

DOING BUSINESS IN THE UK



GOWLING WLG



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INTRODUCTION



The UK is regularly listed as one of Europe's top destinations for foreign investment according to figures published by UK Trade & Investment. The UK is definitely sending out the message that it's open for business.

According to UK Trade & Investment, the UK is currently the number one destination for foreign direct investment in Europe. More companies locate their European HQs in the UK than anywhere else in Europe. Companies based in the UK can now reach more than 500 million consumers throughout the European free trade zone. The UK also has free or preferential trade agreements with many non-EU countries.

The exact terms and timing of the UK's withdrawal from the European Union ("EU") following the "Brexit" referendum vote remain unknown. But according to studies published in 2014 by the World Bank and Ernst & Young, it's already easier to do business in the UK than in any other major European economy. And the UK Government has given clear indications that Britain will remain open for business come what may.

The common language, similar cultures, relative lack of red tape and increasingly attractive tax regime are all factors that make the UK a preferred choice for many US corporations coming to Europe for the first time.

Red tape is increasing throughout the world and Europe is no exception - the increased influence over time of the European Union on individual European states has led to an increase in regulation. Thankfully, in the UK, with the exception of certain industries (finance and utilities being the two main examples), the regulatory environment is relatively "light touch", and the UK Government has committed to reduce the red tape burden on UK businesses still further. It's possible, although by no means certain, that "Brexit" may allow more of these reductions.

The tax regime here is an increasingly competitive one, with corporation tax due to reduce to just 17% by 2020. There are also many other tax breaks. Where companies are generating their own intellectual property in the UK, for example, there is a generous research and development credits scheme, which is generally accepted to reduce R&D costs by up to 25% (depending on the size of the business). In addition, worldwide profits of UK companies that are attributable to income arising from the exploitation of patented inventions can attract "patent box" treatment and will be taxed at only 10%. These factors combine to make the UK attractive not only as a European holding company location, but also as an IP holding jurisdiction or for a top company in US pre-IPO re-organisations.

Doing business in the UK \ Section 1: Corporate

SECTION 1: CORPORATE



LEGAL BACKGROUND

The main legislation dealing with company matters is the Companies Act 2006 ("Companies Act"). Typically, when US corporations come to the UK they will set up either:

- a subsidiary (typically a private limited company, which will be a separate legal entity and a wholly-owned subsidiary of the US corporation); or
- a branch (which is an extension of the US corporation itself, requiring public filing in the UK to tell the world that the US corporation is now doing business in the UK).

Why would a corporation prefer one route over the other?

(a) Subsidiary

When corporations decide to enter the European market for the "long haul", they commonly decide to create a local legal entity to employ people, enter into contracts and ring-fence liabilities. The UK has proved to be a very popular entry point into Europe and it therefore makes sense for many US corporations to create a UK subsidiary to help manage that move. To the extent that the group wants to expand further into Europe, it can either do this via the UK legal entity (setting up a series of European branches) or by creating further subsidiaries in the various other European states.

Establishing a subsidiary is often seen as a way of providing greater confidence and certainty for building business relationships – whether employees or business partners.

(b) Branch

Some companies feel that if they are testing a market, they do not want to bear the cost of a full legal entity set-up. It is quite possible for a US corporation to trade in the UK without a subsidiary – they must simply inform the UK Companies Registry (and the tax authority, HM Revenue & Customs) that they have a UK place of business (a "branch"). All the contracts made by the branch (including with employees) will be entered into by the main US trading entity, which will bear all the related obligations and liabilities.

(c) Accounting aspects

Accounting aspects have an important role to play in the decision making also: subsidiaries must file their own annual accounts at the UK Companies Registry, while branches must file accounts that will include details of their US parent corporation's finances. Local accountancy advice should always be sought. We can put you in touch with a local accounting firm if this is helpful.

Part 1: Corporate Issues relevant to a potential UK subsidiary

All limited companies in the UK are registered at Companies House, an executive agency of the Department for Business, Energy & Industrial Strategy. The main functions of Companies House are to:

- (a) incorporate and dissolve limited companies;
- (b) examine and store company information delivered under the Companies Act (including annual accounts and an annual "confirmation statement", which sets out key details in relation to the company such as the names of directors and shareholders); and
- (c) make the above information available to the public.

NAME

Under English law, the name of a private company (i.e. a company which cannot have its shares traded on a stock exchange) must end with the word "Limited" of which the permitted abbreviation is "Ltd".

The existence of a company does not of itself give any proprietary rights over the words comprised in its name as a business name or a trade mark. If required, we can advise you on trade mark registration that you might want to consider.

There are a number of boxes which need to be ticked in order to avoid your name choice being rejected by the Registrar of Companies:

- no two English companies can have the same (or very similar sounding) name (the Companies House website has a service allowing you to check this); and
- a company name cannot contain any sensitive or offensive words.

SHARE CAPITAL

Under English law, there is no maximum share capital limit. There is no minimum permitted share capital for a private company (although it must be more than zero). "Thin capitalisation" tax rules may penalise companies that have a high ratio of debt to share capital. A private company must have at least one shareholder (also known as a "member"), who must hold at least one share.

It would also be worth considering at this stage the possibility of having more than one class of share. Having different classes of share allows different shareholders to have different rights in respect of, for example, dividends, voting and the ability to transfer shares.

The ability to create an ownership structure with different classes of share is especially useful if you are looking to attract private investment as investors may require different rights to attach to their shares.

Subject to any restrictions in the company's constitution, shares are transferable by a simple printed transfer form and when a transfer takes place transfer duty, currently at the rate of 0.5% of the price paid, is payable by the transferee. However, when the transfer is between members of the same group or for a price below £1,000, no transfer duty will usually be payable. Shares traded on the AIM market are also exempt from transfer duty.

DIRECTORS

Formally a company will be managed by its directors. They will act both collectively (i.e. as a board of directors meeting periodically) and (particularly as regards executive directors) as individuals, under actual or ostensible authority as agents of a company.

English law does not have any nationality or residence requirements in respect of directors. The minimum number of directors is usually two (although it is permissible to have a sole director provided he or she is a natural person) and there is no maximum permissible number, although it could be inconvenient for a small company to have more than about five directors.

At least one director must be a natural person, i.e. not a corporate entity.

Until now, it has been common for UK companies to have directors that are themselves corporate entities. The law is changing so that by October 2017, with a very few exceptions, all UK company directors must be natural persons, not corporate entities.

One of the directors will usually be appointed chairman of the board of directors, who will also usually act as chairman at any general meetings of shareholders.

Please note that if the majority of the directors are from an overseas country, this could lead to central management and control of the UK subsidiary being exercised there. This may cause the UK subsidiary to be regarded as dual resident by HM Revenue & Customs (UK) and as resident in the overseas country by that country's tax authorities.

The only formal requirement for board meetings is that at least once a year a meeting must take place (or alternatively written resolutions must be signed by all the directors; see below) in order to approve the annual accounts. Whether board meetings should take place more frequently (and possibly at regular intervals, such as every month or every three months) is a matter for your commercial decision. Articles of Association usually provide for resolutions of the directors to be

passed without holding a meeting, by circulating the resolutions for signature by all directors. They can also provide for a director to participate in a board meeting by means of a conference telephone or video conference facility.

The incoming directors would be appointed by a resolution of the existing directors. Before the incoming directors can be formally appointed, they must give their written consents.

You should also be aware that:

- a) a director who is an individual must be at least 16 years old;
- b) directors are subject to detailed duties and responsibilities under the Companies Act.

If required, we can advise incoming directors on their personal duties and responsibilities as directors under English law.

SECRETARY

A UK company may have a secretary, who is an officer of the company, but there is no longer a requirement for a private company to have one. The secretary may be, but does not have to be, one of the directors; and another individual or company may act as secretary.

English law imposes a significant number of duties on the secretary, including the maintenance of minute books and registers. Although English law does not have any nationality or residence requirements in respect of the secretary, nevertheless as a practical matter the secretary is usually a UK resident.

We can provide company secretarial services to the subsidiary for an annual fee of £695 plus VAT and disbursements on the basis that the services are restricted to maintaining the minute books and registers, and ensuring compliance with specified Companies House requirements.

REGISTERED OFFICE

A UK company must have a registered office in England or Wales. This is the address for formal service of legal proceedings and other formal documents. It does not need to be (although in practice it frequently is) the principal, or indeed any, place at which your subsidiary carries on business.

We can provide a registered office services to the subsidiary for an annual fee of £695 (£895 for a London address) plus VAT, provided that the subsidiary also uses and pays for our company secretarial service as set out above.

As a practical matter, it is often convenient that the secretary should be based where either the registered office or the principal place of business is located. The registered office can be changed at any time with little formality (a board resolution and a form which is filed at Companies House). The only significant consequence of a change of registered office is that the tax district to which the subsidiary makes its corporation tax returns may change.

AUDITORS

A UK company must have auditors, who will be a firm of accountants (unless the company is exempt from the requirement that its annual accounts be audited in accordance with the Companies Act, for example, it meets the conditions of the small companies exemption). For companies whose financial year ends on or after 1 January 2016 they will qualify for an audit exemption if they meet two of the following criteria: (i) they have an annual turnover of no more than £10.2 million; (ii) their balance sheet total is no more than £5.1 million; (iii) they have on average 50 or fewer employees.

An auditor's role is not to act as book-keepers (although it is permissible for a firm of accountants which provides book-keeping services also to act as auditors) but in effect to represent the interests of creditors and of shareholders and to ensure that the annual accounts have been prepared in accordance with the requirements of the law and of financial reporting standards, giving a true and fair view of the company's position at the financial year-end.

A company's auditors have a right of access at all times to its books and accounts and also to receive notices of and attend shareholder meetings and speak at them on any part of the business which concerns them as auditors.

CONSTITUTIONAL DOCUMENTS

A UK company will have two constitutional documents, the Memorandum of Association and the Articles of Association.

The Memorandum of Association, which must be in a prescribed form, simply states that the subscribers wish to form a company under the Companies Act and have agreed to become members and, in the case of a company that is to have a share capital, to take at least one share each. It must be authenticated by each subscriber.

The Articles of Association will regulate the way in which the company is conducted, dealing with matters such as the payment of dividends, appointment/removal of directors, transfers of shares and proceedings at director and shareholder meetings. Articles of Association often incorporate the statutory "Model Articles", which comprise model articles, prescribed by regulations made under the Companies Act, and amend certain provisions accordingly.

The unaltered form of Model Articles are automatically adopted by a company in cases where a company does not submit any other Articles of Association with Form IN01.

When deciding whether to rely on the Model Articles alone, consideration should be given to the wide range of uses the Articles of Association can be put to, and how they can meet the needs of your company.

As the document which governs the proceedings of the company, the Articles of Association can include provisions to cover all manner of subjects such as voting rights, dividend rights, termination of directorships, and the sale of shares.

This can be particularly important if an equity investor is involved. It may be equally important when considering who will be the members of the new company.

For example, it may be important to a potential shareholder that they have an equal number of shares to you. However, through the Articles of Association, you can agree that you retain a majority of the shareholder votes despite having an equal number of shares.

A further document which you may wish to consider creating (albeit one to which the company may not necessarily be a party) is a shareholders' agreement.

Rather than governing the relationship between the shareholders and the company, this document governs the relationship between shareholders. It can be another useful document when determining what rights different shareholders are to have.

As can be seen from the above, the constitutional documents of a company are a critical aspect to the formation of a company. If you would like help or advice in creating a tailored set of Articles of Association or shareholders' agreement, we would, again, be happy to assist.

ARTICLES OF ASSOCIATION – EXAMPLE PROVISIONS

- **Dividends:** this article will deal with the important matter of when dividends are paid, in what proportion and to whom. Different types of shares may carry different rights to dividends.
- **Exit/Liquidation:** these articles dictate how the proceeds from the sale of the company or its liquidation are divided up between the shareholders.
- **Voting rights:** this article details the voting rights attached to each class of shares.
- **Anti-dilution protection:** this article may be included by the investor to protect it against future investments that occur at a lower price per share than the price paid by them at the time of their investment. This article can provide that the initial investor receives additional "bonus" shares if a lower priced investment occurs in the future.
- **Allotment of shares:** this article dictates whether new shares must be offered to existing shareholders before any third party (to prevent dilution of shareholdings).
- **Transfers of shares:** these articles dictate whether shares can be transferred by any of the shareholders and to whom. There is likely to be a list of transfers that are "permitted". If a transfer is not permitted or otherwise approved by the company, the shareholder may be required to first offer their shares to the existing shareholders before selling them to a third party.

OTHER FORMALITIES

As indicated above, UK companies have to maintain certain registers and minute books. The most important of these "statutory registers" is the register of members, which sets out ownership of the company's shares.

UK companies must maintain a register of "persons with significant control". The information on this register must be filed at Companies House. Persons with significant control may be the holders or controllers of a substantial minority (over 25%) of the company's shares or voting rights or may have or control the right to appoint a majority of the company's directors. They may also have significant control by other means such as being a dominant customer of or supplier to the company. These measures are aimed at preventing the concealment of the identity of those who in reality control the company's actions.

A UK company must show in all of its business letters, orders, invoices and other business documents, its name and business address, its country and number of registration and the address of its registered office.

COMPANY MATTERS – SHAREHOLDER THRESHOLDS AND RESOLUTIONS

The key percentage thresholds for a shareholder are as follows:

- (a) holding shares that have more than 50% of a company's votes attaching to them; and
- (b) holding shares that have 75% of a company's votes attaching to them.

The above thresholds are a result of the below principal types of shareholders' resolution.

- (a) An ordinary resolution, passed by a simple majority of votes cast by shareholders present and voting at a meeting of which the relevant notice has been given, is effective (among other matters) to appoint auditors and appoint/ remove directors.

- (b) A special resolution, passed by a 75% majority of votes cast by shareholders present and voting at a meeting of which the relevant notice has been given, is required (among other matters) to alter the Articles of Association, change the company's name (unless the Articles of Association provide that the company's name can be changed by other means, for example, a resolution of the directors), reduce capital or place the company into voluntary liquidation.

WRITTEN RESOLUTIONS

It is possible for private companies to dispense with meetings altogether and pass members' resolutions in the form of written resolutions agreed and signed by the relevant majority (or, in the case of a single member company, such as some wholly-owned subsidiaries, the sole member).

Part 2: Alternatives to Incorporation

UK establishment

Alternatives to incorporating a UK subsidiary would be to create a UK establishment. An establishment is defined broadly as a "branch" or any place of business that is not such a branch. A place of business would be anywhere that a company regularly conducts business or premises that indicate that a company may be contacted there. A branch conducts business on behalf of a company, not just business which is merely ancillary or incidental to the company's business as a whole. A branch allows a company to conduct business through local representatives in the UK rather than referring abroad.

In addition to the Companies Act, the main legislation dealing with a UK establishment is the Overseas Companies Regulations 2009.

UK establishment registration, filing and disclosure requirements

- (a) a completed Form OSIN01 (giving details about the company and its officers);
- (b) a certified copy of the company's constitutional documents;
- (c) a copy of the latest set of audited accounts required to be published by the parent company's local law; and
- (d) the current registration fee (currently £20 or £100 for a same day service).

If there are changes to any of the information submitted then updates must be submitted to Companies House on one of a number of specified forms within 21 days of the change. We can advise in respect of any filing that needs to be made at Companies House.

UK establishments of overseas companies whose parent law requires the publication of accounts which have been audited must deliver a copy of those accounts within three months of public disclosure.

The UK establishment of an overseas company incorporated in an EEA state which is not required by its parent law to deliver accounting documents does not have to file any accounts at Companies House.

All other UK establishments of overseas companies whose parent law does not require the publication of audited accounts must, within 13 months of a company's accounting reference date, deliver accounts to Companies House that comply with UK company law. Such accounts would relate to the wider parent group and not solely to the UK establishment.

UK company law requires for these purposes accounts consisting of, as a minimum, a balance sheet and profit and loss account, with a minimum of notes. No directors' or auditors' report is required, neither are details of directors' emoluments or pension contributions. A filing fee is payable on filing each set of accounts.

SECTION 2: TAXATION



GENERAL

Once you carry on business in the United Kingdom ("UK"), you will be subject to UK corporation tax on profits either as a result of trading through a permanent establishment (including branch) in the UK (a "UK PE") or through a UK subsidiary. The tax position for a UK PE and for a UK resident subsidiary is broadly similar. The UK has no separate branch profits tax for a UK PE.

A company is tax resident in the UK if it is incorporated in the UK or otherwise if it is managed and controlled from the UK. Non-UK resident companies not trading through a UK PE are liable to UK income tax at the basic rate (currently 20%) on UK source income (e.g. a rental stream on property).

A UK resident subsidiary is subject to UK corporation tax on its worldwide profits (i.e. wherever in the world they have arisen, and whether they are income or capital in nature). In respect of those profits which are also taxable in a non-UK jurisdiction, double taxation relief will normally be available via a relevant double taxation treaty (of which the UK has more than 100) or unilaterally. In addition, provided certain stringent conditions are met, a UK resident company can elect to operate an exemption from UK tax for all of its foreign permanent establishments.

A non-UK company with a UK PE is subject to UK corporation tax on all profits derived from any trade carried on through that UK PE. These profits may also be subject to corporate income tax in the company's jurisdiction of residence, although credit may be available in that jurisdiction for the UK corporation tax paid on these profits.

The rate of corporation tax is 19% for the financial years beginning on 1 April 2017, 2018 and 2019. It will reduce to 17% from 1 April 2020.

A UK PE or a UK resident subsidiary must register with HM Revenue and Customs ("HMRC") within three months of commencing business. The UK PE/subsidiary will become liable to account for corporation tax on the expiry of nine months from the end of the accounting period to which the tax relates. Large companies have to make quarterly payments of corporation tax. The UK PE/subsidiary will need to appoint accountants (or other service providers) to deal with its tax compliance needs.

The UK has a general anti-abuse rule ("GAAR"). This means that arrangements to avoid taxation may be invalidated (even if they would previously have been lawful) if they are deemed to be "abusive". The rule is designed to counteract what was previously regarded as technically lawful but "aggressive" tax planning.

The GAAR is an additional weapon in the arsenal of HMRC. There are also many specific anti-tax avoidance provisions. For example:

- Large groups contriving to avoid creating a UK PE that would otherwise bring a non-UK company into the charge to UK corporation tax may be subject to "diverted profits tax" (DPT) in the UK. The rate of DPT is purposely higher than the UK corporation tax rate (to discourage this sort of contrived behaviour), and is currently 25%;
- If a non-UK company makes profits from a trade of dealing or developing UK land, then it can be subject to UK corporation tax – whether or not it has a UK PE.

The UK courts have also developed a common law doctrine of "looking through" (i.e. disregarding) artificial arrangements and transactions the sole or main purpose of which is to avoid tax.

In spite of this doctrine, the GAAR and specific anti-tax avoidance rules, there remain opportunities for creating tax efficiencies upon which we can advise.

PAYMENT OF DIVIDENDS

Once you carry on business in the UK, you will be subject to UK corporation tax on profits either as a result of trading through a UK PE or through a UK subsidiary.

Repatriation of profit from a subsidiary is by dividend. Dividends can only be paid out of accumulated realised profits, and any losses have to be made good before dividends can be paid. A dividend paid by a UK resident company is made out of post-tax profits, and is therefore not deductible in computing taxable profits.

The UK does not impose withholding tax on dividend payments, whether made to a UK resident or non-UK resident shareholder.

Profits earned by a branch can be repatriated to the parent company at any time; there is no branch profits tax to be withheld.

Individuals in receipt of dividend income benefit from a tax-free dividend allowance of £5,000 per tax year. The amount of UK tax payable in respect of this income is decided by which of the tax bands the individual is in:

- (a) Basic rate tax payers will pay 7.5% on their dividend income from shareholdings above £5,000 a year;
- (b) Higher rate tax payers will pay 32.5% on their dividend income from shareholdings above £5,000 a year; and
- (c) Additional rate tax payers will pay 38.1% on their dividend income from shareholdings above £5,000 a year.

PAYROLL TAXES

A UK PE/subsidiary which employs individuals to work in the UK will be required to deduct income tax under the pay as you earn system (known as PAYE) from all payments of salary and bonuses made to those individuals.

Subject as set out below, social security payments known as National Insurance Contributions ("NICs") are also payable both by the employee and the employer. The employer deducts the employee's contribution (generally at a rate of 12% or 2% depending on level of earnings, with certain exceptions) from payments of salary when made to the employee but the employer's contribution is made in addition to the employee's and may not be recovered from the employee (so is an additional cost for the employer). Currently employer's NICs are charged at the rate of 13.8% of the gross salary paid to the employee. Every business is entitled to an annual "employment allowance" of £3,000 to reduce its liability for the employer's contribution.

If employees are coming to work in the UK from another country in the European Economic Area and they hold certain certificates issued in that country, UK national insurance will not be payable in respect of those individuals until expiry of that certificate. Similar exemptions may apply for workers coming from other jurisdictions.

As soon as a UK PE or subsidiary employs any individuals it should inform HMRC and establish a payroll system (this can be outsourced to a payroll services provider).



PATENT BOX

The UK's "patent box" regime gives a reduced effective rate of corporation tax (from 1 April 2017, 10%) on worldwide income derived from the commercial exploitation of patents. By doing so it provides an incentive to monetize IP rights in the UK – by encouraging companies to retain valuable IP rights in the UK, and by attracting IP investment and commercial exploitation to the UK.

A company will qualify for the reduced rate if it owns patents in qualifying intellectual property rights (broadly, UK and European patents) or owns an exclusive licence in respect of those rights. Income qualifying for the reduced rate includes income derived from the sale of patented items or those incorporating a patent; licensed-in patent rights; and compensation for patent infringements.

The "patent box" regime is in addition to the "research & development tax credit" regime. This regime encourages the creation of IP rights in the UK.

INTEREST DEDUCTIONS FOR DEBT

Interest on debt is generally deductible when calculating profits liable to UK corporation tax. This general rule is subject to various anti-tax avoidance provisions such as transfer pricing and thin capitalisation.

Influenced by the outcome of the OECD's BEPS project, the UK has introduced (with effect from 1 April 2017) a new restriction which caps relief for those groups paying net interest in excess of £2 million. Broadly, a UK corporate group can claim a deduction for net interest but it is capped at 30% EBITDA. An international group has the same cap, but it may elect (for UK tax purposes) to cap its deduction for net interest on a different basis (broadly, by reference to the ratio of its worldwide net interest exposure to its accounting EBITDA).

The restriction includes interest paid to non-related parties. Excluded from the restriction is interest expense incurred to finance public infrastructure (including real estate let to third parties).

VALUE ADDED TAX ("VAT")

VAT is a UK sales tax.

The UK PE/subsidiary is likely to need to register in the UK with HMRC for VAT purposes.

VAT is charged, very broadly, on all supplies of goods and services made (or deemed to be made) by a business in the UK. If the UK PE/subsidiary is registered for VAT and uses the supplies it receives for taxable business purposes, then it will receive credit for VAT it incurs. For most businesses in a supply chain, the impact of VAT is largely neutral, as the business can recover the VAT that it pays on supplies. The exception to this is business that is classified as exempt – and this includes finance and insurance business.

VAT is also chargeable on the importation of goods into the UK from outside the EU. Special rules apply for supplies received from within the EU.

There are four main categories of supply for UK VAT purposes: standard rated: 20%; reduced rate 5%; zero rated 0%; and exempt - outside the scope of VAT. Most supplies are standard rated.

If a person (whether through a UK PE or a subsidiary) makes taxable supplies in the UK and the value of those supplies (ignoring those supplies that are exempt) exceeds at the end of any month:

- (a) a specified limit (£85,000 for 2017/18) in the year then ended; or
- (b) there are reasonable grounds for believing that the value of the taxable supplies in the next 30 days will exceed the specified limit, that person should notify HMRC and register for VAT. There are financial penalties for failing to do so.

A person without a UK VAT establishment is required to notify HMRC and register for VAT where it makes any taxable supplies in the UK.

Where turnover is below the specified limit a person may voluntarily register for VAT (in order to recover VAT charged to it).

STAMP TAXES

Stamp duty is payable on any transfer (but not on the first issue) of shares in a company and certain other securities (although shares traded on the AIM market are exempt from stamp duty). Stamp duty is charged at 0.5% of the price paid for the shares.

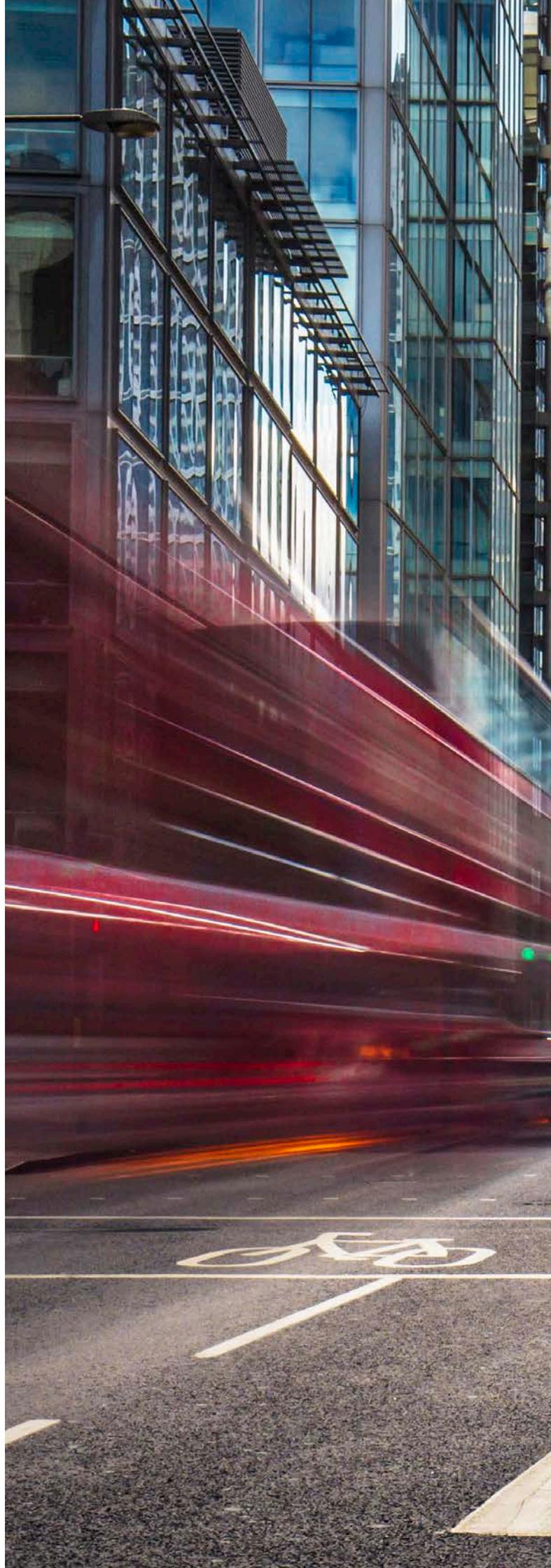
Stamp duty land tax is payable on the acquisition of most types of UK real estate. It is charged by reference to the price paid for the real estate (including rent under a lease). It is a liability of the person acquiring the real estate. It is charged at various rates that are applied to slices of the price. Acquisitions of commercial real estate attract rates of up to 5%. Rents are charged at 1% of the net present value. Various reliefs and exceptions may be available.

Help is at hand

We would be delighted to guide you through the rules set out above, and to help you manage your tax requirements, liabilities and risks when coming to the UK to do business.

We can provide legal technical advice and help design tax strategies tailored to your business. We can recommend other service providers to help you with your tax compliance obligations.

Where other advisers propose tax-efficient structures for your business or the use of a tax planning scheme, you should always seek legal advice. We provide an independent "tax audit" and review service to ensure you understand and appreciate the tax risks involved.





SECTION 3: MISCELLANEOUS



EMPLOYEES

UK employment law is based on contract. It is part of the "Anglo-Saxon" tradition of employment, rather than the Continental European model which is less "contract-based" and much more state-regulated. An exception is in relation to transfers of undertakings (see below).

In the UK, employment relationships are governed by contract law but within a statutory framework comprising both domestic and, at least for the time being, European Union law.

England and Wales, Scotland and Northern Ireland each have separate legal jurisdictions and systems. Contract law in each country is largely the same, although there are some differences in Scotland. The statutory employment protection legislation is common to England, Wales and Scotland. While employment law in Northern Ireland is very similar, there are some differences particularly with regard to discrimination law addressing sectarian religious belief and political opinions.

All employees in the UK work under a contract of employment, whether in writing or not. A written employment contract is not required but is commonly provided to ensure that the intentions of both parties are clear. UK law requires that the employee is given a "Statement of Particulars of Employment" containing information about the main terms of the employment within eight weeks of their start date.

There are three main categories of employment status: employees, workers, and the self-employed. The rights enjoyed by an individual under employment protection legislation flow from their employment status. At one end of the employment status spectrum are "employees" who are afforded the greatest level of protection. Rights which apply only to "employees" include the right to claim unfair dismissal, statutory notice periods, redundancy pay, the rights to maternity/paternity/parental leave and the right to request flexible working.

At the other end of the spectrum are the self-employed who are not entitled to employment protection rights. This category includes those who are genuinely in business on their own account.

Somewhere in the middle are "workers" who are entitled to some key employment rights, including national minimum wage, holiday pay and rest breaks, discrimination and whistleblowing protection, and pension auto-enrolment.

We can advise you on the difficulties that often arise in identifying the boundaries of these three categories which often appear blurred.

Workers are entitled to be paid the National Minimum Wage (NMW), which is reviewed on an annual basis.

The current hourly rate for workers 25 and over is £7.50 (rising to £9.00 per hour by 2020) and known as the "National Living Wage". For workers aged 21 to 24 the NMW rate is £7.05. Lower minimum amounts apply to younger employees and apprentices.

There is a statutory sick pay scheme by which the employer must provide a minimum level of sick pay for up to 28 weeks. This can no longer be reclaimed from the state. Many UK employers offer sick pay schemes that exceed the statutory minimum though this is not mandatory.

Working time and holidays are regulated under the Working Time Regulations 1998. Employees cannot, in general, be required to work for more than 48 hours per week (averaged over a 17 week period), although they can agree to opt out of this restriction. Employees are also entitled to a minimum of 5.6 weeks holiday per annum for full-time employees that equates to 28 days each year. There is no obligation to give workers holiday on public holidays, but it is common to do so (forming part of the 5.6 week entitlement).

UK law also provides for specific "family-friendly" employment rights. Employees, subject to certain qualifying conditions, may have rights to maternity pay, paternity leave and pay, and adoption leave and pay. Specifically, female employees, regardless of their length of service, can take up to 52 weeks of maternity leave, and may be entitled to maternity pay depending upon the level of their earnings and their length of service. Statutory maternity pay is 90% of "normal" pay for the first six weeks of maternity leave and then at the lower rate of £140.98 (or, if lower, 90% of "normal" pay) for up to a further 33 weeks (current in 2017 - rate normally reviewed annually). Mothers can choose to curtail their maternity leave and opt into "shared parental leave". This enables mothers to elect to convert a portion of maternity leave so that up to 50 weeks' leave and 37 weeks' pay can be shared between both parents.

For any employees who have 26 weeks' continuous service and high enough earnings statutory maternity pay must be provided. Much of the cost of this can be recouped from the government and it is worth checking the specific regulations on the government's website.

Statutory paternity leave and pay of two weeks' salary is also available to fathers who have been employed for more than 26 weeks within 56 days of the birth of a child.

All parents (fathers, mothers and adoptive parents) who have one year's service are entitled to up to 18 weeks of unpaid parental leave. Parental leave can be taken any time before the child's 18th birthday. No more than 4 weeks unpaid parental leave can be taken in any given year.

Part-time workers must not be subjected to less favourable treatment than full-time workers on the basis of their part-time status. Where possible the benefits for full-time workers should be pro-rated for part-time workers.

After 12 weeks' service, agency workers have a right to the same basic working and employment conditions as employees recruited directly by the hirer. Employers can choose to "opt out" of this right, but in return they must pay agency workers for a minimum of four weeks between assignments (if there is no alternative work).

There is no legal requirement for employers to provide for medical insurance but it is not uncommon to do so.

Non-compete provisions and other post-termination restrictions are not generally enforceable as being in restraint of trade. However, an employer may enforce these if they protect a legitimate business interest, go no further than is required, and in addition are reasonable in scope. Non-compete provisions should be tailored to the relevant employee's role to ensure that the provisions are appropriate and reasonable in the circumstances. The reasonableness of a restrictive covenant is judged at the time it was entered into, not when the employer seeks to enforce it. It is important to review restrictive covenants particularly when an employee is promoted.

Employers in the UK are required to enroll all eligible workers into a qualifying workplace pension scheme. Enrolment is automatic for all eligible workers unless they actively "opt out" of their workplace pension. The employer is obliged to pay mandatory minimum contributions.

There is no "employment at will" in the UK. Employment is terminable either by giving notice, or in limited and exceptional circumstances, with immediate effect. The statutory minimum notice periods (dependent on length of service) that employers are required to give are as follows:

- (a) For employees with one month to two years' service, one week's notice.
- (b) For employees with more than two years' service, one week's notice per completed year of service up to a maximum of 12 weeks.

Employees must give at least one week's notice of termination. Notice periods can be extended by contract.

If an employee's job becomes redundant he/she will be entitled to a statutory redundancy payment, provided that he/she has been employed for at least two years. Broadly speaking, a redundancy situation arises where there is (i) a business closure, (ii) a workplace closure or (iii) a need to reduce the workforce. The entitlement will depend on age and length of service but will not exceed £14,670 (rate reviewed annually).

If an employee is dismissed after more than two years' service then he/she will have the right not to be unfairly dismissed. A dismissal will be unfair unless:

- (a) there was a valid reason for dismissal (i.e. one of the statutorily prescribed reasons); and
- (b) the dismissal was handled in a way that was procedurally fair.

Any compensation awarded for a finding of unfair dismissal will be made up of two elements: a basic award (which operates in the same way as the statutory redundancy payment) and a separate award to compensate the employee for loss of income which can be up to £80,541 (rate reviewed annually) or 12 months' salary, whichever is the lower.

The Equality Act 2010 protects employees and workers from discrimination on the basis of certain characteristics, known as "protected characteristics". These are; age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Discrimination law covers the whole of the employment cycle. It impacts job adverts and the recruitment process, terms and conditions of work, conduct during employment, dismissal and any work-related matters arising after employment has ended, such as giving references. Compulsory retirement will amount to a form of age-related discrimination, unless it can be objectively justified.

If an Employment Tribunal finds an employee has been discriminated against they can award compensation, which is uncapped.

Employers must give men and women equal pay, terms and conditions. Gender pay gap reporting requirements for employers with more than 250 employees have been in force since April 2017.





USING OVERSEAS WORKERS

With the exception of Croatian nationals, overseas workers from within the European Economic Area (EEA) or Switzerland currently have the right of free movement to live and work in the UK. Following the UK's vote to leave the EU in 2016 these rights of free movement are uncertain and may cease in the future. However, the UK has two years to negotiate its exit from the EU and until then EEA and Swiss nationals can continue to live and work freely in the UK.

Migrant workers from outside the EEA and Switzerland are subject to a points based immigration system. There are some limited exceptions to this system including for sole representatives of overseas businesses intending to set up a wholly-owned subsidiary or register a UK branch for an overseas parent company although eligibility requirements apply.

If you are planning to engage overseas workers we can advise you on the best way of formalising those arrangements.

The provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") apply to many mergers, acquisitions and outsourcings in the UK. TUPE is the UK implementation of the European Union Acquired Rights Directive. In simple terms, TUPE provides that the employment of the employees working in a purchased business or service provision will transfer on the same terms and conditions of employment (excluding some pension provisions) to the new owner or service provider. It is not generally possible to contract out of TUPE requirements. There is as yet no indication that "Brexit" will have any effect on the imposition of TUPE rights as they currently exist.

Under the Public Interest Disclosure Act 1998, workers who "blow the whistle" on their employer by making a protected disclosure (i.e. a disclosure concerning an alleged criminal offence or other wrongdoing) have the legal right not to be dismissed, selected for redundancy or subjected to any other detriment for having done so.

The Bribery Act 2010 requires organisations to implement a programme to prevent bribery and ensure there are "adequate procedures" in place to prevent bribery being committed on its behalf.

In contrast to other EU member states, works councils are rare in the UK. Employees are only normally collectively represented through trade union recognition (relatively low in the private sector) or where statute requires employee consultation, most notably in relation to collective redundancies (20 or more redundancies within a 90 day period) and transfers of undertakings. Crucially, no consultative body has the power to block or even delay any actions of the employer, albeit there may be financial penalties to reflect failures to comply with specific statutory requirements.

When it comes to employment law, the best option is always to avoid problems in the first place. Our team can help you to reduce risk while ensuring managers act commercially.

DATA PROTECTION

Member States of the European Economic Area are required to implement the "Data Protection Directive" which is intended to protect the personal data of individuals. This Directive has been implemented into UK legislation by the Data Protection Act 1998 (the "DPA") and is enforced in the UK by the Information Commissioner's Office. Individuals also have the right to take direct action for breaches of the DPA which cause them to suffer any damage or distress. There is as yet no indication that "Brexit" will have any effect on existing UK data protection law.

The DPA applies to all "data controllers" who process personal data in the UK. A data controller is an entity or person determining the purpose for which and manner in which personal data is processed ("processing" covers just about anything that can be done with personal data). There are two fundamental requirements of the DPA which data controllers must comply with (subject to some exceptions to the rule) and these are:

(a) Having a notification with the Information Commissioner's Office. This is a publicly available record which is submitted to the Information Commissioner's Office detailing what personal data is processed by a data controller and for what purposes and also whether personal data is transferred outside of EEA countries. Unless exempted from the obligation to notify, failure by a data controller to notify is a criminal offence. Please do let us know if you would like us to assist with an assessment of whether any notification exemptions apply and, where notification is required, with putting a notification in place;

(b) Compliance with the eight Data Protection Principles. We have not set out the detail of these principles here (although we would be happy to provide more detail and assistance if required) but essentially, they address issues of transparency, adequacy, accuracy, retention and security of personal data. The eighth principle is commonly particularly key for any data controller that transfers personal data outside of the EEA, which is prohibited unless it is adequately protected. We regularly advise our clients on what constitutes adequate protection for the purpose of the eighth principle and help implement necessary measures to enable transfers of personal data.

Compliance with data protection law is of increasing importance for any business handling personal data. On 25 May 2018, the new General Data Protection Regulation ("GDPR") will come into force. Under the GDPR, both data controllers and data processors will be subject to much more onerous obligations, and risk facing large fines of up to €20 million or 4% of annual turnover (whichever is greater) for non-compliance. It is vital to implement good data protection practices now, in order to future-proof your business against the risk of non-compliance in order to avoid the risk of such fines and damage to your business's reputation and brand.

It is not yet clear to what extent, if any, the UK will be obliged to implement future EU laws as a term of "Brexit". If you would like advice on getting ready for GDPR, our Information Law team is able to assist.

INTELLECTUAL PROPERTY

Intellectual property ("IP") includes patents, designs, copyright (covering for example written and artistic works such as web pages, product brochures and software), database rights, registered trade marks, rights in passing-off (a cause of action essentially protecting unregistered trade marks/branding) and rights in trade secrets (e.g. in customer lists and manufacturing processes).

Some IP rights (e.g. copyright, unregistered design rights) arise when automatically provided subsistence criteria are satisfied, which may, for example, depend on the nationality or employment status of the author. Other IP rights arise on registration (for example patents, registered trademarks, registered designs).

The jurisdictional reach of an IP right covering the UK depends on the type of right. For example, a trade mark may be registered for the UK or as a European Union Trade Mark ("EUTM"). Patents may be registered for the UK or as a European Patent designating the UK; in each case the territorial scope of the granted right is limited to the UK. Registered and unregistered designs are available or may arise limited to the UK or covering the EU. Copyright protection is currently national in scope although rights may arise in other EU countries (or indeed in the UK) pursuant to international treaties.

Particularly for technology companies, copyright is an important asset. Copyright arises immediately on the creation of an original literary work or artistic work. "Original" in this context means that the author must have created the work through his own skill, judgment and individual effort (only minimal effort is required) and that it is not copied from other work.

Like trade marks, designs can be registered or unregistered. If you have a potentially valuable and original 2D or 3D design, it may be wise to register and exploit it. We can help in this assessment.

Certain works can also be protected as confidential information, which means that they could be monopolised forever (e.g. the Coca-Cola recipe) or at least for as long as you can keep the work secret.

However, protection as confidential information can be relatively unreliable in comparison to patent protection since it depends on strict working practices, the honesty of those involved and their respect for secrecy. Once the information is leaked, its value is lost and no patent protection can be sought.

Generally under UK legislation, any IP created by an employee (i.e. someone employed under a contract of service rather than an independent contractor under a contract for services) in the course of their employment is owned by their employer. However, the employer's rights can in some cases be extended by contract and/or the duties of the employee in relation to IP creation can be made more specific. We can advise and assist in the preparation of any service agreements to protect your interests to the fullest possible extent to ensure that, for example, employees cannot use the materials for their own purposes if they were to set up their own business having left the company. However, it is not possible to protect generally transferable knowledge and skills developed through the course of employment.

If IP is created for you by an independent contractor (e.g. software developers or website designers) the IP will generally be owned by them, subject to any agreement to the contrary. Therefore it is important to obtain assignments of IP when dealing with contractors.

It should be remembered that trade marks are territorial in scope. Trade marks are only protectable in the UK where they have been registered for the UK or as an EUTM (i.e. covering the UK) or where goodwill has arisen in the UK, which will almost always require trading activity within and focused upon the UK. This means that it is possible that the trade mark that you currently freely use at home may infringe someone else's trade mark when you start to use it in the UK. In addition, the trade mark protection that you enjoy at home will not extend to the UK. Therefore you may wish to consider carrying out a trade mark search to ensure that you can use your intended trade mark in the UK and/or protecting your name and/or logo by registration as a UK trade mark (protecting against infringement of the trade mark in the UK) or, if you have plans to expand into the rest of Europe, an EUTM.

UK companies may use the ® symbol in connection with registered trade marks, and the TM symbol in connection with unregistered trade marks, in order to alert third parties as to your rights. It is worthwhile having brand guidelines in the UK for your business and agencies to use, as it may be easy to lose your UK trade mark rights if you do not use your trade marks consistently.

Transfers and licences of UK IP rights, as well as agreements governed by English law, should contain the necessary checks and measures to ensure that they are English law compliant.

Additionally, transfers of UK IP rights should be registered at the appropriate UK IP registries to ensure that you do not lose certain rights in any future litigation or lose rights of priority as against third parties acquiring rights in your IP. We can help with this.

Finally, it should be noted that changes are afoot at the European level which will impact the availability and scope of IP protection in the future:

- a) A "unitary patent package" is expected to introduce 1) a patent of unitary scope covering participating Member States of the EU and 2) a Unified Patents Court ("UPC") with jurisdiction to hear disputes regarding the infringement and validity of unitary patents and European patents. The system is unlikely to come into force before 2019. In advance of this, owners of European patents would be well advised to consider the implications of the expected changes for their business, and in particular their strategies regarding i) whether to "opt-out" any existing European patents from the UPC system and ii) future patent filings. We can advise and assist in relation to this;
- b) Upon "Brexit" EUTMs and EU designs (registered and unregistered) will no longer apply in the UK, although it is likely to be agreed that the UK national registrations will be divided out of existing EU registrations;
- c) Proposals are under negotiation by European legislators for the creation of a European copyright title that would apply directly and uniformly across the EU.

Once again, it is not possible at this stage to determine to what extent, if any, the UK will be obliged to (or will elect to) implement future EU law changes into domestic law following "Brexit". Nor is it possible to predict the extent (if any) to which EU protections will be available on a voluntary or "opt-in" basis to entities domiciled outside the EU.



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