Franchising Q&A: Ireland

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Ireland - specific information concerning the key legal and commercial issues to be considered when setting up a franchise.

This Q&A provides country-specific commentary on *Practice note, Franchising: Cross-border overview*, and forms part of *Cross-border commercial transactions*.

General

1. Is franchising common? What statistics are available to show the importance of franchising in the national economy? What types of products/businesses are susceptible to franchising? What comments can be made about the expansion of domestic franchisors overseas?

In 2018, the Irish Franchise Association reported that the franchising sector in Ireland employed approximately 43,000 people; in 2017, it reported that over 2,975 franchise units were in operation across the country.

In 2015, it was estimated by Allied Irish Banks that 41% of active franchise networks in Ireland are food-related. It was also reported by the Irish Franchise Association in 2019 that approximately 44% of franchises in Ireland are of Irish origin. However, there are many opportunities in Ireland for foreign investment. Additionally, a small, though growing, number of Irish franchises have expanded overseas, in particular to the UK market.

Overseas expansion

2. Does national law permit a foreign franchisor to enter into a franchise agreement without establishing a wholly-owned subsidiary or a branch office in the foreign country?

Yes; there is nothing in Irish law that prohibits a foreign franchisor from entering into a franchise agreement without establishing a wholly-owned subsidiary or a branch in Ireland, although this may cause some practical operational difficulties in securing a franchise network in Ireland.

Overseas franchisors franchising directly into Ireland, and the master licensees of overseas franchisors, are eligible to join the Irish Franchise Association, but this is not compulsory (see also *Question 7*). To become members, they must provide:

- A record of:
  - franchise openings;
  - any withdrawals by franchisees; and
  - any disputes.
- Evidence of profitability over a period of two years.

3. Are there any rules that would restrict the setting up of branches or subsidiaries or joint ventures by a foreign-owned business?

No. Ireland encourages foreign direct investment, and there are few restrictions on this.

4. Will there be any difficulties in a domestic franchisee making payment to a foreign franchisor either in local currency or in the currency of the franchisor's country? Are there any exchange controls in operation?

Ireland does not currently have any exchange control regulation in place against any currency.

Regulation of franchising

5. Is franchising specifically regulated by law? Is any legislation pending, which is likely to affect franchising? Are there any formalities that a franchisor must comply with when setting up a franchise system (for example, any registration or disclosure requirements)?

There are no Irish laws that specifically regulate franchising in Ireland, and there is no such legislation pending. There are no formalities that apply generally when setting up a franchise system.

However, franchises which are involved in regulated industries (such as healthcare services) may be subject to further regulation applicable to that industry.

The Consumer Protection Acts 2007 and 2014 prohibit "pyramid promotional schemes", and this will catch any franchises which may be construed to constitute pyramid promotional schemes. The main feature that characterises a pyramid promotional scheme is the giving by a person of consideration in money or money's worth, for an opportunity to receive compensation derived primarily from the introduction of other persons into the scheme, rather than from the supply or consumption of a product. The scheme may, but need not, involve the supply of a product. Franchisors should be aware that it is an offence to establish, operate or promote a pyramid promotional scheme, and potential franchisees should note that it is an offence to knowingly participate in such a scheme.

6. Are there any laws, regulations or case law that apply to distributorship or agency relationships that might be interpreted in such a way as to apply to the franchise relationship?

The European Communities (Commercial Agents) Regulations 1994 and 1997 (the Commercial Agents Regulations), which transpose the Commercial Agents Directive (*86/653/EEC*), may apply in situations where an arrangement may be referred to as a "franchise" but is an agency arrangement in reality.

However, where the arrangement between the parties is a pure franchising arrangement, then no particular law relating to agency will apply.

7. Is there an obligation on franchisors and/or franchisees to comply with any voluntary code? What are the main obligations imposed in such code? Is it usual practice to incorporate the code into the franchise agreement?

Membership of the Irish Franchise Association is not mandatory for franchisors or franchisees. The Irish Franchise Association (*www.irishfranchiseassociation.com*) requires all member organisations to comply with its Code of Ethical Conduct (the Code). The Code is based on the European Franchise Federation's Code of Ethics for Franchising. Failure to comply with the Code may result in a franchisor or franchisee having their membership from the Irish Franchise Association withdrawn.

The Code requires that a franchisor:

- Has operated a business concept with success, for a reasonable time and in at least one pilot unit before starting its franchise network. A minimum of one year's audited trading accounts must be produced in an application for full franchisor membership of the Irish Franchise Association.
- Be the owner, or have legal rights to the use of, its network's:
  - trade name;
  - trade mark; or
  - other distinguishing identification.
- Provide individual franchisees with initial training and continuing commercial and/or technical assistance during the entire life of the franchise agreement.
- Give written notice to its franchisees of any contractual breach and, where appropriate, grant reasonable time to remedy any default.

The Code requires that a franchisee:

- Devote its best endeavours to the growth of the franchise business and to the maintenance of the common identity and reputation of the franchise network.
- Supply the franchisor with verifiable operating data to facilitate the determination of performance and the financial statements necessary for effective management guidance.
- Allow the franchisor, and/or its agents, to have access to the individual franchisee's premises and records at the franchisor's request and at reasonable times.
- Not disclose to third parties the know-how provided by the franchisor (during or after termination of the agreement).

The Code obliges both parties to:

- Exercise fairness in their dealings with each other.
- Resolve complaints, grievances and disputes with good faith and goodwill.

There are a number of "essential minimum terms" included in the Code which should be incorporated into a member's franchise agreement. These are:

- The rights granted to the franchisor.
- The rights granted to the franchisee.

- The goods and/or services to be provided to the franchisee.
- The obligations of the franchisor.
- The obligations of the franchisee.
- The terms of payment by the franchisee.
- The duration of the agreement, which should be long enough to allow franchisees to amortise their initial investments specific to the franchise.
- The basis for any renewal of the agreement.
- The terms on which the franchisee may sell or transfer the franchised business, and the franchisor's possible pre-emption rights in this respect.
- Provisions relevant to the use by the franchisee of the franchisor's:
    - distinctive signs;
    - trade name;
    - trade mark;
    - service mark;
    - store sign;
    - logo; or
    - other distinguishing identification.
- The franchisor's right to adapt the franchise system to new or changed methods.
- Provisions for termination of the agreement.
- Provisions for surrendering promptly on termination of the franchise agreement any tangible and intangible property belonging to the franchisor or other owner of it.

The Code further requires that the franchise agreement must:

- Comply with national law, EU law and the Code.
- Reflect the interests of the members of the franchised network in:
    - protecting the franchisor's industrial and intellectual property rights; and
    - maintaining the common identity and reputation of the franchised network.
- Be written in (or translated into, by a sworn translator) the official language of the country in which the franchisee is established.
- Be given immediately to the franchisee in signed form once signed.

- Set out clearly the parties' respective obligations and responsibilities and all other material terms of the relationship.

Competition law

8. Are there any national laws or regulations that would affect the following business practices:

- Exclusive dealing?
- Territorial restrictions?
- Customer restrictions?
- Resale price maintenance?
- Minimum purchase targets?
- Imposition by the franchisor of restrictions on the sources of supply to franchisees?
- Discrimination by the franchisor among franchisees for fees, royalties, payment for goods, services, and so on?

Section 4 of the Competition Act 2002 (the Competition Act) prohibits agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition in trade in goods or services in the state.

In addition, section 5 of the Competition Act prohibits the abuse of a dominant position.

These provisions mirror the wording of Articles 101 and 102 of the Treaty on the Functioning of the European Union, which prohibit the same practices at EU level.

Prevention, restriction or distortion of competition

As franchise agreements constitute agreements between independent undertakings (franchisor and franchisee), section 4 is particularly relevant in this context.

Franchise agreements often cover matters such as:

- The price at which the franchisee may sell products.
- How products are to be sold.

- Whether or not the franchisee may compete with the franchisor's business.

These provisions may constitute "vertical restraints" of competition which fall within section 4.

However, where provisions of a franchise agreement are found to restrict competition, the agreement may nonetheless be lawful where its pro-competitive effects outweigh its anti-competitive effects (*section 4(5), Competition Act*).

The European Commission's Guidelines on Vertical Restraints (the Guidelines) provide guidance on assessing the lawfulness of vertical restraints in franchise agreements. (As noted in the Irish Competition and Consumer Protection Commission's (CCPC) (*www.cpcc.ie*) Notice in Respect of Vertical Agreements, Irish law generally accords with the Guidelines.) The Guidelines note that:

- The more important the transfer of know-how in a franchise situation, the more likely the franchise agreement is to generate efficiencies capable of outweighing the anti-competitive effects of vertical restraints.
- Vertical restraints in franchise agreements provide uniformity and quality standardisation which increases the attractiveness of the product to the consumer.

As such, provisions are likely to be justified by the efficiencies created by the overall franchise agreement, and therefore lawful in accordance with section 4(3) of the Competition Act, where they concern:

- Exclusive dealing.
- Territorial restrictions.
- Customer restrictions.
- Minimum purchasing targets.
- Restrictions on sources of supply.

The CCPC has adopted a Declaration on Vertical Restraints (the Declaration), which provides that certain categories of vertical agreements are deemed compatible with section 4. The Declaration largely reflects the Vertical Agreements Block Exemption Regulation (*330/2010*) (Block Exemption Regulation).

The exemption provided by the Declaration and the Block Exemption Regulation only applies where:

- The market share of the buyer and the seller are each below 30%.
- The arrangements are not of a "hardcore" type that cannot be exempted even if the 30% threshold is met (for example, resale price maintenance (see *Question 9*)).

The Declaration will usually exempt franchise obligations such as:

- Exclusive dealing.
- Territorial restrictions.
- Customer restrictions.

- Minimum purchase targets.
- Restrictions on the sources of supply to franchisees.

Abuse of a dominant position

Section 5 of the Competition Act and Article 102 TFEU may also be relevant to a franchising situation where the franchisor is dominant (for example, because it has a high market share). The following may be considered an abuse of a dominant position:

- A refusal to supply.
- Discriminatory treatment of franchisees with respect to:
  - fees;
  - royalties; or
  - payment for goods and services.

9. Are there any local provisions relating to the imposition of minimum or maximum prices?

Resale price maintenance is considered a "hardcore" infringement of competition law and is therefore presumed to infringe section 4(1) of the Competition Act (see *Question 8*). However, the provision of maximum or recommended resale prices by the franchisor is generally lawful, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, the franchisor.

The Guidelines identify the risk that maximum or recommended resale prices may become a focal point for resellers. Even where the franchisee has a contractual right to lower the retail price recommended by the franchisor, if in practice franchisees are pressured into charging the recommended price, the arrangement will amount to resale price maintenance. The Guidelines highlight practices that may amount to indirect resale price maintenance, such as:

- Fixing maximum discounts that may be offered by franchisees.
- Linking the prescribed retail price to competitors' retail prices.
- Warnings.
- Penalties.
- Delay or suspension of deliveries.

Maximum or recommended retail prices (which do not amount to resale price maintenance) will also be covered by the Declaration and the Block Exemption Regulation where the parties' market shares are below 30% (see *Question 8*). By contrast, as a hardcore restriction under competition law, resale price maintenance does not fall with the ambit of the Declaration or the Block Exemption Regulation.

A franchisor may run a promotion with specified prices, but it must ensure that franchisees are entitled to opt out of the promotion. However, the Guidelines suggest that a short-term (that is, two- to six-week) campaign involving a co-ordinated low price where necessary to organise a franchise system may be justified under Article 101(3) of the TFEU.

10.Are there any laws or regulations relating to restrictive covenants or covenants not to compete during the franchise agreement? To what extent is it possible to continue the restrictions after the agreement has expired? In particular, to what extent does the geographical extent and or the length of time of the restriction affect its enforceability?

Competition law

The Guidelines note that the transfer of substantial know-how in a franchising situation will usually justify a non-compete obligation on the franchisee for the whole duration of the franchise agreement.

Non-compete obligations during the currency of the franchise agreement will always be exempted under the Declaration and the Block Exemption Regulation where their duration does not exceed five years (assuming the 30% market share thresholds are met) (see *Question 8*). Agreements that are tacitly renewable beyond a period of five years will be deemed to have an indefinite duration.

Post-termination non-compete provisions generally fall outside the Declaration and the Block Exemption Regulation, unless all the following criteria are satisfied (in addition to the 30% market share thresholds):

- The obligation relates to goods or services which compete with the goods or services which are the subject of the contract.
- The obligation is limited to the premises and land from which the franchisee operated.
- The obligation is indispensable to protect know-how.
- The duration of the obligation is limited to a period of one year after termination of the franchise agreement.

Contract law

Under Irish law, post-termination non-compete provisions must be:

- Reasonable in terms of their duration, geographical scope and the products that are covered.
- Limited to what is necessary to protect the value of the franchisor's business and know-how.

In *O'Brien Sandwich Bars Limited v Byrne*, the Irish High Court upheld a one-year post-termination non-compete provision which prevented the plaintiff from operating a competing sandwich bar business within a one-mile radius of the franchise business (*[2008] IEHC 466*). More recently, the Irish High Court also found a non-compete provision of 12 months' duration to be enforceable against a departing employee in *Ryanair DAC v Bellew [2019] IEHC 907*.

11. Does national law allow the franchisor to retain for its own exclusive use, volume rebates, commissions, allowances paid by suppliers of products or services to franchisees?

We are not aware of any specific prohibition of these practices in Irish competition law.

Intellectual property

12. How are trade marks protected under national law?

A trade mark may be registered with the Intellectual Property Office of Ireland under the Trade Marks Act 1996 (Trade Marks Act). If EU-wide protection is required, then a trade mark may be registered with the EU Intellectual Property Office under the EU Trade Mark Regulation (*2017/1001*).

A registered trade mark is a proprietary right, and the owner of a registered Irish trade mark has rights and remedies under the Trade Marks Act, including a right for the registered trade mark to not be used by another without the owner's permission. If there is unauthorised use of a registered trade mark, the owner may bring infringement proceedings under the Trade Marks Act against the infringing party.

Trade mark registration is not obligatory: a franchisor may acquire unregistered rights with the use of its trade mark, but it would then have to rely on the common law right of passing off to enforce its right against a competitor using its trade mark. This can be a more difficult and expensive method of protecting a trade mark.

13. In the event that the franchisor is based abroad, is it necessary that the franchisee is registered as owner or user of the trade mark in order to be able to import goods bearing the trade mark?

There is no requirement that franchisees be registered users of a trade mark to import goods which use the trade mark.

If a franchisee wishes, it may register its interest in the trade mark with the Intellectual Property Office of Ireland, by way of a recordal of the licence on the Irish Trade Mark Register. This will allow the franchisee to protect its rights in the trade mark if an infringement occurs.

14. What intellectual property rights are typically licensed in a franchise agreement?

A franchisor will generally licence to a franchisee the non-exclusive right to use the following of the franchisor's intellectual property rights in the running of the franchisee's business:

- Trade name.
- Trade marks.
- Service marks.
- Business method (that is, the method which the franchisor has developed and implemented for the running of its business; this may include back office and front office controls).

15. What provisions are usually made in respect of trade marks in addition to any licensing of their use?

Provisions are normally included in a franchising agreement to:

- Limit the use of the trade mark.
- Restrict any rights a franchisee may claim in the trade mark.
- Prevent the franchisee from taking any action which may adversely affect the trade mark.

16. Does the franchisee become entitled to any rights in a trade mark (or any other intellectual property right) by virtue of selling the trade marked products in its territory?

Potentially. A franchisee's rights are typically restricted by the terms of the franchise agreement to an exclusive or non-exclusive licence to use the trade mark only in the manner specified in the agreement.

17. What provisions are usually made in respect of goodwill?

Provisions in a franchise agreement normally state that all goodwill in respect of the brand, business method and intellectual property rights will become the exclusive property of the franchisor, and that the franchisee will not acquire any rights in respect of that goodwill. However, if no such provisions are included in the agreement, there would be a risk for the franchisor that the franchisee might claim that goodwill arising from the sale of the trade marked products in the franchisee's territory would accrue to the franchisee, rather than to the franchisor.

18. Can the franchisor impose restrictions on the use of the franchisor's know-how and other confidential information by a franchisee either during or after the expiration of the franchise agreement?

Yes. A franchise agreement normally contains restrictions on the disclosure of any confidential information to third parties. Know-how is often included in the definition of intellectual property rights, and these rights are typically restricted through the limited licence which the franchisor grants the franchisee for a specified duration. Confidentiality obligations will normally survive the termination of the franchise agreement. However, a franchisor will not be able to prevent a franchisee from using any acquired skill and knowledge that arises during the franchise agreement.

19. Are there any competition law implications of licensing intellectual property rights?

No competition law implications arise relating to licensing intellectual property rights in franchise agreements in particular. As long as the licence of intellectual property rights relates directly to the use or resale of the franchised goods or services, licensing of intellectual property rights in a franchise agreement will fall within the scope of the Declaration and Block Exemption Regulation (see *Question 8*).

Real property

20.Are there any restrictions on ownership or leasing of immoveable property that may arise in a franchising situation?

No.

Employment issues

21. Is there a risk that franchisees may be treated as employees of the franchisor?

Although a label alone is insufficient to determine the relationship between the parties, genuine franchise relationships should not give rise to an employment relationship between the franchisee's personnel and the franchisor. This is particularly the case where the franchisee:

- Operates on their own account and assumes risk in relation to profit and loss.
- Provides their own equipment and insurance.
- Are responsible for their own tax arrangements.

However, in circumstances where an argument arises as to the employment status of a so-called franchisee, a court or tribunal will look beyond the contractual relationship to assess the reality of the arrangement on the ground. This involves examination of a number of factors and tests (the importance of each factor will depend on the particular circumstances of the case):

- **Mutuality of obligation.** There must be mutuality of obligation between an employer and the employee (meaning an obligation on the employer to give the individual work, and an obligation on the individual to carry out this work) (see *Minister for Agriculture v Barry [2009] 1 IR 215; Henry Denny & Sons Ltd t/a Kerry Foods v Minister for Social Welfare [1998] 1 IR 34*).
- **Control.** An individual will be considered to be an employee if they are subject to the command of the purported employer as to the way in which they do their work (see *Roche v Kelly [1969] IR 100*).
- **Integration.** If the work of the relevant individual is merely accessory to the business and not integrated into it, then the individual will not be deemed to be an employee (see *In Re Sunday Tribune [1984] IR 505*).

The "multi-factorial" test has also been used as a factor to determine an employment relationship. This test says that an employment arrangement arises if all the criteria below are met:

- An individual agrees that in consideration of a wage or other remuneration, they will provide their own work and skill in the performance of some service for another.
- An individual agrees that in the performance of that service they will be subject to the other's control to a sufficient degree to establish an employer/employee relationship.
- The other provisions of the contract are consistent with it being a contract of employment.

(*Ready Mixed Concrete v Minister for Pensions [1968] 2 QB 497; Kirwan v Dart Industries and Leahy [M1 UD 1/80]*.)

The franchise agreement

22. Are any particular formalities required for a franchise agreement to be enforceable under national law?

No specific formalities are required for a franchise agreement to be enforceable, other than those required for any contract to be enforceable. Where no consideration is provided, the contract should be executed as a deed.

23. What rights does the franchisor usually grant to the franchisee?

The franchisor will generally, at a minimum, grant the following rights to the franchisee for the duration of the franchise agreement, in return for the payment of a fee:

- The right to use the franchisor's products or business idea.
- The right to use the general style of the franchisor, including intellectual property such as trade marks.

24. Is it usual for the franchisor to grant exclusivity? Does this have any competition implications?

It is common for exclusivity to be granted by the franchisor to the franchisee in respect to a particular territory. However, granting exclusivity will not necessarily be standard practice for all franchise agreements and will depend on the franchisor's business model. Exclusivity arrangements will be subject to Irish competition law; in particular, the Declaration (see *Question 8*).

25. What term is commonly agreed for a franchise? Is it common to include a test period?

The parties are free to agree any term they wish between themselves for the franchise agreement. If the franchise agreement extends longer than five years, certain criteria must be satisfied, in order to comply with Irish competition law. In accordance with the Declaration of the CCPC, direct or indirect non-compete obligations in vertical agreements will not be enforceable unless these criteria are satisfied (subject to the 30% market share thresholds) (see *Question 10*).

Test periods may be included in franchise agreements, but are not a standard feature in Irish franchise agreements.

26. What rights of renewal are commonly included in the agreement? Is a charge made for renewal?

It is common for franchise agreements to include a right of renewal. It is often the case that a right of renewal is based on the franchisee agreeing to a contract on the same terms as the previous franchise agreement.

The basis for a contract renewal should take into account:

- The length of the original term.
- The extent to which the agreement empowers the franchisor to require investment from the franchisee for refurbishment or renovation.
- The extent to which the franchisor may vary the terms of the agreement on renewal.

It is not standard for a charge to be paid on renewal, but this is a matter to be agreed as between the parties.

27. Does national law impose any obligations on the franchisor?

National law does not impose any specific obligations on the franchisor. Though not a legal obligation, the Code does impose requirements on its members (see *Question 7*).

28. What events will be regarded in law as justifying termination of the franchise agreement? Do any statutory obligations arise on termination? What provision is usually made in the agreement for termination?

The franchise agreement between the parties may set out certain events which, on occurrence, may allow either of the parties to terminate the contract. Generally, these events will include:

- A material breach of the terms of the agreement.
- The insolvency of one of the parties.

Under common law, either party may terminate the franchise agreement in the event of a repudiatory breach by the other party (see *Berber v Dunnes Stores Ltd [2009] IESC 10*). A party may also be able to terminate the franchise agreement in the event of a misrepresentation by the other party; depending on the degree of the misrepresentation and the type of misrepresentation (that is, fraudulent, negligent or innocent), differing remedies will arise, such as rescission or damages.

No statutory obligations arise on termination. No right of compensation arises on behalf of the franchisee on termination where there is no right of renewal or the franchisee chooses not to exercise a right of renewal.

29. What rights does the franchisee have to compensation on termination of the franchising agreement? How is compensation for termination calculated?

The franchisee has no rights to compensation on the termination of the franchising agreement under national law. However, any reasonable provisions under the franchise agreement which allow the franchisee to recover damages for a material breach of the contract will be enforceable. Damages recoverable will depend on the terms of the contract; in particular, the value of the contract and any provisions in the contract limiting liability.

International taxation

30.What is the tax treatment of the initial fee paid by the franchisee?

Value added tax (VAT) is payable on the initial fee.

Usually the initial fee is treated as payment of a capital sum, as are any related legal fees, whether payable in one sum or instalments. Capital payments are not allowable deductions in computing the taxable profits of a trade.

The initial fee will usually be treated as a revenue receipt (taxable income) in the hands of the franchisor.

The tax treatment of the initial fee is likely to vary depending on the type of franchise business, therefore specific advice should be sought from a tax expert on a case-by-case basis.

31. How will management and other continuing fees from the franchisee to the franchisor be treated in the franchisee's hands and, in particular, are there any tax deductions that have to be made?

VAT will be payable by the franchisee on management and other continuing fees payable to the franchisor. Typically, franchisees are not required to make any tax deductions in relation to the existence of a franchise, but specific advice would need to be sought dependent on the nature of the franchise business itself.

32. What is the tax treatment of intellectual property royalties paid by the franchisee?

Generally, there will not be a separate IP royalty; it is included in the management fee. Any separate IP royalty payments are subject to VAT in the same way as management fees.

33. Will a foreign franchisor who appoints a franchisee directly in your national territory be regarded as carrying on business in the national jurisdiction and therefore subject to the national tax regime?

In theory, a franchisee is of independent status acting in the ordinary course of its business and so will not be a permanent establishment of the foreign franchisor. In these circumstances, the foreign franchisor will generally not be regarded as carrying on business in Ireland for tax purposes.

However, if the franchisor has any form of permanent establishment in Ireland, it may need to be registered for tax on the basis of its activities as franchisor (for example, if it has a team of business development managers working on its behalf, or if it operates a franchisee training centre).

This analysis is theoretical, and there are many different circumstances in which a franchisee may be considered to be acting as an agent for the franchisor. If a foreign franchisor is regarded as carrying on a trade in Ireland through an agent (for example, a franchisee attending trade shows and selling franchises on behalf of the franchisor) the franchisor will be chargeable to Irish tax in respect of:

- Trading income arising directly or indirectly from the agency.
- Any other income arising from property or rights used by or held by the agency.
- Any chargeable gains attributable to the agency.

34. Is it possible to make use of tax haven companies in international franchising?

In theory, yes, both franchisees and franchisors can take advantage of this just like any other corporate entity, subject to compliance with all relevant tax rules, regulations and legislation.

35. Is there a withholding obligation on dividends paid to foreign companies/individuals?

Dividends paid by Irish-resident companies are generally liable to a dividend withholding tax (DWT) at the rate of 25% income tax (rate as of 1 January 2020) for the year of assessment in which the distribution is made.

The following categories of non-resident companies qualify for exemption from DWT (a "qualifying non-resident shareholder"), provided they operate within an EU member state other than Ireland, or a country with which Ireland has a double taxation treaty (a "relevant territory"):

- Companies resident for the purposes of tax in a relevant territory which are not controlled by Irish residents.
- Companies not resident in Ireland which are under the ultimate control of persons who are neither resident nor ordinarily resident in the state, but are resident for the purposes of tax in a relevant territory.
- Companies the principal class of shares of which (or of a company of which it is at least a 75% subsidiary) is substantially and regularly traded on a recognised stock exchange in a relevant territory.
- Companies which are wholly owned by two or more companies, each of whose principal class of shares are substantially and regularly traded on one or more recognised stock exchanges in a relevant territory.

The following categories of non-resident individuals are exempt from DWT:

- An unincorporated body of persons, such as a charity or superannuation fund, which is resident for the purposes of tax in a relevant territory.
- Individuals who are neither resident nor ordinarily resident in Ireland but are resident for the purposes of tax in a relevant territory

Exemption from DWT is not an automatic entitlement. To claim an exemption, a qualifying non-resident person must complete the relevant exemption declaration form.

36. Are there any other differences in the tax treatment of dividends paid to foreign companies/individuals as opposed to domestic shareholders?

Distributing company liability

The distributing company's liability depends on the residence of the shareholder, as the distributing company may have to withhold tax based on residency (see *Question 35*).

Shareholder liability

The jurisdiction of the shareholder does alter the shareholder's liability. Irish tax resident shareholders are subject to Irish tax:

- Irish tax resident individual recipients will be subject to income tax at dividend rates.
- Irish corporate recipients will not be liable to pay tax on the dividend receipt, subject to various anti-avoidance provisions.

Foreign tax resident shareholders are subject to DWT on all dividends paid. However, a qualifying non-resident shareholder may claim an exemption from DWT provided certain criteria are met (see *Question 35*).

37. Are there circumstances in which the (undistributed) profits of a foreign subsidiary can be taxed in the hands of a parent company that is tax resident in your jurisdiction (controlled foreign company legislation)?

Yes. Part 35B of the Taxes Consolidation Act 1997 provides for the controlled foreign company (CFC) rules, which were introduced as an anti-abuse measure, designed to prevent the artificial diversion of profits from controlling companies to offshore entities in low or no-tax jurisdictions.

A company is considered to have control of a subsidiary where (in broad terms) it has direct or indirect ownership of, or entitlement to, more than 50% of any of the following in relation to the CFC:

- Issued share capital.
- Voting power.
- Distribution amount.

The rules operate by attributing undistributed profits of the CFC, arising from non-genuine arrangements introduced for the purpose of avoiding tax, to the controlling company in the state for taxation, where the controlling company carries out relevant Irish activities.

38. Does national law permit a franchisor to make loans to a franchisee? Does national law dictate any terms of such a loan, for example, rate of interest? Does national law/regulation impose any debt/equity restrictions?

National law permits a franchisor to make loans to a franchisee; however, the implications of transfer pricing rules (provided for in Part 35B of the Taxes Consolidation Act 1997) may need to be considered in respect of the rate of interest charged.

The transfer pricing rules apply the arm's length principle, whereby the amount charged by one related party to another for a product or service (such as the rate of interest on a loan) must be comparable to the amount charged between unrelated parties.

39. Is there a withholding obligation on interest paid to foreign companies/individuals?

Yes. Ireland imposes withholding tax (at a rate of 20%) on Irish source annual interest paid to foreign companies/individuals. A double tax treaty between Ireland and the jurisdiction of the recipient's residence may provide relief, either by way of a complete exemption or by reducing the applicable rate of withholding.

40. Are there any restrictions on the capital structure of a company incorporated in your country with a foreign parent (thin capitalisation rules)?

There are no specific thin capitalisation rules in Ireland, but some provisions in the Irish tax legislation can deny a full deduction for interest payments in certain circumstances. Interest payments to overseas affiliates may, depending on the location of the recipient, be reclassified as distributions in certain situations, and therefore would not be tax-deductible (*section 130, Taxes Consolidation Act 1997*).

41. How does national law define a "branch"? How are its profits taxed? What taxes are payable on the repatriation of profits by a foreign branch?

The Irish Taxes Consolidation Act 1997 defines "branch" as "any factorship, agency, receivership, branch or management".

Branch in Ireland of a foreign company

Corporation tax only applies to branch offices to the extent that they are carrying out a trade in Ireland. The chargeable profits of a non-resident company carrying on a trade in Ireland through a branch are:

- Any trading income arising directly or indirectly through or from the branch.
- Any income from property or rights used by, or held by or for, the branch (for example, patent royalties received by the branch), but this does not include distributions received from companies in the State.
- Chargeable gains attributable to the branch.

Foreign branch of an Ireland resident company

In the case of a branch representing a company which is a tax resident in Ireland, the Ireland resident company will be charged with the corporate tax on its worldwide income (unlike in the scenario above, where the foreign company is operating on the Irish market through an Irish branch office). The foreign branch is also liable to pay capital gains tax applicable to the disposal of assets.

No tax is withheld on repatriation of foreign branch profits to the Irish tax resident head office. Where the profits of an Irish resident company include profits of a foreign branch, credit is available for foreign tax paid in respect of the branch to offset the Irish tax arising on those profits.

Any excess foreign tax credits may be offset against Irish tax arising on other branch profits in the year concerned. Any unused credits may be carried forward indefinitely and credited against corporation tax on foreign branch profits in later accounting periods.

42. Are there any special tax considerations when a joint venture is used as a franchise vehicle?

This is an extremely complex area which depends on a number of considerations; for example, whether (among other things):

- It is a joint venture vehicle or a contractual joint venture.

- The joint venture companies are incorporated in Ireland or elsewhere.
- It is the franchisor or franchisee which is the joint venture.

The following tax issues may arise:

- Capital gains tax may be payable on the transfer of assets/shares to the joint venture.
- Capital allowances or balancing charges may apply in respect of the transfer of assets.
- Tax losses may need to be transferred.

In respect of borrowings obtained to finance a joint venture, it may be possible to set interest payments against the profits of the joint venture company. Repatriation of profits, thin capitalisation rules and transfer pricing rules may also be relevant in the context of international joint ventures.

Specific advice should be sought from tax advisers.

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