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COMPENDIUM 2015

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→ Ireland

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Clients include multinational companies, insurance companies owner managed businesses, government and public bodies and regulatory authorities. We operate across a range of sectors including: healthcare, retail, aquaculture, food and drinks, green tech, renewables, pharmaceuticals, sports, construction, property, hotels, technology, life sciences, waste, manufacturing and medical devices.

We have expertise in numerous practice areas including:

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- Litigation and dispute resolution
- Planning and environmental
- Public and regulatory law
- Private client / estate planning
- Renewables
- Technology and intellectual property

Real Estate Law

There are no particular restrictions on non-Irish or non-EU persons or companies acquiring or leasing real estate in Ireland. The following is a brief outline of the main issues that need to be taken into consideration when acquiring property in Ireland.

Title

In Ireland property ownership is divided into two categories – freehold and leasehold. Freehold land is land which is owned outright by the owner. Leasehold is land which is subject to a lease. Much property in Ireland is held under long leases, usually in excess of 99 years. Long leases are particularly common in urban areas and they help the landlord to maintain some element of control over their land as the tenant will be subject to covenants and conditions in the lease. Office and commercial premises are often let to tenants under shorter leases for terms up to 25 years, subject to the payment of market rents.

Registration

There are two systems of registration of real estate in Ireland, the Property Registration Authority and the Registry of Deeds. Registration in the Property Registration Authority is intended to provide evidence of ownership in one single document called a folio, whereas in the Registry of Deeds, the system is slightly more complicated. A solicitor is required to investigate the title to the property to assess if the vendor owns the land and has "good marketable title" to it. It is compulsory to register all new purchases in the Property Registration Authority (formerly the Land Registry) meaning that the Registry of Deeds system of registration will become less common.

Buyer Beware – Due Diligence is essential in any property transaction

It is prudent for prospective purchasers and tenants to have the subject property surveyed in advance of signing contracts for sale in order to determine if there are any structural defects. This is because the principle "buyer beware" applies in Ireland so that a purchaser takes a property in its actual state and has no comeback once the transaction is closed should any latent defects flare up.

When buying or selling a property in Ireland, it is vital that a solicitor is consulted as early as possible in the process to avoid a party unwillingly entering into a binding agreement. The vendor's solicitor must draw up the Contract for Sale and demonstrate that their client has "good marketable title" to the property. The Contract for Sale will also deal with planning, taxation and condition of the property and list any vouching documentation that is held on title in this respect.

The solicitor for the purchaser should carry out due diligence to establish that the vendor has definite good marketable title and that no liabilities will pass with the property to their client. For example, the purchaser's solicitor will ensure that statute has been complied with and that no litigation in relation to the property is pending.

Planning and Development

The use to which a property is put, the construction of new property and alterations to existing property must comply with the planning and building control regulations in Ireland (unless the specific development is exempt). These regimes are operated by the local authorities. Planning considerations require adherence to regional development plans whilst building control is concerned with the proper construction of buildings having regard to fire safety and safety of the structure of the building.

Commercial Leases

In Ireland, commercial leases are typically between five and twenty five years. Leases in excess of five years tend to place full responsibility on the tenant for the cost of repair and insurance of the premises. They also commonly provide for rent reviews every five years and there is now legislative provision for upwards and downwards review for leases entered into after 28 February 2010. It could be said that because of recent economic developments, together with statutory changes (both VAT and Landlord and Tenant Rights), some tenants are now enjoying an increase in their negotiating power. Currently, there is considerable excess in capacity and development and so this has afforded tenants with greater flexibility.

For leases over five years in duration, break clauses are usually inserted giving the option to terminate at year five, ten and fifteen. However, rent reviews which result in downward reviews are still very uncommon. Since the 1960's, practically every Irish commercial lease for a term in excess of five years contained a five yearly upwards only rent review clause. This clause provided that the rent first reserved would be reviewed every five years to the higher of the rent payable immediately before the review or the open market rent at the date of the review. Section 132 of the Land and Conveyancing Act 2009 now provides that rent review clauses in leases granted after 28 February 2012 can be interpreted as reviewing rents to the open market value thus making downwards rent reviews possible.

A case was taken in the High Court in 2012 in relation to an upward only rent clause in a lease for a well known café premises in the city's Grafton Street. The High Court found that the clause in particular was capable of being construed in that rental figure could rise or fall. The landlord appealed this to the Supreme Court and in July 2014 the Court rejected the High Court finding in that the clause was capable of being downwardly reviewed. The lease was found to be "upwards only". The case was stated to be confined to the particular facts of the case however and not general application.

Stamp Duty

Stamp duty is a tax on deeds and instruments transferring ownership of property. Stamp duty is payable by a purchaser on the purchase price of a property. Stamp duty on commercial property is currently two per cent of the consideration paid. Stamp duty is also payable on occupational leases by the tenant at a rate of one per cent of the annual rent.

Programme to Simplify Irish Land Law

A major restructure of Irish land law and conveyancing practice has been undertaken by the Law Reform Commission and the Department of Justice, Equality and Law Reform. A new act introducing major reform was introduced in December 2009. This has brought clarity to the law in the area and modernized the law to some extent. The aim of the act was to simplify the law in the area, not only for practitioners but for the general public also. Compulsory registration of ownership in the Property Registration Authority (PRA) was introduced so that, eventually, all ownership will be recorded in the Property Registration Authority and evidenced by one document called a folio. This is going to be a long process but is a step in the right direction.

The Property Registration Authority has launched an E Registration facility to assist with the simplification of the procedures for the registration documents relating to title.

In addition to eDischarges and eCharging Orders, a new range of services have recently been launched by the PRA that allow legal practitioners to correspond electronically with the PRA, circulate documents securely, pay fees electronically, draft Deeds of Transfer.

It will soon be possible to draft Deeds of Charge, and subsequently Transmissions and Priority entries. Further developments in this area lead to a simplification of the registration process.

Tax Law

Corporation Tax

The scope and remit of Irish corporation tax is largely dependent on the residential status of a company. Broadly speaking, a company that is resident in Ireland for tax purposes is subject to Irish corporation tax on its worldwide income. A non-resident Irish company that operates through Ireland is subject to Irish corporation tax on trading income arising directly or indirectly from a branch of its company located in Ireland.

When assessing whether a company is tax resident in Ireland, one needs to firstly look to Irish statute which provides that a company is tax resident in Ireland if it is incorporated in Ireland. However, there are exemptions to this general rule, as follows:

- Where the company is under the ultimate control of a person resident in any EU Member State, or in another country which has a double tax treaty with Ireland, or which itself is related to a company whose principal class of shares is regularly traded on the stock exchange in an EU country or treaty country, and the company carries on trade in Ireland or is related to a company which carries on trade in Ireland.

- Where the company is regarded as being non-resident in Ireland under the provisions of a double taxation agreement between Ireland and another country.

If either of these exemptions apply, then the test for whether a company is tax resident in Ireland is whether the company carries out its central management and control from Ireland.

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There is no definition in Irish statute of this term and so guidance is obtained from case law. Many factors are taken into consideration by the courts. The most prevalent of these are where the directors of the company are resident, where the strategic decisions of the company are made, and where board meetings are held.

How is the tax liability calculated in Ireland?

For many years, Ireland had a 10% incentive rate of corporation tax which applied to certain sectors – manufacturing operations established prior to July 1998 continued to avail of this special rate up until 31 December 2012. Companies from all sectors currently pay a rate of 12.5% on trading profits. This is one of the lowest corporation tax rates in Europe. During Ireland's Budget for 2014, the Irish government re-affirmed Ireland's commitment to the 12.5% rate of tax on company trading profits. The National Recovery Plan 2011-2014 also confirms Ireland's intention to maintain this rate of corporation tax into the foreseeable future.

Non trading profits earned by a company, such as investment income and other activities, are taxed at a higher rate of 25%.

Dividends received by an Irish resident company from another Irish resident company are exempt from corporation tax.

Dividends received by an Irish tax resident company from subsidiaries or branches in other EU member states or a country with which Ireland has a double tax treaty can be taxed at a rate of

12.5% where certain conditions are satisfied. The Finance Act 2012 extended this relief to countries with which Ireland has ratified the OECD Convention on Mutual Administrative Assistance in Tax Matters.

Group relief may be claimed where one member of a group of companies is entitled to surrender its trading losses to another group member company. There are certain conditions which must be satisfied before a company can qualify as a member of a group for the purposes of this relief.

A company's taxable profit is based on its accounting profit as adjusted for certain items. The principal adjustment is the disallowance of capital expenditure incurred by the company.

A company is subject to corporation tax by reference to the taxable profit it earns in an accounting year. This normally coincides with the company's accounting year.

Transfer Pricing

Transfer Pricing rules in Ireland apply an arm's length principle to trading transactions between associated persons such as the supply and acquisition of goods, services, money or intangible assets. Transfer Pricing rules apply to both cross-border and domestic transactions

An arm's length amount in relation to a trading transaction is the amount of the consideration that independent parties would have agreed in relation to the transaction had those independent parties entered into that transaction. "Arm's length" is to be construed as far as practicable in accordance with the OECD Transfer Pricing Guidelines.

If the Irish Revenue Commissioners determine that a trading transaction between associated persons was not entered into at arm's length and this has the effect of reducing profits or increasing losses within the charge to tax an adjustment will be made by substituting the arm's length consideration for the actual consideration.

Small and medium enterprises (defined in the EU Commission Recommendation dated 6 May 2003, as having less than 250 employees and either a turnover of less than ¤50m or assets of less than ¤43m on a group basis), are excluded from the scope of the transfer pricing legislation.

Exemptions and Allowances

Ireland's favourable tax regime to date has played a significant part in attracting inward investment. Key tax incentives include:

- Ireland's low corporate tax rate for trading income;
- Favourable holding company tax regime;

- Generous tax depreciation (capital allowances) for capital expenditure on intellectual property assets and research and development tax credits; and
- An extensive double tax treaty network.

Ireland has signed comprehensive double taxation agreements with 71 countries, of which 68 are in effect. Additionally, tax treaty based reliefs are often available from the time of signing the relevant tax treaty and not the time it comes into force which in practice can be considerably later.

Special tax regimes apply to earnings from commercial management of woodlands, patent royalties deriving from inventions developed in the European Economic Area, artistic earnings, and certain shipping activities.

Research and Development Allowance ("R&D")

A R&D expenditure tax credit was introduced into Ireland's tax code with effect from 1 January 2004. The relief takes the form of a 25% (previously 20%) tax credit for qualifying R&D expenditure for companies subject to Irish corporation tax.

Specified Intangible Assets

Under this relief, a company carrying on a trade can claim capital allowances on the capital cost incurred on intangible assets such as patents, registered designs, trademarks, brand names, domain names, copyrights, know-how, licences and directly attributable goodwill.

This relief is claimed against the income streams generated by the expenditure and over the qualifying life of the specified intangible asset or fifteen years.

The relief is restricted so that it cannot exceed 80% of the profits associated with the exploitation of the relevant intellectual property for which the deduction is claimed. The interest cost of funding the acquisition of the intangible assets is deductible but is also restricted.

Any unutilised capital allowances or interest is carried forward.

Scientific Research Allowance

A deduction against profits of a company's trade is available for revenue and capital expenditure on scientific research. This can apply even when the scientific research does not apply to the trade being carried out by the company in question at the time. A deduction is also allowable for payments made to a company to a body approved by the Minister of Finance and /or to an Irish university in order to undertake the scientific research. Expenditure on capital equipment for research purposes qualifies for 100% capital allowances.

Capital Gains Tax

Ireland also imposes a capital gains tax on gains arising from the disposal of assets where the gains are not treated as trading profits. The rate of capital gains tax is currently 33% for disposals made on or after 6 December 2012. Where a company resident in Ireland is subject to corporation tax, any capital gains are subject to corporation tax in such a way that results in the same liability as if capital gains tax had applied to the gain. Where a company has related companies that are tax resident in Ireland and certain criteria are met, assets can be transferred between companies without gains being recognised for tax purposes.

Value Added Tax

Ireland has a value added tax ("VAT") system based on the EU Sixth Directive. At the time of writing, the standard rate of VAT is 23%. Lower rates of 13.5% and 0% are applicable to certain supplies of goods and services and a rate of 9% applies to certain restaurant, hotel, leisure and other tourism services. Legislation also provides that certain supplies are VAT exempt.

Stamp Duty

Stamp duty is a tax primarily on certain documents of transfer or ownership including those transferring ownership in real estate. The rate of duty on share transfers is 1% of the purchase price or market value, residential property rates of duty are 1 to 2% depending on price, and the rate of duty on transfers of commercial property and business goodwill is 2%.

Instruments effecting the transfer of, and contracts for the sale of, intellectual property (including goodwill directly attributable to intellectual property rights) are exempt from stamp duty.

Transfers of shares listed on the Enterprises Securities Market (an equity market of the Irish Stock Exchange) are exempt. There is no stamp duty or capital duty on the issue of shares or loan capital. Relief from stamp duty applies to transfers between associated companies and in certain re-organisations.

Property Tax

A property tax known as "rates" applies to commercial properties and is payable annually. Private residences and agricultural holdings are exempt from rates. Rates are based on the rateable valuation of land and buildings as determined by the relevant local authority.

Ireland has introduced an annual residential Local Property tax ("LPT"). The rate of LPT will be 0.18% for properties up to a market value of €1m. Residential properties valued over €1m will be assessed at the actual value at 0.18% on the first €1m in value and 0.25% on the portion of the value above €1 million.

Deposit Interest Retention Tax and Exit Taxes on Life Assurance Policies and Investment Funds

The rate of retention tax that applies to deposit interest, together with the rates of exit tax that apply to life assurance policies and investment funds, is 41%. The rate applies to payments made on or after 1 January 2014 and is deducted at source by deposit takers.

TAX ON INDIVIDUALS

Income Tax

Ireland has a system of income tax which is levied at two rates. As of 2013, an individual is subject to income tax at a rate of 20% on his/her first €32,800 of income and 41% thereafter. The threshold of €32,800 is increased to €41,800 when the individual is married.

In addition to income tax, an individual is also subject to two social contributions known as PRSI (Pay Related Social Insurance Scheme) at four per cent of his/her income and the Universal Social Charge at the following rates:

€0 - €10,036	2%
€10,137- €16,016	4%
€16,017 upwards	7%

Scope of Irish Income Tax – Domicile

In order to be subject to Irish income tax, the individual must be resident, ordinarily resident and/or domiciled (have a permanent home) in Ireland. A person is tax resident if they spend a total of 183 days (or any part of a day) in Ireland in any one tax year or they spend a combined total of 280 days over two tax years (assuming a minimum of 30 days in each tax year). It should be noted that if a person is resident in Ireland for three consecutive tax years, they then become ordinarily resident for tax purposes.

Domicile is initially determined by an individual's domicile of origin. Generally, the country where the individual's father is domiciled when they are born is considered to be his/her domicile and so they will be regarded as domiciled in that country unless a domicile of choice is acquired. Individuals resident and domiciled in Ireland for tax purposes are subject to Irish income tax on their worldwide income. Individuals who are not resident or ordinarily resident in Ireland for tax purposes are subject to Irish income tax (subject to the provisions of any appropriate double tax treaty) where they are in receipt of Irish source income.

An Irish resident, but not domiciled person is subject to Irish income tax on Irish source income, on foreign employment income to the extent duties of the employment as performed in Ireland, and on any other income to the extent it is remitted to Ireland.

Capital Gains Tax

Irish resident individuals are liable to capital gains tax at a rate of 33% on their worldwide gains, subject to a number of exemptions, to include a gain on the disposal of their principal private residence, the disposal of tangible moveable assets with a life of less than 50 years and disposals of certain qualifying assets on attaining 55 years of age, subject to compliance with certain conditions.

Persons who are non-resident are subject to capital gains tax on the disposal of certain specified assets such as land or buildings, Irish mineral or exploration rights, assets used for a branch activity carried out in Ireland, goodwill of a trade carried on in the Ireland, or unquoted shares which derive their value or a greater part of their value from Irish land or buildings or an exploration right.

Property purchased between 7 December 2011 and 31 December 2014 may qualify for a relief from Capital Gains Tax. If the property is held for a seven year period, the capital gain relating to that seven year period should be fully relieved from capital gains tax if certain conditions are satisfied. This relief applies to residential and commercial properties situated in an EEA State.

A new CGT incentive was introduced in the 2014 Budget (Finance Act 2014) to encourage entrepreneurs to invest and re-invest in assets used in new productive trading activities. The measure applies where an individual, who has paid capital gains tax on the disposal of assets, makes investments in a new business in the period 1 January 2014 to 31 December 2018 and subsequently disposes of this investment no earlier than three years after the date of investment. The CGT payable on the disposal of this new investment will be reduced by the lower of (i) the CGT paid by the individual on a previous disposal of assets in the period from 1 January 2010 and (ii) 50% of the CGT due on the disposal of the new investment. Commencement of this measure is subject to receipt of EU State Aid approval.

Capital Acquisitions Tax

Taxable inheritances and gifts are liable to capital acquisitions tax at a rate of 33%. If neither the disponer nor the beneficiary is resident or ordinarily resident in Ireland then the tax charge applies only to inheritances/gifts of property situated in Ireland

There are a number of reliefs available in relation to capital acquisitions tax, including business relief, agricultural relief and favourite nephew relief. Inheritances and gifts taken by a spouse or civil partner are exempt from capital acquisitions tax.

There are three tax-free thresholds depending on the relationship between the disponer and the beneficiary. The aggregate of inheritances and gifts taken on or after 5 December 1991 from the same group threshold is taken into account in computing tax payable on the current benefit.

→ Corporate Law

Irish company law is governed by both statute and common law. The statutory regime is contained in the Irish Companies Acts 1963 to 2012 as well as regulations implementing various European directives.

Corporate law is on the threshold of major reform and development as a consequence of the work of a government-appointed advisory body, the Company Law Review Group (the "CLRG"), since 2001. The CLRG was asked to make proposals for the modernization and, where possible, simplification of Irish company law. The reports of the CLRG led to the publication of the heads of a Companies Consolidation and Reform Bill in 2007.

In May 2011, the Department of Jobs, Enterprise and Innovation published a long-awaited draft of the main part of a new consolidated Companies Bill (the "Bill"). This Bill will implement recommendations of the CLRG to update, consolidate and reform Irish company law.

Business Structure

While most foreign companies in Ireland operate through an Irish incorporated subsidiary, business can be conducted through a branch of a foreign company. A foreign company may establish a place of business in Ireland without incorporating an Irish company subject to filing certain information in the Companies Registration Office (the "CRO"), including copies of the company's constitutional documents, details of the persons authorized to bind the company, and the name of the person resident in Ireland authorised to accept service of process on behalf of the company.

The two main types of company in Ireland are private companies and public companies. The vast majority of companies registered in Ireland are private companies limited by shares. They are by far the most popular form of business entity for inward investment projects. The shareholders of a private limited company have limited liability. Public limited companies are typically used where securities are listed or offered to the public.

Procedure for Incorporation

To incorporate a private company limited by shares, certain documents must be publicly filed with the CRO. These include details of the proposed name of the entity, the shareholders, directors and company secretary.

Under an express incorporation scheme, it is possible to incorporate a company within 5 working days. Outside of the express scheme, it can take approximately 2 to 3 weeks for a company to be incorporated. There is no minimum capital requirement for an Irish private company and shares can be denominated in any currency.

To incorporate an Irish company, the following documents have to be filed with the CRO:

- Memorandum of Association;
- Articles of Association; and
- Form A1.

Every Irish incorporated company is required to have one EEA1 resident director unless it holds a surety bond to the value of ¤25,394.76 or the Revenue has certified it has a real and continuous link with one or more economic activities in Ireland. At all times, there must be two directors and a company secretary (who may be one of the directors). A corporation is not eligible to be a director.

Name of an Irish Company

The CRO may refuse a company under a proposed name if it is identical to, or too similar to, the name of an existing company, if it is offensive or if it would suggest State sponsorship. Names which are phonetically and/or visually similar to existing company names will also be refused by the CRO. This includes names where there is a slight variation in the spelling. It is often recommended that company names include extra words so as to create a sufficient distinction from existing names.

Registration does not give the company any proprietary rights in the company name. As well as searching the Register of Companies, it is also important to check any proposed name against the names on the Irish Business Names Register and Irish and EU Trade Marks Registries (and any other registers, depending on where it is proposed to carry on business). This is to ensure that the proposed company name does not conflict with an existing business name or trade mark, since the person claiming to have a right to that name or mark could take legal action to protect its interest. It should also be noted that certain names cannot be used unless approved by relevant regulatory bodies. By way of example, the words "bank", "insurance", "society" and "university" cannot be included in a company name unless prior permission is obtained from the relevant regulatory authority.

Where a company uses a business name that is different from its company name, the business name must be registered by that company with the Irish Register of Business Names at the CRO.

Company names may be reserved for a period of up to 28 days in advance of incorporation. A company will not be incorporated in Ireland unless the company will, when registered, carry on an activity in Ireland. A declaration confirming this must be completed and filed with the incorporation documents at the CRO.

Statutory Obligations of the Company

A company has ongoing statutory obligations including:

- Holding its first Annual General Meeting ("AGM") within eighteen months of incorporation and AGMs thereafter at intervals of not more than fifteen months;

- Filing the first annual return six months after the date of incorporation and subsequent annual returns in each year thereafter. The second and subsequent annual returns must be filed with the CRO together with the relevant accounts, made up to a date not more than nine months earlier than the date of the annual return and presenting the company's accounts to the members of the company for consideration at the AGM.

- Keeping proper books of account. Accounts of all companies must be audited by independent accountants, except for small limited companies with a turnover not exceeding ¤7,300,000 and which fulfil a number of other conditions.

The shareholder meeting requirements are relaxed for single member companies.

Management and Governance Structure

The management of a company is nearly always delegated to the board of directors. All companies must have at least one secretary and a minimum of two directors, one of whom is required to be a resident of the EEA. The secretary may also be one of the directors of the company. A body corporate may act as secretary to another company, but not to itself. A body corporate may not act as a director.

The directors of a company have wide responsibilities under Irish law. They are obliged to act in the best interests of the company as a whole and to ensure that the company acts in compliance with Irish company law. Directors should familiarise themselves with their duties under Irish law. The Office of the Director of Corporate Enforcement has published an information booklet on the subject entitled 'The Principal Duties and Powers of Company Directors' and a copy is available to download from their website at www.odce.ie.

Statutory Duties

As well as these general duties, a director has specific duties under the Companies Acts including a duty to keep proper books of account and to have the annual audit carried out, although there is an audit exemption for small companies. Directors have a duty to file annual accounts and annual returns and failure to file an annual return can cause the company to be struck off. Late filing of an annual return can mean that the company loses the benefit of the audit exemption. A director also has a duty to disclose certain interests, whether it is in shares in the company or in any contract that the company might be entering into. Directors have duties to keep certain registers. The Companies Acts also govern transactions between the company and directors and/or their connected persons and there are specific duties for directors in companies which are insolvent.

Corporate Governance

There is a great deal of discussion in the media about directors' duties and best corporate governance practice. We can expect to see increased regulation in this area which will affect all companies and not just listed companies, so it is important to get it right from the beginning. This involves, amongst other items, putting the right systems in place, keeping proper records and complying with obligations as a director to act in the best interests of the company.

Registered Office

Every company is required to have a registered office in Ireland to which communications and notices may be sent. The company must file the situation of its registered office in the CRO.

Company's Notepaper

A company must ensure that its registered name appears on all business letters of the company and on all cheques, invoices, order forms and receipts of the company. The names of the directors and their nationality (if not Irish) must also be included on all business letters. The place of registration, registered number of the company and the address of the registered office must also be displayed on the company's business letters, order forms, website and certain electronic communications (for example, email, letters and electronic order forms) along with the company's registered name. A company is also required to paint or affix its name in a conspicuous place, in legible letters, on the outside of every office or place in which its business is carried on.

Investment Incentives

Generous fiscal incentives are available to foreign companies looking to invest in Ireland. These packages are flexible and vary from project to project. A summary of the primary grant aids available is as follows:

- Capital grants contributing towards the cost of fixed assets, including site purchase and development, buildings and, new plant and equipment;

- Where a factory building is rented, a grant towards the reduction of the annual rental payments may be available instead;

- Employment grants to companies which will create jobs. Normally, one half is paid on certification that the job has been created and the balance one year later, provided the job still exists;

- Training grants to cover the full cost of certain training initiatives. Covered costs include trainees wages, travel and subsistence expenses and engagement of instructors/consultants to train. Training grants are based on specific training programmes agreed between each investing company, IDA Ireland and FÁS, the Irish National Training and Employment Authority2; and

- Research and development grants in respect of approved research and development work, including product and process development, feasibility studies and technology acquisitions.

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