EVERSHEDS SUTHERLAND

All set for Brexit?

Practical Irish company law implications

The Irish Companies Registration Office ("**CRO**") recently issued guidance for companies on preparing for Brexit. In this article we echo that guidance and look at other practical company law implications of Brexit.

European Economic Area resident director requirement

The potential impact of Brexit on Irish companies who fulfil their European Economic Area ("**EEA**") resident director requirement by having one director who is resident in the United Kingdom ("**UK**") will depend on whether the UK remains in the EEA in order to comply with the requirements of Section 137 of the Companies Act 2014 (the "**Act**").

Under the Act, there is a requirement for an Irish company to have:

- an EEA resident director on their board
- to put a bond in place which provides insurance to cover any unpaid fine or penalty imposed on the company
- to have obtained a certificate from the Revenue Commissioners confirming that the company has a real and continuous link with one or more economic activities being carried on in the State.

The most common method of complying with the above requirement is to have an EEA resident director on the board of an Irish company.

The EEA consists of the twenty-eight member states of the EU (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the UK), as well as Iceland, Liechtenstein and Norway.

There are many Irish companies that fulfil the EEA resident director requirement by having a UK resident director and these companies will now have to consider one of the following alternatives in the event that the UK ceases to be a member of the EEA:

- whether that director should be replaced with another director who is resident in an EEA country
- alternatively, put a bond in place. This bond can be obtained from an insurance company which would pay fines or penalties incurred under Irish tax or company law up to the value of €25,000 over a two year period
- obtain a certificate from the Irish Revenue Commissioners to state that the company has a real and continuous link with an economic activity being carried out in Ireland on the basis of the Irish Revenue Commissioners being satisfied that this is the case ie, tax returns / filings being made by the Company.

In order to safeguard Irish tax residency it is recommendable to appoint an Irish resident director when fulfilling the EEA resident director requirement. Irrespective of the requirement from a company law perspective to have an EEA resident director, it may be prudent from an Irish tax perspective that, where possible, the majority of directors should be Irish resident individuals. This should facilitate having a director physically present at meetings of the board which would support the company being managed and controlled in Ireland from a tax perspective.

It is important that a company is able to demonstrate that it is managed and controlled in Ireland in order to ensure that it is regarded as Irish tax resident. The board of directors should take all decisions affecting matters of policy, strategy or management at meetings of the board held in Ireland. In particular, all decisions relating to financing, investment policy, the expansion of business, managing and supervising outsourcing relationships and the entering into of any material contracts should be taken in Ireland. All meetings of the board of directors (which should take place at least quarterly) should be held in Ireland and the majority of those directors attending meetings should be residents of Ireland.

Specific advice should be taken in respect of safeguarding Irish tax residency. If you have any queries in relation to the tax residency of an Irish company we would be happy to assist.

Irish subsidiaries exempt from filing individual entity financial statements with the CRO

Where an Irish company is a subsidiary undertaking of a holding undertaking which is established under the laws of an EEA country, the Irish subsidiary, subject to certain conditions, may not be required to file its individual entity financial statements with its annual return at the CRO. However, this filing exemption is only available where the holding undertaking is incorporated in an EEA country and so could not be relied upon in a post Brexit environment. Should the UK exit the EEA, the Irish companies that filed consolidated financial statements of their UK parent will need to examine other options.

Financial Year End

Sections 288 (4) & (9) of the Act permit an Irish registered company to change its financial year-end date once in every five years. However, this restriction does not apply whereby the company is a subsidiary undertaking or a holding undertaking of another EEA undertaking and the new proposed financial year-end would align the Irish company with that other EEA undertaking. Post the UK's exit from the EEA, this could have practical consequences for an Irish company that has been recently acquired by a new UK parent who had altered its financial year-end in the preceding five years but whose financial year-end is not aligned with its new UK parent.

Branches

A UK company that has a sufficient presence in Ireland has to register as a branch of an EEA company with the CRO. In the event that the UK leaves the European Union without any deal, the external company will be subject to filing annual returns with the CRO under the non-EEA country legislation. Section 1304 of the Act sets out the filing obligations of non–EEA companies. Sections 1305/1306 of the Act apply in relation to the annual returns of non-EEA companies.

Potential Irish tax effects

Some Irish tax legislation refers to EU/EEA membership. Consequently, in the event of both an EU and EEA exit by the UK, certain domestic tax reliefs may not be available to UK companies in particular circumstances.

For instance, in order to claim relief from Irish stamp duty in the case of a reconstruction or amalgamation involving the transfer of an undertaking or a transfer of shares, the acquiring company must be an EU or EEA incorporated company. However, as part of the Irish Government's preparations in the event of a no deal Brexit, the Irish Government recently published a draft bill containing certain legislative measures which seek to maintain the status quo in the event of a no deal Brexit. The draft bill may be updated or adjusted further in light of ongoing developments. The draft bill includes a measure, which if ratified, will extend relief from Irish stamp duty in the case of a reconstruction or amalgamation as outlined above to UK based acquiring companies. The full Bill is expected to be published on 22 February 2019.

If the UK does not obtain EEA status there may also be direct tax implications that will need to be considered, such as potential withholding tax on group payments. The draft bill also contains measures to maintain the status quo in this regard. However, companies looking to rely on any reliefs that are dependent on EU/EEA membership should be mindful that all of the equalising measures contained in the draft bill may not be ratified. Detailed tax advice should be taken and our experienced tax team would be happy to help.

Restructuring of group

Brexit will likely have an impact in many areas affecting the operations of a business, such as access to finance, supply chain logistics, tax implications and employment issues. This could influence the way in which groups organise their operations such that consideration may need to be given to changing the corporate group structure, for example establishing new Irish or UK incorporated subsidiaries or unwinding existing structures to optimise the post-Brexit scenario.

If you would like to discuss any of the points raised in this article and the potential impact of Brexit on your company, please contact us.

Contacts

Vivienne Feaheny
Head of Company Secretarial

+353 1 6644 280
viviennefeaheny
@eversheds-sutherland.ie

Audrey McGrath
Senior Company Secretary

+353 1 6644 985
audreymcgrath
@eversheds-sutherland.ie

eversheds-sutherland.ie

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