EVERSHEDS SUTHERLAND

Knowing your options

Subbing-in or branching out?

With Brexit looming, many external companies are considering establishing a presence in Ireland. In this article we examine two of the core options available; (i) establishing a branch in Ireland and (ii) establishing a subsidiary in Ireland, and some benefits and drawbacks of each.

The options

The principal options available to external companies intending to establish an Irish presence are:

1. **A branch:** an extension of the external company[1] (and not a separate legal entity); **or**

2. **A subsidiary:** an independent company with a separate legal existence to the external company.

The key differences

1. Separate Legal Personality

The main distinction between a branch and subsidiary is that a subsidiary is a separate legal entity which can carry on an independent business. As a separate entity, the external company's liability will be limited, with some exceptions, to the share capital invested by it. Conversely, as a branch is an extension of the external company, the external company retains ultimate liability for the actions and liabilities of the branch.

2. Filing formalities/set-up

The requirements for setting up a branch depend on whether or not the external company establishing it is based in the European Economic Area (**"EEA"**), with different requirements imposed on companies from outside the EEA. Registration must take place within 30 days of the establishment of the branch. To establish a branch, the Irish Companies Registration Office (**"CRO"**) will require

(i) details of the external company's officers, and

(ii) certified copies of the external company's key constitutional documents and financial statements.

An indicative timescale for establishing a branch is 5-15 working days[2].

Alternatively, a subsidiary is usually incorporated by registration as a limited company, which takes the form of either a private company limited by shares (**"LTD"**) or a designated activity company (**"DAC"**). A key difference between both is that a DAC is established for a particular purpose which must be detailed in its constitutional documents.

An indicative timescale for establishing a subsidiary is:

(i) 3-5 working days using pre-approved constitutional documents, or

(ii) 7-10 working days using a bespoke constitution.

In light of Brexit, it may be of benefit to have an EU/ EEA registered company in order to avail of any EU benefits or schemes that are limited to EU/ EEA entities. This is aside from the benefits which arise in the regulatory sphere, such as passporting of regulatory approvals, which such entities will be acutely aware of.

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[1] The definition of external company was recently changed under the Companies (Accounting) Act 2017.

[2] A longer period is usually only necessary in the case of non-English speaking jurisdictions or where the certification/notarisation process takes time.

3. Tax residency and taxation generally

There are a number of considerations to be taken into account from a tax perspective when deciding whether to operate via a branch or a subsidiary.

A branch will be required to register for Irish corporation tax and file an annual corporation tax return. Assuming the external company retains its tax residency abroad, only the activities of the Irish branch (or other Irish source income) will be subject to corporation tax in Ireland. However, the activities of the Irish branch may also be taxable in the external company's home jurisdiction. Depending on the corporation tax rules in the home jurisdiction, the external company may get a credit for Irish corporation tax suffered on branch profits. However, due to Ireland's low 12.5% corporation tax rate, this can result in a higher overall corporation tax charge than if the Irish activities were carried out through a subsidiary structure.

A subsidiary incorporated in Ireland will also be required to register for Irish corporation tax and file an annual corporation tax return. Generally, a subsidiary structure should have the effect of minimising the overall tax costs attributable to the Irish activities as the profits attributable to the Irish activities would only be taxable in the parent company's home jurisdiction once they are repatriated.

The expected income and tax profile of the operation should be borne in mind in deciding on the final structure. For example, a branch structure may be favoured in a situation where there are existing tax losses in the group that can be utilised. Similarly, if it is expected that the Irish activities will generate start-up losses in the initial years, trading through a branch rather than a subsidiary may allow the external company to take a corporation tax deduction in the home jurisdiction (often at a higher rate) for the Irish branch losses against the home jurisdiction income (however, as the losses can be carried forward for Irish tax purposes, this is a temporary advantage only). A subsidiary structure does not permit this in the same way.

As required, both a branch and a subsidiary will have to register and account for Irish VAT and payroll taxes in the same manner.

Detailed tax structuring advice should be taken when considering setting up a branch or subsidiary, as the relevant implications will vary depending on the particular circumstances of the activities and group structure. If you have any queries in this regard, our **Tax Team** will be happy to assist.

4. Compliance

Once established, a branch must notify the CRO of changes to its registered details. It must also file a certified copy of the external company's accounting documents on an annual basis. If the external company is a non-EEA entity, there are certain additional requirements around the delivery of accounting documents and a statement of its called up share capital.

The ongoing compliance requirements are broader for a subsidiary. For example, an annual return and financial statements[3] must be filed on an annual basis as well as notification of any changes to the company's officers or constitution. Statutory books, registers and records must also be maintained.

5. Directors and Officers

Both a LTD and a DAC are required to have at least one EEA resident director[4], and a company secretary. From a management and control, and hence an Irish tax residency, perspective, it is preferable if the EEA resident is an Irish resident individual. While this is not required for a branch, there must be an Irish resident person appointed and authorised to accept service of process/notices and to ensure compliance with the companies legislation.

Conclusion

Given the ongoing uncertainty around Brexit, incorporating a subsidiary in Ireland may be an attractive option for external companies. With Ireland likely to become a real alternative to the UK for company registrations, external companies should be aware of their options when considering establishing a presence in Ireland so that the preferred legal structure, and indeed tax structure, is implemented in order to obtain the required benefits. However, irrespective of the structure chosen, an Irish presence is worthy of consideration in light of Ireland's EU status and attractive business, tax and regulatory environment.

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[3] In certain circumstances a subsidiary may be able to file its parent's consolidated financial statements

[4] In the absence of having an EEA resident director, a €25,000 bond will be required to be registered with the CRO.