

External companies

Registration under the Companies Act 2014

The officers of the External Company will have to decide whether or not its activities in the Republic of Ireland come within the definition of a 'branch'. Does it have an appearance of permanency, a local management system and can it negotiate business with third parties? Should any of the foregoing apply then it is likely that the External Company is a branch and consequently has a requirement to register and file accounting documents with the CRO.

What is it? (Part 21, Companies Act 2014)

Any foreign undertaking (including a body corporate and a partnership) ("External Company") which establishes a branch in Ireland must register that branch in the Companies Registration Office ("CRO") within thirty days of the branch's establishment.

EEA External Company or Non-EEA External Company

Does the registration requirement differ for an EEA External Company or a Non-EEA External Company?

No. The obligation to register with the CRO is the same.

Limited or Unlimited External Company

As currently implemented, there is no obligation for an External Company, whose shareholders have unlimited liability, to register as a branch with the CRO.

However, that will change on 9 June 2018 with the commencement of Section 80 of the Companies (Accounting) Act 2017 which will provide that an unlimited liability External Company, that is a subsidiary of a limited liability body corporate, will be required to register with the CRO. Therefore, foreign unlimited companies that have established or will establish a branch may now meet the definition of an External Company.

The existing obligation for a limited liability body corporate to register as a branch with the CRO still applies.

Registration

In order to register a branch of an External Company, certain documents must be filed in the CRO including a statutory form, details of the External Company, certified copies of the instrument that is its Constitution (e.g. the Memorandum and Articles of Association), details of the branch, the person authorised to accept service of process and to ensure compliance and lastly copies of the latest accounting documents.

So, what is a branch?

A branch is defined in the Companies Act 2014 as having the same meaning as that contained in EU Council Directive No. 89/666/EEC of 21 December 1989 (the "Branch Disclosure Directive"). Unfortunately, the term branch is not defined in the Branch Disclosure Directive but judgements of the European Court of Justice suggest that a company, which has a place of business in Ireland, having the appearance of permanency, such as the extension of a parent body, which has a management that is materially equipped to negotiate business with third parties so that, although knowing that there will, if necessary, be a legal link with the parent body, the head office of which is abroad, it does not have to deal directly with the parent body but may transact business at the place of business in Ireland.

What is not a branch?

There is also case law which gives insight into what is not a branch. The case in point (In Re Coutinho Caro & Co) involved a German company that had an establishment in the United Kingdom. The judge decided that the German company's UK operation could not be classified as a branch as it lacked sufficient independence and authority to conduct the German company's operation in the United Kingdom.

The operation was found to be a mere "office" of the German company as it acted as an intermediary between the German company and its UK customers. Every activity of the UK operation had to be approved by the German company. The judge said that "I do not propose to essay the task.... of attempting to define what a branch is. One may, however, feel clear as to some things that are not branches.... I think the business, if it is to be recognised, must involve no dependency upon headquarters.... Now the management of this London business had no initiative or authority; it could do nothing of its own motion, it received orders and received payments everything else was carried out in Hamburg.... In my opinion, it was not a branch...."

It is one of the most frustrating aspects of the registration requirements that there is no statutory Irish definition of the term 'branch'. Each case will turn on its own facts but if an External Company is seeking to argue that the tax residency of its operations is in Ireland, there is a strong argument that they should consider registering a branch in Ireland.

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What Accounting Documents have to be Filed?

On registration and thereafter every year, an External Company should deliver to the CRO a copy of the accounting documents that the External Company is required to prepare and to be made public in accordance with the laws of the country in which it is incorporated.

The definition of an External Company has been broadened with the commencement of Section 80. As a result, an unlimited liability External Company, that is a subsidiary of a limited liability body corporate will come within scope for filing its accounting documents at the CRO even if not required to make them public in their own jurisdiction.

Are Non-EEA Accounting Documents Different?

If a Non-EEA External Company is required under the laws of its country of incorporation to prepare accounting documents, and whether or not those accounting documents are required to be audited under those laws, those accounting documents are required to be filed with the CRO.

Non-EEA Accounting Documents: Options

If there is no requirement for a Non-EEA External Company to prepare accounting documents under the laws of the country in which it is incorporated, or the Non-EEA External Company so decides, it must file with the CRO:

- Audited* Financial Statements and a Directors' Report prepared in accordance with the EU Accounting Directive; or
- Audited* Financial Statements prepared in accordance with International Financial Reporting Standards and a Directors' Report prepared in accordance with the EU Accounting Directive.

(*unless the Non-EEA External Company qualifies for Audit Exemption under EU law).



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