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Introduction and overview
Introduction and overview

As we move towards a more global and knowledge-based economy Intellectual Property (IP), as an economic resource, and its protection, is becoming of increasing importance. It is widely accepted that IP protection stimulates innovation, contributes to economic growth and increases business activity. An integral part of international trade, IP has become increasingly important to the continued success of the Irish economy and its attractiveness for Foreign Direct Investment (FDI) by Multi-National Companies (MNCs).

Importance of IP

- Encourages innovation
- Drives economic growth and competitiveness
- Differentiates Irish production in the international marketplace
- Creates and supports high paying jobs
- Incentivises education
- Rewards entrepreneurs
- Encourages FDI
- Helps incentivise the search for global challenges
It is widely accepted that IP plays a vital role in promoting innovation and stimulating the economy to foster growth. Consequently, it is vital that appropriate policies and procedures are in place to ensure that Ireland remains an attractive location for investors looking to set up their operations in Europe. Ireland offers a low corporation tax rate (12.5%) and provides significant tax incentives for companies exploiting IP. IP protection is considered one of the key factors taken into account by potential inward investors to Ireland.

IP is a valuable asset and, as a consequence, the subject of both abuse and infringement. As Ireland moves towards a more global knowledge based economy, the importance of IP and its protection will be fundamental in the attraction of FDI to Ireland.

Ireland continues to make significant efforts to stimulate innovation, and encourage Research and Development (R&D) activities to further increase the country’s attractiveness as a location for FDI. The Irish government has been proactive in its efforts to encourage R&D, ensuring that Irish IP laws are kept relevant and up-to-date.

The IP regime is now at a stage of major change, both locally and in the EU, across many areas, including the:
- new pan Europe patent right and Unified Patent Court (UPC) regime;
- proposed amendments to the Copyright and Related Rights Act;
- changes to trademark protection;
- proposed EU directive on trade secrets; and
- enactment of legislation on plain packaging.

The Irish Government Budget for 2015 announced that the well-known ‘Double Irish’ tax mechanism is being phased out by 2020 but will be replaced by a number of initiatives to ensure Ireland’s continued attractiveness as an FDI destination.

As competing countries lower their corporation tax rates (for example, the UK is reducing their rate from 20% to 18% by 2020, with a 1% interim cut in 2017), Ireland will need to work harder to maintain its competitiveness. One of the possibilities being advanced relates to the provision of further benefits and tax incentives to IP intensive companies through a so-called Knowledge Development Box (KDB) regime.
At the same time, Ireland continues to strive to improve its IP protection in the legal regime and enforcement. It was announced in November 2014 by the Minister for Jobs, Enterprise and Innovation that Ireland will establish a local division of the UPC, subject to the international agreement on a UPC being ratified.

In addition, as the Transatlantic Trade and Investment Partnership (TTIP) negotiations progress, the topic of IP protection continues to be at the forefront of the debate. This report considers and assesses the strengths and weaknesses of the current Irish IP regime and will assess the opportunities and threats offered by the new proposals, such as the Knowledge Development Box (KDB) and the impact that the introduction of plain packaging has on Ireland’s perception as a strong supporter of IP protection.
This section establishes the definition of IP, provides some facts and figures in relation to IP globally and in Ireland and gives an overview of the key international, EU and national frameworks in relation to IP.
What is Intellectual Property (IP)?

"Intellectual Property refers to creations of the mind, such as inventions, literary and artistic works, designs, and symbols, names and images used in commerce." – World Intellectual Property Organisation (WIPO)

IP can be divided into:
- industrial property - patents for inventions, trademarks and industrial designs; and
- literary, musical, artistic, photographic and audio-visual works – Copyright¹.

- Patent - an exclusive right that allows the patent holder to limit use of specific inventions by others. Available for up to 20 years on payment of renewal fees. Longer term protection is also possible, e.g. for pharmaceuticals.

- Trademark - a monopoly right that protects any word, symbol (logos and package design) or device which distinguishes goods and services from another.

- Copyright - an automatic right covering a wide range of works including literary, artistic, dramatic and musical works, sound recordings, films and broadcasts, computer software and performances.

- Industrial designs - can be a monopoly or non-monopoly right and protect the overall visual appearance of a product.

- Other - geographical indicators, know-how.

¹ Irish Patent Office
Key figures

- 22.6% of employment generated by IP intensive industries in Ireland
- Ireland ranks 14 out of 144 countries in World Economic Forum (WEF) competitiveness report in IP protection indicator
- 108,218 patents in force in Ireland in 2013
- EC Innovation Union Scoreboard 2014 - Ireland 9th best performing in research and innovation
- Contribution of IP intensive industries to Irish GDP
- State's investment in R&D in 2013 was €724m
- Ireland has a 25% tax credit for R&D expenditure
- Ireland ranks 20 out of 144 countries in WEF competitiveness report in the innovation pillar
The figure below provides a short overview of the key international, EU and Irish legislative frameworks surrounding IP.

**Patents**
The agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) sets a minimum 20 year potential lifetime for patents applicable to all World Trade Organisation (WTO) members. There is no 'global' patent. Patent Cooperation Treaty (PCT) (at WIPO) provides a single international search and preliminary examination. Patent must still be granted for individual states or regions by respective offices.

**Copyright**
The Berne Convention is an international copyright treaty providing minimum legal protection for authors of copyright works. It has 166 contracting parties (July 2013).

**Trademarks**
The Madrid Protocol is a system for the international registration of trademarks (administered by WIPO). The Madrid Protocol has 91 contracting parties, 56 of which are also contract parties to the Madrid agreement. Trademark Law Treaty (TLT) harmonises national application procedures of trademarks. It has a total of 53 contracting parties (July 2013).

**Designs**
The Hague Agreement provides a mechanism for registering a design in several countries by means of a single application (administered at WIPO).

**Patents**
European Patent Convention (EPC) aligns protection of patents across EU countries, although some differences remain. In addition, national systems for processing also differ.

**Copyright**
The EU is a contracting party of the Berne Convention.

**Trademarks**
At EU level, trademarks are granted by OHIM (the EU trademark and designs office). This grants a mark valid in all 27 member states.

**Designs**
EU-level Registered Community Designs (RCD) are granted by OHIM, which protects for 25 years. There are also community unregistered design rights lasting three years.

**Patents**
National law in Ireland is aligned with EPC, though some differences remain. National systems for processing also differ.

**Copyright**
Ireland is a member of the Berne Convention via the EU. There are differences in what is protected by copyright between countries.

**Trademarks**
Trademarks can be granted in each country through the national IP office. No restriction on the length of a trademark right, provided a mark is used. In Ireland, similar to the UK, trademarks can also be protected through common law aka 'passing off'.

**Designs**
Ireland is a member of The Hague Agreement. The Patent Office registers design rights.
Changes and developments

This section focuses on the most recent development in the area of IP protection both in Ireland and the EU and provides an assessment of the proposed changes.
IP regime in Ireland

According to the European Patent Office (EPO), Ireland’s strong national and international IP laws have created an attractive and protective environment for R&D intensive companies. These companies now account for over 50% of Irish GDP and 23% of total employment.  

Ireland’s IP laws offer comprehensive and practical protection to businesses who distribute IP intensive products from Ireland. IP protection in Ireland is guided by the following:
- The Irish Trademarks Act 1996;
- The Patents Act 1992; and
- The Copyright and Related Rights Act 2000.

Ireland continues to proactively explore new ways to improve its IP protection regime. The most recent development in the area of IP protection in Ireland and EU include:
- the new pan European patent right and UPC regime;
- proposed amendments to the Copyright and Related Rights Act;
- planned changes to trademark protection in EU and Ireland;
- the proposed EU directive on trade secrets;
- Government’s recent KDB proposal; and
- the proposed expansion of the EU geographical indication of origin system to include non-agricultural products.

In addition to the above, the proposed free trade agreement between the EU and the US – Transatlantic Trade and Investment Partnership (TTIP), has a significant IP protection dimension.

Each of the changes and proposed developments is discussed in more detail further in this section.

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2 The European Patent Office, the Office for Harmonization in the Internal Market, 2013, “Intellectual Property rights”
Pan European patent right and UPC regime

"Removing bureaucratic obstacles, extra costs and the legal uncertainty of having 28 different and often contradictory systems makes the single market more attractive." - Vice-President Viviane Reding, the EU’s Justice Commissioner

The proposed EU Unitary Patent Package (UPP) aims to provide a single unified pan European patent and a single court for litigation of European patents. The package consists of two parts: a unitary patent and a UPC. The proposed unitary systems is subject to ratification of the UPC agreement by the member States. The national referendum where the ratification decision will be made in Ireland is due to take place in late 2015.

**Unitary patent**
The first element of the EU UPP is a unitary patent. Currently patents granted by the EPO result in a number of individual country specific patents that need to be recognised and enforced in each country individually. An introduction of a unitary patent will result in patents granted by the EPO having a unitary effect for the territory of 25 participating states. The unitary patent will exist alongside with the standard European patent and use the same application process. An additional request will have to be submitted with the EPO to make a patent unified.

**Unified Patent Court (UPC)**
The UPC will comprise a Court of first instance (including regional and a central division) and an Appeals Court. The central division will be located in Paris. Two specialist divisions will also be established in London (specialising in human necessities, chemistry and metallurgy) and Munich (specialising in mechanical engineering, lighting, heating, weapons and blasting). An Appeals Court will be based in Luxembourg.

UPC will have jurisdiction over unitary patents and, subject to transitional provisions, standard European patents. However, during the seven year transitional period, holders of standard European patents can avoid applying to the UPC and choose to initiate proceeding before the national courts.
"This new court is an important boost for innovation in Ireland. It will mean that businesses involved in innovation activities will be able to resolve disputes over patents locally, more cheaply and more easily than before."

- the Minister for Jobs, Enterprise and Innovation, Richard Bruton T.D.

**UPC in Ireland**

Despite the fact that the Irish economy is relatively small compared to other EU countries, many IP intensive companies have chosen Ireland as a location for their EU headquarters and manufacturing facilities. As a result, Ireland’s Commercial Court has gained significant experience and developed an effective and straightforward patent litigation system.

Therefore, a decision to establish a local division of the UPC in Dublin rather than opting to be part of a regional division was announced in November 2014, subject to a successful ratification of the Agreement on UPC. It is expected that this decision will contribute to Ireland’s reputation as a nurturing environment for R&D intensive businesses and promote Ireland’s dedication to ensuring its IP protection framework is in line with best practice.

The local division of the UPC in Dublin will have exclusive competence over unitary patents and European patents. The existence of a local division is expected to significantly reduce litigation costs to the Irish resident holders of unitary patents.
The introduction of an EU UPP is expected to deliver significant benefits. However, certain concerns regarding the new arrangement have been expressed by various stakeholders. The figure below provides a summary of the key advantages expected to be provided by the new proposal and risks and concerns associated with it.

**Advantages**

- Patent will be granted centrally by the EPO and automatically validated by up to 25 participating states.
- A centralised system will simplify the process, reduce the costs and administrative burden.
- No requirement for translations into official EU procedural languages, however translations in EU languages will be available online free of charge.
- Avoid duplication of litigation cases.
- Enhance legal certainty.
- Promote Ireland as a “smart economy” protecting and enforcing IP assets.
- Commercial Court of the High Court Division has a good track record in IP litigation and can be transitioned to act as a local division of UPC with minimal costs.

**Risks and disadvantages**

- Only EU member states can participate, thus the framework excludes Albania, Switzerland, Liechtenstein, Iceland, Monaco, Macedonia, Norway, Serbia, San Marino and Turkey.
- Some EU states chose not to sign the agreement (i.e. Spain, Italy and Poland).
- Unable to adjust the scope of the unitary patent (to cover only a reduced number of locations).
- More expensive compared to the “standard” EU patent when protection is only required in a limited number of locations.
- A patent can be revoked centrally.
- Constitution will require amendment.
- Local UPC divisions will have to power against patent revocation in other jurisdictions which will have a unitary effect, despite the location of the business.
- Creates scope for unethical behavior (for example, patent trolls), through starting litigation in remote location hence restricting the patent user and increasing litigation costs/times. This may result in significant commercial losses.
Proposed amendments to the Copyright and Related Rights Act

Overview
Ireland’s main copyright legislation is the Copyright and Related Rights Act 2000. The legislation is over 14 years old and is outdated considering the technological developments and changes in the online environment which have arisen since then. As a result, the Act is considered by the wider community to be restrictive in respect of online activities and creates barriers to digital innovation. For Ireland to maintain its status as an internet hub and attractiveness for FDI, changes to the current copyright legislation are necessary.

Proposed amendments to the Copyright and Related Rights Act
In May 2011, The Minister for Jobs, Enterprise and Innovation, Richard Bruton T.D. set up the Copyright Review Committee (the Committee) to examine the current Copyright legislative framework. The purpose of the Committee was to identify any areas of the legislation that might be “deemed to create barriers to innovation and to make recommendations to resolve any problems identified.”

On 29 October 2013, the Committee published its report, ‘Modernising Copyright’. The report recommends a series of amendments to the Irish Copyright and Related Rights Act, 2000. The report also included a draft bill to amend existing Irish copyright legislation entitled the “Copyright and Related Rights (Innovation) (Amendment) Bill 2013” as well as a draft “District Court (Small Claims) (IP) Rules, 2013.”

The summary of recommendations, as they are presented in the report, are outlined in the pages to follow.

“The change introduced in these Regulations heralds a small but important change in Irish Copyright law that facilitates the making available online by our cultural institutions of important literary, artistic and other cultural works to promote learning and disseminate culture to meet greater societal needs.” - Minister for Skills, Research and Innovation, Damien English T.D., October 2014
Recommendation: overhaul of the institutional and enforcement framework for copyright in Ireland “The centerpiece recommendations relate to the establishment of a Copyright Council of Ireland and specialist IP tracks in the District and Circuit Courts, and to the introduction of tightly-drawn exceptions for innovation, fair use and very small snippets of text in the context of online links.”

New public copyright institutions

• the report proposes an overhaul of the institutional and enforcement framework for copyright in Ireland by way of:
  - the establishment of a self-financing Copyright Council to provide education and advices on copyright issues. The Council would also be responsible for the setting up of a digital copyright exchange aimed at providing a mechanism to expand and simplify the collective administration of copyright; and
  - specialist IP tracks in the District and Circuit Courts and increased monetary limit for IP claims in the Circuit Court.
• in addition, it is recommended that a review of the operation of the changes made by the Bill is carried out every five years or so after it comes into force.

Introduction of limited copyright exceptions for innovation and fair use

• the report proposes that the innovation exception, subject to limitations, should provide that it should not be a breach of copyright to derive an original work which either substantially differs from, or substantially transforms, the initial work; and
• using the US doctrine for “fair use” as a base, it was deemed too broad for the Irish context and a narrower “fair use” version is proposed for Ireland. Greater flexibility will also be extended to the courts in determining same in certain limited circumstances.

Online linking

• it is recommended that “linking” should not infringe copyright, except where the provider of the link knew or ought to have been aware that it connects with an infringing copy; and
• recommendations on the guidelines for reproduction of small snippets of linked work which, if adhered to, do not fall under infringements of copyright, are also provided.
Recommendation: improvements to the position of rights owners
“The position of rights owners will be improved, by recommendations to extend remedies, technological protection measures and rights management information. Furthermore, photographers, in particular, will benefit from the recommendation that copyright protection for metadata be strengthened.”

Technological protection measures
Technological protection measures refer to a system put in place by the owner of a piece of copyright material which can be used to restrict access to the piece of copyright material. The report recommends enhancing the legal remedies surrounding technological protection measures, including a range of proportionate civil remedies for infringement of copyright and rights. Explicit protection is proposed for digital watermarks and other metadata applied to photographs and not only that copyright protection be extended to metadata, but also that tampering with or its removal constitutes an infringement of copyright.

Recommendation: improvements to the position of copyright users – enhanced consumer protection
“The position of copyright users will also be improved, by recommendations to introduce the full range of exceptions permitted by EU law, including format-shifting, parody, education, disability and heritage, as well as related exceptions for non-commercial, user-generated content and content mining. Furthermore, copyright deposit libraries, in particular, will benefit from the recommendation that the existing legal copyright deposit provisions be extended to digital publications. Finally, all users will benefit from a comprehensive recommendation that any contract term, which unfairly purports to restrict an exception permitted by the Act, should be void”.

Introduction of the full range of exceptions permitted by EU law
This will work to ensure Ireland remains competitive with other jurisdictions which already have the full range of exceptions permitted by EU law already in place (for example, the UK).

Private copying and private copy levies
The proposed introduction of the EU Copyright Directive private copying exceptions allow, for private use:
• reproduction on paper (i.e. photocopying);
• format-shifting (including remote storage in the cloud); and
• back-up copies.

The report recommends that any such levies are not charged in the context of any of the private copying exceptions above.
The proposed amendments to the current copyright legislative framework are expected to deliver significant benefits. The figure below provides a summary of the key advantages expected to be provided by the amendments and risks and concerns associated with it.

**Advantages**

- works will be more available for educational and research purposes
- provides a stimulus for innovation
- Ireland’s cultural and heritage works will be made more publicly available: greater access to works in the collections of European cultural institutions will be provided
- greater flexibility under the proposed more open-ended formulation for fair use will be provided
- greater ability to respond to the actively changing needs of the digital/online environment.

**Risks and disadvantages**

- the new formulation for fair use could create some legal uncertainty as to which uses are, or are not, included in the scope of the "fair use" exception
- increased work load of the District and Circuit courts could result in delays in cases being heard
- the requirement that prohibitive or unfair contract terms may be made "void" will result in additional diligence when businesses and rights-holders draft consumer contracts related to copyright.
Trademark protection in EU and Ireland

“A trademark may consist of any signs capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.” - Article 2, Directive 2008/95/EC of the European Parliament and of the Council

**Current system**
A trademark is a monopoly right that protects any word, symbol (logos and package design) or device which distinguishes goods and services from another. There are two types of trademark: a national trademark and a community trademark.

**National Trademark (NTM)** - protection offered by trademark registration is limited to the country (national office) in which they are registered. This can lead to multiple registrations when protection is required in more than one jurisdiction.

**Community Trademark (CTM)** - there are initiatives in place with the aim of simplifying the system whereby a single registration covers multiple jurisdictions. The CTM, which is administered by the OHIM, is one such initiative. The aim of the CTM is to create a unified trademark registration system which offers protection throughout the EU.

**EU trademark reform**
On 27 March 2013, the European Commission presented a package of initiatives to make trademark registration systems all over the EU “cheaper, quicker, more reliable and predictable”. The proposed package contained three initiatives:
1. recast of the 1989 Directive (now codified as 2008/95/EC) approximating the laws of the member states relating to trademarks (the Directive);
2. revision of the 1994 regulation (now codified as 207/2009/EC) on the community trademark (the regulation); and
3. revision of the 1995 Commission regulation (2869/95) on the fees payable to OHIM (the fee regulation).

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3 The Office for Harmonization in the Internal Market (OHIM)
In April 2015, after two years of discussions, The European Parliament and the Council confirmed that they had reached political agreement on an EU trademark reform package. Under the agreement, the following is proposed to be incorporated in the new system:

- reduced fees - a new structure with a reduced level of fees to be paid by applicants and proprietors of trademarks;
- the renaming of the OHIM to "European Union Intellectual Property Office";
- the improvement of the governance structure and the establishment of sound financial procedures in the OHIM;
- closer cooperation between national offices and the OHIM;
- streamlined, more efficient and harmonised registration procedures across trademark offices in the EU;
- the setting up of an “offsetting mechanism” to cover expenses incurred by national industrial property offices resulting from the handling of procedures involving EU trademarks; and
- anti-counterfeiting protection - increased protection for trademarks in relation to goods in transit throughout the EU territory.

“Considered together as a package, the main common objective of this initiative, and of the parallel proposal for recast of the Directive, is to foster innovation and economic growth by making trademark registration systems all over the EU more accessible and efficient for businesses in terms of lower costs and complexity, increased speed, greater predictability and legal security.”

Advantages

- improves the conditions for businesses to innovate and encourages economic growth
- clearer, simpler and more streamlined registration procedures
- increased speed of application process and greater predictability
- cheaper – lower fees make it a more affordable registration system
- increased legal certainty by clarifying provisions and removing ambiguities in terminology
- facilitates cooperation between OHIM and the members' national offices
- more effective in providing trademark protection against counterfeits. Provides trademark owners a better right to prevent importation of counterfeit goods into the EU.

Risks and disadvantages

- reducing the gap in registration and renewal fees between the CTM and NTM could prompt a shift towards greater reliance on CTMs by brand owners. This shift away from NTMs could force national offices to increase the cost of registering and renewing same. This will increase costs for:
  - businesses that only operate in a small number of countries within the EU that have no need for EU trademark protection; and
  - businesses that operate on an EU basis, but are unable to register a CTM due to pre-existing rights and therefore must register with the individual national offices.
- higher percentage of failed CTM applications expected to increase with the number of member states in the EU also increasing:
  - this will increase costs for failed CTMs. Applicants with failed CTM applications, who attempt to convert the failed application to one or more NTM applications, will be unable to recoup the costs of filing the CTM application. In addition, they will also be required to repay to register in each national office where the CTM application is converted.
- potential for levels of higher administration – reduced registration fees could encourage increased filings and 'over protection'
- money diverted from OHIM (via "offsetting mechanism") may escape the IP system and be used for activities unrelated to trademarks – this is a concern raised from selected members of the European Parliament’s Legal Affairs Committee.
In November 2013, the EU Commission announced a proposal for a new directive to protect trade secrets and confidential business information. Information is considered to be a trade secret if it has commercial value and is not disclosed to the public with the owner making every reasonable effort to keep it undisclosed. Trade secrets include commercial know-how, customer lists, R&D information that does not qualify to be protected by a patents, business plans and other valuable information.

The proposed directive aims to tackle unlawful acquisition, use and disclosure of trade secrets and misappropriation of confidential information. It will harmonise the national laws of member states by establishing common definition, procedures and sanctions. Its ultimate purpose is to streamline the litigation process for national courts and make it easier for victims to receive compensation. The introduction of the directive will make a single EU market for IP a step closer.

Current protection of trade secrets across the EU

The existing mechanisms of protection of trade secrets vary greatly across the EU member states. Eighteen of the member states (including Germany, Finland and Sweden) have legislation on misappropriation of trade secrets, whilst another five (including Ireland and the UK) have no such specific provisions and rely on common law provisions.

Current protection of trade secrets in Ireland

Currently Ireland does not have laws specifically designed to protect trade secrets. Companies have to rely on general tort law and contract laws to protect their valuable information. In this context, the use of "non disclosure" and "confidentiality agreements" to bind business partners to protect the confidentiality of the information received is widespread. To date, the existing system has provided sufficient protection against unlawful use and disclosure of confidential information.

"The contributions [consultations] that were received welcomed the proposed legislation [EU Directive] and verified the economic importance of trade secrets to Irish business and the need for appropriate legislation to protect those secrets."

- Minister of State for Research, Innovation and Skills, Damien English T.D., 25 March 2014

In November 2013, the EU Commission announced a proposal for a new directive to protect trade secrets and confidential business information.
The EU Trade Secrets Directive and TTIP
IP protection is one of the areas discussed as part of TTIP aiming at establishing an open market between the US and EU.

The US legislation already provides protection to trade secrets via the Uniform Trade Secrets Act 1979 and the America Invents Act 2011. Therefore an action is expected from the EU side to bring its legislation in line with the US to ensure equal protection.

Advantages
• create a unified framework across the EU
• provide further confidence to the US investors, as the concept and protection of trade secrets is well-established in the US.

Risks and disadvantages
• for countries with common law systems where confidential information is protected by the law of equity, introduction of new rules may complicate the protection and enforcement process
• the new system applies to commercial trade secrets only, the existing approach in Ireland applies to all confidential information.
Following the decision in October 2014, about a gradual abolition of a tax regime known as a "double Irish" that allowed many MNCs to structure their finances to avoid taxation, the Irish Government proposed a different tax incentive, in addition to the existing 25% R&D tax credit, to allow R&D intensive businesses to lower their tax bill.

The new proposal involves the creation of an Irish version of a well-known "patent box" tax arrangement. The Government aims to take the best from the existing international examples and create a "best in class" tax scheme in Ireland. The introduction of a new scheme will be subject to approval by the EU authorities in Brussels and OECD. The OECD and EU are currently revising the rules for the design of similar incentives. Therefore the final design of the Irish KDB will depend on the outcome of this work.

**EU and OECD view**

One of the key priorities of the EU 2020 strategy is to stimulate innovation and encourage growth. A favourable tax treatment of innovation focused activities is perceived as an essential element of achieving this target with many EU countries, including Belgium, Cyprus, Spain, France, Hungary, Luxembourg, Malta, Portugal, Denmark and the UK promoting patent box-like tax schemes.

However, the Base Erosion and Profit Shifting (BEPS) project carried out by OECD is likely to have some significant impact on the way patent box regimes are designed. Action 5 of the project focuses specifically on tax regimes related to intangibles. The proposed rules aim to align the substance of the business activity with profits generated to ensure that preferential tax treatment applies to profits that are substantially related to R&D activity.

There are currently two approaches under review that would define the "substantial activity" level: transfer pricing approach and nexus approach. Whilst both approaches require a taxpayer to own the intangible asset and carry out important business functions in the jurisdiction, the first approach doesn't specify the level of R&D to be carried out in the state or that the income related to R&D must be generated in the state.

The outcome of the OECD work will inform the design of the Irish KDB. Should the second approach be adopted, it will significantly limit the number of companies that will be able to benefit from the new tax scheme as they may not have a sufficient level of R&D activities located in the state.
"It is intended that the design of the KDB in Ireland will be along the lines of what are commonly known as 'patent boxes' which have existed for many years in countries that compete with us for FDI… it will be necessary to ensure that the Irish KDB meets with the standards that remain to be agreed by both the OECD and the EU." - Minister for Finance, Michael Noonan T.D., 5 November 2014

**Irish KDB design**

The essence of the proposed KDB is that a lower tax rate will be applied to earnings generated from IP, it is likely that a requirement for the relevant R&D to be carried out in Ireland will be included. Therefore, the scheme is likely to provide advantages to only a limited number of companies who carry out R&D activities in Ireland.

The Government launched a public consultation process to allow interested parties to express their views on how the KDB should be designed. The figure below summaries the key elements of the proposed KDB as they stand given the EU and OECD agenda at the time of writing this report.

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**Qualifying IP**

It is likely that only patents and assets similar to patents that were developed in the country will qualify for KDB; this will significantly limit the breadth of the proposed scheme.

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**Qualifying income**

Income that will be subject to the KDB regime is expected to include proceeds from sale of qualifying IP, income related to IP infringements, income from licencing of qualifying IP and sale of products incorporating qualifying IP generated in the State.

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**Tax rate**

The lower tax rate that will apply to qualifying income is expected to be between 5% (Dutch rate) and 10% (UK rate). At the time of writing this report, the most recent Government proposals indicated the lower rate.
"It will provide an effective tax rate for IP income that is below the normal headline rate of corporation tax with the aim of encouraging companies to locate high-value jobs associated with the development of IP in Ireland." – The Department of Finance, January 2015

Advantages

• stimulate R&D within the state by providing additional tax incentive
• together with a 25% R&D tax credit, creates a significant advantage for R&D intensive operations in Ireland.

Risks and disadvantages

• is likely to have a limited application to IP income generated in the state only
• may be limited by the level of spend on R&D in the state
• apply only to patents related income.
EU Geographical Indication (GI) of origin system

Geographical Indication (GI) attached to a specific product is a way of distinguishing products that possess unique characteristics such as quality, reputation, production process and other characteristics that are related to the product's location of origin. These characteristics add value to the product and, therefore, are a valuable type of IP.

Geographical indicators are protected under TRIPS and all members of WTO are required to provide GI protection. All individual countries are allowed to choose legal instruments used to protect Geographical Indication’s (GIs).

Current EU system

The protection of GIs at the EU level refers to names of products that have unique characteristics. There are currently three schemes that apply exclusively to agricultural and food products:

- **Protected Designation of Origin (PDO)**
  - PDO can be applied to products that have a strong link with a specific area where they are produced.

- **Protected Geographical Indication (PGI)**
  - PGI status can be given to a product that is at least partially produced in a specific location and, as a result, acquires unique characteristics.

- **Traditional Speciality Guaranteed (TSG)**
  - TSG protects a registered product name and means that a product has specific characteristics (raw materials, production process, etc.) that has been consistent for at least 30 years. It does not link the product with any specific geographical location.

There are over 1,000 product names registered in the EU under the GI system.

Non-agricultural products are not currently protected under this system. As a result, individual producers who wish to protect GI have to apply in each member state individually and request protection where it is if at all available.
Proposed changes

The EU is exploring the possibility of expanding the scope of protection to non-agricultural products. Across the individual EU member states and the world, the level of protection available to non-agricultural GI products differs significantly. The EC published a number of studies into the area over the past year to identify whether an action at EU level is required. It was established that the existing mechanisms that exist at national level only are not sufficient and do not maximise the benefits offered by non-agricultural GI.

Further discussion on the topic is underway following an extensive public consultation.

A submission prepared by the Department of Jobs, Enterprise and Innovation highlighted that currently there is no demand in Ireland beyond the existing system of certification marks for a specific non-agricultural GI protection.

Advantages

- positive impact on quality and consumer confidence
- a unified EU protection would support trade relationships with third countries that have non-agricultural GI protection in place
- help producers to protect their product from illegal imitation on a wider geographical scale.

Risks and disadvantages

- excessive rules on GI could be burdensome and hard to comply with and, as a result, drive emerging and small businesses off the market
- could create uncertainty regarding future use in the existing markets
- increase prices
- treatment of competing products
- given the wide range of products, setting up specification/benchmark for GI qualification can prove to be difficult and ultimately limit product innovation.
IP and fast moving consumer goods
IP and fast moving consumer goods

**Overview**
Governments globally are exploring increasingly more aggressive approaches to the regulation of different categories of consumer goods; tobacco, alcohol and food. The most restrictive regulation was first introduced in Australia, in September 2012, by way of a total ban of “on-pack branding” for cigarettes and tobacco products.

Following Australia’s lead, on 10 March 2015, Ireland introduced The Public Health (Standardised Packaging of Tobacco) Act 2015. The new legislation will ban all forms of branding such as trademarks and logos on packs of cigarettes, tobacco and cigars and introduce 65% health warnings on the packs from May 2016. Its aim is to remove the marketing ‘fashion element’ from smoking to discourage children and young people from taking up smoking.

The new legislation was promoted by the Department of Health, various public health organisations and advocacy groups. International tobacco manufacturing companies, however, claim that enactment of this legislation raises concerns about the integrity of the Irish IP protection system, as it ultimately restricts the use of registered trademarks.

Additionally, there are concerns from the wider consumer goods sector that tobacco regulation is a road map for regulation of other consumer products such as alcohol, food and pharmaceuticals. In February 2014, the UN’s World Health Organisation (WHO) called for the introduction of “treaties and laws extending tobacco-style restrictions to alcohol and sweetened beverages” which suggests that these fears may be well founded.

**Standardised packaging and IP**
Standardised/plain packaging bans all branding, colour and logos on tobacco product packaging other than the brand name and variant, which may only be printed on specified locations on the pack in a uniform typeface, size and colour. All tobacco packaging must use the same defined colour and carry health warning labels.

The introduction of standardised packaging has raised concerns from different industries, governments and IP organisations. On March 28, 2014, the concerns of many brand owners were expressed in a joint statement of leading IP associations: Association of Trademarks and Designs Rights Practitioners (APRAM), The Benelux Trademark Association (BMM), Czech Association for Branded Products, the European Communities Trademark Association (ECTMA), ICC BASCAP; MARQUES, l’Union des Fabricants (Unifab) and the Union of European Patent Attorneys (UNION-IP). In the statement they say they object to “the adoption of restrictive legislation or policy options frequently referred to as 'generic' or 'plain packaging’'. “The IP business and professional communities have very strong concerns that any legislation that precluded - whether fully or in part - brand owners from the ability of making legitimate use of their trademarks, would amount to an indirect legislative expropriation of private intellectual property and, as a consequence, lead to the extinction of their property rights.”
These professional IP Associations claim that plain packaging violates IP rights, which are laid out in the TRIPS Agreement. While Article 20 of TRIPS says the use of trademarks “shall not be unjustifiably encumbered,” a separate part of the agreement, Article 8, says countries can amend laws to “adopt measures necessary to protect public health and nutrition.”

Australian law is currently the subject of challenges by five countries before the WTO, on the basis that it goes against provisions of TRIPS and the Technical Barriers to Trade Agreement. The Government of New Zealand, which also has been considering the introduction of plain packaging, has decided at this stage that it will not proceed until the challenge is resolved.

Ultimately the issue on whether IP rights in Ireland are being interfered with will be determined by the Irish Courts or, possibly, Europe. The issue on the potential for contagion into the alcohol, food and pharmaceutical sectors is, however, a distraction on Ireland’s underlying strong IP protection message.

**Impact on FDI**

In the context of attracting FDI this issue was highlighted by the President of the US Chamber of Commerce who wrote to the Taoiseach to express concerns that the standardised packaging proposals would “undercut well-established protections for IP.”

The previous Grant Thornton report on FDI in 2014 highlighted a number of significant concerns about the potential impact of plain packaging for tobacco products on the broader business community:

“The introduction of standardised packaging introduces significant risk and a precedent that could have unintended consequences for both Exchequer receipts and international investment in Ireland. Of those who expressed an opinion in the Amárach Research survey, 44% stated that the introduction of brand restrictions would have an impact on the decision to invest in Ireland.”

“Ireland has a strong IP regime, however the lack of enforcement and harmonisation of international IP legislation, such as the proposed changes relating to standardised packaging, create issues for Ireland as a destination for FDI.”
Impact on price – commoditisation of products
There are concerns from the tobacco industry that, unable to use trademarks in the normal course of trade and deprived of their branding power, companies will become more dependent on competing on price. A case study on Australia, carried out by The International Property Rights Index 2014 (IPRI2014), claims that the price of legal tobacco products consumed has dropped substantially since the legislation was introduced. As a result of price drops, consumption of tobacco in Australia has increased. In addition, the study indicates that consumption of illegal tobacco has also increased, funding further criminal activity.

Impact on counterfeit goods
Business Action to Stop Counterfeiting and Piracy (BASCAP), an initiative of the International Chamber of Commerce (ICC), is worried that standardised packaging “would increase the prevalence of counterfeit goods in the market, reduce brand owners’ ability to take action against such activity and undermine the ability of consumers to make informed purchasing decisions”, thus making it easier to mistake the product as genuine and also easier to counterfeit a product.

Ahead of a UK Government consultation on the marketing of tobacco products, Jeffrey Hardy, Director of ICC explains that “plain packaging will open the door to smuggling of foreign brands from abroad”. BASCAP are also of the opinion that that plain packaging will “simply increase the size of the business opportunity for criminal networks”.

In Ireland, the Revenue Commissioners and An Garda Síochana are of the opposite view and claim that the new legislation on plain packaging will not have any significant impact on illicit trade for tobacco products. The Revenue Commissioners have advised that “the tax stamp is a key means for them to distinguish between legal and illegal products, irrespective of the way in which the cigarettes are packaged”.

“It will be impossible to prosecute manufacturers of counterfeit tobacco products for counterfeit practices because technically there will be no illegal act of counterfeiting in the absence of trademark.”
- Jeffrey Hardy, Director of ICC
Tobacco labelling regulation - a template for other industries

Prior to the introduction of The Public Health (Standardised Packaging of Tobacco) Bill 2014, the Oireachtas Health Committee heard detailed submissions from interested parties. One of the most interesting submissions was made on behalf of the Incorporated Law Society of Ireland. In its submission, the Director General Mr. Ken Murphy, said the purpose of the Law Society submission was not to protect the tobacco industry, rather it was concerned with the wider effect and impact such a law would have on IP rights, and trademarks, in other areas.

"There is a real concern also that plain packaging in the tobacco industry is just the beginning of a trend that will severely undermine IP owners’ rights in other sectors such as alcohol, soft drinks and fast foods.” – Ken Murphy, Director General of the Incorporated Law Society of Ireland, February 2014

The tobacco industry is an example of how regulations can be incremental and increase in severity over time. For example, early health warning labels on cigarettes were small in size with more recent labels increasing in size and containing graphic images.

Alcohol, beverages, food products and pharmaceuticals are already being identified by public health commentators as target industries with many of the same conclusions being drawn for tobacco, alcohol and food marketing. Simon Capewell, professor of clinical epidemiology at the University of Liverpool and a prominent health campaigner, has stated that:

“Sugar is the new tobacco …everywhere, sugary drinks and junk foods are now pressed on unsuspecting parents and children by a cynical industry focused on profit, not health.”
- Simon Capewell, Professor of clinical epidemiology, University of Liverpool
The alcohol industry

On 22 June 2015, the Irish Parliament (Oireachtas) Joint Committee on Health and Children published its report on the Pre-Legislative Scrutiny of the General Scheme of the Public Health (Alcohol) Bill 2015. The recommendations contained in the Committee report include the following:

“Alcohol labelling should be treated in a similar fashion to tobacco legislation, to include the following:

- clear health warnings to be included on alcohol products, indicating that alcohol causes disease;
- the Minister should also consider ensuring that warnings be given prominence with an emphasis on visual, graphic designs for maximum effect;
- labelling should be standardised, taking into account best practice on design guidelines;
- labelling should include sufficient information on alcohol content in grams, standard drink size, and relate this to recommended maximum weekly consumption; and
- a complementary public awareness campaign should be run to clearly explain labelling to the public.”

This report is modelled on the report on the General Scheme of the Public Health (Standardised Packaging of Tobacco) Bill 2013, published by the Committee in April 2014. In addition, the heads of the bill itself, acknowledges it has modelled a number of its provisions on existing tobacco related legislation including the recently adopted Plain Packaging Act.

The food industry

At a recent conference held by the International Trademark Association (INTA) Sophie Anger, associate general counsel at Mars Inc, said brand owners were not any nearer to knowing whether plain packaging laws that have been introduced for tobacco will extend to confectionery products, but said the company, and others in the industry, were “mindful of the possibility”.

“If we are forced to remove our branding this will have an impact. It will make it harder for us to enforce our brand, distinguish ourselves from our competitors and it will make counterfeits easier to produce.”

- Sophie Anger, associate general counsel at Mars Inc.

Internationally, public health activists are increasingly turning their attention to food, arguing against “imaginative marketing techniques” in supermarkets to “create a neutral environment for consumers” Australian Institute of Food Science and Technology. Plain packaging for soft drinks has also been discussed in the Australian context.

Chile has proposed regulations that would place images of “Stop” signs on food high in fat, sugar and salt and South Africa has introduced plain packaging for baby formula. Additionally, graphic health warnings for food are also under discussion in Canada, California, New Zealand and the United Kingdom, where it is openly argued that “food should be regulated like tobacco”.

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**The pharmaceutical industry**

Speaking at the launch of the Grant Thornton report on FDI in 2014, Myrtha Hurtado Rivas, Head of Global Trademarks, Novartis Pharma, which employs 1,500 people in Ireland, raised serious concerns in relation to the trend towards increasing standardisation of packaging.

“There is a trend towards increased regulation of IP rights of pharmaceutical brand owners, aimed at increasing access to generic medicines, patient safety and reducing health budgets. Novartis strongly supports these aims. Nevertheless, it is essential to find the right balance between attaining these objectives and the IP rights at stake. Brands and ornamental features are part of the trade dress and the brand identity of pharmaceutical products built up during an IP long period of time and with considerable investment,”

- Myrtha Hurtado Rivas, Head of Global Trademarks, Novartis Pharma