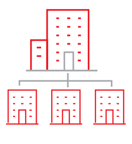


Managing Corporate Governance in Irish Subsidiaries Series: Post-Brexit Considerations

Matheson

In the first of a series of articles providing insights on the management and corporate governance of Irish-incorporated companies and, in particular Irish subsidiaries of international companies, Pat English (Partner, Head of International Business) and Grainne Boyle (Partner, International Business) explain the primary considerations which companies and directors should be aware of, and should action as necessary, from an Irish corporate legal perspective following Brexit.

Consideration / Matheson recommendation

Board oversight and deliberations

To the extent not actioned to date, the board of directors of the Irish company should convene a board meeting and arrange for a full briefing on the implications of Brexit on the company's business, and the industry generally. The directors will want to demonstrate that they have taken active steps to ensure the Irish subsidiary has addressed any challenges or opportunities for the company post-Brexit. The directors should approve and authorise all actions to be undertaken by the company in response to such challenges or opportunities.

Some key areas of review, consideration and discussion by directors in this respect during board meetings include:

1. business or financial updates in respect of the company's operations post-Brexit, including the identification of any key areas of concern and / or growth, together with an analysis or overview of the actions being undertaken in response to same;
2. any changes or challenges to the company's supply or distribution process;
3. data protection and GDPR, particularly in the context of any data transfers between the Irish company and any UK affiliates or third parties;
4. contractual arrangements with customers, suppliers or third parties, including the governing law of arrangements and the applicability of EU law;
5. regulatory compliance, to the extent that the company's business is regulated; and
6. employment.

Specialist professional advice in respect of these implications should be obtained as appropriate.

EEA-resident director

Section 137 of the Companies Act 2014 requires every Irish registered company (subject to certain exceptions) to have at least one director who is resident in an EEA member state.

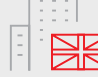
Where an Irish company relied on a UK resident director to satisfy this requirement, one of the following alternative arrangements will need to be put in place as soon as possible:

1. appoint an additional director who is EEA resident;
2. put a bond in place to avail of an exemption to the rule; the prescribed form of bond must be to the value of €25,000 - this provides that in the event of a failure by the company to pay fines or penalties incurred under company law or the Taxes Consolidation Act 1997 (as amended), money is payable under the bond in discharge of the whole or part of the company's liability. The premium is respect of the bond is typically in the region of €1,600 and lasts for a duration of 2 years; or
3. request a certificate from the Registrar of Companies certifying that the company has a real and continuous link with one or more economic activities that are being carried on in the State (Ireland). Applications for such certificates are not very common and must also be accompanied by a statement from the Revenue Commissioners that they have reasonable grounds to believe that the company has such a link.

The board (or shareholders) of the company should approve any director changes. Public filings will need to be made with the Irish Companies Registration Office to record details of the director changes.

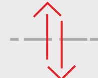
The proposed alternative arrangement chosen, and the company's board composition generally, should also be considered with the company's tax advisors.

Branch of a UK company



A UK company which previously registered as a branch in Ireland will now be regarded as a branch of a non-EEA company. While such companies will not need to re-register the branch as a branch of a non-EEA company, going forward applications from UK companies will need to satisfy the non-EEA company criteria and documentation.

Cross-border mergers



Cross-border mergers are no longer permitted between Irish registered and UK registered companies under the European Communities (Cross-Border Mergers Regulations) 2008 which require that all the merging entities be governed by the laws of an EEA member state.

Alternative options are available to effect the cross-border transfer of assets and liabilities between an Irish company and a UK company, for example a traditional business transfer or asset distribution.

Guarantee by a holding company

Under section 357 of the Companies Act 2014, an Irish subsidiary company can file the consolidated financial statements of its holding company (established under the laws of an EEA member state) rather than file its own financial statements. This is permitted if the holding company provides a guarantee of the subsidiary's commitments and liabilities and certain other conditions are met.

As the holding undertaking must be established under the laws of an EEA state, an Irish subsidiary relying on a UK established holding company for such guarantee will need to reconsider such arrangement. It may need to establish a new holding undertaking (perhaps by way of share transfer, strategic merger, acquisition or simple incorporation) elsewhere in the EEA in order to continue to avail of the guarantee structure. This might of course bring other factors such as third party consents and contractual implications into play.

Consolidated group financial statement exemptions

Under section 299 of the Companies Act 2014, a holding company that is a subsidiary undertaking of an undertaking registered in the EEA may avail of an exemption from the obligation to prepare consolidated group financial statements where certain other requirements are satisfied.

An Irish holding company relying on a UK registered holding undertaking under this provision to avoid the consolidated group financial statements requirement will need to consider whether to establish a new legal structure in order to continue to avail of the exemption. Our comments above in relation to additional factors to be considered (eg consents and contracts) apply equally here.

Financial year end change

While a company may only change its financial year-end date once every five years, one of the exemptions to this rule is where a company intends to change its financial year end date to align with a subsidiary or holding company which is incorporated in another EEA member state.

This exemption will no longer be available where the company with which the Irish company is seeking to align is a UK-incorporated subsidiary or holding company.

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