

Q&A

MCCANN
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LAWYERS SHARE
INSIGHTS ON THE
U.S.-IRELAND
TRANSACTION
BOOM



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IRELAND'S AMERICAN ACCENT

Ireland's innovative regulatory and corporate landscape continues to make the country an attractive business destination for U.S. companies and investors.

With over 40 million Americans proudly claiming Irish heritage, Ireland and the U.S. have a unique connection that has translated into significant economic activity and cross-border transactions between the two countries. U.S. companies have invested over \$270 billion in Ireland (more than the BRIC countries combined), and more than 100,000 Irish people work for U.S. companies in Ireland. On the flipside, Irish investment in the U.S. is in excess of \$26 billion, and Ireland matches the U.S. job for job, with an equivalent number of Americans working for Irish companies in the U.S.

Reporter Howard Stock spoke to McCann FitzGerald Managing Partner Barry Devereux and Corporate Partner Gary McSharry, who recently joined the firm after working for a number of years in New York advising U.S. companies and private equity firms on M&A, private equity and the establishment of structures and operations in Ireland.

WHAT FACTORS HAVE INFLUENCED DEAL FLOW FROM THE U.S. INTO IRELAND?

MCSHARRY: When the U.S. administration moved to reduce the attractiveness of offshore jurisdictions for U.S. companies in 2008/09, a number of U.S. companies that had originally migrated to Cayman or Bermuda decided to move onshore. Ireland, as a member of the OECD with a transparent low-tax regime, was well placed to receive a number of those companies. We then saw major activity via inversions as U.S. companies acquired non-U.S. targets and, as part of the acquisition, moved their domicile away from the U.S. When the U.S. rules changed and it became more difficult to claim a substantial business activity as the basis for an inversion, a number of U.S. companies migrated via the shareholder value test, whereby shareholders in the target company owned at least 20% of the merged company post-inversion, so it had to be quite a significant target company. The numerous commercial

and corporate benefits and advantages of locating in Ireland have led to an upward trajectory and a growing volume of activity between the U.S. and Ireland.

WHAT ARE SOME OF THE MOST SIGNIFICANT RECENT TRANSACTIONS WITH U.S. COMPANIES?

MCSHARRY: Many of the largest U.S. deals in the past year required significant Irish law support as they involved Irish incorporated entities. There was the c. \$40 billion acquisition by Medtronic of Covidien

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(Irish incorporated target), and the c. \$70 billion acquisition by Actavis (Irish incorporated buyer) of Allergan. Mylan are also currently making a c. \$28 billion hostile offer for Perrigo, and because it is an Irish target, the transaction is subject to Irish takeover laws. McCann FitzGerald have also been involved in the \$2bn merger of Jazz Pharmaceuticals and Azur, the \$660m acquisition by Horizon Pharma of Vidara and the c. \$1 billion proposed merger of Chiquita and Fyffes, which was scuppered by the sale of Chiquita to another suitor.

DEVEREUX: These are Irish companies, but they are listed on the New York Stock Exchange or Nasdaq. This means that, when someone bids for these companies, the transaction is governed by both Securities and Exchange Commission takeover rules and Irish takeover rules. What that means is any such deal needs a significant input from Irish corporate lawyers as well

as U.S. corporate lawyers in order to satisfy both sets of takeover rules. For us it effectively means co-counselling with major U.S. law firms. It's a significant change in what we do because historically there wouldn't have been any companies in Ireland anywhere near the value of the likes of Medtronic, Allergan, Perrigo etc. So we are now exposed to far greater-sized transactions that have been led out of the U.S., but the Irish input is very significant.

HOW DOES THE CROSS-BORDER NATURE OF THESE DEALS AFFECT THEIR COMPLEXITY?

MCSHARRY: Because there have been so many substantial, complex U.S.-Irish transactions, ultimately there's a well-worn path. There are some nuances between SEC and Irish takeover rules, but now that McCann FitzGerald has advised on a number of these deals, something that was complex initially is now relatively straightforward for us. For the most part, U.S. advisors are also comfortable operating within Ireland because we're also a common law regime with freedom of contract and we share many legal principles. The new Companies Act (which Ireland introduced in June 2015) is a significant piece of legislation, with the purpose of making it even easier to do business in Ireland from a company law perspective. U.S. lawyers find it a very easy transition as opposed to working in, for example, a civil law jurisdiction.

DEVEREUX: There are things that may be more difficult to do in Ireland that are routine in the U.S., such as increasing or decreasing the price in a takeover scenario but it's a bit more flexible in the U.S., so we've had to find ways of ensuring that the clients' objectives can be achieved within the rules here.

MCSHARRY: Just in terms of activity, it's important to also note that there continues to be significant U.S. private equity activity in Ireland. Over the last few years, there has been real value to be gained for U.S. investors in Irish assets, and you've had major U.S. funds acquiring significant portfolios of assets (including real estate) at very good values. There also continues to be strong activity with U.S. companies using Ireland as an efficient

location for European operations, where they can get closer to over 500 million new potential E.U. customers and a significant talent pool.

WHAT HAS HAPPENED TO TRANSACTIONS INVOLVING INVERSIONS?

MCSHARRY: The move by the U.S. Treasury to limit the post-inversion benefits led to a slowdown, but judging by recent inversions over the summer, it would appear that those attempts have not been fully successful. Ultimately, the U.S. Treasury needs Congress to act, but as I understand it, Congress is reluctant to address inversions without addressing reform of the overall U.S. tax code, which may take time.

HOW HAS THE NEW IRISH COMPANIES ACT BEEN RECEIVED BY AMERICAN CLIENTS?

DEVEREUX: I think making life easier is a good thing—it consolidates over 50 years of company legislation, which means that the framework for doing business in Ireland is now housed in one piece of legislation, with an emphasis on efficiency and simplicity. In the U.S. you can merge and fuse two companies and one of them disappears. Previously, in Ireland that wasn't generally possible. So one company will buy another company and afterwards they might do an internal reorganization and move the assets from B to A, whereas U.S. companies will say to us "Why can't we do a merger where B disappears as soon as we put A into it?" That's now been introduced in the new legislation and it's a very useful add on. For U.S. clients, the substance of an Irish contract is very close to that of a U.S.-style contract.

WHAT MISCONCEPTIONS DO U.S. ENTITIES HAVE COMING INTO IRELAND FOR THE FIRST TIME?

DEVEREUX: Because there is such a well-worn path in terms of U.S.-Irish transactions, misconceptions are becoming far fewer and there is a lot of symmetry with the U.S. U.S. buyers focus a lot more on indemnities, but we usually succeed in winning those points for U.S. acquirers of Irish assets and making Irish sellers conversant with the risk

of giving indemnities versus warranties. It's a technical point, but we generally find a happy middle ground that suits both U.S. clients and Irish sellers.

HOW CLOSELY ARE YOU WATCHING THE U.S. ELECTION?

MCSHARRY: It's obviously important in terms of how the U.S. interacts globally, including

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with Ireland. A lot of focus from the Irish perspective will centre on the U.S. policy on corporate tax. But U.S. companies locate in Ireland for many reasons, not just tax, and those reasons will remain.

WHAT ARE THE MAIN ONGOING SELLING POINTS IN IRELAND?

DEVEREUX: The 12.5% corporation tax rate is well known, as is the fact that we're the only English-speaking member of the eurozone, but one of the things that isn't talked about that much is the willingness of Ireland to recognize the proprietary nature of intellectual property. Irish law is very much in favor of recognizing creativity, and we have a relatively new commercial court that resolves business disputes very quickly. So, rather than take two or three years to settle say a patent infringement, you can go to the commercial court and within six months you can come out at the other end with a judgment. We're hearing U.S. CEOs saying this reason is near the top of their list of reasons why they're here. It makes sense when you look at who is here—it's the world's top pharma companies, the top tech companies and also the big financial companies. And their footprint here is very significant, often being their European HQ or largest manufacturing facility outside the U.S. In addition there is a clustering effect because this is a great place for innovative companies to do business.