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Eligibility for Treaty Benefits Under The Ireland-U.S. Income Tax Treaty

by Jason Connery and Jennifer Blasdel-Marinescu

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SPECIAL REPORTS

Eligibility for Treaty Benefits Under the Ireland-U.S. Income Tax Treaty

by Jason Connery and Jennifer Blasdel-Marinescu

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The information contained herein is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser. This article represents the views of the authors only and does not necessarily represent the views or professional advice of KPMG LLP.

To be entitled to benefits under income tax treaties, companies must satisfy eligibility requirements. This article includes flowcharts to help practitioners navigate the eligibility requirements of the Ireland-U.S. income tax treaty as amended by protocol that apply to Irish companies.[1]

Income tax treaties may exempt business income from source country income taxes and eliminate or reduce domestic withholding taxes on payments between residents of countries that are parties to an income tax treaty. To be entitled to benefits under U.S. income tax treaties, a company must not only be a resident of the tax treaty partner's country, but also satisfy at least one of the tests in the treaty's limitation on benefits provision, if applicable.

The flowcharts in this article focus on the eligibility of Irish companies claiming benefits, under the treaty's LOB article (article 23), on income that would otherwise be subject to U.S. taxation. This article does not address eligibility for treaty benefits of entities that are partnerships or are otherwise transparent for U.S. or Irish tax purposes. It also does not discuss the triangular rules in paragraph 7 of the LOB provision in the treaty. This article is based on the treaty, the protocol to the treaty, the exchange of notes to the treaty and protocol, and the U.S. Treasury Department's technical explanation.

This article is the 12th in a series[2] that provides flowcharts to assist practitioners in determining a company's eligibility for tax treaty benefits under the LOB

[1]Convention Between the Government of Ireland and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital Gains, signed July 28, 1997, as amended by the protocol signed July 28, 1997.

[2]*See* Jason Connery, Douglas Poms, and Jennifer Blasdel-Marinescu, ''Eligibility for Treaty Benefits Under the Sweden-U.S. Income Tax Treaty,'' *Tax Notes Int'l*, July 23, 2012, p. 359; Connery, Poms, and Blasdel-Marinescu, ''Eligibility for Treaty Benefits Under the Australia-U.S. Income Tax Treaty,'' *Tax Notes Int'l*, Dec. 12, 2011, p. 843; Connery, Poms, and Jennifer Blasdel, ''Eligibility for Treaty Benefits Under the Switzerland-U.S. Income Tax Treaty,'' *Tax Notes Int'l*, May 9, 2011, p. 505; Connery, Poms, and Blasdel, ''Eligibility for Treaty Benefits Under the Japan-U.S. Income Tax Treaty,'' *Tax Notes Int'l*, Sept. 6, 2010, p. 789; Connery, Poms, and Blasdel, ''Eligibility for Treaty Benefits Under the 2009 Protocol to the France-U.S. Income Tax Treaty,'' *Tax Notes Int'l*, Apr. 12, 2010, p. 149; John Venuti, Connery, Poms, and Blasdel, ''Eligibility for Treaty Benefits Under the Netherlands-U.S. Income Tax Treaty,'' *Tax Notes Int'l*, Nov.

(Footnote continued on next page.)

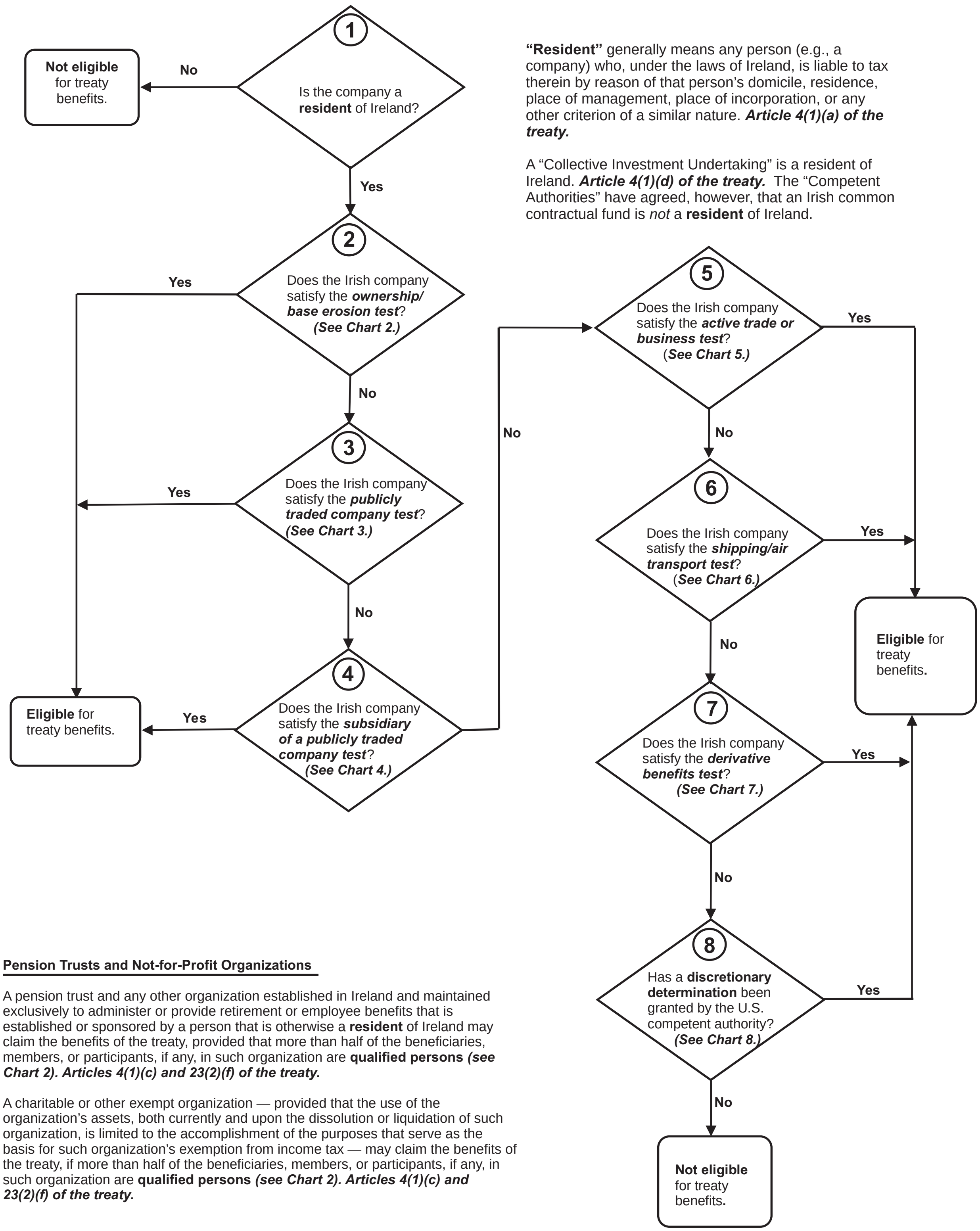
provisions of specific U.S. income tax treaties and, when applicable, in determining eligibility for a 0 percent withholding tax rate on cross-border intercompany dividend payments to the company.

This article contains eight flowcharts that analyze the LOB provision of the treaty as applied to Irish resident companies. Although the flowcharts provide a comprehensive review of applicable provisions under the treaty, taxpayers and their tax advisers should carefully evaluate each case and determine whether the requirements of the treaty are met based on all facts and circumstances. ◆

(Flowcharts start on the following page.)

23, 2009, p. 601; Venuti, Connery, Poms, and Alexey Manasuev, ''Eligibility for Treaty Benefits Under the Canada-U.S. Income Tax Treaty,'' *Tax Notes Int'l*, June 15, 2009, p. 967; Ron Dabrowski, Venuti, Poms, and Manasuev, ''Eligibility for Treaty Benefits Under U.K.-U.S. Income Tax Treaty,'' *Tax Notes Int'l*, Mar. 23, 2009, p. 1095; Venuti, Connery, Poms, and Manasuev, ''Eligibility for Treaty Benefits Under the Luxembourg-U.S. Income Tax Treaty,'' *Tax Notes Int'l*, July 21, 2008, p. 285; Venuti, Dabrowski, Poms, and Manasuev, ''Eligibility for Treaty Benefits Under the France-U.S. Income Tax Treaty,'' *Tax Notes Int'l*, Feb. 11, 2008, p. 523; and Venuti and Manasuev, ''Eligibility for Zero Withholding on Dividends in the New Germany-U.S. Protocol,'' *Tax Notes Int'l*, Jan. 14, 2008, p. 181.

Chart 1. Eligibility for Treaty Benefits Under Article 23 (LOB) of the Ireland-U.S. Tax Treaty



"Resident" generally means any person (e.g., a company) who, under the laws of Ireland, is liable to tax therein by reason of that person's domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature. ***Article 4(1)(a) of the treaty.***

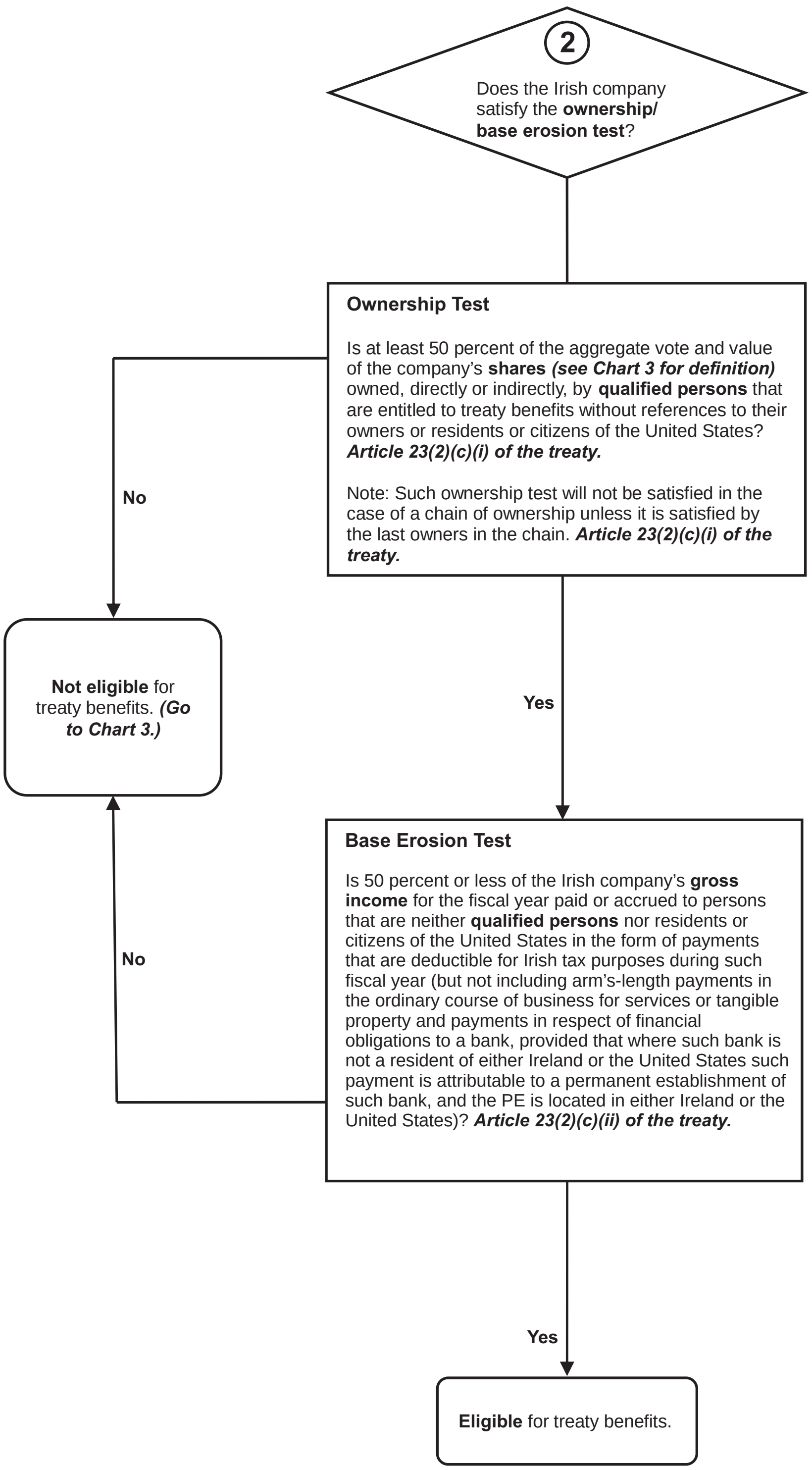
A "Collective Investment Undertaking" is a resident of Ireland. ***Article 4(1)(d) of the treaty.*** The "Competent Authorities" have agreed, however, that an Irish common contractual fund is *not* a **resident** of Ireland.

Pension Trusts and Not-for-Profit Organizations

A pension trust and any other organization established in Ireland and maintained exclusively to administer or provide retirement or employee benefits that is established or sponsored by a person that is otherwise a **resident** of Ireland may claim the benefits of the treaty, provided that more than half of the beneficiaries, members, or participants, if any, in such organization are **qualified persons** ***(see Chart 2). Articles 4(1)(c) and 23(2)(f) of the treaty.***

A charitable or other exempt organization — provided that the use of the organization's assets, both currently and upon the dissolution or liquidation of such organization, is limited to the accomplishment of the purposes that serve as the basis for such organization's exemption from income tax — may claim the benefits of the treaty, if more than half of the beneficiaries, members, or participants, if any, in such organization are **qualified persons** ***(see Chart 2). Articles 4(1)(c) and 23(2)(f) of the treaty.***

Chart 2. Ownership/Base Erosion Test Under Article 23(2)(c) (LOB) of the Ireland-U.S. Tax Treaty



The term **"qualified person"** means a resident of Ireland or the United States that is:

A. an individual resident in the United States or Ireland ***(see article 23(2)(a) of the treaty)***;
B. a qualified governmental entity ***(see article 23(2)(b) of the treaty)***;
C. a person other than an individual that satisfies the **ownership/base erosion test** ***(see article 23(2)(c))***;
D. a person, other than an individual or company, if the principal class of units in that person is listed on a **recognized stock exchange** ***(see Chart 3 for definition)*** located in either Ireland or the United States and is **substantially and regularly traded** ***(see Chart 3 for definition)*** on one or more recognized stock exchanges or the direct or indirect owners of at least 50 percent of the beneficial interest in that person are persons referred to immediately above or a company that satisfies the **publicly traded company test** ***(see Chart 3) (see article 23(2)(d) of the treaty)***;
E. companies that satisfy the **publicly traded company test** ***(see Chart 3) (see article 23(2)(e)(I) of the treaty)***;
F. a person that satisfies the **subsidiary of a publicly traded company test** ***(see Chart 4) (see article 23(2)(e)(ii) of the treaty)***; and/or
G. certain tax-exempt not-for-profit organizations or pension trusts ***(see Chart 1) (see article 23(2)(f) of the treaty).***

"Gross income" means **gross income** for the fiscal year preceding the current fiscal year provided that the amount of **gross income** for the fiscal year preceding the current fiscal year shall be deemed to be not less than the average of the annual amounts of **gross income** for the four fiscal years preceding the current fiscal year. ***Article 23(8)(a) of the treaty.***

The term **"gross income"** is not defined in the treaty. The United States will ascribe the meaning to the term that it has in the United States. In such cases, **"gross income"** will be defined as gross receipts less cost of goods sold. ***U.S. Treasury technical explanation to the treaty.***

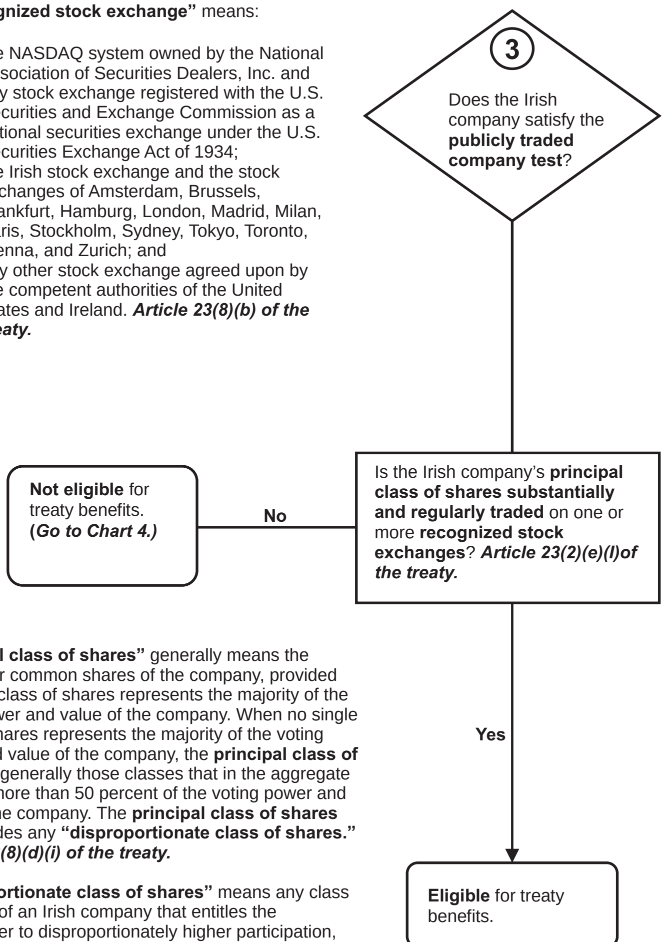
It is understood that transactions between associated enterprises will be considered arm's length if the conditions made or imposed between the two enterprises in their commercial or financial relations do not differ from those that would be made between independent enterprises. Transactions between independent enterprises referred to in article 9 (associated enterprises) will be considered to be arm's length. Whether two enterprises are associated will be determined without regard to the residence of the two enterprises. ***Exchange of notes to the treaty.***

Depreciation and amortization deductions, which do not represent payments or accruals to other persons, are disregarded for purposes of the base erosion test. ***U.S. Treasury technical explanation to the treaty.***

Chart 3. Publicly Traded Company Test Under Article 23(2)(e)(i) (LOB) of the Ireland-U.S. Tax Treaty

"Recognized stock exchange" means:

A. the NASDAQ system owned by the National Association of Securities Dealers, Inc. and any stock exchange registered with the U.S. Securities and Exchange Commission as a national securities exchange under the U.S. Securities Exchange Act of 1934;
B. the Irish stock exchange and the stock exchanges of Amsterdam, Brussels, Frankfurt, Hamburg, London, Madrid, Milan, Paris, Stockholm, Sydney, Tokyo, Toronto, Vienna, and Zurich; and
C. any other stock exchange agreed upon by the competent authorities of the United States and Ireland. ***Article 23(8)(b) of the treaty.***



"Principal class of shares" generally means the ordinary or common shares of the company, provided that such class of shares represents the majority of the voting power and value of the company. When no single class of shares represents the majority of the voting power and value of the company, the **principal class of shares** is generally those classes that in the aggregate possess more than 50 percent of the voting power and value of the company. The **principal class of shares** also includes any **"disproportionate class of shares."** ***Article 23(8)(d)(i) of the treaty.***

"Disproportionate class of shares" means any class of shares of an Irish company that entitles the shareholder to disproportionately higher participation, through dividends, redemption payments, or otherwise in the earnings generated in the United States by particular assets or activities of the company. ***Article 23(8)(d)(ii) of the treaty.*** A **disproportionate class of shares** would include so-called alphabet stock issued by an Irish company that entitles the holder to earnings in the United States produced by a particular division of the company. ***U.S. Treasury technical explanation to the treaty.***

"Shares" include depository receipts thereof or trust certificates thereof. ***Article 23(8)(d)(iii) of the treaty.***

Noncorporate Publicly Traded Entities

Publicly traded trusts or other noncorporate entities resident in Ireland are treated as qualified persons if their principal class of units is listed on a **recognized stock exchange** in either contracting state and is **substantially and regularly traded.** ***Article 23(2)(d)(i) of the treaty.*** From a U.S. perspective, this other publicly traded trust test is redundant because the United States would generally consider such trusts to be corporations that are covered by the publicly traded company test. ***U.S. Treasury technical explanation to the treaty.***

The **shares** in a class of shares are considered to be **substantially and regularly traded** on one or more **recognized stock exchanges** in a fiscal year if:

(i) trades in such class are effected on one or more of such stock exchanges other than in de minimis quantities during every quarter; and
(ii) the aggregate number of shares of that class traded on such stock exchange or exchanges during the preceding fiscal year is at least 6 percent of the average number of shares outstanding in that class during that taxable year, provided that if such class was not listed on a **recognized stock exchange** in the previous fiscal year the **shares** will be considered to have satisfied this requirement. ***Article 9(a)(i) of the 1997 protocol to the treaty.***

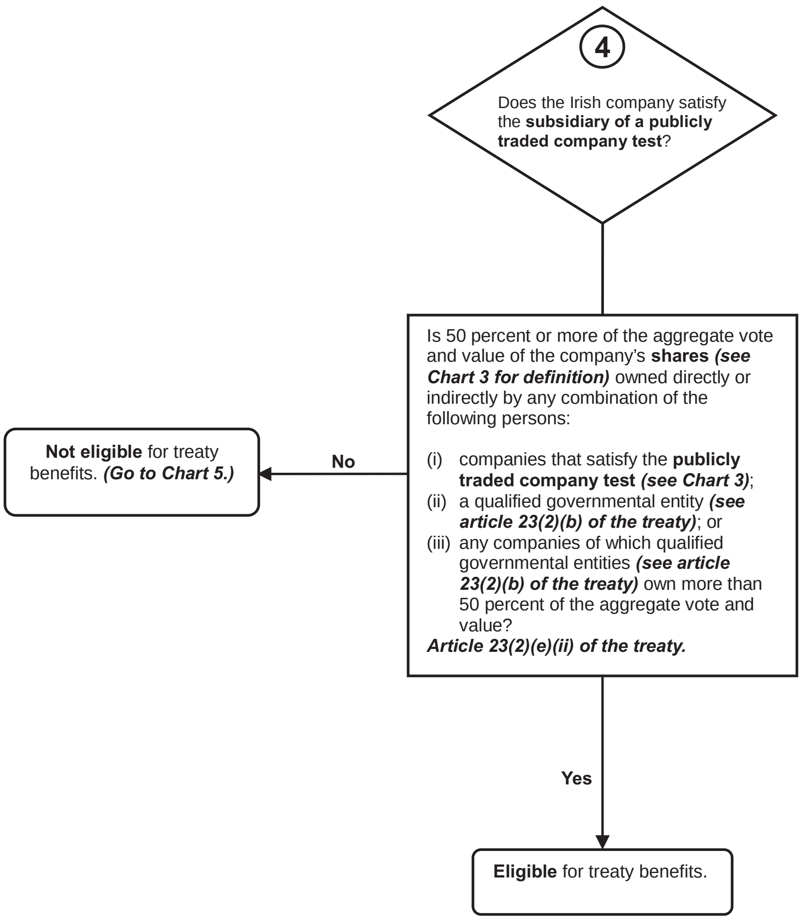
A "building society" incorporated in Ireland is deemed to be a company the **principal class of shares** of which:
(i) is listed on the Irish stock exchange; and
(ii) in any fiscal year, is **substantially and regularly traded** on such exchange.

Article 9(a)(ii) of the 1997 protocol to the treaty.

If a company has only one class of shares, it is only necessary to consider whether the shares of that class are **substantially and regularly traded** on a **recognized stock exchange**. If the company has more than one class of shares, it is first necessary to determine whether one of the classes accounts for more than half of the voting power and value of the company. If so, then only those shares are considered for purposes of the **substantial and regular trading** requirement. If no single class of shares accounts for more than half of the company's voting power and value, it is necessary to identify a group of two or more classes of the company's shares that account for more than half of the company's voting power and value, and then to determine whether each class of shares in this group satisfies the **regular trading** requirement. Although a company with several classes of shares could conceivably have more than one group of classes identified that account for more than 50 percent of the shares, it is only necessary for one such group to satisfy the requirements of this subparagraph for the company to be entitled to benefits. Benefits would not be denied to the company even if a second, nonqualifying group of shares with more than half of the company's voting power and value could be identified. ***U.S. Treasury technical explanation to the treaty.***

The **substantial and regular trading** requirement can be met by trading on any **recognized stock exchange.** Trading on one or more **recognized stock exchanges** may be aggregated for purposes of this requirement. Thus, a U.S. company could satisfy the **substantially and regularly traded** requirement through trading, in whole or in part, on a **recognized stock exchange** located in Ireland or certain third countries. Authorized but unissued shares are not considered for purposes of this test. ***U.S. Treasury technical explanation to the treaty.***

Chart 4. Subsidiary of a Publicly Traded Company Test Under Article 23(2)(e)(ii) (LOB) of the Ireland-U.S. Tax Treaty



Example

An Irish resident company, all the shares of ownership in which are owned by another Irish resident company, would qualify for benefits under the treaty if the **principal class of shares** ***(see Chart 3 for definition)*** of the Irish parent company were listed on the Irish stock exchange and **substantially and regularly traded** ***(see Chart 3 for definition)*** on the London stock exchange. However, the Irish company would not qualify for benefits under the **subsidiary of a publicly traded company test** if the publicly traded parent company were a resident of the United Kingdom, not of the United States or Ireland. The requirement that the company described in the **subsidiary of a publicly traded company test** be owned by a resident of the United States or Ireland is confirmed in paragraph 4 of the exchange of notes. ***U.S. Treasury technical explanation to the treaty.***

An Irish company is a qualified person if the direct or indirect owners of at least 50 percent of the beneficial interests in the entity are entities that satisfy the **publicly traded company test** ***(see Chart 3)*** or a similar publicly traded test for non-companies such as trusts ***(see article 23(2)(d)(i) of the treaty). Article 23(2)(d)(ii) of the treaty.***

It is understood that, for purposes of determining whether a company qualifies for benefits under the **subsidiary of a publicly traded company test**, a company is "described in the **publicly traded company test**," only if that company is a resident of Ireland or the United States and is entitled to the benefits of the treaty by reason of the **publicly traded company test**. **Exchange of notes to the treaty.**

<u>**Subsidiaries of Publicly Traded Entities**</u>

An Irish resident entity is treated as a qualified person if the direct or indirect owners of at least 50 percent of the beneficial interests in the entity are entities that satisfy the **publicly traded company test** (***see Chart 3***) or noncorporate publicly traded entities that satisfy a similar publicly traded test in article 23(2)(d)(i). ***See article 23(2)(d)(ii) of the treaty.***

Chart 5. Active Trade or Business Test Under Article 23(3) (LOB) of the Ireland-U.S. Tax Treaty

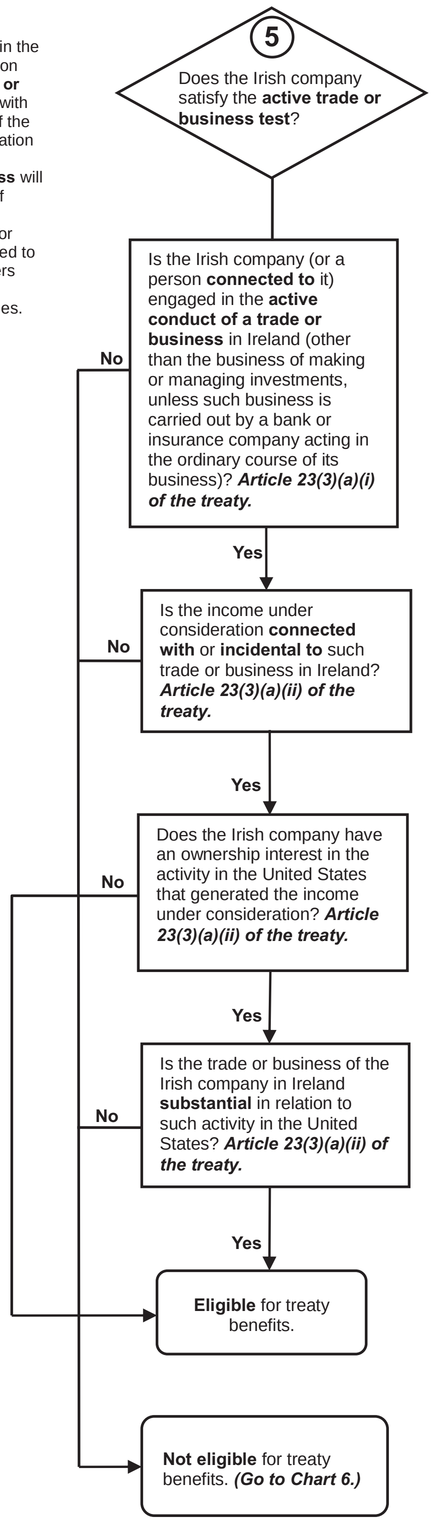
(Only applies if an item of income is derived in connection with or incidental to an active trade or business in Ireland)

The term **"trade or business"** is not defined in the treaty. The United States will refer to the section 367(a) regulations in defining the term **"trade or business."** These regulations are consistent with the requirement under subparagraph 9(b)(i) of the 1997 protocol, which states that this determination will be based on all the relevant facts and circumstances. In general, a **trade or business** will be considered to be a specific unified group of activities that constitute or could constitute an independent economic enterprise carried on for profit. A corporation generally will be considered to carry on a **trade or business** only if the officers and employees of the corporation conduct substantial managerial and operational activities. ***U.S. Treasury technical explanation to the treaty.***

An item of income is **connected with** a trade or business if the activity in the United States that generated the item of income is a line of business that **forms a part of** or is **complementary** to the trade or business conducted in Ireland by the income recipient. ***Article 23(3)(b)(i) of the treaty.***

A business activity generally will be considered to **"form a part of"** a business activity conducted in the United States if the two activities involve the design, manufacture, or sale of the same products or type of products or the provision of similar services. For two activities to be considered to be **"complementary,"** the activities need not relate to the same types of products or services, but they should be part of the same overall industry and be related in the sense that the success or failure of one activity will tend to result in the success or failure for the other. In cases in which more than one trade or business is conducted in the other state and only one of the trades or businesses forms a part of or is complementary to a trade or business conducted in the state of residence, it is necessary to identify the trade or business to which an item of income is attributable. Royalties generally will be considered to be derived in connection with the trade or business to which the underlying intangible property is attributable. Dividends will be deemed to be derived first out of earnings and profits of the treaty-benefited trade or business and then out of other earnings and profits. Interest income may be allocated under any reasonable method consistently applied. A method that conforms to U.S. principles for expense allocation will be considered a reasonable method. ***U.S. Treasury technical explanation to the treaty.***

Income derived from the United States will be considered "**incidental to**" a trade or business conducted in Ireland if the production of such income facilitates the conduct of the trade or business in the other state. An example of incidental income is the temporary investment of working capital derived from a trade or business. ***U.S. Treasury technical explanation to the treaty.***



Whether a resident of Ireland is engaged in the **active conduct of a trade or business** will be determined on the basis of an analysis of all the relevant facts and circumstances. In any case, however:

(i) A bank will be considered to be engaged in the active conduct of a trade or business if it regularly accepts deposits from the public or makes loans to the public. It is understood that a resident of Ireland that, as of the date of signature of the treaty, is licensed by the banking authorities in Ireland to engage in the business of banking satisfies this requirement.

(ii) An insurance company will be considered to be engaged in the active conduct of a trade or business if its gross income consists primarily of insurance or reinsurance premiums and investment income attributable to such premiums. ***Article 9(b) of the 1997 protocol to the treaty.***

Banks that, at the time of the signature of the treaty, were licensed by the banking authorities of Ireland to engage in a banking business are deemed to satisfy the active conduct requirement. ***U.S. Treasury technical explanation to the treaty.***

Because a headquarters operation is in the business of managing investments, a company that functions solely as a headquarters company will not be considered to be engaged in an **active trade or business**. ***U.S. Treasury technical explanation to the treaty.***

In determining whether an Irish company is **"engaged in the active conduct of a trade or business"** in Ireland, activities conducted by a partnership in which the Irish company is a partner and activities conducted by persons **connected to** the Irish company are deemed to be conducted by the Irish company. A person will be **connected to** another if one possesses at least 50 percent of the beneficial interest in the other (or, in the case of a company, at least 50 percent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or another person possesses, directly or indirectly, at least 50 percent of the beneficial interest (or, in the case of a company, at least 50 percent of the aggregate vote and value of the company's **shares** ***(see Chart 3 for definition)*** or of the beneficial equity interest in the company) in each person. In any case, a person will be considered to be **connected to** another if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same person or persons. ***Article 9(b)(ii) of the 1997 protocol to the treaty.***

Whether the trade or business of the Irish company is **substantial** in relation to the activity in the United States will be determined based on all the relevant facts and circumstances. In any case, however, the trade or business is deemed substantial if, for the preceding fiscal year or for the average of the three preceding fiscal years, the asset value, the gross income, and the payroll expense that are related to the trade or business in Ireland (1) equals at least 7.5 percent of the asset value, the gross income, and the payroll expense, respectively, that are related to the activity that generated the income in the United States and (2) the average of the three ratios exceeds 10 percent. When calculating the above ratios, only the resident's proportionate ownership interest in such trade, business, or activities, whether held directly or indirectly, is taken into account. ***Article 23(3)(b)(ii) of the treaty.***

For purposes of the substantiality test, relevant circumstances generally would include the relative scale of the activities conducted in the two states and the relative contributions made to the conduct of the trade or businesses in the two states. ***U.S. Treasury technical explanation to the treaty.***

For purposes of the substantially ratio test, the term **"value"** generally will be defined using the method used by the taxpayer in keeping its books for purposes of financial reporting in its country of residence. **See Treas. reg. section 1.884-5(e)(3)(ii)(A).** Also, for purposes of the substantiality ratio test, only items actually located or incurred in Ireland and the United States are included in the computation of the ratios. ***U.S. Treasury technical explanation to the treaty.***

A resident of a contracting state does not have an ownership interest in an activity in the other state merely because it supplies goods, provides services, or grants other facilities to that activity. For example, a lessor who would not otherwise have an ownership interest in an activity in the other state would not acquire such an interest merely because it leased property for use by that activity. ***Article 9(b)(iii) of the 1997 protocol to the treaty.***

Chart 6. Shipping/Air Transport Test Under Article 23(4) (LOB) of the Ireland-U.S. Tax Treaty

(Only applies to shipping or air transport income)

The **shipping/air transport test** provides that a resident of Ireland that derives income from the United States described in article 8 (shipping and air transport) and that is not entitled to the benefits of the treaty under paragraphs 1 through 3 of article 23 will nonetheless be entitled to the benefits of the treaty with respect to income described in article 8 if it meets one of two tests. These tests in substance duplicate the rules set forth under IRC section 883 and therefore afford little additional benefits beyond those provided by the IRC. ***U.S. Treasury technical explanation to the treaty.***

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Does the Irish company satisfy the **shipping/air transport test**?

Did the Irish company derive U.S.-source shipping or air transport income as described in article 8 of the treaty?

No

Yes

Is at least 50 percent of the aggregate vote and value of the Irish company's shares owned directly or indirectly by:

(i) **qualified persons** ***(see Chart 2 for definition)*** or citizens of the United States or individuals who are residents of a third state that grants by law, common agreement, or convention an exemption under similar terms for profits as mentioned in article 8 to citizens and corporations of the other state? ***Article 23(4)(a) of the treaty and U.S. Treasury technical explanation to the treaty***; or

(ii) a company or combination of companies the **principal class of shares** ***(see Chart 3 for definition)*** in which are **substantially and regularly traded** on an **established securities market** in a third state, provided that such third state grants an exemption under similar terms for profits referred to in article 8 of the treaty to citizens and corporations of the United States either under its national law or in common agreement with the United States or under a convention between that third state and the United States? ***Article 23(4)(b) of the treaty.***

No

Not eligible for treaty benefits. ***(Go to Chart 7.)***

Yes

Eligible for treaty benefits**.**

The term **"substantially and regularly traded on an established securities market"** is not defined in the treaty. In determining whether a resident of Ireland is entitled to the benefits of the treaty under the **shipping/air transport test**, the United States will refer to the principles of IRC section 883(c)(3)(A) for guidance as to the definition of this term. ***U.S. Treasury technical explanation to the treaty.***

"Established securities market" generally means:

A. a foreign securities exchange that is officially recognized, sanctioned, or supervised by a governmental authority of the qualified foreign country in which the market is located, and has an annual value of shares traded on the exchange exceeding $1 billion during each of the three calendar years immediately preceding the beginning of the tax year;
B. a national securities exchange that is registered under section 6 of the Securities Act of 1934 (15 U.S.C. 78(f));
C. certain United States over-the-counter markets;
D. any exchange designated under an LOB article in a U.S. income tax treaty; and
E. any other exchange that the Secretary may designate by regulation or otherwise. ***Treas. reg. section 1.883-2(b).***

Stock of a corporation is **"regularly traded"** on one or more **established securities markets** if:

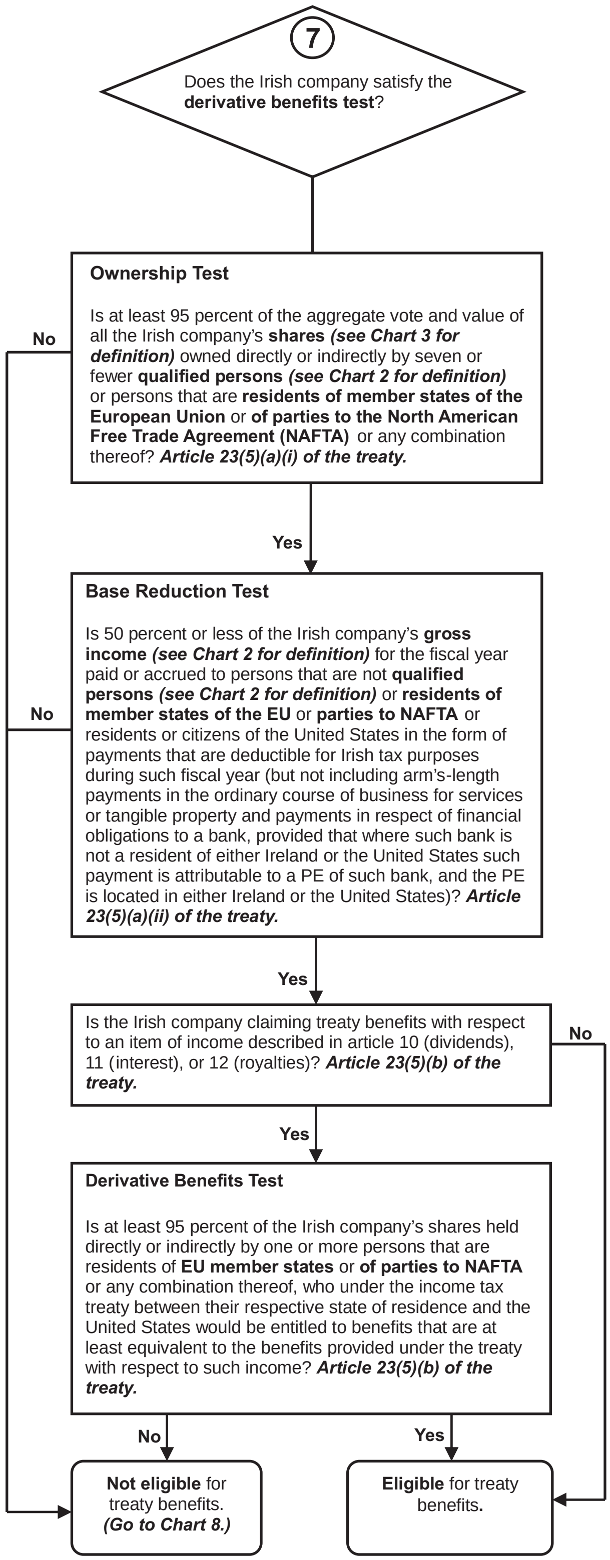
A. one or more classes of stock of the corporation that, in the aggregate represent more than 50 percent of the total combined voting power of all classes of stock of such corporation entitled to vote and of the total value of the stock of such corporation are listed on such market(s) during the tax year; and
B. with respect to such class relied on to meet the more than 50 percent requirement of (A) above:
   (i) trades in each such class are effected, other than in de minimis quantities, on such market or markets on at least 60 days during the tax year (or 1/6 of the number of days in a short year); and
   (ii) the aggregate number of shares in each such class are traded on such market(s) during the tax year and are at least 10 percent of the average number of shares outstanding in that class during the tax year (or, in the case of a short tax year, a percentage that equals at least 10 percent of the average number of shares outstanding in that class during the tax year multiplied by the number of days in the short tax year, dividend by 365). ***Treas. reg. section 1.883-2(d).***

Note: Special rules apply for classes of stock traded on domestic **established securities markets** ***(see Treas. reg. section 1.883-2(d)(2))*** and for closely held classes of stock ***(see Treas. reg. section 1.883-2(d)(3)).***

Chart 7. Derivative Benefits Test Under Article 23(5) (LOB) of the Ireland-U.S. Tax Treaty

The term **"resident of a member state of the European Union"** means a person that would be entitled to the benefits of a comprehensive income tax convention in force between any member state of the European Union and the contracting state from which the benefits of the treaty are claimed (in this case the United States), provided that if such treaty does not contain a comprehensive LOB article (including provisions similar to the **base erosion test** ***(see Chart 2)***, the **publicly traded company test** ***(see Chart 3)***, and the **subsidiary of a publicly traded company test** ***(see Chart 4)***), the person would be entitled to the benefits of the treaty under the principles of paragraph 2 (qualified persons) if such person were a resident of Ireland or the United States under article 4 (residence) of the treaty. ***Article 23(8)(e) of the treaty.***

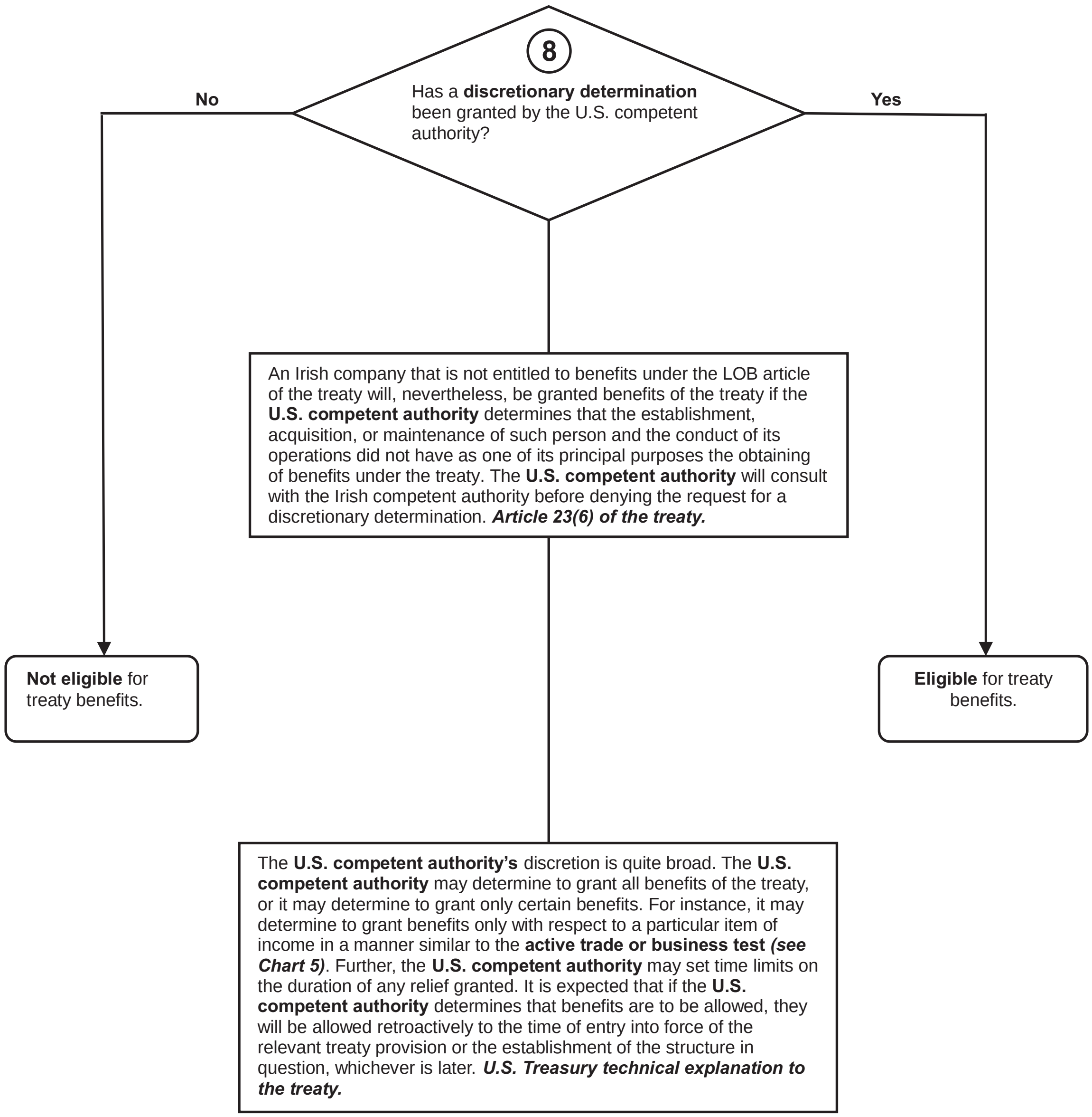
The term **"resident of a party to NAFTA"** means a person that would be entitled to the benefits of a comprehensive income tax treaty in force between any party to **NAFTA** and the United States, provided that if such convention does not contain a comprehensive LOB article (including provisions similar to those of the **base erosion test** ***(see Chart 2)***, the **publicly traded company test** ***(see Chart 3)***, and the **subsidiary of a publicly traded company test** ***(see Chart 4)***), the person would be entitled to the benefits of the treaty under the principles of paragraph 2 (qualified persons) if such person were a resident of Ireland or the United States under article 4 (residence) of the treaty. ***Article 23(8)(f) of the treaty.***



The **derivative benefits test** requires a comparison of the rate of tax imposed on a particular payment under the treaty to the rate of tax that would be imposed under the income tax convention between the source state and any **EU member state** or party to **NAFTA** whose residents account for some of the ownership interest described in the **ownership test**. Benefits will be extended with respect to such a payment under this provision only if at least 95 percent of the company's shares are owned by persons resident in an **EU member state** or a party to **NAFTA** for which the rate (or rates) of withholding tax provided in the income tax treaty between the source state and such state is less than or equal to the rate or rates imposed under the treaty. This rate comparison is by definition satisfied for persons owning shares that are also **qualified persons** ***(see Chart 2 for definition)***. If for a particular payment less than 95 percent of the ownership interest is accounted for by persons that satisfy the rate comparison, then the **derivative benefits test** does not apply to that payment (although it may apply to other payments and would apply to items of income, profit, or gain other than those referred to in subparagraph 5(b)). ***U.S. Treasury technical explanation to the treaty.***

The rates of tax to be compared under the **derivative benefits test** are the rate of withholding tax that the United States would impose had the **EU** or **NAFTA** resident directly received its proportionate share of the dividend, interest, or royalty payment and the rate of withholding tax that the source state would have imposed had that person been a resident of the other state and the person's proportionate share of the dividend, interest, or royalty payment had been paid directly to that person. ***U.S. Treasury technical explanation to the treaty.***

Chart 8. Discretionary Determination by U.S. Competent Authority Under Article 23(6) (LOB) of the Ireland-U.S. Tax Treaty



The U.S. competent authority is the Secretary of the Treasury or his delegate. ***Article 3(1)(e)(i) of the treaty.***

Requesting competent authority assistance — A taxpayer may request the assistance of the **U.S. competent authority** under Rev. Proc. 2006-54. The **U.S. competent authority** may determine in its own discretion that the taxpayer qualifies for certain benefits under the LOB article of the treaty.

There is a US $27,500 user fee for requesting a **discretionary determination** under the LOB provision. If a request is submitted for more than one entity, a separate user fee is charged for each entity. **Rev. Proc. 2006-54, section 14.2, as amended by IR 2012-38.**