

Welcome

Commercial Property - Trends & Legal / Tax Considerations in Commercial Leases





COMMERCIAL PROPERTY MARKET OVERVIEW

31st MARCH 2022



INTRODUCTION

- 01** Offices
- 02** Industrial
- 03** Retail
- 04** Investment

01

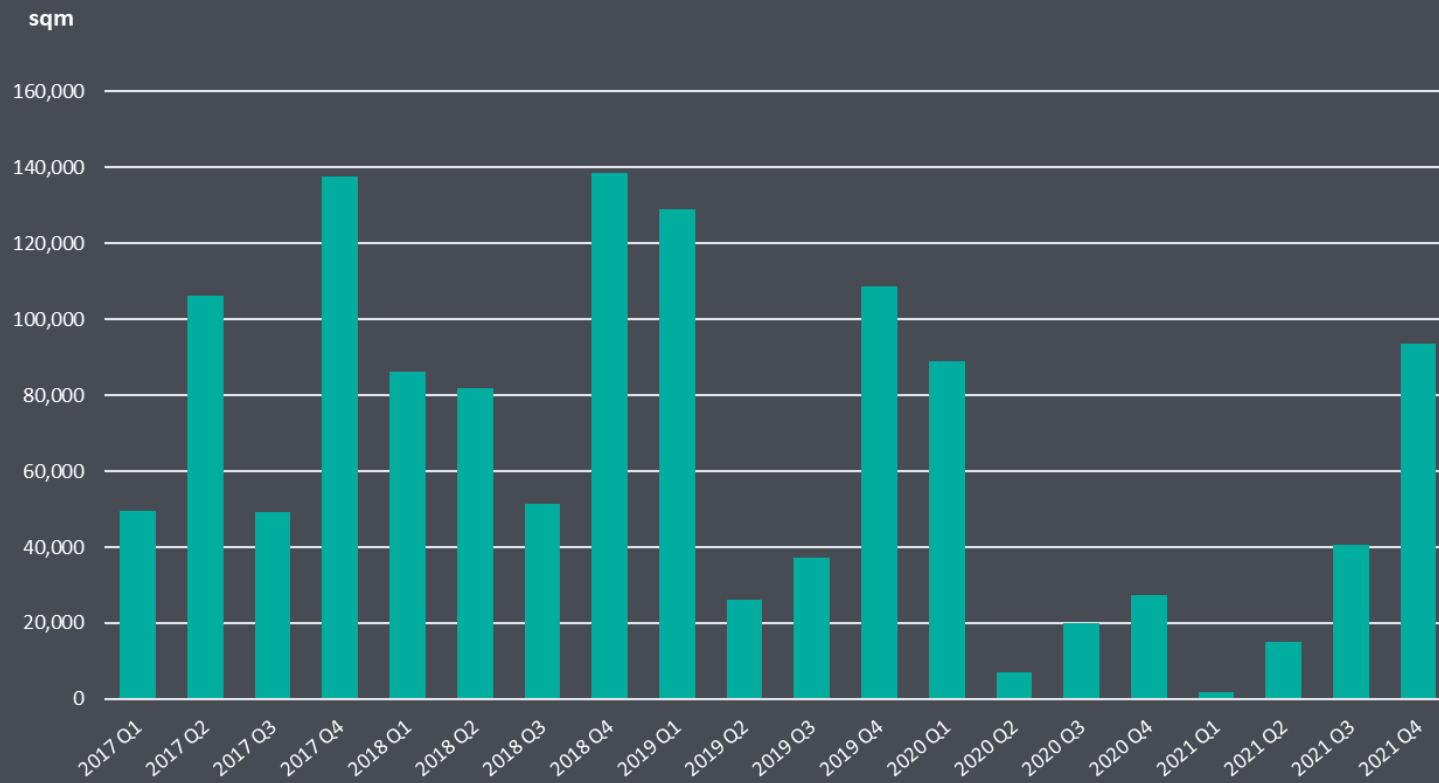
OFFICES



ACTIVITY

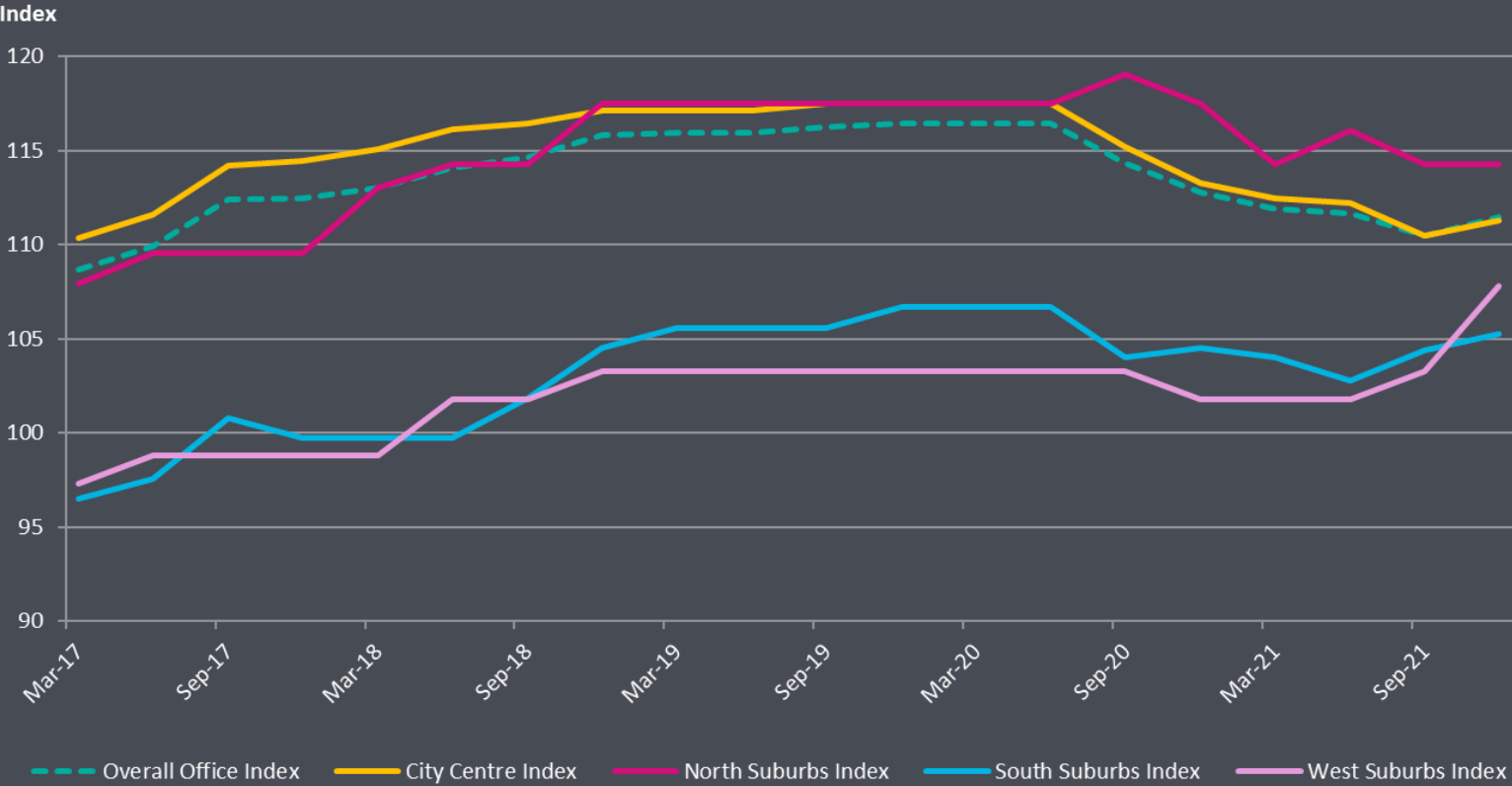
OFFICES

DUBLIN OFFICE QUARTELY TAKE UP (Q1 2017 – Q4 2021)



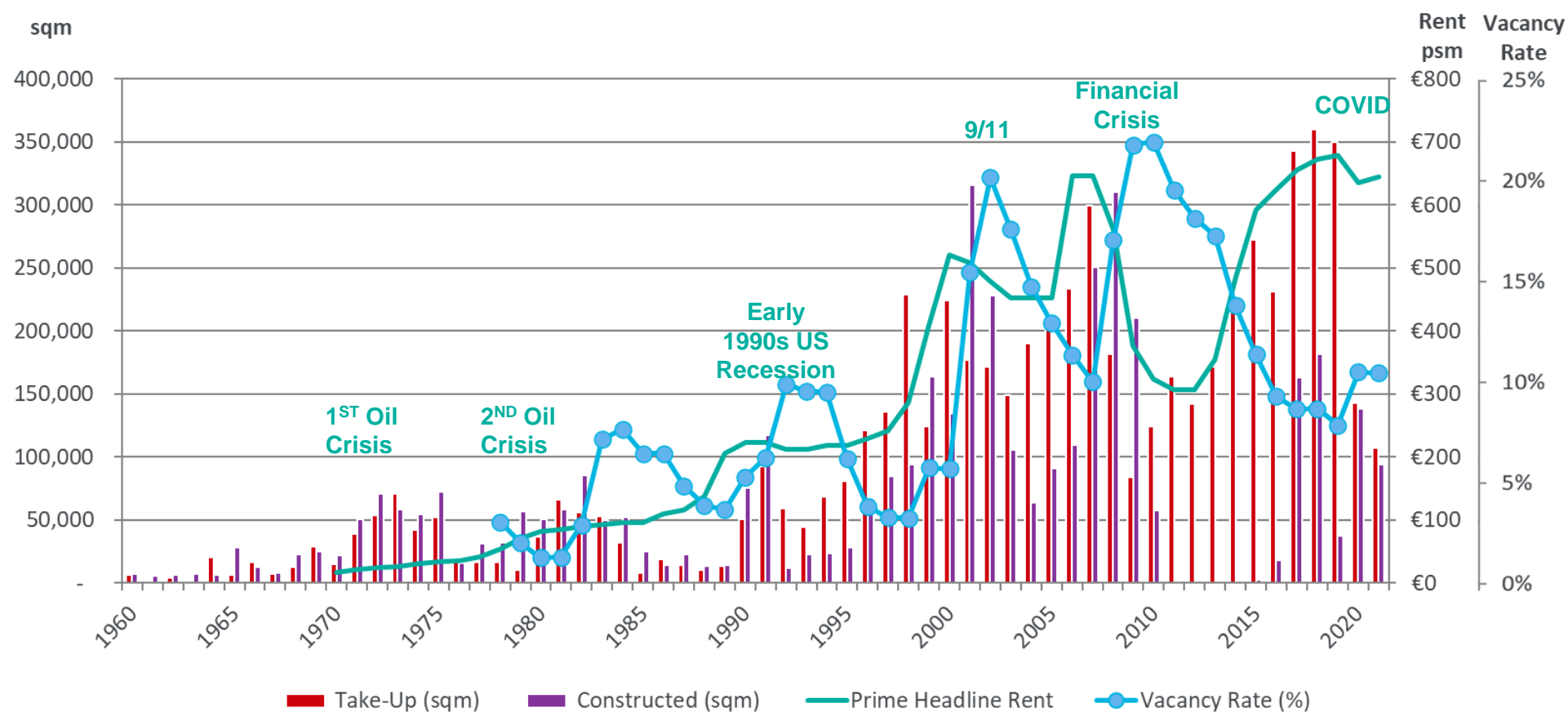
DUBLIN OFFICE RENTS INDEX

OFFICES



EXTERNAL IMPACTS ON OFFICE MARKET CYCLES

OFFICES



OFFICES

IRELAND – INWARD INVESTMENT



**BEST COUNTRY IN WESTER
EUROPE**

to invest in



1ST

for flexibility and adaptability
people



1ST IN THE WORLD

for inward investment by quality
and value



1ST IN THE WORLD

for investment incentives



IN THE TOP 15

most innovative countries in the
world



THE TOP 5

global software companies



14/15

top medical tech companies



18/25

top financial services companies



10/10

top pharma companies



8/10

top industrial automation
companies

1,700 multinational
Companies in Ireland

One-third had operations
for over **20 years**

Employ 275,000 people
Growing **20,000** jobs
per annum

€ TURNOVER IN 2021

OFFICES

- Meta (Facebook)

€40.6bn

€6.7m per employee



- Google

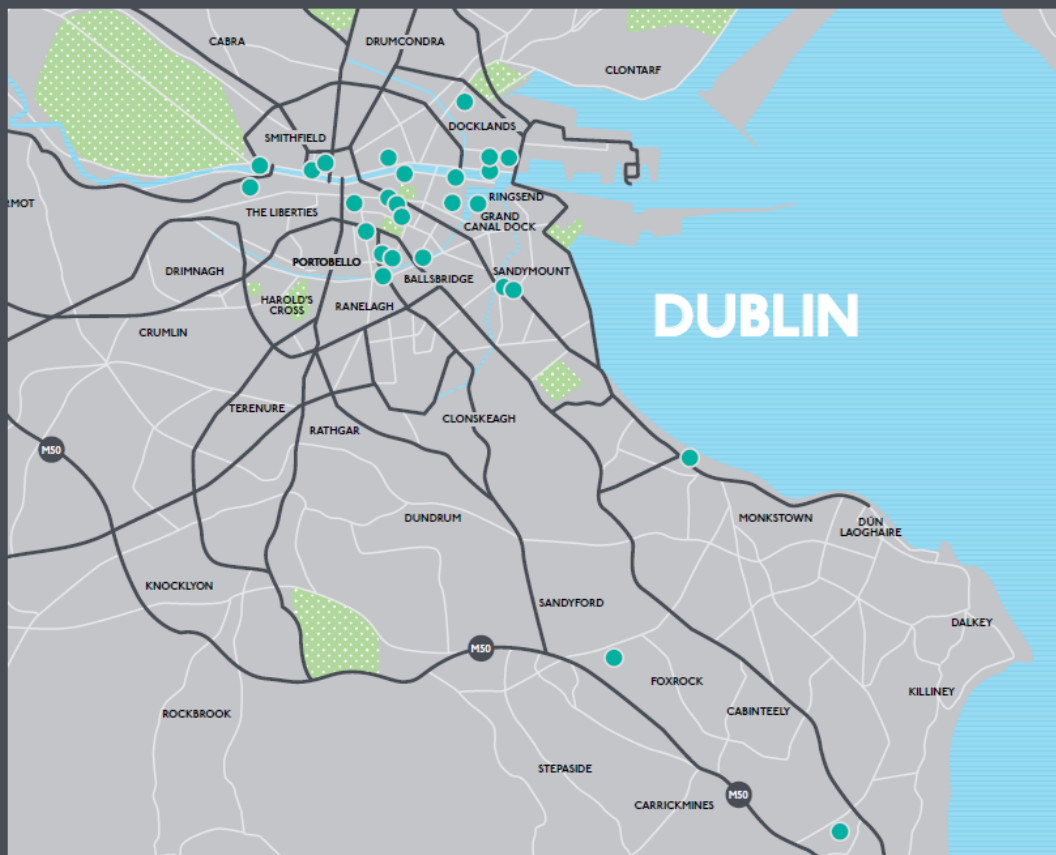
€48.8bn

€6.1m per employee



NEW STOCK - DUBLIN

OFFICES



● UNDER CONSTRUCTION

COMPLETED 2021:
94,000 sqm

UNDER CONSTRUCTION:
430,000 sqm
95% City Centre
60% pre-let

02

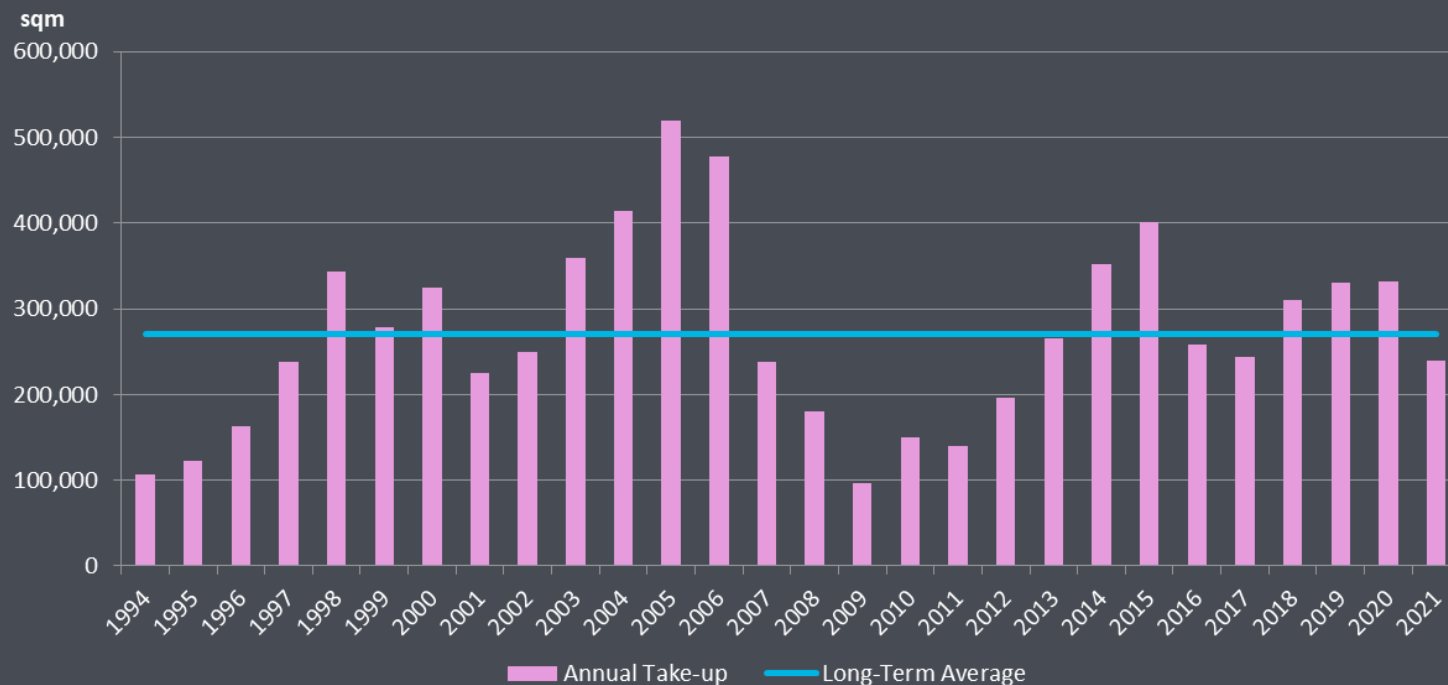
INDUSTRIAL



DEMAND & ACTIVITY

INDUSTRIAL

- **Star performer** of occupational markets during pandemic – activity just shy of LTA
 - 3PL and large retailers / Pharma
- Indigenous demand <1,000 sqm



02

VACANCY

INDUSTRIAL

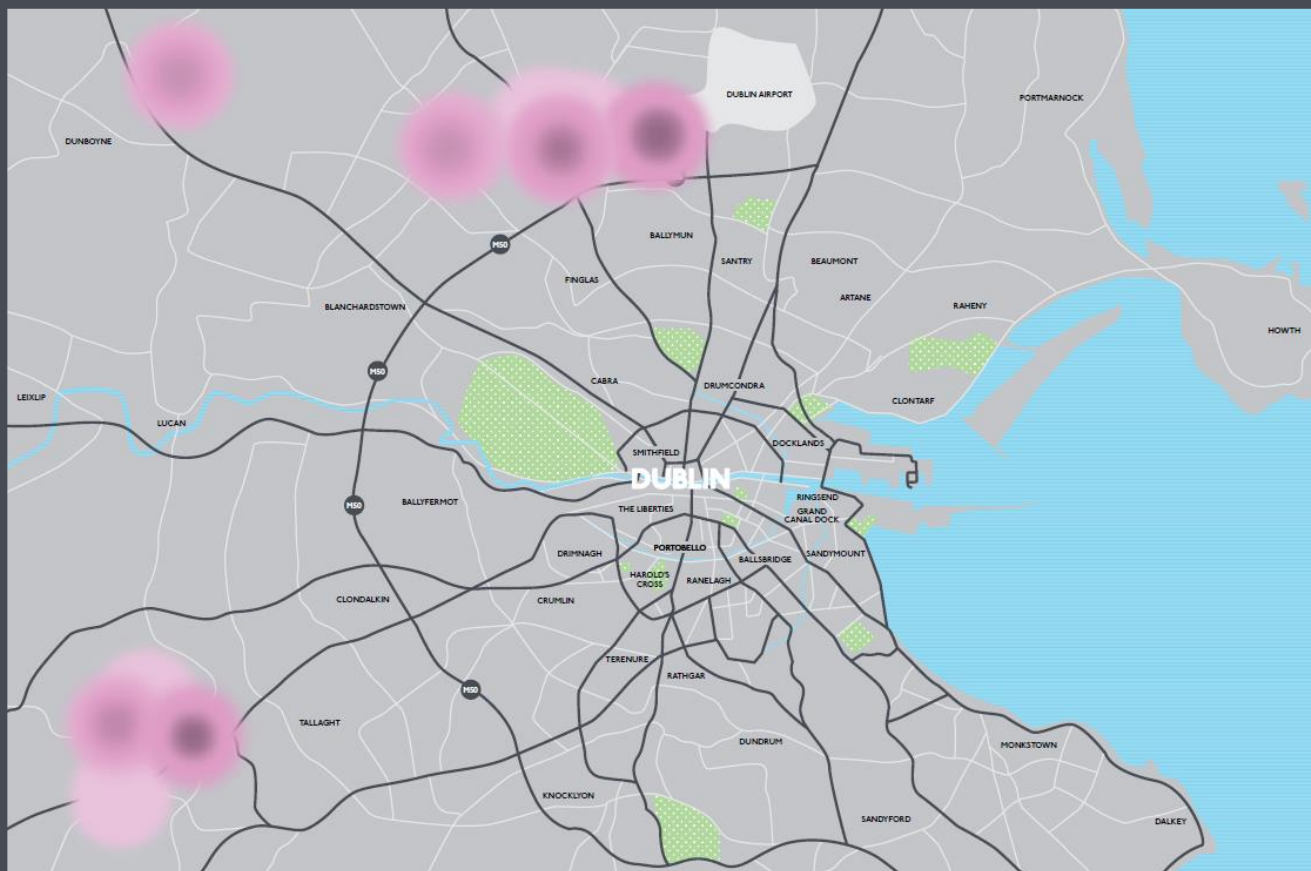
- Major **supply shortages**

< 4%

02

NEW STOCK - DUBLIN

INDUSTRIAL



UNDER CONSTRUCTION:
275,000 sqm

40% available

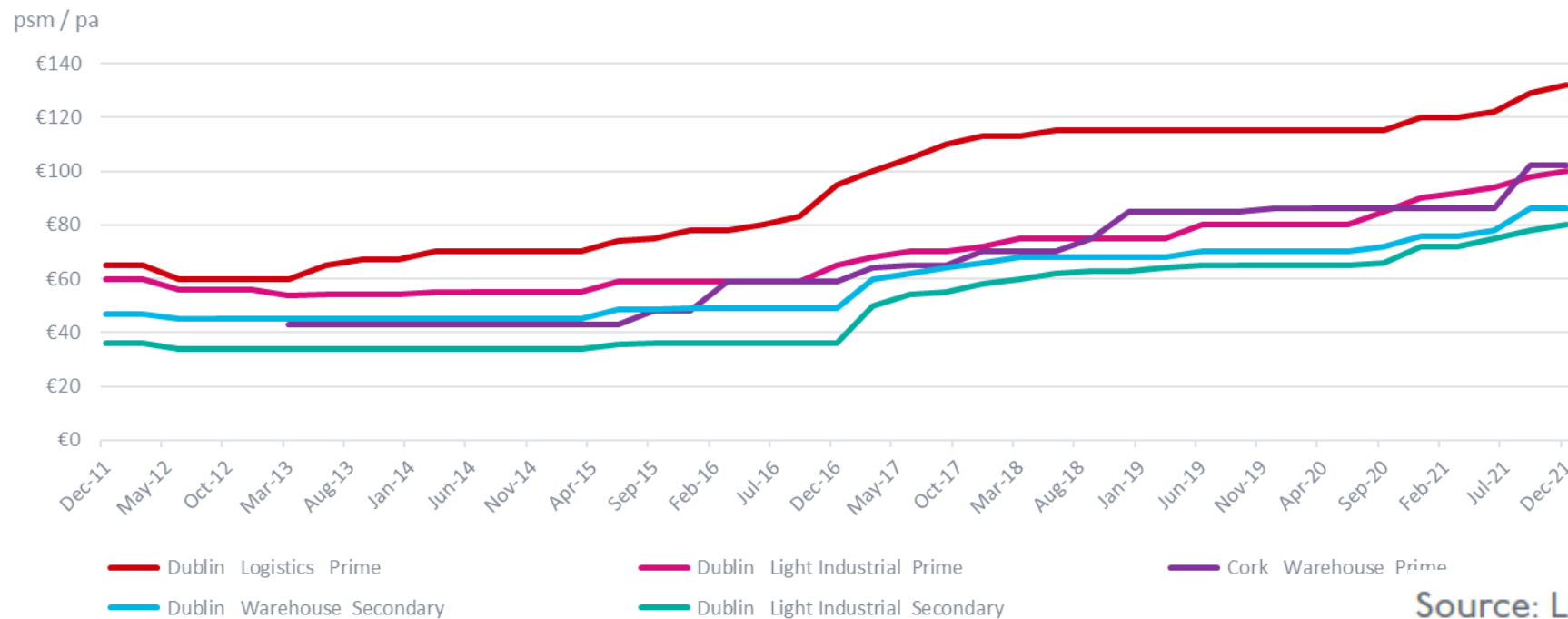
*10,200 sqm average lot
size*

All 12 – 14m eaves

SW or NW

COMMERCIAL TERMS

- Continually **moving** further in favour of the landlord
 - Design-and-build and quality used space: 20 years / BO at year 10 or 12 – moving towards year 15 / RF 4 months
- Continued rental **growth**



03

RETAIL



Retail

KBC CONSUMER SENTIMENT INDEX

67.0



RETAIL SALES VOLUME

BETWEEN FEBRUARY 2020
& FEBRUARY 2022

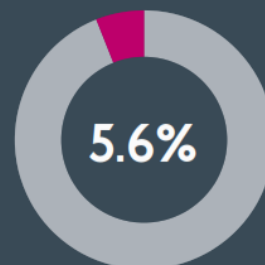
+40.5%

TEXTILES,
CLOTHING &
FOOTWEAR

-24.3%

BARS

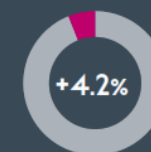
INFLATION



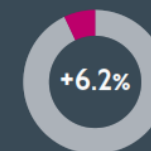
THE
LARGEST
ANNUAL
CHANGE
SINCE
APRIL 2001

SOURCE: CSO

RETAIL SALES



ALL SALES
BETWEEN FEBRUARY 2020
& FEBRUARY 2022



ALL SALES
ANNUAL CHANGE
FEBRUARY 2022

SOURCE: CSO

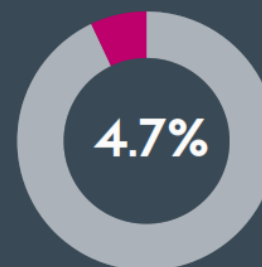
CAPITAL GROWTH

-7.4%

ANNUAL
CHANGE
TO DECEMBER 2021

SOURCE: MSCI

ONLINE SALES



PORTION OF
TOTAL SALES
COMPLETED
ONLINE
IN FEBRUARY 2022

SOURCE: CSO

03

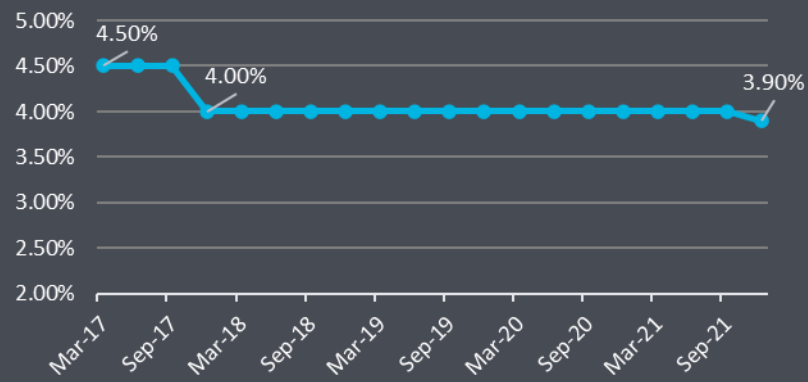
INVESTMENT



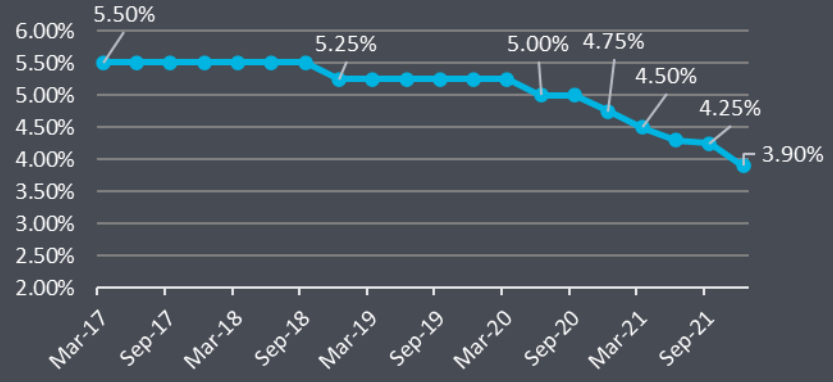
PRIME YIELDS (2017 – 2021)

INVESTMENT

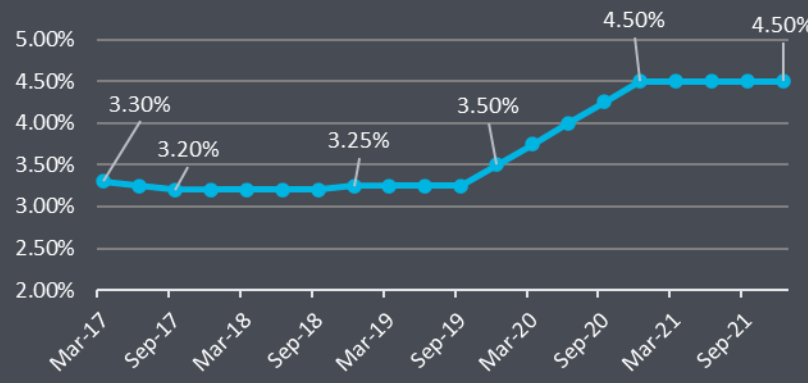
OFFICE



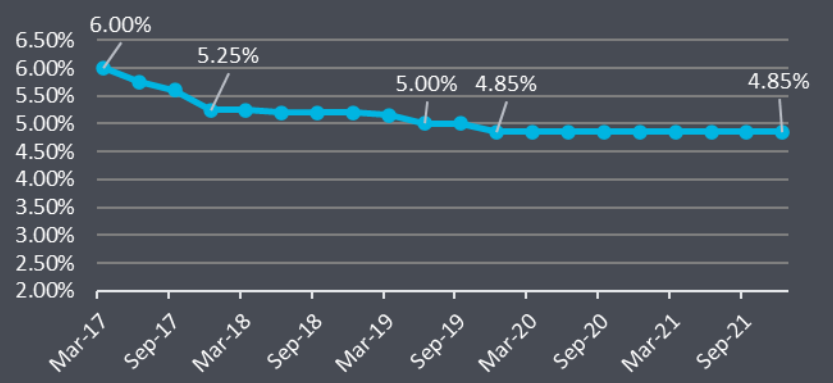
INDUSTRIAL



RETAIL



PRS



03

PRICING

INVESTMENT

	CAPITAL VALUES		NET EQUIVALENT YIELD		
	Change in Capital Values since the onset of the pandemic	Change in Capital Values in the first 9 months of 2021	Prime Yield End-2021	Change in Yield since the onset of the pandemic	Change in Yield in 2021
OFFICES	-4%	-1%	3.90%	-10 BPS	-10 BPS
RETAIL	-22%	-6%	4.50%	+75 BPS	—
INDUSTRIAL	+14%	+12%	3.90%	-135 BPS	-85 BPS
PRS*	—	—	4.85%	—	—

* PRS yields do not have OPEX accounted for and as such, are on a gross income basis.

Source: Lisney (Yields), MSCI (Capital Values)

03

OFFICES

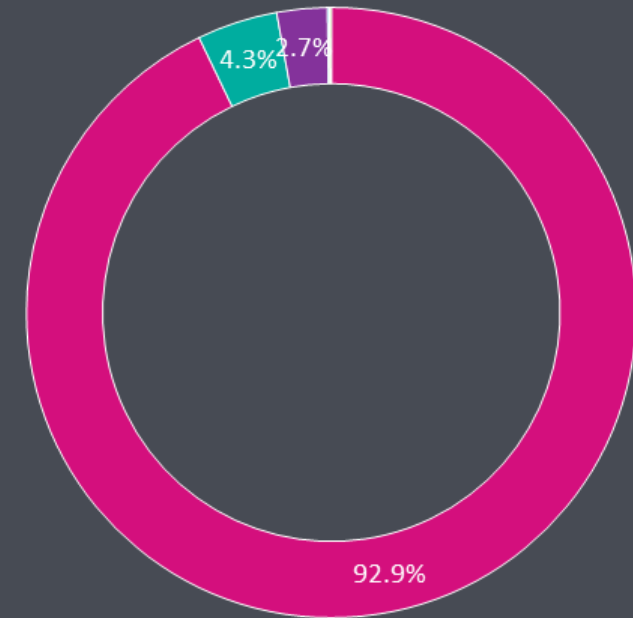
INVESTMENT

- Strong spend despite office staff WFH / 28%

€1.6bn

- Net Zero Asset Managers Initiative
- Large assets due to come to the market

LOCATION



■ Dublin (92.9%) ■ Cork (4.3%) ■ P&C (2.7%)
■ Limerick (0.1%) ■ Louth (0.1%)

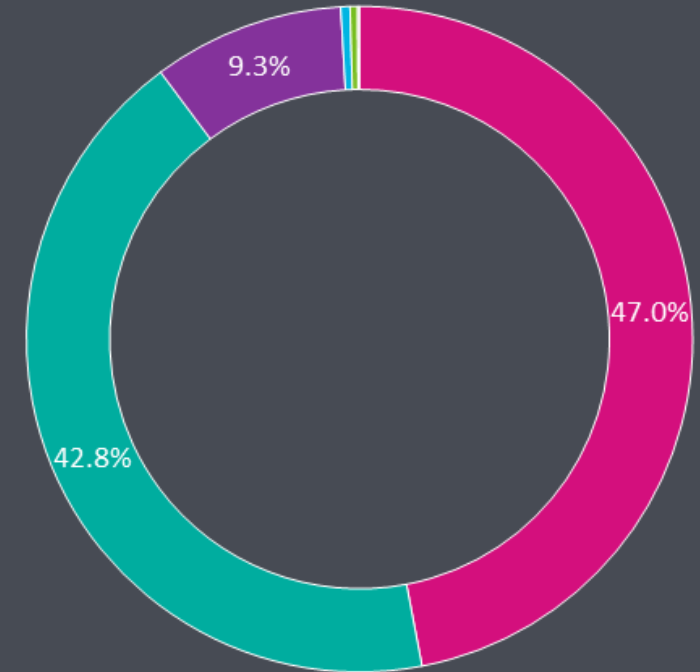
INVESTMENT

- Largest annual investment spend ever on industrial in 2021 / 18%

€1bn

- Equivalent to previous 6 years combined
- Acceptable investment grade
- Portfolios and large distribution centres
- Forward funding deals
- New stock bundled and sold

LOCATION



■ Various (47%) ■ Dublin (42.8%) ■ Kildare (9.3%)
■ Longford (0.5%) ■ Galway (0.4%) ■ Cork (0.1%)
■ Meath (0.03%)

03

RETAIL

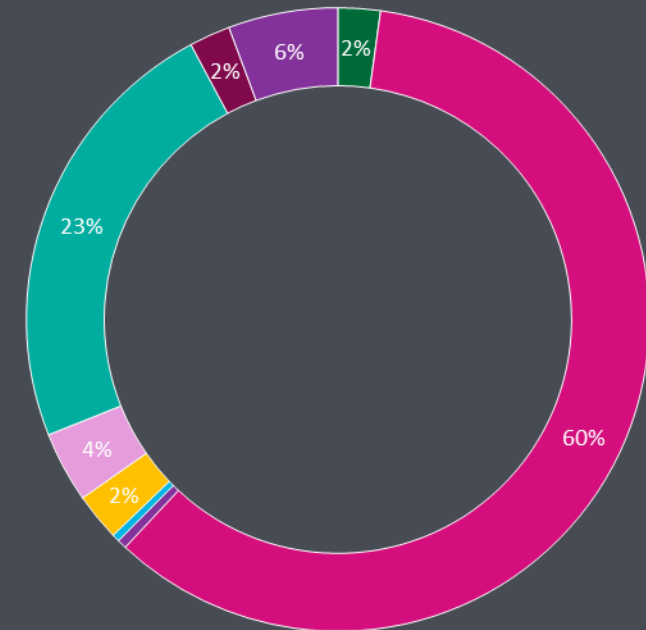
INVESTMENT

- The sector is making somewhat of a resurgence following five or six difficult years.

€320m

- Average deal size €9.1m
- A renewed demand for priced correctly well-located schemes with good tenant line-ups

LOCATION



■ Cork (2.2%)	■ Dublin (59.8%)	■ Limerick (0.5%)
■ Meath (0.4%)	■ Sligo (2.5%)	■ Tipperary (3.7%)
■ Various (23.2%)	■ Westmeath (2.1%)	■ Wicklow (5.7%)

03

KEEP AN EYE ON

INVESTMENT

- Inflation
- Interest rates
- Ukraine
- Covid
- Brexit
- Supply chain
- Geo-political shift towards self sufficiency
- Housing
- Labour shortages
- Government debt



THANK
YOU





LANDLORD & TENANT

Roisin Bennett, Reddy Charlton LLP

31 March 2021

Agenda

- **Post Pandemic changes in leases**
 - Temporary arrangements
 - Long term lease variations
 - Documenting arrangements
- **Other factors**
 - Code of Conduct between Landlords & Tenants
 - SCARP
 - Recent caselaw
- **New Leases**
 - Negotiation Trends
 - Turnover Rents
 - Green Leases
 - Impact of World Economy



POST PANDEMIC – TEMPORARY ARRANGEMENTS TO HELP TENANTS

Rent reductions

Rent deferral

Rent holiday

Variation of rent payment monthly rather than quarterly to suit tenant cashflow

Forebearance given coming to an end

POST PANDEMIC – LONG TERM ARRANGEMENTS

Reduction in rent in return for extension of lease term

Variation to turnover rent for a specific period of time

Reduction in rent in return for landlord break option

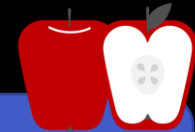
Landlord seeking renunciation of landlord and tenant rights

Postponement of rent review

Tenant foregoing break option or postponing break option

DOCUMENTING THE ARRANGEMENTS

- Be careful of the use of Side Letters – they are personal only to the parties involved and will not bind successors in title of either part
- A Side Letter can be conditional upon compliance with other lease covenants
- A Deed of Variation is permanent amendment to the lease – applies to the tenant and landlord and any successors in title – be mindful of tax consequences of a Deed of Variation and any VAT issues – complexities can arise!



CAUTION – TAKE ADVICE ON DOCUMENTING ARRANGEMENTS AS COULD HAVE ADVERSE CONSEQUENCES – AFFECT UPWARDS ONLY RENT REVIEW – VAT CONSEQUENCES

Code of Conduct between Landlords and Tenants

Introduced during the pandemic and its application has been extended until 30 April 2022.

- Intended to promote and reinforce good practice in landlord and tenant relationships as they deal with income shocks caused by the pandemic.
- Voluntary.
- Does not impact leases.
- It is a useful tool for tenants and/or guarantors to use in dealing with any disputes with a landlord and that issues be resolved based on the principles of the Code.
- The Code advocates alternative dispute resolution mediation where the parties cannot agree.
- Landlord should have regard to the Code and be mindful of a court's attitude in the event of forfeiture proceedings and likely attitude of a court.
- For more information, please click [here](#) to access the guide.

SCARP

	Micro Company	Small Company
Net Turnover does not exceed	€700,000	€12,000,000
Balance Sheet does not exceed	€350,000	€6,000,000
Average No. of Employees does not exceed	10	50

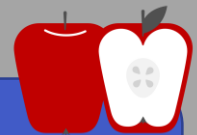
- “Small Companies Administrative Rescue Process” (“**SCARP**”) - The Companies (Rescue Process for Small and Micro Companies) Act 2021 (the “**Act**”).
- Government initiative designed to help small businesses struggling with debt and facing the prospect of insolvency. Exclusively to “small and micro companies”, as defined under the Companies Act 2014:
- Benefits – Out of Court, Cheaper, Efficient (70 day timeline), Transparent
- Observations – New process, practicality yet to be tested – impact on commercial leases to be seen.
- 2020 cases of New Look and Monsoon – steps tenants need to take before embarking on drastic measures
- Autumn 2022 before we see uptake in this area

Recent Caselaw: Footlocker Retail Ireland Limited

- Issue: related to contract law and frustration of leases
- Can a lease be partially frustrated?
- If so, were Footlocker entitled to a declaration confirming that its lease had been partially frustrated?

HELD

- No doctrine of partial frustration exists under Irish law
- Tenant cannot retain occupation but at same time be free from the obligation to pay rent
- Obligation to pay rent is not severable
- Judgment against Foot Locker €1m plus costs
- Appeal heard Thursday 24 March 2022 – judgment awaited



NOTE:
Circumstances during pandemic will not override contractual obligations.

New Leases - Negotiation Trends



Rent free periods –
Tenants want rent free to
cover fit out periods



Service charge – tenants
wanting certainty around
the scope and level of
service charge



Learnings from Covid-19

Tenants seeking carve out for
pandemic type event
Keep open clauses



**RICS Commercial Leasing
Code**



SCSl Service Charge Code

Negotiation Trends: Turnover rent

Issues for landlord

- Sector specific
- Will lease be pure turnover or base plus a percentage of turnover top up?
- Care needs to be taken in drafting as to what is “Gross Turnover”
- How are online orders accounted for? Click and collect?
- How does it fit with rent review?



Issues for tenant

- Confidentiality issues – disclosure by landlord
- Maintain flexibility – break option linked to turnover if not achieving certain sales levels
- Are the arrangements binding on landlord’s successors in title?

Turnover Rents: Issues for Lenders

- What does projected rent look like?
- Impact on financial covenants
- Affect on property valuation



Emerging Trends

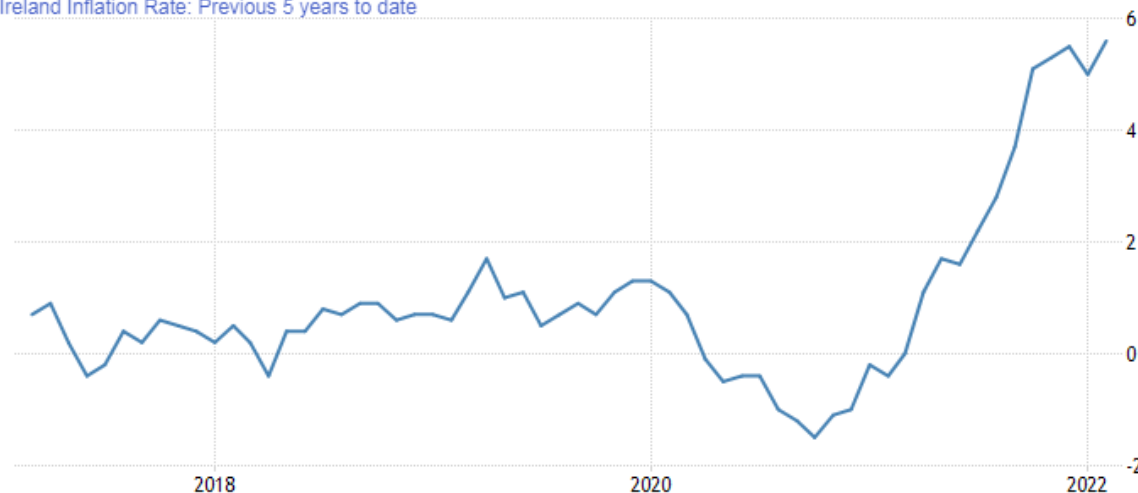
- **GREEN LEASES – OFFICE LETTINGS**
 - ESG
 - New office space - NZEB requirements – this is a legal requirement since 2019
 - Retrofitting of old space - cost versus benefit
 - Two tier market - new vs old stock
 - Office market – hybrid working – tenant needs to satisfy its employee demands – bicycle spaces/sustainability policies



WORLD ECONOMY: THE GREAT UNKNOWN!

- Inflation – impact on CPI rent reviews
- Supply chain issues - getting product to the shop floor! Particularly important on FMCG where raw materials coming from the East
- Consumer spending – initial surge post lifting of restrictions – but this is limited to certain sectors bars, hardware, electrical goods but notably department store spending is down
- Tenants entering into leases will want maximum flexibility to break if needed

Ireland Inflation Rate: Previous 5 years to date



TRADINGECONOMICS.COM | CENTRAL STATISTICS OFFICE IRELAND



QUESTIONS

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Commercial Lettings Tax Considerations

31/03/2022

SINEAD MCMAHON

We're by your side



Agenda

1. Overview of VAT treatment of rents
2. Premiums
3. Surrender/Assignment of a lease
4. Break clause / variations
5. Capital Good
6. Tenant fit out
7. Lease within a VAT group
8. Dilapidations
9. Common pitfalls

Overview of VAT treatment of rents

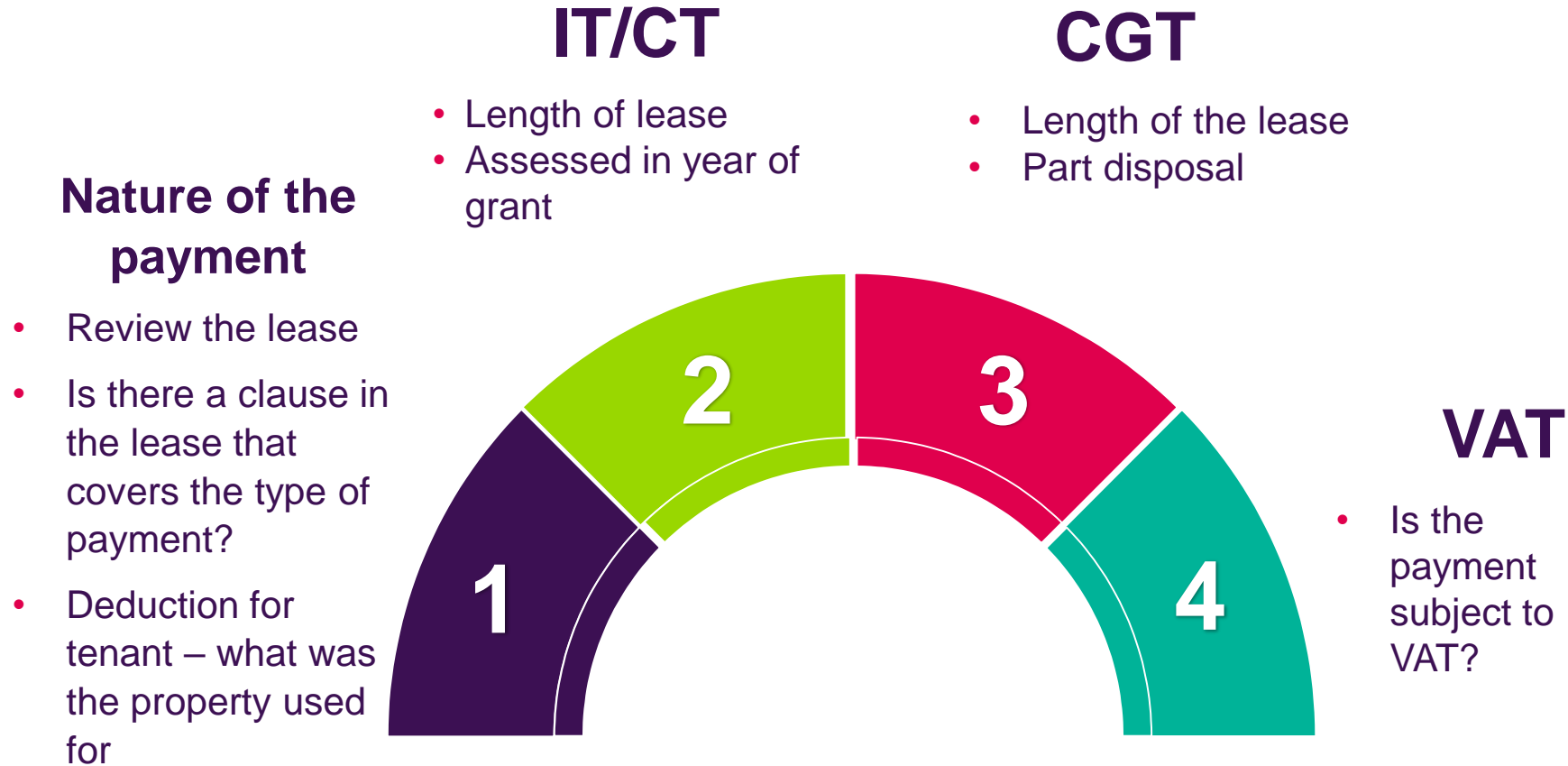
Post 1 July 2008

- > No distinction between long and short leases
- > All leases are exempt from VAT
- > Cannot recover VAT on acquisition / development or maintenance where VAT not charged on rent
- > Landlord can 'opt to tax' – landlords discretion (only applies to commercial properties)
- > The option to tax is on a lease by lease basis
- > Connected party rules
- > Landlord can cancel an option to tax at any time

Pre 1 July 2008

- > Properties developed post 1972 in the 'VAT Net'
- > Leases of less than ten years i.e. short leases, were treated as supply of 'service'
- > Short leases were exempt from VAT but 'waiver' could be put in place
- > Waiver covered all properties owned by the landlord
- > Leases of more than ten years were treated as a supply of 'goods'
- > Capitalised value used for long leases and VAT paid up front where no VAT 4A procedure in place
- > VAT life is generally 20 years

Premiums – Considerations from a Tax Perspective



Payments treated as premiums

Premiums

- > Payment for granting a lease
- > Deemed premium – tenant undertakes work
- > Reverse premium – landlord to tenant
- > Lump sum paid in place of full rent
- > Sum paid for the surrender of a lease
- > Sum paid for the variation or waiver of a lease



Premium payments

Rent / capital payment

Lease that is less than 50 years

- > Partially taxed as rental income with balance subject to CGT
- > Always consider what the payment is being made for and whether there is a clause in the lease – can differ from the above general rule.
 - > E.g. premium paid on surrender – CGT based on case law if not included in the lease

On lease that is over 50 years

- > CGT part disposal rules

VAT

- > Treated for VAT purposes the same as the rent i.e. if you opt to tax the rent then the premium will be subject to VAT
- > Reverse premium (landlord to tenant)
 - > Generally not subject to VAT if no services provided by the tenant
 - > Caveat – if tenant does something more than simply enter the lease - watch out for anchor tenants

Surrender/Assignment - VAT

1. Transitional lease

- > Person acquired, developed or has an interest in property pre 1 July 2008
- > Was entitled to deduct VAT on acquisition/development
- > Creates a “legacy” letting/lease (greater than 10 years)
- > Occurs within 20 years of later of creation, or most recent assignment
- > Where tenant had an entitlement to recover VAT on creation of the lease:
 - > Assignment/surrender vatable on reverse charge basis
 - > Landlord/Assignee acquires a capital good
 - > Landlord/Assignee need to ensure property used for vatable purposes for remainder of the VAT life
- > Where tenant had no entitlement to recover VAT on creation of the lease:
 - > Assignment/surrender is exempt
 - > Possible to make a joint option to tax
- > Payment for assignment / surrender of a legacy lease
 - > Outside the scope of VAT

Surrender/Assignment - VAT

2. Non transitional lease

- > No VAT on surrender or assignment unless payment being made

Assignment payments

- > Assignor to assignee – assignee is providing a service by taking over the tenants rights and obligations – Vatable service
- > Assignee to assignor – in Revenue's view, assigning the interest in the lease is the supply of a services and therefore vatable

Surrender payments

- > Payment by landlord to tenant – taxed the same way the rents are taxed under the lease
- > Payment by tenant to landlord – also taxed the same way as the rents

Break clause / Variations

- > In Revenue's view, exercising a break clause is treated the same way as surrendering the lease
- > Deed of variation is very complex area for VAT
 - > Depends on what the variation is and how structured from a legal perspective. Some Revenue guidance on the following:
 - > Extend the term of the lease – seen as a new lease, no surrender
 - > Reduce the rent – no VAT implication other than on the rent itself
 - > Reduction in floor area – partial surrender
 - > No clear guidance on other types of variations so caution is recommended – obtain advice when drafting!
- > Watch out for reduction of rent or waiver of rent where no deed of variation is put in place – rent taxed on a receivable basis and not a received basis. Be mindful of S101 Taxes Consolidation Act 1997!!
- > In some cases stamp duty can arise on a deed of variation – get advice

Capital Goods

- > New concept of a “Capital Good” - effectively an interest in property in which taxpayer was entitled to recover VAT
- > Every capital good has a VAT life – generally 20 intervals or 10 intervals (refurbishment)
- > “Intervals” broadly mirror financial years
- > Entitlement to recover VAT based not on first use of the property but on how property used during the VAT life i.e. Look at each year
- > Intention for use of the property is an important VAT concept
- > Aim of CGS is to determine the level of VAT recovery over the use of the property.
- > Under the old regime recovery was determined on initial use which led to harsh results.

Tenant Fit Out

- > Refurbishment creates a “capital good” with a ten year VAT life
- > Refurbishment v’s repairs and maintenance – no clear definition by Revenue
- > Watch the length of the lease or any break clause
- > Where lease is surrendered within the life of the capital good
 - > Clawback of VAT for tenant?
 - > Will landlord take over the capital good?
 - > Remove the refurbishment to restore the property to its state before that fit-out was undertaken
- > Critically important to review the VAT clause in the lease from a tax perspective

Lease within a VAT Group

- > Lettings are ignored for VAT purposes (deemed supply of services)
 - > Not necessary to opt to tax the letting within a VAT group.
- > Deemed to be used for vatable use – no claw back of VAT on acquisition / development
- > Watch out for assignment / surrender of legacy lease within a VAT group – not ignored for VAT purposes – can often be overlooked!
- > Entitlement to inputs is not affected by the lease. Look at all companies in the group as one.
- > Where one member of the VAT group has a waiver in place then that waiver applies to all members of the VAT group.
- > If VAT group is broken up, option to tax must be put in place to avoid potential claw back of VAT

Dilapidation Payment

Tax treatment for tenant

- > Revenue v's Capital
 - > No guidance from Revenue on tax treatment
 - > A lot of case law in this area (UK)
 - > What is the “asset” that is being repaired/replaced
 - > Distinguish between a “repair/replacement” and an “improvement”
 - > Alterations to a building or improvements are normally regarded as capital expenditure
 - > The costs of reinstatement to the original state and condition may qualify as repairs
- > Payments by tenants to landlords do not constitute consideration for any taxable supply – outside the scope of VAT
- > Dilapidation works carried out by tenant prior to surrender of lease – watch out for any capital good created

Common Pitfalls

- > Surrender of a legacy lease followed by a new letting – opt to tax rentals important to avoid costly VAT clawback
- > Acting for purchaser of a reversionary interest on a legacy lease – need to be aware of potential VAT arising on a “surrender” of the leasehold interest
- > Joint option to tax may not always be the right answer – compensation for VAT clawback

Common Pitfalls

- > Be aware of tenants refurbishment - capital good?
- > Surrender documents for VAT purposes – watch stamp duty
- > Watch definitions in leases – VATCA 2010, “Deductibility adjustment”
- > Distinction of licence v letting – different VAT treatment
- > Waivers of exemption- haven’t gone away!
- > Be aware that Transfer of Business relief may apply




Thank you

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We're by your side

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Thank You



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Save the Date!

- > RBK Lunchtime Series continues on Monday, 25th April 2022
- > Brexit & Goods – Practical Experiences