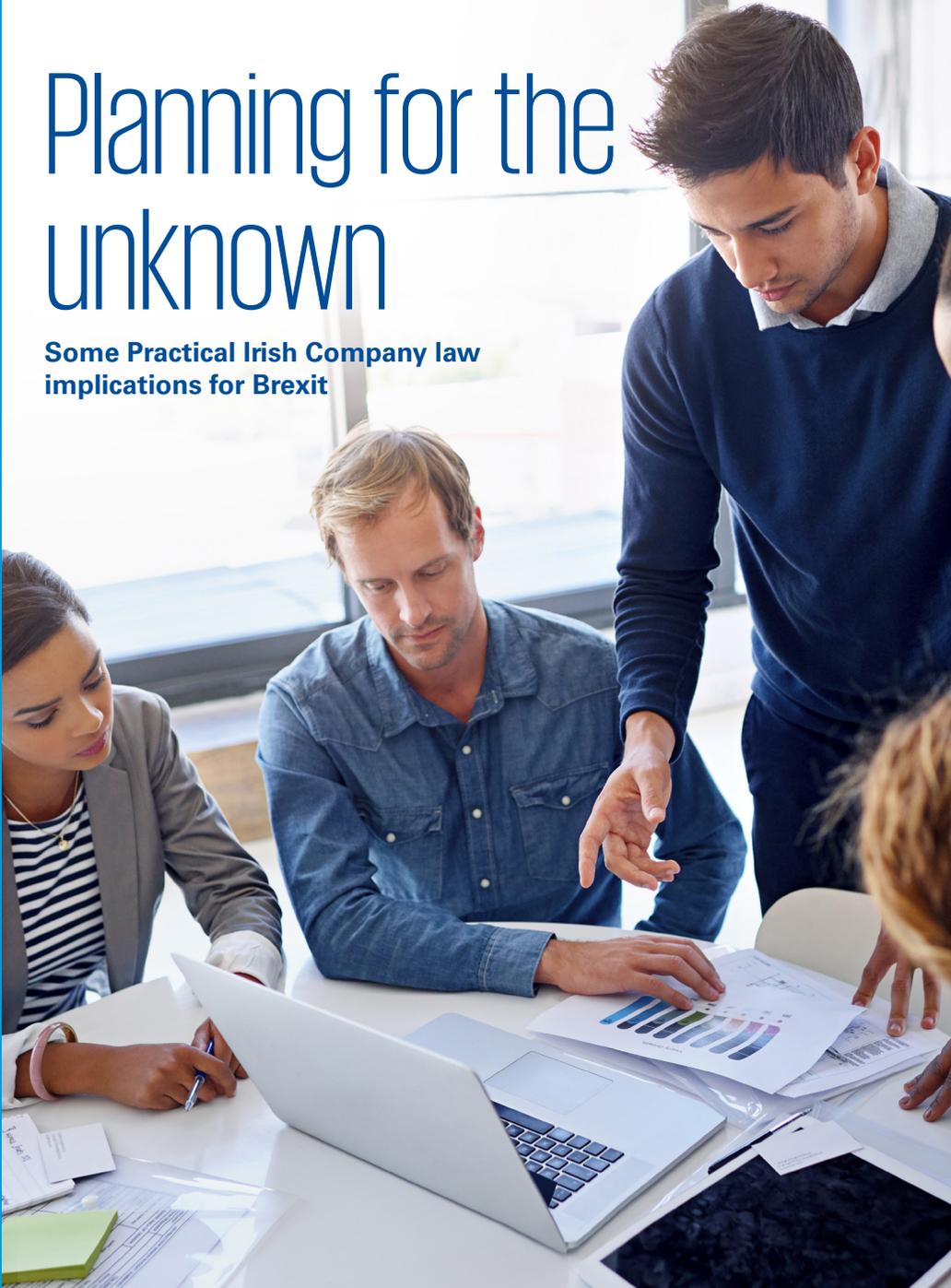




Planning for the unknown

Some Practical Irish Company law implications for Brexit



For corporate groups which may have an Irish registered company, either forming part of, or heading up the group, there are several Irish company law considerations to be borne in mind and which may require action as part of an overall Brexit strategy.

As negotiations between the UK and the European Union on the terms of the UK's proposed exit from the EU proceed, companies must plan ahead as much as possible despite the uncertainty. It may be some time before any clarity emerges so it is necessary to manage the uncertainty over at least the next year and address the impact of a post Brexit environment.



1. EEA Resident Director Requirement

The Irish Companies Act requires an Irish registered company to have at least one director who is resident in an EEA country:-

- Any company that is relying on a UK resident director to fulfil this requirement will need to consider whether that director should be replaced with another director who is resident in an EEA country
- Alternatively, a 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
- A company could also obtain a certificate from the Irish Registrar of Companies 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.



2. Irish subsidiaries exempt from filing individual entity financial statements with the Irish Companies Office

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 may not be required to file its individual entity financial statements with its annual return at the Irish Companies Office.

Certain conditions must be fulfilled in order to avail of this filing exemption, including the requirement that the holding undertaking gives an irrevocable guarantee of the subsidiary's liabilities included in its financial statements for the whole of that financial year. The scope of this guarantee was recently expanded in the Companies (Accounting) Act 2017 to include "commitments" in the financial year as well as liabilities. However, this filing exemption is only available where the holding undertaking is incorporated in an EEA country and obviously could not be relied upon in a post Brexit environment.

As a result, groups would need to look at alternative ways of avoiding publishing potentially commercially sensitive information on their Irish subsidiaries. Options include having another EEA parent in the group guaranteeing the subsidiary's liabilities or preparing and filing abridged financial statements on the basis of qualification as a small company.

There are further considerations to be borne in mind where the Irish subsidiary is also a holding company and had been relying on the size exemption from preparing and filing consolidated financial statements. The Companies (Accounting) Act 2017 has decreased the size thresholds which must be met in order for a holding company to qualify as a small group. As a result, it is now only a small group which can avail of the size exemption from consolidation. A group that previously qualified may not be able to avail of this consolidation exemption. In other words, unless the group qualifies as a small group (see table below for criteria to be met), consolidated financial statements may be required to be prepared and filed at the Companies Office which could increase the extent of potentially commercially sensitive information on public record.

Qualifying Criteria for a Small Group. Two out of the three criteria must be met for at least two consecutive financial years

| | |
|------------------------------------|---------------------------|
| Turnover | </= €12 million |
| Balance sheet total | </= €6 million |
| Average number of employees | </= 50 |



3. Irish Stamp Duty Relief

A relief from liability to Irish stamp duty can be claimed under Section 80 of the Stamp Duties Consolidation Act, 1999 (as amended) in the case of a reconstruction or amalgamation involving the transfer of an undertaking or a transfer of shares. There are several conditions to be satisfied in order to qualify for the relief, key amongst which is that the acquiring company must be an EU registered company. The threat of a significant stamp duty liability may mean that potential UK acquirers might expedite planned acquisitions so as to be sure of the availability of the stamp duty relief.

- A UK company that has a sufficient presence in Ireland will have registered as a branch of an EEA company. However, once the UK ceases to be part of the EEA, the branch registration will have to be changed to that of a non EEA company.

Summary

At this stage, no one can know with certainty what the final outcome of the UK's negotiations with the EU will bring. However, no business can afford to stand by to wait and see what happens. In the context of the possible implications for Irish registered companies with links with the UK, failure to act now could result in a breach of Irish company law or having a corporate structure that is not ideal. Directors of Irish companies should examine all associations with the UK now to determine what action is needed and to try to plan for what is currently the unknown.



4. 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 structure, for example establishing new Irish or UK incorporated subsidiaries or unwinding existing structures to optimise the post Brexit scenario.



5. Some Other Considerations

- The Irish Companies Act permits an Irish registered company to change its financial year end date once in every five years. However, this restriction does not apply in the event that a change in financial year end by a subsidiary or holding undertaking of another EEA undertaking is to align its financial year end with that other EEA undertaking. Post the EU's exit from the EU, this could have practical consequences, for example, for an Irish company that has been recently acquired by a new UK parent.

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