

REQUIREMENT TO HAVE AN EUROPEAN ECONOMIC AREA RESIDENT DIRECTOR

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1. INTRODUCTION

At least one of the directors for the time being of a company is required to be resident in a member State of the European Economic Area (EEA).¹ Having an EEA-resident alternate director does not satisfy this requirement.²

The European Economic Area member States are:

Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.

This requirement does not apply to any company that for the time being holds a bond or a section 140 certificate³.

This leaflet is a brief guide only and should be read in conjunction with the relevant legislation. You should contact your professional adviser if further assistance is required.

All forms (and associated filing fees) referred to in this publication are available at www.cro.ie.

2. REQUIREMENT TO HAVE AT LEAST ONE EEA-RESIDENT DIRECTOR

The requirement to have at least one EEA-resident director does not apply to any company which for the time being holds a bond, in the prescribed form, in force to the value of €25,000. This bond provides that in the event of a failure by the company to pay

- (a) a fine imposed on the company in respect of an offence committed by it under the Companies Act 2014 and/or
- (b) a fine imposed on the company in respect of an offence committed by it under section 1078 Taxes Consolidation Act 1997 and which consists of a failure by the company to deliver a statement under section 882 of that Act or to comply with a notice served on it under section 884 of that Act, and/or
- (c) a penalty which it has been held liable to pay under section 1071 or 1073 Taxes Consolidation Act 1997,

a sum of money becomes payable under the bond in discharge of the whole or part of the company's liability in respect of any such fine or penalty.

No bond can be accepted by the CRO for the purposes of section 137 Companies Act 2014 other than the prescribed form (see Appendix 2).

The Surety under the bond must be a member of a class specified in Schedule 2 to the Companies Act 2014 (Bonding) Order 2015 i.e. a bank, building society, insurance company or credit institution.

It should be noted that it is a criminal offence not to have at least one EEA-resident director of an Irish-registered company.^{3,4} The company and every officer of the company who is in default may be prosecuted in this regard. The Registrar of Companies is empowered to bring proceedings before the Dublin Metropolitan District Court for breach of the requirement to have an EEA-resident director.

¹ Section 137 Companies Act 2014

² Section 137(7) of the Act. An alternate director is a substitute director who may be appointed by a full-time director if the articles of the company so permit.

³ See 4.2 below regarding section 140 certificates.

⁴ Or a current bond or a current section 140 certificate: Section 137(6) of the Companies Act.

3. NEW COMPANIES

A bond must accompany any application for incorporation of a company where none of the directors is an European Economic Area (EEA)-resident.

Where a bond is being filed, the following requirements must be met:

- Presenters are to **clearly** identify applications for incorporation that are accompanied by bonds.
- The prescribed execution requirements (i.e. under the Common Seal of the Surety) must be adhered to.
- The **original** bond, together with a certified copy, should be submitted to the CRO with the Form A1.

3.1 Effective date of bond

A period of two years is prescribed by the Companies Act 2014 (Bonding) Order 2015 as the **minimum** period of validity of the bond. This period may commence *“not earlier than the occurrence of the event which gave rise to the requirement to effect a bond”*. Furthermore, for new companies, the bond must be effective as at the date of incorporation.

With regard to new companies, the event that gives rise to the requirement to effect a bond is the incorporation of a company without an EEA-resident director. However, there is also a statutory requirement that the bond be furnished to the CRO pre-incorporation, with the Form A1.

We acknowledge that the foregoing may cause some difficulties in practice for companies.

It should be noted that paragraph 5 of the bond enables the parties to stipulate its commencement date. This is not required to correspond with the date on which the parties execute the bond, and so the parties have a degree of flexibility.

The CRO has implemented the following requirements in relation to the effective date of bonds received in connection with new companies:

The effective date of the bond may not exceed four working days prior to the date of the company’s incorporation, exclusive of incorporation date.

As customers are aware, service standards apply to all incorporation schemes. These are:

Fé Phrainn: incorporation within 10 working days of receipt of documents

A1 Online: incorporation within 5 working days of receipt of documents

Ordinary: while there is no guaranteed service level, in practice incorporation is currently taking 15 working days after date of receipt of documents

In calculating the date from which the bond is to take effect, therefore, applicants ought to take account of the manner in which they are incorporating and the relevant time scales.

The following effective dates apply in practice:

Fé Phrainn: the fifth working day after the date of receipt of Form A1 by the CRO

A1 Online: as and from the date of receipt of Form A1

Ordinary: as and from the tenth working day after the date of receipt of Form A1

The bond is a very valuable and **time-constrained** document. Thus where it is attached to incorporation documents filed with the CRO (especially on Online A1), the words “Bond Enclosed” must be written on the accompanying envelope and the relevant box on the cover page of Form A1 must be ticked.

In the event that an application for incorporation, which is accompanied by a bond, is returned by the CRO to the presenter for amendment, a new bond with an adjusted effective date in line with the above will be required, unless the revised application is resubmitted to the CRO **within five working days**.

4. EXISTING COMPANIES

Where the termination of a directorship notified on Form B10 leaves the company without an European Economic Area (EEA)-resident director, the company should lodge either a bond with the B10 notifying the CRO of the termination of the directorship of the sole or last remaining EEA-resident or obtain a certificate pursuant to section 140 Companies Act 2014. (See 4.2 below)

4.1. Bond

Where a bond is being filed post-incorporation:

- The prescribed execution requirements (i.e. under the Common Seal of the Surety) must be adhered to.
- The **original** bond, together with a certified copy of same, should be submitted by the company with Form B10. Otherwise, the resigning director may submit the bond with a letter sent to the Registrar of Companies, within 14 days of his/her resignation, notifying the Registrar that to his/her knowledge, no other director of the company is resident in a member State. If the bond has not already been so filed as at the date on which the annual return of the company is delivered to the CRO, the bond is required to be sent to the CRO with the annual return of the company, if during the period to which the return relates none of the directors of the company is an EEA-resident.
- Presenters are requested to **clearly** identify Forms B10 and B1 accompanied by bonds, by ticking the appropriate tick box on the front page of the respective form.

4.1.1. Effective date of bond

A period of two years is prescribed by the Companies Act 2014 (Bonding) Order 2015 as the **minimum** period of validity of the bond. This period may commence *“not earlier than the occurrence of the event which gave rise to the requirement to effect a bond”*.

Where the only EEA-resident director of a company resigns post-incorporation, the period of validity of the bond ought to commence with effect from the date of resignation of the EEA-resident director.

It should be noted that paragraph 5 of the bond enables the parties to stipulate the commencement date of the bond. This is not required to correspond with the date on which the parties execute the bond. Accordingly, bonds may be entered into in advance of the date on which the company's obligation to have a bond in place arises, provided that (a) its period of validity commences no earlier than that date and (b) it is for a minimum period of two years.

4.2. Section 140 certificate

If **following incorporation**, a company applies for and is granted a certificate from the Registrar of Companies that the company *“has a real and continuous link with one or more economic activities that are being carried on in the State”*, that company will be exempted from the requirement to have at least one EEA-resident director from the date of the certificate, as long as the certificate remains in force.

In order to obtain a certificate that it has such a link, the company will have to satisfy the Revenue Commissioners that one or more of the following conditions are satisfied by the company:

- (a) the affairs of the company are managed by one or more persons from a place of business established in the State and that person or those persons is or are authorised by the company to act on its behalf;
- (b) the company carries on a trade in the State;
- (c) the company is a subsidiary or a holding company of a company or another body corporate that satisfies either or both of the conditions specified in paragraphs (a) and (b);
- (d) the company is a subsidiary of a company, another subsidiary of which satisfies either or both of the conditions specified in paragraphs (a) and (b).

(Section 140(9) of the Companies Act 2014).

Application for a section 140 certificate is made to the CRO on **Form B67**. This application must be accompanied by a statement from Revenue, made within two months of the date of the application to the CRO, that it has reasonable grounds to believe that the company has such a link. Application to Revenue for the necessary statement can be made to Revenue Commissioners, Companies Unit, PO Box 1 Wexford.

APPENDIX 1

Definition of Residency in Ireland, where such residence is being relied upon as satisfying the EEA- Residency requirement pursuant to section 137.

Pursuant to section 141 Companies Act 2014, so far as it is a person's residence in Ireland that falls to be determined for the purposes of section 137, then for the purposes of section 137 that person is resident in Ireland at a particular time ("the relevant time") if –

(a) *he or she is present in the State at –*

(i) any one time or several times in the period of 12 months preceding the relevant time ("the immediate 12 month period") for a period in the aggregate amounting to 183 days or more, or

(ii) any one time or several times –

(I) in the immediate 12 month period, and

(II) in the period of 12 months preceding the immediate 12 month period ("the previous 12 month period"),

for a period (being a period comprising in the aggregate the number of days on which the person is present in the State in the immediate 12 month period and the number of days on which the person was present in the State in the previous 12 month period) in the aggregate amounting to 280 days or more, or

(b) that time is in a year of assessment (within the meaning of the Taxes Consolidation Act, 1997), in respect of which the person has made an election under section 819(3) of that Act.

(2) Notwithstanding subsection (1)(a)(ii), where in the immediate 12 month period concerned a person is present in the State at any one time or several times for a period in the aggregate amounting to not more than 30 days –

(a) the person shall not be resident in the State for the purpose of sections 137 or 139, at the relevant time concerned, and

(b) no account shall be taken of the period for the purposes of the aggregate mentioned, in subsection 1(a)(ii).

(3) For the purposes of subsections (1) and (2) –

(a) references in this section to a person's being present in the State are references to the person's being personally present in the State, and

(b) a person shall be deemed to be present in the State for a day if the person is present in the State at any time during that day."

APPENDIX 2

FORM OF BOND SECURED BY A COMPANY THAT DOES NOT HAVE A RESIDENT DIRECTOR

COMPANIES ACT, 2014 – SECTION 137(2)

COMPANIES ACT, 2014 (BONDING) ORDER, 2015

KNOW ALL MEN BY THESE PRESENTS:

1. THAT We, (name of Surety)^{NOTE ONE}

.....
.....
(in this bond referred to as "the Surety"), having our registered office at

.....
at the behest of (name of company)

.....
having its registered office at

.....
(being a company seeking an exemption from the terms of section 137(1) of the Companies Act, 2014 (in this Bond referred to as "the Act") hereby undertake and acknowledge ourselves bound to pay to the nominated person (within the meaning of section 137(2) of the Act) such sum or sums of money as the nominated person may demand in writing –

- (a) in respect of the whole or part of any fine imposed on the company in respect of an offence under the Companies Act, committed by it,
- (b) in respect of the whole or part of any fine imposed on the company in respect of an offence under section 1078 of the Taxes Consolidation Act, 1997, committed by it, being an offence that consists of a failure by the company to deliver a statement which it is required to deliver under section 882 of that Act or to comply with a notice served on it under section 884 of that Act,
- (c) in respect of the whole or part of any penalty which it has been held liable to pay under section 1071 or 1073 of the Taxes Consolidation Act, 1997,
- (d) with the consent of the Revenue Commissioners, such sum as may have been sanctioned by the Revenue Commissioners and the Minister for Business, Enterprise and Innovation in respect of defraying such expenses as may have been reasonably incurred by the nominated person in carrying out his or her duties under section 137(2) of the Act,

whether such fine or penalty arises during or before the period of validity of this bond provided that the aggregate of such sums of money which the Surety shall be obliged to pay to the nominated person shall not in the period of validity of this bond exceed €25,000 (twenty five thousand euro).

2. It is a condition of this bond that the Surety shall not become liable to pay a sum of money referred to in paragraphs (a) or (b) of clause 1 of this bond unless the time permitted for payment of the fine imposed by the Court has expired and the sum concerned has not been fully discharged.

3. It is a condition of this bond that the Surety shall not become liable to pay a sum of money referred to in paragraph (c) of clause 1 of this bond unless a demand for payment has been made of the company by the Revenue Commissioners and the sum concerned has not been fully discharged within the time expressed to be allowed for payment in such demand.

4. It is hereby acknowledged and agreed by the Surety that the granting of time to the Company in respect of the payment of a penalty imposed by the Revenue Commissioners shall not affect the liability of the Surety under this bond.

5. This bond shall have effect for the period of _____ commencing on the ____ day of _____ 20__ and expiring on the ____ day of _____ 20__
(in this bond referred to as the period of validity).^{NOTE TWO}

6. It is hereby acknowledged and agreed by the Surety that in the event of this bond not being renewed immediately on its expiry, the Surety shall as soon as practicable thereafter, but in any event within 7 days, notify the registrar of companies to that effect in writing.

7. The Surety hereby acknowledges and confirms it will as soon as practicable after entering into this bond furnish a certified copy to the registrar of companies.

Dated this ____ day of _____ 20__.

Present when the Common Seal^{NOTE THREE}
of the Surety was affixed hereto:

^{NOTE ONE} Surety must be a member of a class specified in Schedule 2 to the Companies Act, 2014 (Bonding) Order 2015 (bank, building society, insurance company or credit institution)

^{NOTE TWO} Period must not be less than 2 years for the bond and may not commence earlier than the occurrence of the appropriate event which gave rise to the requirement for the bond.

^{NOTE THREE} The Bond must be executed under the seal of the Surety.

AN OIFIG UM CHLÁRÚ CUIDEACHTAÍ
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