.com/business/commercial-property/hammerson-becomes-major-player-with-dundrum-deal-1.2715635.

In December 2016, a group led by US real estate investor Hines sold Liffey Valley Shopping Centre and adjacent lands to Germany's largest public pensions group, Bayerische Versorgungskammer for €630 million.

Blackstone had previously acquired the well-known Burlington Hotel in Dublin for a reported €67 million in 2012.[8] The Burlington Hotel was subsequently rebranded 'Doubletree by Hilton', and was sold to Deka Immobilien in August 2016 for a price reported to be in excess of €180 million.[9] A record amount of €720 million was spent on 51 hotel transactions in Ireland in 2016.[10] Deka Immobilien also purchased the Whitewater Shopping Centre in Newbridge, County Kildare, for €180 million from its joint owners, Ballymore Properties and Elm Holdings.

In 2015, Lone Star acquired Jurys Inns Group Limited, the Ireland-based owner and operator of a hotel chain, from a consortium of private equity firms for a total purchase price of €910 million. Jurys Inn operates hotels in Ireland and the United Kingdom, and one hotel in the Czech Republic. Lone Star has been very active in the Irish market in recent years, acquiring €540 million-worth of sub-prime mortgages from Start Mortgages and IBRC's UK loan book for €4.7 billion.

InfraVia acquired Carechoice, the second-largest private owner and operator of nursing homes in Ireland. Carechoice operates six nursing homes across Ireland (in Dublin, Cork and Waterford) providing over 500 care beds for elderly.

III REAL ESTATE COMPANIES AND FIRMS

i Publicly traded REITs and REOCs – structure and role in the market

REITs were only introduced in 2013, and all three Irish REITs in operation are listed companies. The Irish Stock Exchange (ISE) has created a listing regime for REITs, and has aligned the new requirements with those of the FCA Listing Rules in the United Kingdom to facilitate REITs with the possibility seek a dual listing in Ireland and the United Kingdom. With a choice of adopting IFRS, US GAAP or Irish GAAP for financial reporting, the Irish statutory regime is sufficiently agile to integrate with the majority of global organisations.

Green REIT's portfolio mainly comprises commercial real estate. Green REIT purchased commercial property during the recession when banks were in the process of deleveraging, and is now focusing on 'driving further risk-adjusted shareholder returns through the exploitation of the asset management initiatives and development opportunities within the portfolio'.

Hibernia REIT's portfolio mainly comprises commercial and residential real estate assets. The value of Hibernia REIT's properties climbed 9.9 per cent to €1.167 billion as at 31 March 2017. Hibernia REIT's primary focus is on the office sector, but it also acquires industrial, warehousing and distribution, recreational, retail, residential and other Irish property assets.

8 The property was purchased in 2007 for €288 million, which shows the extent of the collapse in property values in the recession.

9 *Irish Times*, 27 May 2016.

10 *Irish Times*, 16 March 2017.

IRES REIT maintains a mainly residential rental portfolio, and it is currently one of the largest private landlords in Ireland. The firm purchased loan portfolios from NAMA and others in 2014 and 2015. It has a current portfolio of over 2,000 apartments and net assets of €469.5 million as at 31 December 2016.

Cairn, the Irish property development company, was floated on the London Stock Exchange in March 2015, raising approximately €440 million from investors in Ireland, the United States, the United Kingdom and other jurisdictions, and approximately €52 million following a secondary offering in May 2017 Cairn was the first Irish property developer to float on the stock exchange since McInerney Holdings plc in 1997 (which delisted in 2010). Cairn focuses on acquiring greenfield or brownfield sites in Ireland that are suitable for residential development, with an emphasis on Dublin and the Dublin commuter belt, as well as other urban centres. Cairn properties include Cherrywood, a retail-led, mixed-use town and over 3,800 apartments and houses.

REOCs are not a recognised concept in Ireland, and as such there is no specific advantageous tax regime in place as there is with REITs. Given the success of Irish REITs, which are predominantly held by international investors, and the popularity of the REOC internationally, the agile Irish financial and tax system may adapt to bring the concept to Ireland.

ii Real estate PE firms – footprint and structure

International private equity groups have invested heavily in Irish real estate in recent years. During the recession, large transactions were primarily structured as acquisitions of loans secured by underlying real estate assets. Apart from loan book acquisitions, private equity houses have also directly acquired and developed trophy assets, including Blackstone's acquisition of the Burlington Hotel in 2012, and its acquisition of Blanchardstown Shopping Centre for around €950 million in June 2016.

Key private equity players in the Irish market include Blackstone (details of its activity are set out above), Kennedy Wilson and Apollo. Kennedy Wilson acquired Bank of Ireland's real estate management business in 2011, and has become one of the largest property players in Dublin. Kennedy Wilson's rental income from properties in Ireland rose to £42.7 million in 2016 from £29 million in 2015. Kennedy Wilson's Irish portfolio includes high-end hotels such as the Shelbourne Hotel, Portmarnock Hotel and Golf Links, shopping centres and prime office space. Apollo acquired loans secured on the Arnotts department store in Dublin following a lengthy bidding process. The loans, which had a face value of €230 million, were bought from the liquidators of IBRC.

In completing acquisitions, an Irish regulated fund is frequently used as the acquisition vehicle. This is now typically an Irish collective asset management vehicle (ICAV) or another variant of a qualified investor alternative investment fund (QIAIF), which generally holds the real estate asset directly or, in certain cases, through a wholly owned limited liability nominee company.

IV TRANSACTIONS

i Legal frameworks and deal structures

Private companies

In a private property sale, there is no codified system of protections afforded to a prospective buyer, nor a codified set of obligations imposed on a seller. Instead, the common law principle of *caveat emptor* applies, and the buyer must build protections into the acquisition agreement. While authorisations from regulatory bodies are required in certain sectors, including banking, insurance, financial services and telecommunications, there are no restrictions on the foreign ownership of real estate or shares in companies owning real estate. Government policy encourages foreign investment, and the applicable tax regime can be favourable depending on the structure used.

The primary means used to acquire real estate in Ireland are under private contract, by way of a direct purchase of specified assets (asset purchase) or a purchase of the issued shares of a property owning company (share purchase). Consistent with international practice, the advantage of purchasing a company by buying its shares is that the buyer steps into the shoes of the seller as shareholder of the property-owning company and the company continues in its existing form. There is also a stamp duty saving of 1 per cent in buying shares rather than commercial real estate assets. A private share purchase would not be regulated by the Irish Takeover Rules 2013 (Rules, considered in detail below), giving parties more freedom to agree the timetable of a transaction and to include and rely on conditions to completion. An asset purchase can be more advantageous in circumstances where the buyer is interested in a small number of (or specific) assets (e.g., a property), or where there are sizeable or unquantifiable liabilities in a company that would be acquired in a share purchase. A buyer can cherry pick the assets while avoiding unquantifiable or unknown liabilities.

REITs and public companies

In light of their recent introduction in the Irish market in 2013, there have been no public takeovers or spin-offs of an Irish REIT to date. One must go back to 2002 to the takeover (by way of management buyout) of Green Property plc for an example of a public takeover of an Irish-listed (pure) real estate company.

A potential takeover of a REIT with shares admitted to listing on the Official List of the ISE[11] would typically take the form of a public offer, which will be regulated by the provisions of, *inter alia*, the Irish Takeover Panel Act 1997 (as amended), the Rules and the European Communities (Takeover Bids (Directive 2004/25/EC)) Regulations 2006 (Regulations). The Irish Takeover Panel (the Panel) would monitor and supervise a takeover bid.

Court-sanctioned schemes of arrangement (which have become more prevalent in recent years, particularly in the area of re-domestications) can also be used to obtain control of a publicly listed company. The main advantage of a scheme over a public takeover is that the bidder acquires 100 per cent of the target through a cancellation of all of the shares owned by the target's existing shareholders and the issue of new shares to the bidder in their place. The reserve created by the cancellation is capitalised and applied in paying up new shares in the target to the bidder. Using a scheme will usually confer a stamp duty advantage (no stamp duty of 1 per cent is payable), but a scheme is less flexible than an offer and typically takes longer than an offer to implement (largely because three separate court hearings are required).

In a takeover, the duties and responsibilities imposed by Irish law on a REIT's board of directors are similar to those of directors of an Irish-listed company. Any successful takeover offer would likely have to be recommended by a REIT's board of directors (although similarly to any other listed company, a hostile takeover is theoretically possible). When considering

11 The shares of the REIT must be listed on the main market of a recognised stock exchange in a Member State of the EU. QIAIFs may seek to list their shares on a recognised stock exchange but are not obliged to do so. REITs must be listed on the main equity market, whereas QIAIFs will list as investment funds.

or recommending an offer or scheme, the directors must observe their fiduciary duties to the company, must act *bona fide* in the best interests of the company and not have regard to their personal interests.

Mandatory offer

Under the Rules, a bidder is required to make a mandatory offer, which must be for cash or include a full cash alternative, for the remaining securities in a target if:

a it (or any person acting in concert with it) acquires a holding of 30 per cent or more of the voting rights of the target;

b its holding (or holding combined with any persons deemed to be acting in concert with it) of less than 30 per cent of the voting rights increases to 30 per cent or more; or

c its holding (or holding combined with any persons deemed to be acting in concert with it) of between 30 and 50 per cent of the voting rights increases by more than 0.05 per cent of the aggregate percentage voting rights in that company in any 12-month period.

Squeeze-out or sell-out

The bidder can compulsorily acquire the shares of minority shareholders under the Regulations and must receive a level of 90 per cent acceptances in value and voting rights of the shares subject to a takeover bid. If the Regulations do not apply to the target company, the Irish Companies Act 2014 (2014 Act) contains a procedure to compulsorily acquire the shares of minority shareholders, which necessitates a level of 80 per cent of acceptances. The Regulations also provide for rights of 'sell out' for shareholders. The main condition to be satisfied to enable the exercise of sell-out rights is that the bidder has acquired, or has unconditionally contracted to acquire, securities that amount to 90 per cent in value and voting rights attaching to the securities affected.

Stakebuilding

Under the Transparency Rules issued by the Central Bank of Ireland (CBI), every time a bidder for a publicly listed company reaches or passes through a whole percentage integer from 3 to 100 per cent, a notification to the target and the CBI (via the ISE) must be made within two trading days, and the target must itself notify the markets by the end of the next trading day. Additional legal constraints to stakebuilding are set out in the 2014 Act and the Substantial Acquisition Rules 2007 (SARs), which restrict the speed with which a person may increase a holding of voting securities between 15 and 30 per cent. The SARs also apply where persons are acting in concert.

Other typical deal structures

ICAVs

The ICAV is a bespoke corporate collective investment vehicle used in regulated fund structures, and it has been the preferred form of collective investment undertaking for large property acquisitions since it was introduced in 2015. ICAVs have two clear advantages over certain other property holding structures. From a corporate perspective, ICAVs avoid the need for compliance with certain Irish company law requirements,[12] resulting in reduced

12 For example, it will not be necessary for the ICAV to produce consolidated accounts, and the ICAV may dispense with the ability to hold an annual general meeting by giving at least 60 days' written notice to all

administrative obligations and costs. However, as they are regulated by the CBI, there are higher establishment expenses and ongoing regulatory costs. From a tax perspective, ICAVs have the advantage of being able to elect in their classification, under the US 'check-the-box' taxation rules, to be treated as transparent entities for US federal income tax purposes. This may give rise to advantageous tax treatment for US investors in certain circumstances.

Limited partnerships (LPs)

Another type of structure being used regularly for substantial property deals is the LP. An LP is established pursuant to the Limited Partnerships Act 1907 and must consist of at least one general partner and one limited partner. The general partner (GP) of the LP, who manages the LP's business, has unlimited liability (although the GP may be a limited liability company, effectively limiting the liability of the LP). An LP is transparent from an accounting and taxation perspective and is not subject to Irish company law. There are also fewer public filing requirements for an LP than a company. The use of LPs as a component part of a tax-efficient structure for holding Irish real estate has increased recently. It would be highly unusual to use an LP in a public offer.

ii Acquisition agreement terms

In Ireland, loan portfolio sales (secured by real estate assets) are nearly all conducted as private contract auction sales. Guarantees, deposits, equity commitment letters or net asset value covenants are typically required by sellers in loan portfolio sales. Terms are extremely seller-friendly, with limited title and capacity warranties (and none in relation to enforceability of security), low caps on liability compared with market practice in typical M&A private company transactions (e.g., 10 per cent of overall consideration) and other extensive limitations on liability. However, pricing also reflects the fact that, on the basis of the overall acquisition framework, there is a very remote chance of being able to bring a successful warranty claim. The use of warranty and indemnity insurance and title insurance is increasingly used to bridge the risks sellers refuse to cover commercially.

Type of consideration

The principal form of consideration in real estate transactions in Ireland is a deposit on signing with a single cash payment on completion. Shares, loan notes, warrants, promissory notes or any combination of these may be offered as consideration, but it is uncommon.

As noted above in relation to public companies, in the case of a mandatory offer or where a bidder acquires any shares in the target company for cash during the offer period, the Rules require that the consideration is cash or a cash equivalent. Where cash is being offered, the legal requirement for a cash confirmation means that the financing must be in place at the time of the Rule 2.5 announcement (an announcement of a formal intention to make an offer) in respect of a target to which the Rules apply.

Representations, warranties and indemnification

In common with the practice in most common law jurisdictions, a private property acquisition agreement can, and would typically, include certain buyer protections, such as warranties and indemnities. Liability is usually resisted by the seller for information made available (possibly

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ICAV shareholders.

to a number of potential suitors) at the due diligence stage. In a real estate acquisition via shares, disclosures are made in a disclosure letter and a seller's liability is usually limited to the extent of matters fairly disclosed in or by the disclosure letter. Indemnities may be negotiated in circumstances where specific issues of concern are discovered during diligence (but indemnity protection is the exception rather than the rule).

Closing conditions

Common conditions to closing include antitrust or regulatory approval, shareholder approval (in public deals) and availability of financing (only in private deals). The Competition and Consumer Protection Commission (CCPC) is the antitrust regulatory body in Ireland. Subject to certain financial thresholds, a bidder proposing to acquire direct or indirect control of a company with a trading business must provide advance notice to the CCPC and get its approval. Any transaction that requires CCPC approval will be void if put into effect before the approval of the CCPC is obtained. Recent changes in Irish antitrust law have resulted in many individual hotel acquisitions (as they are trading businesses) requiring CCPC approval.

iii Hostile transactions

Hostile transactions rarely occur in Ireland, and none has ever successfully been executed in relation to a real estate listed company. A public takeover can either be by way of public offer or a scheme of arrangement. A hostile bid is highly unlikely to be structured as a scheme (as a scheme typically requires the cooperation of the target). Typically, the announcement of an offer would be a joint announcement and the target would provide important input into the announcement, which needs to comply with the Rules. Because of the nature of real estate assets, the asymmetry of information between the hostile bidder and the resisting target in its response document would present something of a challenge for any hostile bidder.

iv Financing considerations

Transactions are typically structured with a combination of equity and senior bank debt. However, in order that the financing requirements do not jeopardise a deal, private equity firms often acquire either the assets or the loan portfolios from their own cash reserves and seek to put in place bank financing afterwards. As business confidence has returned to the Irish market, more Irish companies appear to be accessing the equity capital markets (both in Ireland and overseas) to facilitate acquisitions.

2016 and 2017 have seen an emergence of 'forward-funding' deals in which investors agree to buy completed developments before or during the construction phase, enabling investors to obtain better returns while avoiding most of the development risk.[13] By way of illustration, in May 2017, JP Morgan announced its decision to acquire a 130,000 square foot building under construction in Dublin's docklands, which Kennedy Wilson is developing in a joint venture with Fairfax Financial and NAMA, structured as forward-finance deal, for a reported €125 million. This trend reflects a shift away from opportunist investors snapping up prime properties at bargain prices to a market where longer-term investors take a risk that the developer will deliver a property on time and within budget.[14]

13 See footnote 4.

14 www.businesspost.ie/property/forward-funding-paves-way-investors-388226?auth=login.

Another trend that has emerged in the past 12 to 18 months is alternative lenders entering the market. Credit availability is shifting away from solely traditional lenders to a mixture of banks, mezzanine lenders and non-bank lenders. Non-bank lenders are typically investors and institutions that are willing to lend and can include hedge funds, pension funds and insurance companies. Interest rates on non-bank lending are typically higher than those for traditional bank loans.

v Tax considerations

REITs and QIAIFs (including ICAVs) benefit from special tax treatment in Ireland, both in relation to the direct taxation of the vehicle itself and in relation to the taxation of the shareholders in those vehicles.

A REIT is exempt from Irish corporation tax on income and gains arising from its property rental business (subject to certain clawback rules). A REIT is required to distribute 85 per cent of its property income annually. Irish-resident investors are fully liable to Irish tax on such distributions (save in certain cases, e.g., pension schemes or charities). In the case of non-Irish resident investors, income distributions from the REIT are subject to 20 per cent dividend withholding tax, which must be withheld by the REIT regardless of whether the investor is resident in a double tax treaty jurisdiction.[15] Certain non-residents may be entitled to recover some or all of the tax withheld on distributions from the REIT under the provisions of a double tax treaty, or otherwise may be able to claim credit against taxes in their home jurisdictions. Exemptions from withholding tax will apply for distributions to pension funds, insurance companies and certain investment undertakings.

Irish QIAIFs (including ICAVs) are exempt from Irish tax on income and gains regardless of where their investors are resident. However, changes introduced in late 2016 now seek to impose a charge to tax where at least 25 per cent of the value of the total assets of the QIAIF, directly or indirectly, is derived from Irish real property assets (with certain exceptions), or where the main purpose of the QIAIF is dealing in or developing Irish land or carrying on an Irish property rental business. Where this occurs, in broad terms the QIAIF must apply a 20 per cent withholding tax on the occurrence of certain events, including the payment of distributions, cancellation, redemption or repurchase of units from an investor or the disposal of such units (again with certain investors excluded, e.g., certain pension funds). This applies irrespective of the tax residence of the investor.

LPs are transparent for tax purposes, meaning that no tax will be chargeable at the LP level. Instead, the investors are subject to tax directly. As noted above, LPs must have at least one general partner and one limited partner. These partners could include companies, individuals or corporate vehicles with special tax treatment, as described above.

An Irish-resident company is subject to Irish corporation tax at 25 per cent on rental income.[16] In addition, in the case of a closely held Irish-resident company, a 20 per cent surcharge applies in respect of rental income held by the company that is not distributed within 18 months of the end of the accounting period in which the income arises. In contrast, non-Irish resident companies are subject to Irish income tax at 20 per cent on Irish rental

15 This differs from the position, for example, in respect of treaty-resident investors in normal Irish-resident companies, where various dividend withholding tax exemptions are available.

16 Various deductions are available in computing taxable rental income, including interest on borrowings to purchase or develop Irish property, subject to certain requirements and restrictions.

income, and the close company surcharge on undistributed rental income does not apply. For individual investors, rental income derived from Irish property is subject to Irish income tax at marginal rates (currently 20 or 40 per cent, depending on the level of income).[17]

Stamp duty and VAT are considerations for any acquisition of property, regardless of the property holding structure used or the tax residence of the investor. Stamp duty applies at a rate of 1 per cent on a share sale and at a rate of 2 per cent on an asset sale. VAT is not chargeable on a share sales, but may be chargeable on asset sales depending on the circumstances and the nature of the property. Any such VAT may be recoverable by the buyer depending on its VAT status and the use to which it is applying the real estate.[18] However, the purchase of an undertaking or business that is capable of being operated on an independent basis should qualify for transfer of business relief, eliminating any VAT charge.

Sales of Irish property generally give rise to capital gains tax (CGT) at a rate of 33 per cent on any gain realised, irrespective of the tax residence of the person making the disposal. CGT also applies to share sales where more than 50 per cent of the value of the shares is derived from Irish land.

vi Cross-border complications and solutions

There are no Irish constraints on foreign acquisitions of Irish property or shares in an Irish property holding company.

V CORPORATE REAL ESTATE

The global recession resulted in propcos owning devalued assets, which breached the terms of their loan-to-value covenants, while the ability to service their debt from the opco income stream became fragile as opcos struggled to meet their rent payments. Nevertheless, to date, there appear to have been no separate opco/propco structures implemented in Ireland at the REIT or other large corporate level. However, these structures are now typically implemented at the individual asset level, primarily in the hotel sector but also in industries that have valuable property assets used in a trading capacity.

VI OUTLOOK

The Irish economy grew 5.2 per cent in 2016 according to latest Central Statistics Office figures, outstripping all other eurozone countries and most official forecasts for the third successive year. While the rate of growth is a fraction of the 26.3 per cent recorded for 2015, the 26.3 per cent rate seems to have been mainly caused by large companies moving assets that were previously held in other jurisdictions to Ireland.

Consumer sentiment is at a 10-year high, unemployment levels continue to fall, access to capital remains buoyant and exchequer returns are exceeding expectations. A weak euro

17 They may also be liable for a pay-related social insurance and a universal social charge, although exemptions may apply in the case of non-Irish resident individuals.

18 VAT on property is a complex area, and the VAT position will vary depending on the nature of the property (residential or non-residential property, freehold or leasehold), whether it is developed or undeveloped, when it was acquired or developed, whether VAT was recovered on its acquisition or development, and other factors.

also enhances the attractiveness of Irish assets. These factors positively influence demand and the ability to execute transactions in the Irish market. However, while interest rates remain low, there are indications that the period of expansive monetary policy is drawing to a close. In December 2016, the ECB announced a reduction in its monthly bond-buying target effective from April 2017.

The negotiations between the United Kingdom and the European Union in relation to the United Kingdom's exit from the EU commenced on 19 June 2017. Clarity on the eventual form of the relationship between the United Kingdom and Ireland and the United Kingdom and the EU will take a number of years to appear. In the meantime, it is clear that some inbound real estate investors might choose to delay investment decisions until there is more clarity on how the Irish economy, which is intrinsically linked to the UK economy – our largest trading partner – will be affected. The next 24 months are likely to be volatile, but may present opportunities. In particular, as a result of Brexit, many opportunities could arise for well-capitalised Irish REITs. Multinationals considering locating their European headquarters in the United Kingdom may decide to switch to Ireland, which, if Brexit is actually implemented, will be the only English-speaking Member State of the EU. Several financial services providers (e.g., JP Morgan) and other businesses have already announced their decision to opt to move certain parts of their operations from the United Kingdom to Ireland, while others are monitoring developments as the impact of Brexit becomes evident.

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