

Right to establish

General

A key right under European Union (EU) law is the right of a business established in one EU state to establish itself in another state. A business from outside the EU established in Ireland is entitled, on the basis of being established in Ireland, to also establish itself in the United Kingdom or any other EU member state. The right includes the right for an individual to take up a business as a self employed person in an other EU state.

The rights of establishment applies to both individuals and companies. There is a right to set up and manage a company or firm in another member state. Restrictions on setting up agencies, branches and subsidiaries are prohibited.

EU rules contemplate both primary and secondary establishments. Primary establishment can be set up by incorporating a company in the other member states. By setting up directly either as an individual or incorporating a company in the other member states another possibility is that the company sets up a secondary establishment such as a branch or agency or subsidiary in the host member state.

The host member state must accord equal treatment to the person exercising this so called %ight of establishment+. This must cover the full social and tax advantages which the %ost+state accords to businesses and self-employed persons. Once a company has established itself either directly as a branch it must enjoy the same benefits and advantages available to national companies and bodies. Obstacles, restrictions or hindrances on the enjoyment of freedom of the establishment must be removed.

A number of important EU cases in relation to the right of establishment have profoundly affected taxation rules. Following these cases, Irish and UK Revenue authorities have

been forced to allow for equal treatment for subsidiaries established in another member state to that afforded to home country subsidiaries.

Limitation on Rights

Member states are allowed only to place restrictions on the persons or individuals who establish themselves in the member state or to provide services into the member state on the basis of grounds of public policy, security and health. However these limitations are strictly limited, must be proportionate and must have clearly demonstrable justification.

Restrictions on the basis of public policy must relate to the individuals' personal conduct and the conduct must constitute a genuine or sufficiently serious threat of affecting the interest of the society concerned. In addition, the restrictions must be proportionate. European Union legislation requires member states to make formal decisions where they seek to base the difference and treatment on one of the above mentioned grounds. Notice must be given and there must be an opportunity to appeal so as to ensure that the measure is not abused.

This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances. This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.