

MASON
HAYES &
CURRAN

TIMES

Issue 37
Autumn 2015

European Connections

Building business in the EU



Kick-starting the EU Economy
Hope Lies with the CMU
Page 2

Keeping up with the Times
IP Enforcement in Ireland
Page 4

Powering Europe
Ireland's Future Potential
Page 6

Managing Partner's Diary

Declan Black, Managing Partner at Mason Hayes & Curran



This summer I have had the opportunity of talking to lots of clients and, of course, to potential clients! It remains extraordinary how many comment on two things: their desire for clearly expressed advice and their desire for brevity. One general counsel even said she and her team could spend their entire day translating external lawyers' advice so that the business could understand it. Happily, this was not her experience with MHC.

It is peculiar that the use of complex or archaic language, and long-winded communications, persists in the profession given the strength of client sentiment against them. Perhaps the old adage "If I had more time, I would have written a shorter letter" is incompatible with the billable hour. The confidence to bill for the additional time it takes to produce clear and short advice may be absent in some lawyers. Or, the desire to cover off risks and limit potential exposure may tempt others to stray from core issues. Or, more fundamentally, the analysis of the factual and legal issues and the advice itself may be fuzzy in the author's mind.

In this context, I am very pleased that MHC is sponsoring PLAIN 2015, Ireland's first plain language conference which takes place at Dublin Castle in September 2015 (www.plain2015.ie). This was a sponsorship viewed by some with a degree of trepidation and rightly so. As sponsors of a plain language conference, the potential to be lampooned for the failings of one out of our 250 fee earners is very real!

To try and mitigate that risk, in addition to our usual training on clarity and plain language, we started counting the number of times that unwelcome terms such as "aforementioned" and "hereinbefore" appeared in our systems. Happily, on a month to month basis, that count is reducing and we do have to make allowances for the fact

that sometimes documents generated by others get onto our systems and are included in the count!

Of course the merit of plain language is the maximisation of clarity and accuracy. It is a hallmark of MHC that our advice be clear and accurate. This is because we see the accuracy of the description of a client's position as a fundamental part of the lawyer's role. This is so whether we are giving advice or setting out a client's position in litigation, in an agreement or in negotiations about a transaction.

We hope our sponsorship of PLAIN 2015 contributes to our being clear and accurate through the use of plain language. I hope that you our clients will benefit from this approach and if you find us using "aforementioned" let me know!

Foreign Investment in Ireland

Another talking point with clients was the extent of foreign investment in Ireland. This remains strong for a number of reasons.

A primary reason is government policy. Since the 1960s, Ireland has adopted policies focused on making Ireland attractive to foreign investors. As the Taoiseach puts it, the objective is to make Ireland the best small country in the world in which to do business.

Ireland's government takes a "holistic" approach towards this objective by integrating policy across multiple government departments and agencies. As a result, government agencies can provide a helpful interface with companies that look to set up in Ireland. Many of our clients have noted the ease of access to government agencies, when establishing offices here. Our young, English-speaking and highly educated workforce is a consistent draw for companies doing business through Ireland. And our taxation policy

is attractive and settled. Secondly, our stable democratic political structures create a secure investment environment with a highly developed rule of law and constitutional protection of property rights. Thirdly, a highly sophisticated ecosystem of professional services has grown over the past number of decades for businesses to tap into when they want to establish in Ireland.

All of this has led to a cluster effect with groups of foreign companies in specific sectors basing themselves in particular parts of Ireland. For instance, a large pharmaceutical sector has developed in Cork; many biotechnology companies have based their operations in Galway and the Silicon Docks host a large number of internet services businesses. The clustering effect reinforces the experience of a workforce in that specific area and serves to develop a confidence in overseas companies when they consider investing in Ireland and see their competitors succeeding with their Irish businesses.

In some ways, Mason Hayes & Curran is similar to the Irish state in that for decades we have taken a holistic approach to the way we provide services to overseas companies considering investing in Ireland. We help them with tax, regulation, commercial contracts, premises and employment contracts. We assist them in how to use Ireland as their European hub.

The approach we have adopted has contributed to significant growth for the firm, which has doubled in size over the last four years. Many international businesses have chosen to work with us. We are not complacent about this growth and will continue to serve our international and Irish clients to the best of our ability.

Regards,

Kick-starting the EU Economy – Hope lies with the Capital Markets Union

The financing of the EU economy is heavily reliant on bank funding. Data published by the Bank for International Settlements estimates that over the past decade EU companies have relied on bank financing for 80% of their debts.



Conor Durkin
Partner
Mason Hayes &
Curran

In announcing plans to develop a strong market for capital in the EU (the “Capital Markets Union” or “CMU”), the EU Commission (“the Commission”) clarified that the challenge for such projects is “to build a single market for capital from the bottom up, identifying barriers and knocking them down one by one, creating a sense of momentum and helping to spark a growing sense of confidence in investing in Europe’s future.”

The CMU is a series of initiatives aimed at developing capital markets financing and alternatives to bank financing in the EU. According to some commentators the story behind the CMU project is that banks created the financial crisis, therefore we need less banks and more capital markets to finance the real economy.

The Commission announced the CMU proposal in February 2015. It is expected to publish an action plan and proposals for reform by the end of September 2015.

Something needs to be done

The development of an effective market for capital is a key initiative of the Commission. The European economy has struggled to recover; economic activity in the Eurozone is weak, which is reflected in low GDP growth rates ranging between 1% and 2%. With over 24 million people unemployed in the Eurozone, the level of unemployment remains stubbornly high.

The financing of the EU economy is heavily reliant on bank funding. Data published by the Bank for International Settlements estimates that over the past decade EU companies have relied on bank financing for 80% of their debts. Furthermore, the Commission estimates that to finance the EU’s infrastructure needs to 2020, over €2 trillion will be needed for investment in telecoms, transport and energy infrastructure.

As a result of recent reforms of the banking sector, EU banks are deleveraging and cannot be relied upon to meet their basic objective of lending to business. Consequently, a large funding gap has developed which will continue to grow if left untreated, which could lead to a prolonged period of stagnation in the Eurozone, reminiscent of the Japanese economy of the 1990s.

Bridging the Funding Gap – Capital Markets Union to the Rescue

Although Europe’s economy is slightly larger than the US economy, the difference in the relative size and importance of US capital markets is surprising. Equity markets in the US

are double the size of EU markets and the private placement market in the US is up to three times bigger. Furthermore, medium-sized companies in the US receive over five times more funding from capital markets compared to similar companies in the EU. The relative scarcity of capital markets financing coupled with a dysfunctional bank lending model means that the development of financing through capital markets and new sources of lending is of critical importance for the EU economy. In this context the Commission is consulting on five priorities for action:

1. Simplify money-raising in EU capital markets

The Commission is reviewing the documentation that companies need to publish to raise money in capital markets. The information that companies are required to publish under the Prospectus Directive is extensive and can be a burden. The Commission’s objective is to simplify the information required, thus making it easier for companies to access capital markets.

2. Facilitate access to EU capital markets

The Commission would like to improve the access to credit information on SMEs. If investors cannot obtain sufficient financial information for the credit assessment, lending to SMEs will be impaired. By developing standards for the disclosure of credit information, the objective is to make it easier for investors and non-bank lenders to obtain the information required to invest and lend to SMEs.

3. Build a stable securitisation regime

Securitisation is the practice of pooling together many loans that are subsequently repackaged and issued by a special purpose vehicle as tradable

securities that are sold to investors. Securitisation allows banks to manage their balance sheets by selling parts of their loan book. However, we learned from the financial crisis that securitisation allowed banks to sell bad quality loans that were repackaged into AAA rated securities.

The Commission wants to encourage high quality sustainable securitisations for the purposes of allowing banks to free up their balance sheets and increase lending to the real economy. The Commission estimates that if SME securitisations could be returned to half the levels they were in 2007 this could generate some €20bn of additional funding.

4. Boost non-bank lending

The Commission's goal is to attract more financing and to develop non-bank sources of long-term finance for the EU. The initiatives being considered include proposals to;

- (i) develop private equity and venture capital financing;
- (ii) facilitate non-bank lending;
- (iii) cultivate more financing by investment funds; and
- (iv) mobilise state and public investment through agencies such as the European Fund for Strategic Investments (the "EFSI").

Private equity and venture capital:

The Commission recognises that private equity and venture capital could be an important source of financing and estimates that if EU venture capital markets were as deep as US markets, as much as €90bn for financing would have been available between 2008 and 2013. Given the relatively small size of the European private equity and venture capital markets, the Commission is seeking recommendations on measures which could boost the scale of private equity and venture capital funds.

Non-bank lending: The development of non-bank lending should mean that the EU economy was not as vulnerable to changes in levels of bank lending. Non-bank lending could come from diverse sources such as large corporates, asset managers, private equity firms and investment funds. Given the challenges that banks are facing, the current environment is a hot house for non-bank lending. Although we have seen dramatic growth in peer-to-peer lending, non-bank lending typically does not occur cross-border between Member States. To develop non-bank lending the challenge is to overcome barriers such as the requirement for national banking licences, legislative preferences given to banks in bankruptcy proceedings, improving access to credit information and harmonising different procedures for taking and enforcing security.

Investment funds: The Commission is looking for proposals on how investment funds can be encouraged to invest in a broader range of assets. Such review will focus on possible enhancements to fund structures such as the European Long Term Investment Funds (ELTIF), European Venture Capital Funds (EuVECA) and the European Social Entrepreneurship Funds (EuSEF).

Recognising the role that investment funds can play in financing the economy, in September 2014, the Central Bank of Ireland developed a regime that permits Irish funds to originate loans.

European Fund for Strategic

Investments: The EFSI will initially be financed with capital of €21bn (funded by the EU budget and the European Investment Bank). With such risk capital, the EFSI plans to unlock additional investment of at least €315bn over the next three years that will be used to finance infrastructure projects.

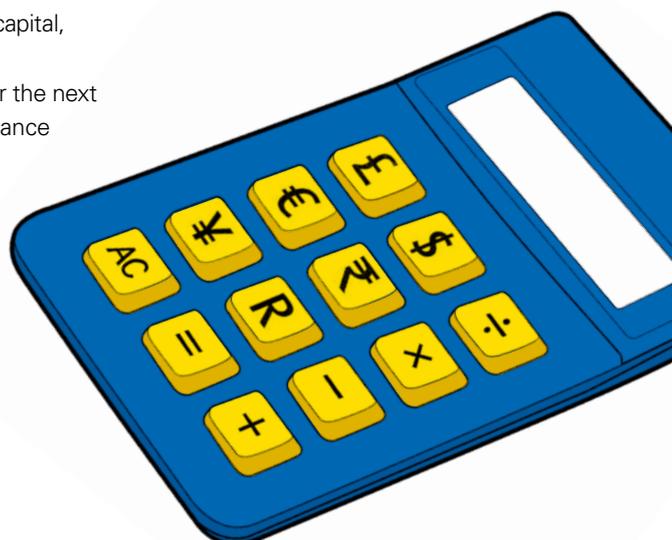
5. Develop private placement markets

Private placement market is where companies can raise funds directly from small groups of investors rather than on a stock exchange. Private placement is an important source of financing, for example 2014 was a record year where over \$65bn was raised and one of the companies that used the US private placement market was Irish company DCC plc, which raised \$750m.

The Commission's objective is to enable companies to tap EU markets for funding. In particular, the Commission is looking at ways to remove existing barriers such as differences in national insolvency laws, improving access to credit information and harmonisation of the legal framework in the EU.

Outlook

The CMU has set a very ambitious task of getting Europe growing again and unlocking investment in Europe's companies and infrastructure. September 2015 should see the release of the Commission's action plan for the development of the CMU. Although many initiatives will take years to complete, the Commission intends to kick-start initiatives for reform and to develop an early sense of momentum and confidence in the process. Seven years following the financial crisis, the CMU comes at a time of palpable desire for economic growth. Benefitting from strong political winds in its favour, we look with anticipation on how these proposals will develop. ■



Keeping up with the Times

Intellectual Property Enforcement in Ireland

This year has seen a marked increase in the number of IP enforcement cases before the Irish Courts, especially those with an international dimension.



Gerard Kelly
Partner
Mason Hayes &
Curran

There have been two recent applications in the Irish Courts for preliminary/ interlocutory injunctions seeking to prevent or cease the marketing of a competing product. These provide important reminders on the principles that an Irish Court will adopt in deciding whether or not to grant such interim relief pending the full trial.

The first case was *Glaxo Group Limited v Rowex Limited* where Glaxo sought to restrain Rowex from continuing to sell a purple asthma inhaler product claimed to infringe Glaxo's Community Trade Mark (CTM) for a purple inhaler device. That unsuccessful application revolved around the issue of adequacy of damages as a remedy. If the party seeking a preliminary injunction can be compensated for damages for its loss at trial then the preliminary injunction will be refused.

The test for an injunction in Ireland

The requirements for obtaining an interlocutory or preliminary injunction in the Irish Courts are essentially the same as the requirements in the UK Courts, namely the principles set out by Lord Diplock in *American Cyanamid Co. v. Ethicon Limited*. These principles, as endorsed by the Irish Supreme Court in *Campus Oil v Minister for Industry and Energy*, provide that in order to succeed in an application for a preliminary injunction the court must determine whether:

- (a) the applicant has raised a fair and bona fide question to be tried;
- (b) damages are an adequate remedy for either party; and
- (c) the balance of convenience lies in favour of granting the injunction.

The colour purple

In May 2015, Judge Barrett refused Glaxo's application for a preliminary injunction. Glaxo, which has been selling its purple Diskus asthma inhaler in Ireland for over fifteen years, claimed that the colour purple had become synonymous with its products. The particular pantone shade has been registered as a Community Trade Mark. The Sandoz group, of which Rowex is a member, made an application for a declaration of invalidity in respect of the CTM at OHIM, the EU body responsible for CTMs. Rowex, like other Sandoz members in the EU, launched a purple inhaler product of a different shade onto the market but with the same active ingredients as Glaxo's product. Glaxo considered this to be "piggy-backing" on its IP and the considerable investment it made in developing its product.

In refusing the application for a preliminary injunction, Judge Barrett considered

two factors to be particularly significant. First, Glaxo had made applications for preliminary injunctions in a number of other EU countries which were not successful, which indicated to the judge that the products could co-exist in Ireland as they were doing in other EU markets. Consequently the Irish Court was reluctant to have Ireland act as an outlier and set it apart from other countries that have refused such relief in the past. Second, Judge Barrett endorsed and applied the previous decision of Judge Kelly on adequacy of damages in *SmithKline Beecham v Genthon*, a patent decision on a preliminary injunction application concerning the launch of a generic pharmaceutical product.

A strict view on adequacy of damages

In *SmithKline Beecham v Genthon*, Judge Kelly followed the test for adequacy of damages set out in the Irish Supreme Court decision in *Curst Financial Services Ltd v. Loewe*, a non-patent case. The Supreme Court held that difficulty, as distinct from complete impossibility, in the assessment of damages should not be a ground for characterising an award of damages as an inadequate remedy. The Supreme Court also held that where there is a commercial loss that is capable of being assessed in damages and there is no doubt as to the capacity of the defendant to pay an award in damages then an injunction should not be granted.

Judge Kelly considered that if an enquiry as to damages incurred by the plaintiff was subsequently necessary, then any impact on the plaintiff's market share would be easily discernible by a review of the plaintiff's market penetration figures together with the defendant's actual sales figures of the generic product. Therefore, any loss to the plaintiff would be classified as a commercial loss, which could be



compensated in damages. There was also an undertaking to record sales from the generic company pending trial.

This approach would appear to be harsher than the corresponding approach adopted by the UK courts. What is significant about the more recent *Glaxo* decision is that these principles have been extended to cases concerning another IP right; trade marks. The indication now is that it may become increasingly difficult to demonstrate to the Irish Courts that damages are an inadequate remedy pending trial where an allegedly infringing competing product has been launched.

The Irish Times fails to keep up with the Times

The second significant case is *The Irish Times Limited v Times Newspapers Limited* where the newspaper The Irish Times sought to prevent UK based newspaper, The Times, from launching an online "Irish Edition" notwithstanding that the two papers have co-existed in Ireland for over 150 years. What was fatal to that application was the culpable delay on the part of The Irish Times in making the application in May 2015 when it was aware of the launch plans some months earlier, as apparent from social media.

Subsequent to the *Glaxo* decision, in July 2015, Judge Hedigan refused to grant an interlocutory injunction in favour of The Irish Times restraining The Times from launching a new digital Irish edition. The defendant in the proceedings, Times Newspapers Limited, intends to launch a digital Irish edition of its newspaper called "The Times (Irish Edition)". The Times currently has a small readership in the Republic of Ireland for its printed edition and has been available since 1787. The Irish Times was established in Ireland in 1859 and its website has a monthly online audience of over 6.5m unique users. The Times was colloquially distinguished from The Irish Times by the use of the name "The London Times". The Irish edition of The Sunday Times has been published in Ireland since the early 1980s. This new product would represent the first national edition of The Times newspaper to be launched outside of the UK.

In the substantive proceedings, The Irish Times is seeking relief on the grounds of trade mark infringement, copyright infringement and passing-off. The Irish Times made an application for an order restraining The Times from launching its new online Irish edition pending the trial.

Delay defeats equity

Although substantive legal arguments were put to the Court concerning the legal basis for granting an injunction, in accordance with the test to be adopted as set out above, the success of the injunction application ultimately hinged on the question of delay.

The Irish Times contended that it first became aware of The Times's intention to launch its Irish edition in the middle of May 2015. However, Judge Hedigan was satisfied on the evidence before him that The Times's intention to launch had been common knowledge since at least September 2014. The Court was referred specifically to tweets showing that those involved in Irish journalism were well aware of The Times's intentions, for example, tweets referring to an advertisement for the post of editor of The Times Ireland. Further, in January 2015, tweets congratulating the newly appointed editor circulated throughout the highest executive levels of The Irish Times. The application for an injunction was commenced in May 2015, seemingly as a reaction to the registration of THE TIMES IRELAND as a CTM by The Times.

As a result, Judge Hedigan held that The Irish Times had "*not moved with the reasonable expedition required of a moving party for interlocutory relief*" and for that reason refused to grant the injunction. The case will continue to trial in due course but provides a useful reminder that injunctions, which are equitable remedies, will only be granted when there is no culpable delay on the part of the party seeking the injunction. In this case, for the purposes of a preliminary injunction, it was held that The Irish Times could not sit back since late 2014 and allow The Times to continue with its plans only to raise the issue at the eleventh hour. In contrast, in the *Glaxo* case, Judge Barrett was not satisfied that Glaxo was guilty of culpable delay in waiting until March 2015 for price reimbursement rather than making an application in November 2014 when it became aware of Rowex's market authorisation.

What is to be learned?

The increase in cases such as these show that rightsholders are willing to enforce their IP rights in Ireland but the lesson learned is that one must act consistently and quickly. While national courts are not bound by preliminary injunction decisions in other countries, such decisions will be reviewed by the Irish Courts. ■

European Commission Launches a Digital Single Market Strategy

The aim of the initiative is to make it easier for citizens to access the wider digital market in Europe.



Philip Nolan,
Partner,
Mason Hayes &
Curran



Oisín Tobin,
Senior Associate,
Mason Hayes &
Curran

In a recent announcement, the European Commission (the “Commission”) has declared its plans to create a Digital Single Market (“DSM”) allowing citizens, individuals and businesses to more effectively access and exercise online activities across the European Union. The aim of the initiative is to overcome the difficulties online and digital operators may face when encounter with 28 sets of rules governing electronic commerce associated with each member state.

What is the Digital Single Market?

In the same way the EU aspires to have a single market for goods and services across the EU, the DSM aims to remove regulatory walls and move from the current 28 national EU markets to one single market in the digital sphere. While online operators can already rely on principles of EU law, such as the Freedom to Provide Services, to trade across the EU, the DSM is aimed at further encouraging cross-border digital trade.

In May, the DSM Strategy was adopted by the Commission which outlined the barriers currently faced by citizens in accessing the digital market, leading to them missing out on goods and services. The Commission revealed that only 15% of citizens purchase goods online from another EU member state and that only 7% of SMEs complete transactions cross-border.

What are the benefits of the Digital Single Market?

The main attraction of the DSM to the EU is its potential for economic growth and employment. The Commission projects that the DSM could contribute €415bn per year to the European economy and potentially create hundreds of thousands of new jobs. The average consumer would be offered greater choice of goods and services and the DSM could positively impact price competitiveness. Business operators would have decreased compliance costs in operating across borders.

What is the strategy?

The DSM Strategy sets out three pillars and 16 key actions which the Commission is tasked with delivering by the end of next year.

Pillars

- Better access to digital goods and services across Europe.
- Ensuring that the right conditions are created to enable digital networks to flourish.
- Maximising the growth potential of the digital economy.

Actions

All 16 of the Commission’s key actions have been set out on their website and include:

- Rules to make cross-border e-commerce easier aiming to provide consumers with a broader spectrum of rights while providing businesses with opportunities to sell across borders more easily.
- A modern, more European copyright law aimed, in part, at ensuring that users who buy films, music or articles in their home country can also enjoy them while travelling across Europe.
- Reinforcing security in digital services, especially with regard to the handling of personal data. The new data protection rules have been eagerly awaited for some time and the Agenda provides that the Regulation is to be adopted by the end of 2015. The Commission also intends to review the e-Privacy Directive, which regulates cookies and spam in Europe.

Where do we go from here and what can we expect?

Although the announcement is recent, many of the legislative initiatives have already been in development for some time. However some may face uphill political battles. Significant legislative plans on this year’s agenda include increased harmonisation of copyright law, a modified proposal for a Common European Sales Law, and a new Directive on Comparative and Misleading Advertising. The Council of the European Union has recently approved a version of the General Data Protection Regulation, although it may be a year or more before a final version is agreed. ■

Powering Europe: Ireland's Future Potential

Ireland is fortunate to be served by electricity and natural gas networks that, generally speaking, are sufficient to serve the energy needs of domestic and industrial consumers – so what is keeping Irish energy lawyers busy these days?



Peter McLay
Partner
Mason Hayes
& Curran

The answer lies in two major European energy policy initiatives, which are together having a profound and ongoing effect upon the organisation of the Irish energy sector. We briefly survey these developments in this article.

Shovel ready

Recent visitors to rural Ireland will have noticed the extent of the construction of onshore wind farms, which are now to be found in 27 of the island's 32 counties.

The majority of these wind farms have been built over the last six or seven years, as part of what has been described as a "rush to wind" – although development work is not confined to wind; major generation projects fuelled by natural gas and biomass have also contributed to the recent arrival of new generating capacity.

Much of this development activity has been spurred not by the scarcity of generation, but instead by government policy (both north and south of the border) to procure that 40% of the electricity consumed on the island of Ireland is produced from renewable sources by 2020. This is the local implementation of an EU policy requiring 16% of energy requirements (of which electricity is just one aspect) by renewable sources.

On the assumption that most of this renewable electricity will be generated by onshore wind farms, it has been estimated that a total of around 5,000MW of wind generation will need to be connected on the island, compared to approximately 3,000MW that is currently installed. For illustrative purposes, each of the larger wind turbines being installed in Ireland at present has a generating capacity of approximately 3MW.

Although arguably less visually obvious, a programme of grid reinforcement and extension is also being undertaken by EirGrid – the operator of the Irish electricity transmission system – with a view to meeting the future electricity demands of consumers and generators. These demands include the transportation and the output of the new wind farms to Ireland's major centres of electricity demand, and the operation of a system with an increasing share of "intermittent" wind generation.

While the magnitude of this task has been reduced from its original ambit, due to the reduction in electricity demand associated with Ireland's recent economic difficulties, EirGrid still estimates that an expenditure of €2.7 – €3.9 billion is required.

To Market, To Market

There is a duality around the operation of an electricity system, and Ireland's is no different. The physical construction and operation of the system is one side of the coin: the other side is the market and regulatory framework that legally underpins the financial operation of the system.

On the "market side," a relatively unheralded dividend of the Northern Irish peace process was the implementation in 2007 of the Single Electricity Market (SEM), the wholesale electricity that includes both jurisdictions on the island of Ireland. Unusually for a European cross-border electricity market, the SEM trading rules are required to facilitate the use of two different currencies. Innovative legal arrangements are also required to ensure that the respective energy regulators act consistently, across the two jurisdictions, in their regulation of market participants.

The relatively low public profile of the SEM is perhaps a sign of its success

– as is the fact that over the course of its operation, project developers have elected to connect around 3,500MW of new generating capacity (out of a total installed all-island capacity of around 13,000MW).

Notwithstanding this success, the governments and energy regulators of the Republic of Ireland and Northern Ireland are currently engaged in the design and implementation of a major set of amendments to the SEM. The project has a working title of "I-SEM" (or "Integrated SEM") and, as the name suggests, it is intended to better co-ordinate the Irish wholesale market's pricing mechanism with that of its neighbour – the BETTA market in Great Britain.

This co-ordination is expected to allow more efficient use of the sub-sea electricity interconnectors that run between Dublin and Wales, and between Northern Ireland and Scotland, which should bring the prices in the neighbouring markets closer together. Such a result would be consistent with the EU's "target model" for electricity, which is intended to deliver something approaching a single EU-wide market for electricity and which is the main regulatory driver of the I-SEM project.

In the interests of a balanced cost-benefit analysis of the market redesign project, one also needs to have regard to its likely costs. Ireland's existing fleet of generators is financed and operated on the basis of the existing market structure, and any change to the structure requires a review, and possible amendment, of these contractual arrangements.

Our energy team is actively engaged in relation to these and other issues facing the Irish electricity and natural gas sectors. ■

Privacy Rights & Wrongs in the EU

The attitude of EU regulators towards the protection of personal data has changed in recent times, as apparent in some notable cases.



Richard Woulfe,
Partner,
Mason Hayes
& Curran

Over the last year and a half or so, it has been apparent that there has been a hardening of attitudes among European Union data protection regulators and Courts to the protection of personal data. This has been manifest by more aggressive regulatory policy and by the Courts focusing on data privacy as a fundamental right which effectively outweighs the right to freedom of expression and freedom of economic activity. This trend is illustrated by the following cases:

In April 2014, the Court of Justice held in the *Digital Rights Ireland* case (C-293/12) that the Data Retention Directive was invalid due to its lack of appropriate safeguards and its failure to provide for the retention of the data within the European Union with supervision by an independent authority in the manner required by Article 8(3) of the Charter of Fundamental Rights of the EU ("the Charter").

In the *Google Spain* case in May 2014, the Court of Justice of the European Union, based on its interpretation of the Data Protection Directive in light of the fundamental freedoms granted by the Charter, recognised "the right to be forgotten". Essentially, the Court held that the data subject was entitled

to require that information be no longer made available to the general public by its inclusion in the list of search results, save where, "it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question."

In February 2015, the Belfast High Court in the case of *CG v Facebook Ireland Limited and Joseph McCloskey* awarded damages of £20,000 to the plaintiff, CG, a victim of a string of abusive comments, who brought a claim on the grounds of misuse of private information and harassment. The Judge found that it should have been apparent to the first defendant from the profile, which included location information, that there was an obvious risk of vigilante violence and that the first defendant misused private information in not deleting that information. The Judge also granted an injunction against the second defendant, the primary publisher, from harassing the Plaintiff.

In March 2015, the UK Court of Appeal in *Vidal-Hall et al v Google Inc* classified "the misuse of private information" as a tort. It also held that damages can be awarded under the UK Data Protection Act 1998 ("UK DPA") where there had been no pecuniary loss and in doing so struck down the application of Section 13(2) of the UK DPA. The Court referred to Article 8 of the Charter (the right to the protection of personal data) and went on to state, "It would be strange if that fundamental right could be breached with relative impunity by a data controller, save in those rare cases where the data subject had suffered pecuniary loss as a result of the breach."

This judgment is inconsistent with the position adopted by the Irish Courts and, in particular, the High Court decision of Judge Feeney in *Collins v FBD Insurance plc* which held that the Plaintiff was not

entitled to general damages under the equivalent Irish section (Section 7 of the Irish DPA) in the absence of any actual financial loss. It is likely that, if the issue was to be decided again by the Irish High Court on appeal, the greater reliance placed by the UK Court of Appeal on the obligations imposed on member states by the Data Protection Directive, the EU Charter and the European Convention for the Protection of Human Rights and Fundamental Freedoms, might be found to be more persuasive.

Finally, in its judgment on 6 October 2015, the Court of Justice held in *Schrems v Data Protection Commissioner* that "Article 25(6) implements the express obligation laid down in Article 8(1) of the Charter to protect personal data" and "the term "adequate level of protection" [which a third country must provide if it is to be considered a "safe harbour"] must be understood as requiring the third country in fact to ensure, by reason of its domestic law or its international commitments, a level of protection of fundamental rights and freedoms that is essentially equivalent to that guaranteed within the European Union by Directive 95/46 **read in light of the Charter.**" [emphasis added.] As we know, Decision 2000/520 of the European Commission (the "Safe Harbour Decision" was struck down by the Court."

In essence, there has been a significant swing in judicial attitude to the protection of personal data, in which the fundamental right to the privacy of personal information is given preeminent importance, over and above not only technical legal arguments but also over other stated rights. In practical terms, this puts a defendant on the back foot if it seeks to defend a claim on technical grounds. An argument based on a nuanced interpretation of a statutory provision can seem lacklustre when stacked against a claim based on fundamental rights. ■



Pictured from left: Jamie Fitzmaurice, Real Estate; David Mangan, Corporate; Maura Dineen, Tax; Adrian Lennon, Dispute Resolution; Natasha McKenna, Dispute Resolution; Declan Black, Managing Partner of Mason Hayes & Curran; Rowena Fitzgerald, Investment Funds; Daniel Kiely, Aviation and Asset Finance; Dr. Kevin Power, Healthcare; Neil Campbell, Financial Services; and Keelin Cowhey, Healthcare. Absent: Shane Dolan, Construction Litigation.

We are pleased to announce the appointment of 11 new partners in recent months, strengthening expertise in our Construction, Dispute Resolution, Financial Services, Healthcare Corporate, Real Estate and Tax teams.

As an award-winning business law firm with 77 partners and offices in Dublin, New York and London, we take pride in the excellence of our service and in the continued expansion of our business.

Due to exceptional growth in 2014, we hired 64 new staff last year and now employ over 420 staff, dedicated to providing consistently excellent legal advice and service.

If you are interested in joining our team, please visit MHC.ie/careers

TECH LAW: Register for Weekly Updates

In 2014 we established a Technology Law Blog to help our clients and friends stay on top of the latest developments in European & Irish privacy, information technology, intellectual property and Internet law.

Since we launched the blog we have covered a wide variety of topics, ranging from 3D printing and driverless cars to online freedom of expression and the *US v Microsoft* case, as well as offering tips on day-to-day operations for innovative businesses in the form of articles such as "A Checklist of Website Legal Requirements" and "Employees Beware – Email Usage in the Workplace".

Visit mhc.ie/blog to see our full list of posts and to subscribe to our weekly updates.



Mason Hayes & Curran Alumni Drinks

Many of our alumni have moved on to work as counsel in areas such as real estate, banking, technology and retail. It was a pleasure to welcome them to our offices for our inaugural Mason Hayes & Curran Alumni Drinks in July 2015 to reminisce and see the many changes over the last number of years.



Pictured at our inaugural Alumni Drinks are (left to right) Maeve Hayes, former Partner, Mason Hayes & Curran, Tony Burke, former Chairman, Mason Hayes & Curran, and Lorcan Buckley, Partner, Mason Hayes & Curran.



Pictured are a group of Mason Hayes & Curran staff ready to compete in Calcutta Run 2015.

Calcutta Run 2015

We raised funds for charities GOAL and the Peter McVerry Trust through participation in Calcutta Run 2015 which is organised by the Law Society of Ireland. We also held further fundraising activities in our office to increase awareness of the work done by these charities.

Mason Hayes & Curran SCSi Golf Outing

Our Real Estate Team hosted their annual golf outing for the Society of Chartered Surveyors Ireland members on 14 May 2015 at the Royal Dublin Golf Club. Teams enjoyed good weather and some healthy competition on the day, with the Lisney team coming out on top.



Partner Michael Doran, left, and Partner Declan Curran, right, pictured with the winning team Hugh Markey (centre left) and Michael Horan (centre right) from Lisney.

Developments in Intellectual Property and Social Media Law

Our April In-House Masterclass covered the topic of the protection of both online and offline intellectual property. As a key issue for businesses, we took a look at recent case law developments in the areas of IP and social media. We were pleased to welcome Peter McCarthy, Head of Legal for Operations and B2B at UPC Ireland, as our guest speaker at the briefing.



Guest speaker Peter McCarthy of UPC is pictured (left) with Gerard Kelly, Partner, Mason Hayes & Curran (centre) and Richard Woulfe, Partner and Head of Intellectual Property, Mason Hayes & Curran.



Partner Ian O'Herlihy, centre, pictured with YSI co-founders Sr. Stanislaus Kennedy (left) and Rachel Collier (right) at the Young Social Innovators Awards and Showcase 2015.

Young Social Innovators Showcase

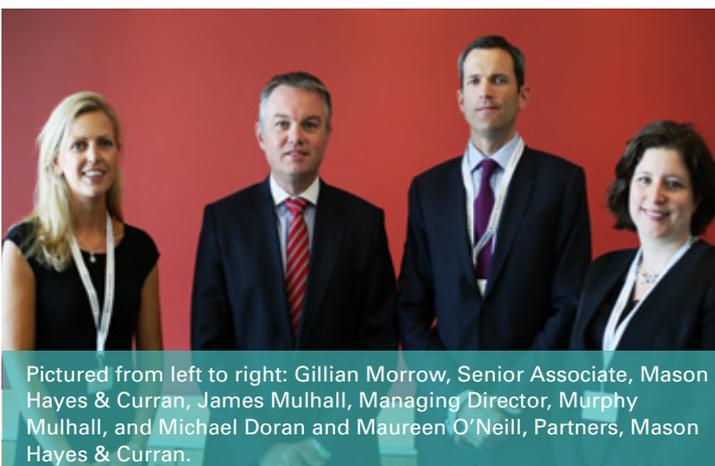
We are pleased to partner with Young Social Innovators as part of our CSR strategy for 2015. Young Social Innovators is Ireland's largest social innovation and active citizenship education programme for young people, helping them to raise social awareness and bring about positive change in Ireland.

UCD Rugby Dinner

We were sponsors of the 2015 UCD Rugby Football Club Annual Dinner which took place in May this year. Special guest Joe Schmidt, Head Coach of the Ireland Rugby Team, joined guests on the evening and was interviewed live by Peter O'Reilly of the Sunday Times.



Pictured from left to right: Will Carmody, Partner, Mason Hayes & Curran, Joe Schmidt, Head Coach of the Ireland Rugby Team, Robert Henson, Partner, Mason Hayes & Curran, and John Gulliver, Partner and Head of Tax, Mason Hayes & Curran.



Pictured from left to right: Gillian Morrow, Senior Associate, Mason Hayes & Curran, James Mulhall, Managing Director, Murphy Mulhall, and Michael Doran and Maureen O'Neill, Partners, Mason Hayes & Curran.

What's in Store for Real Estate in 2015

We held a breakfast briefing on the topic of the real estate market in 2015 and were delighted to welcome James Mulhall, Managing Director of Murphy Mulhall as a guest speaker. Our speakers shared with the audience their predictions for the commercial property market and the event was chaired by Michael Doran, Partner, Mason Hayes & Curran.

Dinner with Leo Varadkar TD

We were delighted to welcome Minister for Health Leo Varadkar TD to our offices for a special dinner in June. The Minister shared with our guests his views on the healthcare system and the economic prospects for Ireland.



Minister for Health Leo Varadkar TD (left) pictured with Declan Black, Managing Partner, Mason Hayes & Curran on his visit to our offices.



Adrienne Gormley, Head of Global Online Revenue Operations at Dropbox is pictured with David O'Donnell, Partner and Head of Corporate at Mason Hayes & Curran, at Dublin Chamber of Commerce Technology Forum.

Dublin Chamber Technology Forum with Dropbox

We welcomed Adrienne Gormley, Head of Global Online Revenue Operations at Dropbox, to our offices for the Dublin Chamber of Commerce Technology Forum. Adrienne shared with the audience Dropbox's reasons for coming to Ireland and how they have used Dublin as a base for expanding their EMEA operations.

Ireland Day NYSE

We were proud to sponsor Ireland Day at the New York Stock Exchange in 2015. This one-day international business summit was attended by a unique group of global business and political leaders engaging on a range of topics and creating one of the leading networking platforms for business interests worldwide.



Pictured is a group at the closing bell on Ireland Day NYSE 2015, including Mason Hayes & Curran Chairperson, Emer Gilvarry, who also took part in panel discussions on the day.

Contents

Managing Partner's Diary Declan Black	01
Kick-starting the EU Economy - Hope lies with the Capital Market Union Conor Durkin	02
Keeping up with the Times - Intellectual Property Enforcement in Ireland Gerard Kelly	04
European Commission Launches a Digital Single Marketing Strategy Philip Nolan & Oisín Tobin	06
Powering Europe – Ireland's Future Potential Peter McLay	07
Privacy Rights & Wrongs in the EU Richard Woulfe	08
Appointments	09
News & Events	10 - 12

Editor's Note

Welcome to the 37th issue of MHC Times. In this issue, we look at Ireland's relationship with Europe and what we have to offer as a country across various sectors.

In our opening article, Conor Durkin comments on how the development of the Capital Markets Union in the EU aims to help the European economy continue to recover from the downturn. Peter McLay then gives us an insight into what's keeping the energy sector busy at the moment while Philip Nolan and Oisín Tobin set out the aims behind Europe's Digital Single Market Strategy.

Commenting on interesting intellectual property cases before the Irish Courts, Gerard Kelly writes how such cases are becoming increasingly popular in recent times. In privacy law, Richard Woulfe looks at how the attitude of EU regulators towards the protection of personal data has changed in recent times.

We also highlight our recent appointments, and have a selection of our latest news and events, followed by some entertaining word play and a look at our art collection.

Ailbhe Gilvarry is a Partner at **Mason Hayes & Curran**



For more information, please contact agilvarry@MHC.ie

MHC.ie

Dublin

South Bank House
Barrow Street
Dublin 4
Ireland

t +353 1 614 5000
e dublin@mhc.ie

London

1 Cornhill
London
EC3V 9EA
United Kingdom

t +44 20 3178 3366
e london@mhc.ie

New York

1450 Broadway
39th Floor, New York
NY 10018
USA

t +1 646 862 2028
e newyork@mhc.ie



In the Frame

We are fortunate to have one of the most important corporate collections of Irish and international contemporary art in Dublin. Included in the collection is “Porcus VIII” by well-known artist John Boyd.

Kevin Hoy, Partner and Head of Real Estate is pictured with the piece, which he has chosen as his favourite in our collection. He comments, “‘Ar mhuin na muice’ is a well-known Irish phrase – being on the pig’s back, doing well. There has been little enough of that in Ireland in recent years, but things are improving.”

“John Boyd’s Porcus VIII reminds us that success does not necessarily equal happiness. There is a hint of Beckett in the simple background, glum human and Delphic pig, which makes me smile. The man seems to holding a lead and yet when you look closely at the painting, the connection is almost ephemeral, so who is leading whom?”

Support of visual arts is a large part of our CSR strategy and we are a long-time supporter of the organisation “Business to Arts”, whose aim is to broker, enable and support creative partnerships between business and the arts. We are also proud to sponsor Temple Bar Gallery + Studios’ art education programme, which works with three schools in our local Ringsend area.

Bons Mots

As a firm, we strive to use plain language and not get bogged down in legalese. However, we still appreciate creativity in expression. Here are a few of our favourite new words.

Intaxication: Euphoria at getting a tax refund, which lasts until you realise it was your money to start with.

Inoculatte: To take coffee intravenously when you are running late.

Glibido: All talk and no action.

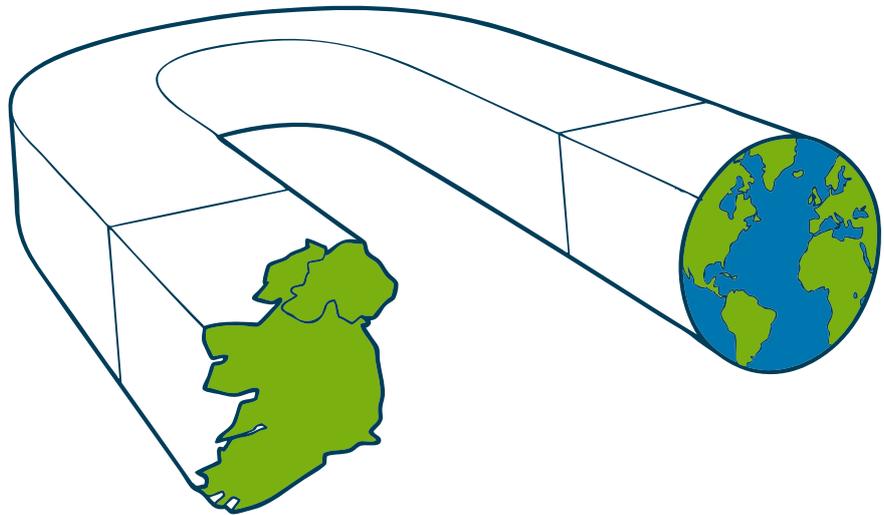
Decafalon: The gruelling event of getting through the day consuming only things that are good for you.

Cashtration: The act of buying a house, which renders the subject financially impotent for an indefinite period.

Sarchasm: the gulf between the author of sarcastic wit and the person who doesn’t get it.

Hipatitis: Terminal coolness.

Dopeler effect: The tendency of stupid ideas to seem smarter when they come at you rapidly.



Attracting Great Business

To find out how we can help your business, please contact:

Declan Black
Managing Partner
t +353 1 614 5017
e dblack@mhc.ie

David O'Donnell
Partner,
Head of Corporate
t +353 1 614 5065
e dodonnell@mhc.ie



We advised global financial information service provider Markit on its acquisition of Information Mosaic.



We advised Mitsubishi UFJ in its acquisition of the fund administration business of UBS.



We advised S&P 500 company Red Hat, Inc. on its acquisition of FeedHenry.



We advised Heptagon Capital on the establishment of the first actively managed China A shares fund, an Irish UCITS, to provide daily liquidity under the RQFII program.



We advised Fortune 500 company Owens & Minor, Inc. on its acquisition of the ArcRoyal Group.



We advised Irish Residential Properties REIT plc on its €200 million IPO on the Irish Stock Exchange, and its €215 million secondary offering.

MHC.ie

*Dublin, London
& New York*