Ready to do Business Internationally? Common Pitfalls When Doing Business in Europe and How to Avoid Them

A&L Goodbody – ACC CLE Panel
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Introduction & Overview

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- Structuring your EU business - choosing the optimum corporate structure
- Privacy, regulation of personal data and export control issues
- Employment and immigration issues
Options when entering a new international market for the first time:
  o Form a new subsidiary
  o Register a branch
  o Enter the market directly

Tax considerations will frequently be the driver
<table>
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<th></th>
<th>Subsidiary</th>
<th>Branch</th>
<th>Direct Entry</th>
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<tbody>
<tr>
<td>Separate legal personality</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
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<tr>
<td>Ongoing corporate disclosure</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
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<tr>
<td>requirements</td>
<td></td>
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<tr>
<td>Business registration requirements</td>
<td>Yes</td>
<td>Yes</td>
<td>Not under EU law unless amounts to a branch - but Member State requirements may vary</td>
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<td>Mandatory laws (GDPR, employment laws etc.)</td>
<td>Yes</td>
<td>Yes</td>
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Privacy, regulation of personal data and export control pitfalls

Mark Rasdale
Partner, Commercial and Technology
Dublin
The Regulation of Personal Data - GDPR

- Most significant reform in 20 years
- Stronger individual rights; new obligations; increased risk profile; significant sanctions
- Principles rich
- European wide scope – subject to Brexit – global reach
- Effective since 25 May 2018 – no transitional phase
GDPR – a European law with global reach

- EU established controllers & processors
- Non EU companies that target or monitor EU data subjects
- Availability of “one stop shop” regulation:
  - lead authority in place of main establishment
  - “concerned” authorities can also be involved
  - EDPB decides if authorities cannot
International litigation heating up…

- Schrems I – Safe Harbor
- Schrems II – Standard Contractual Clauses
- Digital Rights Ireland – Privacy Shield Challenge
- Schrems GDPR complaints filed in 3 EU countries
GDPR Breach – The Ultimate Pitfall

Accountability/Transparency

Consent Threshold

Security Breach Reporting

Processor Contracts

Greater of €20m or 4% turnover

Greater of €10m or 2% turnover

GDPR

…regulatory dawn raids and audits

…and new data subject actions
GDPR - New Customer Rights

▪ “data access right”: right to provision of a copy of all held data, for free, within a month

▪ “portability right”: right to be provided data in a structured, commonly used and machine readable format, and right to transmission to another without hindrance

▪ “no profiling right”: right not to be subject to automated decisions which produce legal effects, unless explicit consent given

▪ “right to be forgotten”: right to erasure, blocking or rectification of data without delay, but within one month
GDPR - New Obligations

- **Accountability**: “the controller shall be responsible for, and be able to demonstrate compliance with..” – evidence will be required

- **Transparency**: significant increase in information to be provided to data subjects (e.g. see Privacy Notice on next slide)

- **Consent**: higher degree of consent required: “freely given, specific, informed and unambiguous indication of the data subject's agreement… such as by a written statement or by clear affirmative action”

- **Data Protection Officer**: appoint a DPO where core activities involve large scale (i) regular and systematic monitoring of individuals or (ii) processing of special/criminal data

- **Privacy by Design and Default**: e.g. Privacy Impact Assessments (PIAs)

- **Reporting**: security breaches to be reported within 72 hours, and individuals notified where at risk – includes Cyber Attacks

- **Board of Directors**: need to understand and make decisions about level of data privacy risk
GDPR Information – Privacy Notices

- **NEW!**
  - Contact details of DPO
  - Legal basis
  - Legitimate Interests
  - Data retention period
  - Individuals’ rights
  - Right to withdraw consent
  - Details of any transfers out of the EEA
  - Right to complain to the ODPC
  - Existence of profiling & logic/purpose
  - Whether data requested is necessary for the contract or required by law

- **Absolute obligation**
GDPR New Controller-to-Processor relationship

- Processors currently have limited exposure
- Processors will have a new risk profile under GDPR
- Data processors liable to fines, damages, and have new shared responsibility and liability with data controller
- Written agreements to be put in place with lengthy list of mandatory contractual obligations
- Controller to processor contracts will have to be renegotiated
International Data Transfers

- Safe Harbour
- Privacy Shield
- Model Contracts

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<th>Plan to avoid GDPR pitfalls</th>
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<td><strong>Establish:</strong> the personal data flows that exist in your organization &amp; the legal basis for processing them – i.e. carry out a “data mapping” exercise.</td>
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<td><strong>Update:</strong> informational Privacy Notices and contract DP terms, and HR data policies and consents. Renegotiate data controller/processor contracts.</td>
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<td><strong>Get ready:</strong> for subject access, data portability, erasure, objections, restrictions and withdrawal-of-consent requests, and procedures for reporting data breaches to local EU regulatory authorities (and who is your lead EU authority) – related to this work, dig out your legally compliant data retention policy.</td>
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<td><strong>Decide:</strong> how your organization will adopt privacy by design and default, anonymization and pseudonymization; and record it – by a “mini” or where “statutorily required” Data Privacy Impact Assessment – appoint a Data Protection Officer who will be responsible for staff awareness and training.</td>
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<td><strong>Plan:</strong> how you collect and record data subject consents (do you want to rely on consents?), and/or decide what other legal bases you will avail of (e.g. necessary for performance of a contract) – for children look at your parental consents process.</td>
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<td><strong>Revisit:</strong> your organization’s continued compliance with GDPR on a regular basis - keep your Board involved.</td>
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Export Control Regime in the EU

- US and EU export control rules exist in parallel
- Encryption and/or encrypted products can be caught (subject to some exceptions)
- Potentially impacts cloud computing and Software as a Service offerings
- No express voluntary disclosure procedures (unlike the US)
Export Control Regime in the EU

- The Global Dual use licence
- Individual Dual Use licence
- Military licence
- Brokering activities licence
- Global transfer licence
Employment
and immigration pitfalls

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Differences within EU Member States

Common law or civil law jurisdiction? | EU Directives
---|---
Statutory entitlements | Immigration policies
1. Statutory Protections
2. Dismissals
3. Benefits
4. Trade unions/works councils
5. Collective redundancies
6. TUPE
7. Immigration matters
Employment Pitfall No. 1: Statutory Protections

- Unfair Dismissals
- Employment Equality
- Redundancy Payments
- Protected Disclosures
Employment Pitfall No.2: Dismissals

- No concept of “employment at will”

- Employee may seek to “injunct” the dismissal – common law
Employment Pitfall No.3: Workplace Benefits

- European Union law base-line
- Annual leave (PTO) – 20 days
- Maternity Leave – 26 weeks + 16 weeks
- Paternity leave – 2 weeks
- Parental Leave – 18 weeks
- Sick pay – no statutory entitlement
- Health insurance
- Pension contribution – compulsory?
Employment Pitfall No.4: Trade Unions / Works Councils

- Workplace representation – Ireland outside the EU norm
- No requirement to recognise/engage with Trade Union
- No significant collective agreements
- Works Councils – opt in or opt out?
Employment Pitfall No.5: Collective Redundancies

- Collective Redundancies Directive 98/59/EC
- Numerical Threshold
- Information/consultation with employee reps – 30 days
- Employers prevented by statute from terminating during the consultation period
- Statutory obligations
Employment Pitfall No.6: Transfer of Undertakings


- Asset sale – is TUPE triggered?

- Automatic transfer to “new” employer by operation of law

- Same terms and conditions of employment (pensions exception)

- Information and Consultation obligations – 30 days
Employment Pitfall No.7: Immigration matters

- Free movement of workers within the EU however US nationals require an employment permit for full time employment
- Senior executives, professionals and technically skilled workers favoured
- Salary and qualification criteria

Ireland: example

- Straightforward application process and fast turnaround time
- Trusted Partner Initiative: fast-track process for “Trusted Partner” companies
Final Thoughts

- Country-by-country analysis
- Engage with your tax advisors at the outset to avoid issues later
- Landing team can play an important role in establishing consistent culture and ethos
- Hire carefully – no employment at will
- Work with experienced local advisors!
- Questions?
Why A&L Goodbody?

Established over 100 years by Alfred and Lewis Goodbody

6 international offices

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No.1 Irish M&A law firm in 2017

Ranked by Thomson Reuters, Bloomberg, Mergermarket and Experian Caryfín

6 years at the top