



Establishing and carrying on a business in the UK

A guide

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Introduction

We have prepared this guide for business people wishing to expand their business activities into the UK. The UK encourages overseas investors and provides a number of incentives to them in the form of investment grants (see page 43 – Investment Grants, below). There are no restrictions that apply to overseas investors which do not also apply to UK business people.

In this guide we look first at the different forms of business organisations which can be established in the UK (see pages 3 to 8) and then consider (see pages 8 to 33) certain aspects of UK law which may impact on an overseas investor's development of its UK operations (such as legislation regarding work permits, employment, real estate, the environment, sales contracts and arrangements, intellectual property and E-commerce). We also outline some of the more specific issues which will affect overseas investors who are establishing financial services and banking operations (see pages 33 - 37). Finally we consider UK tax registration requirements and how to structure investment in the UK to minimise tax liability (see page 37 - UK Taxation).

This guide is not intended to be a substitute for legal advice, but is intended to give some general guidance as to the main aspects of UK law which a business person needs to be aware of when planning to expand into the UK. There may well be special factors to take into account in particular cases.

Field Fisher Waterhouse LLP can give expert advice on all the topics mentioned in this guide at each stage of the process of establishing and then carrying on a business in the UK.

Field Fisher Waterhouse LLP can also assist with introductions to other experts who will be able to assist, such as immigration advisers, accountants, bankers, surveyors, estate agents and insurance brokers. This guide states the law as at 1 May 2009.

Forms of business organisation

There are two main forms of business organisation in the UK, namely:

- a) a company
- b) a partnership

The main distinctions between them are that:

- a company is a separate legal entity distinct from its members, whereas a partnership (except in Scotland) is not
- the liability of the members of a company is normally limited to a fixed amount, while, with the exception of the limited partnership, the liability of the members of a partnership is unlimited
- the shares in a company may be transferred without affecting the continuity of the underlying business
- except for certain types of joint ventures and consortia, members of partnerships are usually individuals, rather than corporations

Alternatively, an overseas company or corporation could register a branch or a representative office. Overseas individuals and corporations may also enter into business transactions directly with UK entities.

UK legislation regulating companies is currently undergoing substantial reform. The Companies Act 2006 has been passed by Parliament and its provisions are being phased in gradually, many having already taken effect, with the remainder due to come into force on 1 October 2009.

Branch/Representative office

Since 1 January 1993, a dual registration system has been in place for companies incorporated outside Great Britain (overseas companies) which establish a place of business in the UK. These companies must register under either:

- a) the "Place of Business" system - this applies to representative offices

or

- b) the "Branch" system - this applies to overseas companies whose place of business constitutes a "branch"

Companies House guidance for overseas companies defines a "branch" as being "part of an overseas limited company organised to conduct business through local representatives in Great Britain rather than referring it abroad". The Place of Business system is for companies who cannot register as a branch because:

- they are from within another part of the UK (Northern Ireland or Gibraltar)

or

- they are not limited companies

or

- their activities in Great Britain are not sufficient to define them as a branch

Examples of operations which cannot register as a branch include warehouse facilities and administrative offices, internal data processing facilities and share transfer or registration offices.

Many companies choose to start their overseas expansion by establishing a representative office in the UK. Such an office would have to limit its activities, so that for tax and other purposes it is not trading in the UK. The representative office may then, in due course, develop into a branch or lead on to the incorporation of a subsidiary.

New provisions relating to the registration of branches in the UK should come into force on 1 October 2009 when the relevant sections of the Companies Act 2006 take effect and related regulations are made. The

sections of this guide entitled Registering a Branch or Representative Office (see pages 4 and 5) and Maintaining a Branch (see pages 5 and 6) describe the position applying until 1 October 2009.

Registering a branch or representative office

How does an overseas company register a branch in the UK?

Within one month of an overseas company opening a branch in the UK, it must deliver the following items to the Registrar of Companies:

(a) Form BR1

Form BR1 gives details of the overseas company, including its corporate name, its state/country of registration, registration number and the location of the register; its legal form (that is, public or private company); a list of its officers and secretary; the extent of the authority of the directors to represent the overseas company in dealings with third parties and in legal proceedings and, if they must act jointly, the name of any other person concerned; whether the overseas company is a credit or financial institution; and whether the overseas company is subject to any winding-up or other insolvency proceedings. In addition, the Form BR1 requires the overseas company to state the address of its principal place of business, the overseas company's objects, the amount of its issued share capital, its accounting reference date and the time allowed under the law of the relevant state for the preparation and disclosure of accounts.

Form BR1 also asks for details in respect of the branch itself including its address; the date on which it was opened; the business carried on by the branch; the name in which that business is carried on (if different from the name of the overseas company); the names and addresses of all persons resident in the UK authorised to represent and/or accept service on behalf of that overseas company in respect of that branch; and the extent of the powers exercised by their representatives.

(b) Constitutional documents

The overseas company is also required to file a certified copy of the overseas company's constitutional documents in their original language. The copy should be certified as a true and fair copy by a notary or government officer in the country in which the overseas company is incorporated.

(c) Translation (where appropriate)

Where the constitutional documents are not in English, a translation must also be submitted, which must be certified with confirmation that the translator was fluent in both English and the original language and competent to undertake the translation.

(d) Audited accounts

The overseas company must file a copy of the latest set of audited accounts required to be published by the law of the country in which the overseas company is incorporated.

(e) Registration fee

The Companies House fee for registering a branch of an overseas company is currently £20.

How does an overseas company register a representative office in the UK?

If an overseas company is proposing to establish a representative office or otherwise carry on a business in the UK which is only ancillary or incidental to the overseas company's business as a whole (for example, warehouse facilities, administrative offices or registration offices for the company), its activities will not be sufficient to warrant the establishment of a branch. It will, however, be required to deliver to Companies House within one month of establishing that place of business, a Form 691 detailing the overseas company's officers, the names and addresses of the persons authorised to accept service of documents on the overseas company's behalf, a

statutory declaration stating the date on which that place of business was established and a certified copy of the overseas company's constitutional documents. The overseas company is also required to deliver copies of its reports and accounts in respect of each financial year. These are not required to be audited. In addition, there are requirements concerning displays of the overseas company's name and country of incorporation at its places of business and on its stationery.

The Companies House fee for registering a place of business of an overseas company is currently £20.

How does a bank establish a representative office in the UK?

In addition to the requirements above, there are requirements under the Financial Services and Markets Act 2000 ("FSMA") to consider. See page 36 (Regulation of Banking) below.

Maintaining a branch

After a branch has been established in the UK, the overseas company has a duty to maintain the branch's registration at Companies House.

Accounts of the whole overseas company, of which the UK office forms a part, need to be filed within thirteen months after the end of the financial year of the overseas company (where the law of the overseas company does not require the publication of audited accounts) or three months after the date of publication of the overseas company's accounts (where the law of the overseas company requires the publication of audited accounts). There are a number of points to note here:

- a) the accounts must be of the whole overseas company of which the UK office forms a part and not of the UK office only
- b) the accounts are placed on the public record
- c) to date, Companies House has not rigorously enforced this requirement but it could do so in the future

- d) notification to Companies House will be required if:
- there is any change in the person authorised to accept service, business address of the office or nature of the business
- or
- there is any change to the directors or secretary of the company of which the UK office forms a part
- or
- there is any change to the constitutional documents of the overseas company
- or
- there is any change to the overseas company's details

The Companies House website contains guidance on this and can be found at www.companieshouse.gov.uk

Establishing an English company

The process of setting up a UK subsidiary is relatively simple and fast. A company can be obtained "off-the-shelf" from company registration agents and the name of the company can be changed to incorporate the name of its parent, provided that there is not another company already registered with the same name. Alternatively, a tailor-made company can be incorporated.

The law governing the establishment and maintenance of a UK company is currently contained in the Companies Act 1985 (as amended) and its main features are described below. Although substantial changes will be made to the establishment process by the Companies Act 2006, the relevant sections are not due to come into force until 1 October 2009.

There are two main types of company:

- a) a private limited company
- b) a public limited company

The essential difference between them is that a public

limited company may make its shares available for purchase by the public, subject to certain restrictions; shares in a private limited company can only be bought and sold privately.

Private limited company

- may be formed by one person and may have only one member
- may have only one director, although at least one director must be a natural person who is not less than 16 years old. There is no requirement that an officer of the company must be a UK national
- need not (since 6 April 2008) have a company secretary (although it may choose to do so). The secretary does not require any formal qualifications
- must have a registered office address in the UK at which the statutory books of the company should generally be kept

Overseas companies setting up in the UK commonly use private limited companies.

Public limited company

- must have at least two members (until 1 October 2009)
- must have at least two directors, and at least one director must be a natural person who is not less than 16 years old. The secretary (or each joint secretary) must also be formally qualified
- must have a minimum authorised share capital of £50,000 (or a euro equivalent, currently specified at €65,600), of which not less than one-quarter must be paid up before it can start business

Maintaining an English company

It would be wrong to assume that the registration of a company at Companies House is the end of the process for establishing a company in the UK. Under English law, a company has a duty to file certain information concerning the company at Companies House and to keep this information up-to-date.

What does an English subsidiary company of an overseas parent need to do to keep its registration up-to-date?

(a) Annual shareholders' meeting

Since 1 October 2007, private companies are not required by general law to hold an Annual General Meeting ("AGM") of shareholders, although they may choose to do so. Public companies, however, must hold an AGM each year within six months of the end of the company's financial year known as the "accounting reference date".

At the AGM of the shareholders, the following matters are normally resolved by a simple majority:

- acceptance of the accounts and dividends contained in them
- re-election of directors (if re-election is required under the Articles of Association)
- appointment or re-appointment of auditors

(b) Annual Return

Once in every calendar year, a company must deliver a form called an Annual Return to Companies House. This form shows the share capital, registered office, the names of the directors, company secretary and shareholders and is signed by a director or the company secretary. It is a public document. A filing fee of £30 is payable on delivery of the form, or £15 if the form is submitted electronically.

(c) Filing of Accounts

The Annual Accounts filed at Companies House should include a balance sheet (signed by a director), a profit and loss account, a directors' report (signed by a director or a company secretary) and an auditor's report, including a business report (signed by the auditor) on the company. The Annual Accounts must be approved by the board of directors, sent to the shareholders (and, if the company is a public company, also laid before a general meeting, usually the AGM), and delivered to Companies House within

nine months (six months for a public company) of the company's accounting reference date. All the signatures must be originals.

There are financial penalties for a delay in filing the Annual Accounts and the company can be threatened with winding up if there is a serious delay. In addition, directors are personally responsible for making sure that the Annual Accounts are prepared and delivered to Companies House. Failure to do so could result in a criminal conviction.

(d) What other information must be sent to Companies House after incorporation?

Following incorporation, the directors have personal responsibility for keeping information about the capital structure, management and activities of the company up-to-date on the public record at Companies House. For example, any changes in the directors and their personal details, or increases in the company's share capital, must be notified to Companies House on the prescribed form, which must be signed by a director or secretary of the company.

(e) Elective resolutions

Until 1 October 2009, the members of private companies may pass an elective resolution (a unanimous resolution with 21 days' notice and capable of being revoked by an ordinary resolution) to grant the directors authority to allot shares up to the authorised share capital of the company for a period greater than the usual five year maximum, either for a longer fixed period or for an unlimited period of time. This has the advantage of reducing the administrative burden on private companies. After 1 October 2009, new sections of the Companies Act 2006 will come into force, doing away with the need for these elective resolutions.

(f) Records required by legislation

The company's officers are required to keep the company's statutory books up-to-date. The statutory books comprise the following official records:

- register of members
- register of debenture holders (if any)
- register of applications and allotments
- register of share transfers
- register of directors
- register of company secretaries
- register of charges or security interests granted by the company
- minutes of proceedings of general meetings of shareholders and directors' meetings

If these statutory books are not properly maintained any director or other officer of the company in default may be liable to a fine.

What are the other issues to be covered?

Under most Articles of Association, the board of directors is given full authority to manage the company, but it is important to bear in mind that shareholders' meetings may be needed from time to time.

(a) Issues which need to be discussed in shareholders' meetings

The Companies Act 1985 (as amended) and the Companies Act 2006 require a company's shareholders to approve various matters, including:

- any increase in the authorised share capital of the company and the issue of new shares unless they are issued to existing shareholders in the same percentage as they own the existing share capital
- any change in the Memorandum of Association or Articles of Association (75% majority required)
- any change to the name of the company (75% majority required and subject to the approval of Companies House)
- the execution of certain directors' service agreements and employee share option schemes

(b) Matters requiring approval by the directors

A wide range of matters must be approved by the company's directors in order, among other things, to:

- issue new shares which have been authorised by the shareholders
- refuse to register the transfer of existing shares which have not been fully paid-up
- refuse to register the transfer of shares on which the company has a lien (namely, a right to withhold the shares or the rights attaching to them from the holder of such shares)
- appoint anyone to be an agent of the company
- appoint new directors to fill a casual vacancy or as an addition to the existing directors, provided this is permitted by, and the new number does not exceed any maximum number of directors fixed by, the Articles of Association
- approve Annual Accounts and the directors' report
- resolve what dividend, if any, should be paid each year by the company. The shareholders cannot propose a dividend greater than is recommended by the directors
- appoint all company officers (chairman, managing director and company secretary)
- authorise the use of the company seal
- approve any change in the registered office of the company

Immigration

Introduction

The UK immigration system is in the throes of a radical overhaul, which commenced in 2008 and will be rolled out over the next few years. 80 different immigration routes to the UK are to be replaced and condensed into a points based system based on a five-tier framework.

The Five-Tier Framework

Tier 1

Tier 1 is aimed at highly skilled individuals who wish to work in the UK. It was introduced on 29 February 2008 and replaced the Highly Skilled Migrant Programme. Tier 1 allows individuals with exceptional skills and experience to seek entry to or stay to work in the UK without having a prior offer of employment. It also allows them to take up self employment opportunities.

Applicants achieve points based on their educational qualifications, past earnings, age, UK experience, English language abilities and available maintenance funds. If approved, clearance is given for an initial two year period, with a possibility to extend for a further three years.

For new applicants based outside the UK the process covers two stages. The first stage is to submit the Tier 1 application to the UK Border Agency (“UKBA”) in the UK. Once approved, the applicant then applies to a British Diplomatic Post overseas for entry clearance. Once that clearance is obtained, the applicant may then enter the UK.

Applicants who are already in the UK when they apply for extensions, or those seeking to apply for Tier 1 and who are able to switch from their current immigration category, must apply to the UKBA and have their passports endorsed in-country.

Tier 2

Tier 2 allows skilled workers with a job offer to enter or remain in the UK to fill gaps in the UK workforce. This Tier was introduced on 27 November 2008. It replaced the UK work permit scheme.

In conjunction with the introduction of Tier 2, any UK employer wishing to sponsor workers under Tier 2 is required to register with the UKBA as a “Company Sponsor”. The onus for “work permit” approval will then switch from the UKBA to Company Sponsors. These registered companies are permitted to self-assess foreign candidates and issue a certificate of sponsorship to them, up to an annual quota.

Tier 3

Tier 3 applies to a limited number of low skilled workers coming to the UK to fill specific temporary labour shortages. Applicants for Tier 3 must be from a country which has effective returns arrangements with the UK. Work in the UK is only permitted with an approved operator. As with Tier 2, the operator has to apply to UKBA to be a registered Sponsor and thus able to issue certificates of sponsorship to suitable candidates. Tier 3 was introduced on 27 November 2008.

Tier 4

Tier 4 applies to students coming to the UK to study. UK educational institutions must apply to be registered sponsors and can then issue certificates of sponsorship to their foreign students. Tier 4 was introduced on 27 November 2008

Tier 5

Tier 5 encompasses youth mobility and temporary workers. It is generally aimed at those allowed to work in the UK for a limited period of time and to satisfy objectives that are primarily non-economic. This Tier includes current categories such as Commonwealth Working Holidaymakers, sportsmen and entertainers seeking entry for a specific engagement. Tier 5 was also introduced on 27 November 2008.

Permanent Residence Status

Under the new points based system only those holding permission to remain in the UK under Tiers 1 or 2 will be permitted to advance to permanent residence status. After a continuous period of five years in the UK in Tiers 1 or 2 they will be eligible to apply. Transitional arrangements will apply to those reaching five years in categories that existed prior to introduction of the points based system.

British Citizenship

Under current rules those foreign nationals who have lived continuously in the UK for five years and who have held permanent residence status for 12 months may be eligible to apply for British citizenship and thus obtain a UK passport.

This scheme is due to be overhauled in 2009. From that time there will be three routes to naturalisation as a British citizenship: workers from Tiers 1 & 2, family members of British citizens and permanent residents, and finally refugees. There will be three stages in the journey to naturalisation: temporary residence, probationary citizenship and finally British citizenship (or permanent residence for those not eligible for citizenship).

Conclusion

2009 will be a testing time for all those involved in and subject to UK immigration, whether as an employer, practitioner or individual. At the time of writing many of the new processes are yet to be tested in practice and many teething problems are anticipated. It is therefore more important than ever that expert advice is sought before making any UK immigration application.

Employment law

Introduction

Employment relationships in the UK are governed by private agreement between employer and employee subject to minimum statutory rights and additional statutory protections for employees. The UK is subject to a large amount of European Union (“EU”) law that affects the employment relationship and harmonises many of the employment rights across the union.

Making employment contracts

(a) What matters should be set out in the contract?

A contract of employment, like any other contract, can be verbal or recorded in writing. However, certain minimum information about the contract must be given to employees in writing in the form of written particulars no later than two months after starting employment. In practice, it is much better to give them before the employment starts and to incorporate them into a broader written contract of employment. The following must be set out in the written particulars:

- names of employer and employee
- job title
- date employment began and any period of continuous employment (for example, with a connected employer)
- rate of pay and intervals at which it is paid
- hours of work
- holiday entitlement (including public holidays) and holiday pay during employment and on termination
- sickness entitlement and sick pay
- pension entitlement and whether a contracting out certificate is in force
- period of notice required for termination of the contract by employer and employee
- details of the applicable disciplinary procedures

- details of the applicable grievance procedures
- place of work
- whether the employment is permanent or for a fixed term and if fixed term, the date on which it expires
- whether there are any agreements with trade unions
- any requirements to work outside the UK
- if there is not a term in the contract relating to any of the matters above, this fact must also be stated

The following are terms which are not obligatory, in that they are not required by statute to be included in written particulars, but should be considered:

- terms protecting confidential information and trade connections
- terms preventing the employee from enticing other employees away from the employer’s service
- terms ensuring flexibility of hours, job description and job location

(b) An employee’s statutory rights

There is also statutory regulation of the terms of the contract relating to:

- minimum notice of termination
- the right to Statutory Pay during maternity, paternity and adoption leave
- the right to return to work after maternity
- the right to Statutory Sick Pay
- prohibitions on deductions from wages
- maximum hours of work and the right to rest breaks and paid annual leave
- the right to be paid at least the National Minimum Wage
- the right to request flexible working hours

The principal rate of the National Minimum Wage is currently £5.73 an hour. For employees aged between 18-21, the hourly rate is £4.77 and for workers under the age of 18 who have ceased to be of compulsory school age, the hourly rate is £3.53. The minimum wage is reviewed annually and changes take effect in October of each year.

The Working Time Regulations (“WTR”) place a 48 hour time limit on the hours employees may work each week. At present, employees can agree to work longer hours but cannot be forced to do so. The limit does not apply to certain employees, such as senior managers who have control over the hours they choose to work.

The WTR also give employees the right to a 20 minute rest break if they work for more than six hours a day. They also give employees the right to daily and weekly rest periods. Statutory holiday entitlement for a full-time worker increased from 4.8 weeks to 5.6 weeks on 1 April 2009.

(c) An employee’s statutory protections

There are also a number of statutory protections for employees which underpin the employment relationship. These include:

- health and safety
- restrictions on information held about employees
- protection for employees who expose a wrongdoing
- the right not to be unfairly dismissed
- the right to a statutory redundancy payment
- the right not to be discriminated against on specified grounds

Anti-discrimination legislation affects every part of the employment relationship from recruitment through to termination. The six “strands” of discrimination are sex, race, disability, sexual orientation, religion or belief and age. Part-time workers and fixed-term employees are also protected from discrimination.

Terminating the employment relationship

How can an employment contract be terminated?

(a) *By notice*

Most contracts of employment can be ended by either the employer or employee giving to the other the

appropriate length of notice that the contract is being terminated.

The period of notice to which an employee is entitled will be the period of notice set out in the contract (unless this is shorter than the minimum notice period laid down by statute). The minimum notice period is one week's notice for employees with between one month and two years' employment and, for employees with more than two years' employment, one week for each completed year of employment. This is subject to a maximum of twelve weeks' notice.

If no period of notice is stated, the employee is entitled to "reasonable notice". This will not be less than the minimum notice period, but may be more. At the end of the notice period the contract ends. The employee is no longer entitled to be paid and should leave.

When terminating an employment contract the employee is required to give an employer no less than one week's notice. However, contracts can and often do specify a longer period of notice.

(b) *The end of a fixed term*

If the contract is for a fixed term it will end at the expiry of the fixed term unless there are provisions allowing it to be brought to an end early.

(c) *Immediate termination*

Often employers will want to dismiss an employee without giving him notice and ask him to leave the premises immediately. If the employee has seriously breached his contract of employment, then an employer can do this without making a payment to the employee. If not, however, the employer will need to make a payment to the employee to reflect the fact that the employer has not given the proper notice.

If a payment needs to be made, the employee will be entitled to be put into the financial position that he would have been in had he been allowed to work his notice period or had the fixed term of the contract been allowed to run. This means the employee will be entitled to his net (namely after tax) salary and the net cash value of any benefits under his contract which he would have received during the notice period or remaining fixed term. The employee will have a duty to mitigate his loss by looking for another job. The first £30,000 of any such payment may be tax free.

Some contracts contain a term which expressly allows an employer to make a payment in lieu of giving the employee notice. In this case the employer just pays the employee normally and must pay tax and National Insurance to HMRC and the employee has no duty to mitigate his loss.

A payment in lieu of notice clause is particularly important when the contract includes post-termination restrictions. Such restrictions can only be enforced when the contract has been terminated lawfully.

Unless the contract allows it, termination without notice will generally be unlawful so it is good practice to have an express payment in lieu of notice provision in any employment contract for that reason.

Disciplinary and grievance procedures

Since October 2004, employers and employees have been required to follow statutory dispute resolution procedures in relation to grievance, disciplinary and dismissal matters in the workplace. The procedures generally involved a three-step standard process (incorporating communication between employer and employee, and meeting and appeal stages) or a two-step modified process. However, these statutory procedures proved complex and unsatisfactory in practice and led to a significant rise in litigation.

On 6 April 2009, a new regime came into force to replace the statutory dispute resolution procedures. This revolves around a new ACAS Code of Practice, which sets out guidelines on handling disciplinary and grievances. This section summarises:

- the new ACAS Code of Practice
- the new supplementary guidance
- transitional provisions

The new ACAS Code of Practice

The new ACAS Code of Practice (**the “Code”**) replaces the one issued in 2004 and provides basic practical guidance for employers, employees and their representatives. It aims to establish concise, principles-based guidance to help resolve disputes early and outlines the key stages of handling disciplinary and grievance issues. Importantly, the Code does not apply to redundancy dismissals or the non-renewal of fixed-term contracts on their expiry (areas which had proved problematic under the statutory dispute resolution procedures).

The Code includes the following general guidance for employers in relation to disciplinary matters:

- establish the facts for each case
- inform the employee of the problem
- hold a meeting with the employee to discuss the problem
- allow the employee to be accompanied at the meeting
- decide on appropriate action
- provide employees with an opportunity to appeal

The Code also includes the following general guidance in relation to handling grievances:

- hold a meeting with the employee to discuss the grievance
- allow the employee to be accompanied at the meeting
- decide on appropriate action
- allow the employee to take the grievance further if not resolved

Failure to follow the Code will not, in itself, make an employer liable to proceedings, but employment tribunals will take the Code into account when considering relevant cases. From 6 April 2009, tribunals may, if they consider it just and equitable to do so, increase or reduce compensatory awards made in relevant cases by up to 25% for unreasonable failure to comply with any provision of the Code.

Non-statutory guidance

New non-statutory guidance is intended to provide supporting information on handling workplace disciplinary and grievance issues. The guidance is purely advisory and has no status in the tribunals. It is intended to complement the Code and is based on ACAS' own experience of handling disciplinary and grievance issues.

The guidance, which contains extracts from the Code, practical examples and template letters, covers information on a number of issues, including how to:

- resolve disciplinary and grievance matters informally
- develop rules and procedures
- deal fairly with formal disciplinary action and grievances
- deal with short-term and long-term absence

Transitional arrangements

Employers should take care to clarify which dispute resolution regime should be followed over the coming months, as transitional provisions apply. The statutory dispute resolution procedures may continue to apply after 6 April 2009 in the following circumstances:

- where the standard or modified disciplinary and dismissal procedures apply and the employer has on or before 5 April 2009:
 - issued a Step 1 letter for the purposes of the standard or modified procedure
 - held a Step 2 meeting under the standard procedure
 - taken relevant disciplinary action against the employee or
 - dismissed the employee
- where the standard or modified grievance procedures apply and:
 - the action about which the employee complains occurs wholly before 6 April 2009 or
 - the action which forms the basis of a grievance begins on or before 5 April 2009 and continues beyond that date and the employee presents a complaint to the employment tribunal or submits a valid grievance on or before 4 July 2009 or on or before 4 October 2009 (depending on the type of the claim)

Please contact us if you would like further information about the Code and the transitional provisions.

Unfair dismissal

(a) Who qualifies?

As a general rule, to qualify to claim unfair dismissal, an employee must have been employed continuously for one year or more at the date of dismissal.

Employees who are dismissed in connection with trade union activities, on maternity related grounds or because they have complained about health and safety or other statutory rights are able to claim unfair dismissal without having worked for the qualifying period above.

(b) What are the procedures to show that the dismissal is fair?

In order to show that dismissal is fair, the first stage is for the employer to show that the dismissal was for a permitted reason. There are 6 permitted reasons: conduct, capability, redundancy, illegality, retirement and a "catch all" for "substantial reasons of a kind justifying dismissal".

The next stage is determining whether the employer has acted reasonably or unreasonably in treating the reason as justifying dismissal in all the circumstances. As part of this, the employer will have to show that it followed a fair procedure in dealing with the employee.

Minor misconduct (for example, lateness for work) requires a number of warnings before dismissal would be justified. Serious offences (for example, theft or violence) may not require a warning prior to dismissal. In both cases, however, the employer would be expected to carry out a "fair" procedure, which includes:

- carrying out as much investigation as is reasonable in the circumstances
- ensuring that the employee knows the nature of the accusation against him or her
- ensuring that the employee is given an opportunity to answer the accusation
- the employer acting in good faith and not, for example, making a decision before hearing an explanation
- reaching a genuinely held and reasonable belief in the employee's guilt
- a sanction which is consistent with the treatment other employees have received

See "disciplinary and grievance procedures" above for further information about the guidelines provided by the Code.

(c) What compensation is paid for unfair dismissal?

(i) Basic award

A basic award is a sum calculated by reference to gross pay, age and length of service. The maximum basic award is currently £10,500.

(ii) *Compensatory award*

Employees can also receive a compensatory award. The maximum compensatory award is currently £66,200. This is reviewed annually and changes take effect on 1 February of each year.

(iii) *Additional award*

A tribunal can also order that the employee be reinstated to his old job or re-engaged by the employer in another job. This happens in a very small percentage of cases each year. If the employer refuses to comply with a re-instatement or re-engagement order, the tribunal can make a further award of compensation called an additional award. The maximum additional award in most cases is £18,200.

Redundancy

(a) What is "redundancy"?

Redundancy occurs where an employee is dismissed because:

- his employer's requirements for work of the kind that he is employed to do have diminished
- or
- his employer closes his business
- or
- his employer relocates his business

(b) Who qualifies for a statutory redundancy payment?

Employees need to have 2 years' employment at the date their employment ends and ordinarily work in Great Britain to be eligible for redundancy pay.

(c) How much is redundancy pay?

Redundancy pay is calculated in the same way as a basic award for unfair dismissal. The maximum award is £10,500.

Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE")

If a business changes hands in the UK, a set of regulations called TUPE provide protection for employees. TUPE applies to a "relevant transfer" which is, for example, where a business is a going concern or where services are outsourced.

TUPE's effect is to move employees and any liabilities associated with them from the old employer to the new employer. Employees have the right to transfer to the new employer on their existing terms and conditions of employment and with all their existing employment rights and liabilities intact. If you are acquiring or transferring a business in the UK it is important to take advice on whether or not the TUPE regulations will apply to your business.

Employment law checklist

It is important to consider obtaining employment advice if you are setting up in the UK. Your first important steps to setting up in the UK include the following:

- drafting contracts of employment
- drafting employee policies
- setting up a payroll
- obtaining Employer's Liability Insurance (which is compulsory)
- drafting a health and safety policy and carrying out risk assessments

Pensions

There are four distinct routes to starting up a business in the UK which have pensions implications:

- purchase of an existing business, for which the core issues are set out in the "Transfer of a business" section of this report on page 16
- purchase of an existing company, for which the core issues are set out in the "Legacy scheme risks" and "Cross-funding risks" sections on page 16 of this guide

- joint venture by creation of a new jointly owned company which has potential crossfunding risks
- development of a stand-alone, wholly owned subsidiary or business, which only has the implications set out under the “Employer’s duties” section on page 15 of this guide

Basic background

Employers in the UK are not obliged to have an employee pension scheme to which they contribute. Employees are not obliged to have a private pension scheme. There is a compulsory State Second Pension which is financed through National Insurance contributions, which is normally managed through a standard payroll and taxation package.

Types of scheme

Pension schemes in the UK are split into two groups: occupational pension schemes and personal pension schemes. Both types benefit from tax-favoured status on contributions into the arrangement and investment income; pensions paid out are taxable as income and certain upper limits are placed on those benefits.

Occupational pension schemes are established by employers and can be either final salary schemes (where the employer bears the financial risk for any deficit in the pension fund) or money purchase schemes (where the employee bears the financial risk of low investment return). Deficits in final salary schemes can grow based on life expectancy and investment returns even where the employer is contributing at the full current rate. It is very rare for a private sector employer to set up a final salary scheme in 21st century Britain.

Employers must contribute to occupational pension schemes. Occupational pension schemes also give rise to compliance issues for employers as they are responsible for managing the scheme in accordance with laws and regulations.

Personal pension schemes are insurer-based arrangements set out in a contract between employees and the insurer. They are money purchase

so the financial risk lies with the employees. Sometimes a collection of such personal contracts are grouped together under one arrangement to form what is known as a Group Personal Pension Plan. In addition, there are special personal pension schemes which have a low cap on charges and expenses known as stakeholder pension schemes. While the employer is not a party to the personal pension contract it will be involved in practice if it offers to make employer contributions and allows employee contributions to be deducted from payroll. Payroll deduction has to be provided for contributing to a stakeholder scheme. The insurer, however, will be the party responsible for managing the scheme in accordance with laws and regulations.

The employer’s duties

Employers of five or more “relevant employees” are required to designate a stakeholder pension scheme, or provide their own pension arrangements. A “relevant employee” is primarily an employee who is resident in the UK for tax purposes.

Designation of a stakeholder pension scheme is achieved by consulting with the relevant employees and then appointing the provider (most of whom are authorised insurance companies). A good guide to the designation process and a list of registered providers is available on the website of the UK Pensions Regulator, www.thepensionsregulator.gov.uk

An employer is not required to contribute to a stakeholder pension scheme and the employees do not have to join it. Where employers choose to contribute, take-up of stakeholder pension schemes is good, but where they choose not to contribute, 90% of such schemes have no members. The employer is required to provide a facility for employees to pay contributions through payroll to the designated scheme.

Generally, employment law considerations will apply in the pensions aspects of the employer-employee relationship. Where pension rights are granted as contractual rights, they can only be removed by contractual agreement; anti-discrimination laws will generally apply to control the employer’s decisions on access to pension benefits and the level of benefits

applied. Certain discriminatory practices have legislative protection, such as the use of different actuarial factors for men and women and a number of protections apply to practices which would otherwise be unlawful age discrimination.

From April 2006, employers have been restricted in their ability to change existing pension arrangements - the restriction is that they must inform and consult affected employees and their representatives. From 6 April 2008, the duty applies to employers with at least 50 employees (regardless of how few of them are in the relevant scheme).

Special Situations

(a) Transfer of a business

Where an employer takes on employees by a transfer of an undertaking to that employer, then an obligation to provide pensions may arise.

Whether or not the obligation arises depends on whether or not the employees were entitled to join a pension scheme immediately prior to the transfer of the undertaking.

Any obligations in relation to personal pension arrangements will transfer to the purchaser. If the employees were entitled to join an occupational pension scheme prior to the transfer, broadly speaking, the purchaser will have to provide access to an occupational pension scheme or a stakeholder pension scheme going forward and employer contributions (of up to 6% of pay) will be required from the purchaser.

In addition, the nature of the obligation on the new employer will vary, depending on whether the transfer is from another private sector organisation or from the public sector (where pensions are traditionally more generous and have greater protection under non-legislative government procurement practice).

(b) Legacy of scheme risks

Where an employer takes on employees by buying the shares of a company, the employer will take on any occupational pension schemes of the seller and any employer obligations in relation to personal pension schemes. The occupational schemes will include historic schemes which may not be open to current employees but can still have very substantial funding deficits.

(c) Deficit cross-funding risks

The Pensions Regulator can transfer liabilities for debts across corporate groups from sister to sister company or up to the parent company or shareholder level. Where a transaction has affected the ability of the scheme to obtain funding, the parties to that transaction can be made liable for any scheme deficit.

This is a statutory change to the basic principle of corporate personality – the parent which sets up or buys a limited liability company may be fixed with its pension scheme liability. Such a liability can be disproportionately large. In certain circumstances directors and shareholders involved in transactions can be fixed with liability, if the Regulator considers it reasonable to do so.

So, if a joint venture is entered into with a UK business by the creation of a new jointly owned company, financial liability may arise for the UK business if any group company within the joint venture partner's group has a final salary scheme. The risk is primarily where the scheme has a deficit, but a scheme in surplus could develop deficit in a matter of weeks in a volatile investment market.

Also, the joint venture company could be made liable for all or part of that deficit under a contribution notice if it transacts with the sister company which sponsors the scheme. Separately, if the employer of that defined benefit scheme is insufficiently resourced or a service company, the joint venture company could be liable to provide financial support to the scheme by way of, for example, a cash injection or cross-subsidy. It does not matter that the defined benefit scheme is not sponsored by the joint venture company.

Distribution and agency agreements

Introduction

It may sometimes not be appropriate for an overseas company to set up a subsidiary company or a branch in the UK. An alternative is for an overseas company to enter into an agency or distribution agreement with another undertaking to sell its goods accordingly.

The choice of agreement will depend on a number of factors including the location and nature of the intended market and the type of goods to be sold. It is important that there is a written contract clearly setting out the terms and conditions of the agreement and, if at all possible, the agreement should be governed by English law. Any such agreement entered into will also be regulated by European law, especially in relation to competition aspects. European competition law is based around Articles 81 and 82 of the Treaty of Rome (which is the treaty that established the EU):

- Article 81 prohibits agreements between undertakings, decisions by associations of undertakings, and concerted practices which have as their object or effect the prevention, restriction or distortion of competition and which may affect trade between member states of the EU
- Article 82 prohibits the abuse by one or more undertakings of a dominant position which may affect trade between member states of the EU

English law contains similar provisions at Chapter I and Chapter II of the Competition Act 1998 which are modelled on Articles 81 and 82 respectively. The difference between the UK and EU legislation is their geographical scope: the UK legislation applies to practices which may affect trade within the UK, while the EU legislation applies to practices which may affect trade within the EU.

Distinction between agents and distributors

(a) Distributor

A distributor is an independent undertaking which enters into a distribution agreement with a manufacturer to buy the goods and to resell these to its own customers. The distributor assumes the commercial risk.

The distributor's independence to deal with the goods in the way it deems fit can be limited by the nature of the distribution agreement.

(b) Agent

An agent acts as an auxiliary to the manufacturer and will be authorised to sell the goods on behalf of or in the name of the manufacturer, or to find potential buyers on the manufacturer's behalf. For most purposes, the acts of the agent will be treated as those of the manufacturer. Whilst an agent may accept certain financial obligations, in most cases the main commercial risk is assumed by the manufacturer.

Application of EU competition law

(a) Article 81

As outlined above, Article 81 prohibits agreements, decisions by associations of undertakings and concerted practices that are restrictive of competition and which may affect trade between member states of the EU.

While Article 81 applies to distribution agreements (other than those which either fall outside of its scope or are exempted as is explained below), genuine agency agreements fall outside its scope. The reason for this is that a genuine agent is treated by EU competition law as forming part of the business organisation of the principal so that the agreement

between the parties is therefore treated as being an internal matter of that economic entity. It is therefore possible, in a genuine agency agreement, for the manufacturer to:

- fix the re-sale prices of the goods
- direct the agents to sell only to certain customers or categories of customers
- appoint agents or distributors for specific territories

However, one must bear in mind that any anti-competitive behaviour by the agent can be imputed to the principal.

(b) Article 82

As mentioned above, Article 82 prohibits the abuse of a dominant position which may affect trade between member states of the EU.

Distribution agreements can infringe Article 82. Whilst it is not impossible, it is unlikely that Article 82 will apply to an agency agreement.

Agency agreements

Before entering into an agency agreement which is to operate within the EU, it is important to be aware of the EU Directive on the Coordination of the Laws of Member States relating to Self-Employed Commercial Agents (the “**Self-Employed Commercial Agents Directive**”) which was implemented in the UK by the Commercial Agents (Council Directive) Regulations 1993 (the “**Commercial Agents Regulations**”). These regulations give greater protection and rights to an agent under an agency agreement and cannot necessarily be excluded by contract.

The Self-Employed Commercial Agents Directive (and the Commercial Agents Regulations) compulsorily incorporate into most agency arrangements certain terms to protect the agent, including minimum notice periods, defined rights of commission (both during and after termination of the arrangements), definitions of duties on each side and confirmation that a non-compete clause can be obtained from an agent. In certain circumstances, where the agent is involved in

the sale of goods as opposed to services, the Commercial Agents Regulations also give the agent a right to compensation or an indemnity on termination of the agency arrangement over and above the right to commission after termination and the parties cannot lawfully contract out of this.

Distribution agreements

(a) Article 81

Not all distribution agreements fall foul of the Article 81 prohibition. There are certain thresholds under which either (i) the agreement falls outside the scope of Article 81 altogether or (ii) the agreement is automatically “exempted” from the application of Article 81 by falling within an EU “block exemption”.

Block exemptions exist for certain types of agreements, industry-specific or research and technology agreements. The EU block exemption most relevant to distribution agreements is the block exemption for vertical agreements. These are agreements between parties at different stages of the economic process such as between a manufacturer and distributor.

A distribution agreement falls outside the scope of Article 81 altogether if the market share of each of the parties is below 15% and the agreement does not contain any “hardcore” restrictions. These include resale price maintenance, restricting export bans and sales to officially appointed distributors and retailers (also known as ‘selective distribution’).

Under the vertical agreements block exemption, a distribution agreement is automatically exempted from the application of Article 81 if the manufacturer’s market share is less than 30% and the agreement does not contain any hardcore restrictions. However, in the case of an exclusive supply agreement (namely, one where the manufacturer sells goods or services only to one distributor inside the EU for the purposes of resale) the relevant market share is that of the distributor. The exemption therefore only applies if the distributor’s market share is less than 30%. In this case, the relevant consideration is the distributor’s share of the purchase market (namely, the goods or

services purchased from the manufacturer) and not the distributor's share of the market in which it sells.

As a consequence, many distribution agreements will fall within one of these two "safe havens".

The Competition Act 1998 brought UK law, to a large extent, into line with EU law. As a consequence, agreements which do not affect trade between member states, but which fulfil the criteria for a block exemption will benefit from such an exemption in the UK.

(b) Article 82

While Article 81 is concerned with agreements, decisions and concerted practices which are harmful to competition, Article 82 is directed towards the unilateral conduct of dominant undertakings which act in an abusive manner. There are therefore 2 limbs to Article 82: an undertaking must be dominant and it must abuse that dominant position. Distribution agreements can infringe Article 82.

Dominance is presumed at a 50% market share but can arise at lower shares.

Article 82 does not provide an exhaustive list of practices which constitute an abuse of dominance. However, by way of example, exclusive and selective distribution agreements could fall foul of Article 82. An exclusive distribution agreement is an agreement under which a manufacturer grants exclusive distribution rights to a distributor for a particular territory. As described previously, a selective distribution agreement is an agreement under which products can be bought and resold only by officially appointed distributors and retailers.

Product liability

Consumer Protection Act 1987

Under the Consumer Protection Act 1987 strict liability is imposed upon producers of products for damage caused by defects in their products. A company which:

- manufactures or processes faulty products
- or
- puts its own name or trademark on the faulty product
- or
- a company that imports a product into the EU (in each case known as a "producer") will be liable to pay compensation for damage caused by the defective product

There are several defences that the producer can use to escape liability. The main ones are that:

- the fault did not exist in the product at the time of supply
- or
- the state of scientific and technical knowledge at the relevant time was not such that the producer of the product might be expected to have discovered if a defect existed in the product while it was under the producer's control. This is known as "the state of the art defence"
- or
- the producer supplied a component part for the defective product, but the defect was wholly attributable to the design of the ultimate product or to compliance by the producer with instructions given to him by the manufacturer of the ultimate product.

It is not possible to escape this liability by stating in a contract that the producer will not be liable.

Labelling regulations

There are specific regulations which must be complied with that impose labelling requirements for certain products. Products covered include food, pharmaceuticals, cosmetics, hazardous substances, tobacco products, electrical appliances and textiles.

Misleading descriptions

The Trade Descriptions Act 1968 makes it an offence in the course of a trade or business to apply a false trade description to any goods, or to supply or offer to supply any goods to which a false trade description is applied. A person guilty of an offence under the Trade Descriptions Act may be liable to a fine, imprisonment or both.

Implied terms relating to the supply of goods or services

Under the Sale of Goods Act 1979 (as amended by the Sale and Supply of Goods Act 1994), any goods sold to the public must be "of satisfactory quality" and reasonably fit for their intended purpose. If the goods are not of satisfactory quality or reasonably fit for their intended purpose, the customer can sue the retailer and claim for any damage.

Similarly, under the Supply of Goods and Services Act 1982 (as amended by the Sale and Supply of Goods Act 1994), if services are provided in the course of the supplier's business, terms will be implied that the services concerned will be supplied at a reasonable cost, within a reasonable time, and provided with reasonable care and skill.

Are there any other laws to protect consumer rights?

An importer, manufacturer or retailer can be liable for faulty products under the law of contract if the goods fail to comply with their specification in the agreement or under the law of tort if the importer, manufacturer or retailer (as appropriate) has been negligent.

In order to try and reduce the risks, a producer should be careful in making any safety claims in advertising and should put warnings and instructions on the products. An importer should negotiate indemnities from the manufacturer or purchaser and take out appropriate insurance cover for product liability resulting in damage in the future for which the producer could be held liable.

Terms and conditions of sale/purchase

Introduction

A company should always try to use its own written contract when it sells or buys goods or services from or to other parties. Failure to do so may result in the company suffering substantial financial losses.

In general, before selling goods or services to a third party, companies should investigate the customer's credit-worthiness. It is also important to ensure that the obligations being accepted by both parties to the contract can realistically be performed.

In the case of distance selling, further terms and conditions will be implied. These are discussed in the section of the guide entitled "E-Commerce" (see pages 24 - 28).

What issues should be included in the contract?

(a) Parties

A contract should begin with a definition of the parties.

(b) Goods

To avoid any confusion or argument arising in the future, it is very important that the contract uses a clear, understandable and widely used definition to describe the goods to which the contract relates.

(c) Price

Under English law, the price of goods or services can be determined:

- by the contract
- or

- in accordance with a formula agreed by the contract
- or
- by the course of dealing between the parties

To avoid uncertainty it is sensible to have a specific provision in the contract as to the price of the goods.

(d) Payment terms

The contract should always make clear when payment is due. The contract should state whether there is to be payment on delivery of the goods (either in full or in instalments) or if a period of credit is allowed (e.g. "payment is due in full 90 days after delivery of the goods").

There is a presumption in English law that time of payment is not "of the essence" unless it is clearly stated as being so in the contract. Therefore, the seller will not necessarily be able to terminate the contract if the buyer has failed to pay by the required date unless either the contract states that time for payment is of the essence of the contract or, where the contract is silent and payment has not been made within a reasonable time, the seller has written to the buyer stating that time has become of the essence.

(e) Carriage

It is always necessary to state the method of transportation (for example, ship, air, or land) in the contract and to transport the goods by that means unless the parties have agreed upon a new method. It could bring the contract to an end if the goods are transported by a means other than that agreed. Ideally the contract should also state which party bears the costs of carriage.

(f) Packaging

The method of packaging the goods could be a term of the contract. If the vendor has delivered the goods with different packaging to that which it agreed with the purchaser in the contract, then the purchaser has the right to refuse delivery and sue for any damage.

(g) Delivery

It is important to decide where delivery will take place (for example, is the buyer to collect from the seller or will the seller send the goods to the buyer?), and to have an appropriate clause reflecting this decision in the contract.

For commercial reasons, the seller will have to give delivery dates/periods to the buyer. However, the seller will want to ensure that the clause regarding delivery dates is drafted in such a way as to exclude liability for any delay (note that any such clause will be subject to the Unfair Contract Terms Act 1977 and so must be reasonable).

If time for delivery is of the essence and there is a delay, the purchaser may cancel the contract, as well as claim damages.

(h) Other clauses

Other clauses that may need to be included will depend on the nature of the individual transaction. It may, for example, be necessary to insert terms concerning samples.

Can a company claim back its goods which it has delivered to a purchaser who has failed to pay for them?

It is sometimes possible for a seller to reclaim unpaid goods if the contract has been carefully drafted and a retention of title clause has been included. This clause aims to pass risk upon delivery to the purchaser, but the property in the goods remains with the seller until he is paid or until the goods are sold on in good faith in the ordinary course of business. The clause can also confer upon the seller the right to repossess the goods and allow him rights of entry to do so and the right to trace and recover the proceeds of sub-sales.

Since this is an intricate area of law, no one can guarantee that the seller will be able to successfully retake possession of the goods even if there is a retention of title clause.

Intellectual property rights

The UK has its own regime for the protection of intellectual property rights (“IPRs”), as well as being subject to EU law and international treaties. The main forms of IPRs are copyright, trade mark, patent, confidentiality, database rights and design rights. These rights are assets of businesses which can be bought, sold or licensed. An intellectual property audit could be useful in identifying and quantifying the value, extent and importance of IPRs to a UK subsidiary.

Copyright

Copyright protects original literary, dramatic, musical and artistic works, published editions of works, sound recordings and films, videos and broadcasts. It gives the creators of these works rights as to how the work is used. Copyright is an unregistered right which comes into effect as soon as the copyright work has been created (for example, by writing it down). As there is no registration system, the creator is the first owner of any copyright arising in a work. An exception to this is that when work is created by an employee in the course of his or her employment copyright will vest with the employer.

Actions covered by copyright include copying, adapting, distributing, communicating to the public by electronic transmission, renting or lending to the public and performing in public. Creators have the right to be identified on their works, to object if their work is distorted or mutilated and can give permission for others to use their copyrighted material. As a general rule, copyright in literary, dramatic, musical or artistic works last until 70 years after the date of the death of the creator. Sound recordings are generally protected for 50 years from the date made or date released (if later) although the European Commission has proposed that this protection is extended to 95 years from such date. Broadcasts are protected for 50 years from the date on which they were first broadcast and published editions are protected for 25 years from publication.

Owners of copyright can apply to a court for an injunction preventing others infringing their rights and requesting them to compensate for any loss/hand over profits from infringing activities. As an alternative to litigation, large scale infringement such as pirating and counterfeiting can be referred to UK trading standards who may apply criminal sanctions.

Confidential information

Frequently the assets of a business will be intangible comprising, for example, customer lists, pricing information, new products or services planned or trade secrets. It can be damaging for this information to be known outside the business. Although employees have a duty to act in an employer’s best interests, which includes not divulging confidential information, it is common for UK employment contracts to state that employees recognise the confidential nature of such information and agree not to disclose it to others, particularly after employment ceases. It is also common for businesses to enter into non-disclosure/confidentiality agreements with third parties prior to negotiations where confidential information is disclosed.

Patents

Patents protect inventions for products and processes. A patent for an invention is a registrable right and gives the inventor the right for a limited period to stop others from making, using, importing or selling the invention without the patent owner’s permission. The owner of the patent has the option to develop his idea further or to allow another to develop it and pay royalties under a licensing agreement. Unlike copyright, a patent is a monopoly right which usually lasts for a maximum of 20 years from the filing date and is granted under the Patents Act 1977.

To be patentable an invention must be new (meaning that it must never have been made public in any way, anywhere in the world, before the date on which an application for a patent is filed), involve an inventive step and be capable of industrial application. An invention involves an inventive step if, when compared with what is already in the public domain, it would not be obvious to a person skilled in the subject.

A patent holder has the right to apply to a court for an injunction preventing others from infringing the patent and to claim damages for the unlicensed manufacture, use, importation or sale of the patented invention. It is important that businesses seeking to establish themselves in the UK do not knowingly infringe other patents.

Trade marks

A trade mark is a sign which is capable of being represented graphically (for example in the form of words, logos, sounds or pictures) which distinguishes the goods and services of one trader from another. It is a badge that differentiates the products of one business from those of other businesses. Trade marks are registrable rights under the Trade Marks Act 1994 and it is also possible to register a Community Trade Mark which is valid throughout the EU. To be registrable, a trade mark needs to be distinctive for the goods and services for which the application for registration is being made, not descriptive, not contrary to law and morality and not similar or identical to any earlier marks for the same or similar goods or services. Subject to payment of registration and renewal fees, trade marks last indefinitely but will become vulnerable to revocation if they are not used for over five years.

Trade marks are valuable marketing tools which are usually protected by registration. If a trade mark belonging to a business is being used by a third party, the business owning the trade mark can sue for infringement if they show that the third party used the mark which is the same as (or similar to) a mark owned by the business for the same (or similar) goods or services. UK Trading Standards may also be able to assist.

Registered Community Designs

This is a new type of design registration which came into force in 2003 and covers the whole of the EU. The right is capable of protecting a broad range of parts and products including industrial and handicraft items. The features of a product that can be protected include lines, contours, colours, shape, texture and

ornamentation. A design can still be registered even if it has no aesthetic or artistic value.

In order to be registrable the design must be new and of individual character. However, a 12 month grace period is permitted which enables the product to be marketed prior to registration. Once registered, the design can be renewed every five years up to a maximum of 25 years.

Registration gives wide protections in the EU as the design, rather than the product, is protected. Remedies for infringement include EU-wide injunctions and damages.

UK Registered Designs

The protection offered and the criteria which must be met for registration are the same as for the Registered Community Design. The main difference is that a UK registered design only provides protection in the UK and therefore the remedies available for infringement are UK-based.

Design right (unregistered)

Design right provides free automatic protection for the internal or external shape or configuration of an original design. Design right allows the proprietor to stop anyone from copying the shape or configuration of the product.

Design right lasts either ten years after the first marketing of products that use the design or 15 years after creation of the design, whichever is earlier. This design right will only provide protection in the UK.

Unregistered Community Designs

A certain amount of protection for designs is available throughout Europe, without the need for registration, under the Unregistered Community Design system.

In order to attract unregistered rights a design must fulfil the same requirements as those described above for Registered Community Designs. The unregistered

right will automatically arise when a design is first made available to the public. The right lasts for three years from that date, but it only provides protection against copying.

Database rights

Databases can be protected in two ways:

- as a literary work under the Copyright Designs and Patents Act 1988 (see above)
- or
- for databases created post-1996, using the specific database rights under the Copyright and Rights in Database Regulations 1997 (the “**Databases Regulations**”)

Database rights under the Databases Regulations protect collections of independent existing data arranged in a systematic or methodical way so that items are individually accessible by electronic or other means. The Databases Regulations make no requirement of intellectual effort or originality. Their main purpose is to provide protection for the investment of time and money by the database owner.

To obtain protection, database owners must show that databases are compiled in a particular way, with investment in the database itself rather than in the creation of data. Any business considering investing in the creation of a database in the UK should seek legal advice in relation to the process to be followed in order to assert its database rights most effectively.

E-commerce

A company that wishes to set up an internet presence needs to be aware of several issues relating to the provision of on-line products and services. The UK is subject to an increasing amount of EU law which aims to regulate e-commerce. In general, the aim of such legislation is to protect the consumer.

Distance Selling Regulations

The Distance Selling Directive was implemented in the UK by the Consumer Protection (Distance Selling) Regulations 2000 (the “**Distance Selling Regulations**”). The Distance Selling Regulations apply to transactions between a supplier and a consumer which are completed at a distance, that is, the parties do not meet face to face prior to the conclusion of the contract (e-commerce, m-commerce, e-mail, telephone sales and mail order all fall under this category).

(a) Who is a consumer and who is a supplier?

A “consumer” is any natural person, who, in contracts covered by the Distance Selling Regulations, is acting for purposes outside his or her trade or profession. A “supplier” is defined as any natural or legal person who, in contracts covered by the Distance Selling Regulations, acts in his or her professional or commercial capacity.

(b) What obligations do the Distance Selling Regulations impose?

The Distance Selling Regulations impose three main requirements on suppliers selling at a distance, namely rights to prior information, written confirmation and a right to cancel.

(i) *Prior information*

The consumer must be provided with certain required information prior to the conclusion of any distance contract. This information must be provided in a clear and comprehensible manner. Failure to provide the following information will prevent the supplier from enforcing the contract:

- identity and address of the supplier
- description of the goods and/or services
- price of the goods and/or services including all taxes
- delivery costs (if applicable)

- arrangements for payment, delivery and performance
- existence of the right to cancel (if applicable)
- cost of using the means of distance communication if other than at a standard rate (excluding premium telephone lines)
- the minimum duration of the contract where products and/or services are performed permanently or recurrently (excluding mobile phone contracts)

(ii) Written confirmation

In a distance contract for the sale of goods the consumer must receive written confirmation of most of the prior information in a durable medium (e-mail is sufficient). In the case of contracts for services, confirmation must be given in good time during the performance of the contract.

(iii) Right of cancellation

Every consumer who is party to a distance contract will have at least seven working days from the day after receipt of the goods (or the day after a service contract is made) to cancel a contract at will without having to give a reason. If the consumer cancels, no penalty can be levied and a full refund must be made within 30 days. During this period, the consumer must take reasonable care of the goods and make them available for collection. If the supplier completely fails to comply with the minimum prior information requirements set out above, the cancellation period is extended by an additional three months. If the supplier is late providing the prior information, but does so within three months, then the seven day cancellation period starts from the date the information is actually given.

(iv) Other requirements

Unless agreed otherwise, the supplier must execute the order within 30 days from the day following the date of the customer's order. If the goods or services are not available, the supplier must inform the customer and refund any sums received within 30 days.

(c) What obligations do the Distance Selling Regulations impose?

Certain types of contract are excluded completely from the scope of the Distance Selling Regulations including:

- those relating to financial services
- contracts concluded by means of automatic vending machines or automated premises
- contracts concluded with telecommunications operators through the use of payphones
- contracts for construction or the sale of land; and
- contracts concluded at auction

In addition, the following types of contract are excluded from the obligations relating to prior information, written confirmation and the right to withdraw:

- contracts for food, beverages and other consumable items
- contracts for the provision of accommodation, transport, catering or leisure services where the supplier agrees to provide the services at a specified date

The E-commerce Regulations

The Electronic Commerce (EC Directive) Regulations 2002 ("**E-commerce Regulations**") apply to businesses which are involved in:

- selling goods or services to businesses or consumers over the internet, via interactive TV, or by email, mobile phone or SMS
- or
- advertising by email or SMS or via the internet
- or
- conveying or storing electronic content for customers
- or
- providing access to a communications network

The E-commerce Regulations impose various requirements, including:

(a) Business Information

Businesses selling online must make the following information available to the recipient of the services and the relevant enforcement authorities in a form which is permanent and easily accessible:

- the name of the supplier
- the geographic address at which the supplier is present
- details of the supplier, including the supplier's email address
- details of any entries in trade registers
- details of any applicable regulating regime, i.e. the name of the professional body with oversight of the supplier, reference to the rules governing the professional body, the EU state of establishment
- where the service provided will be subject to value added tax, the relevant VAT identification number

(b) Relevant information prior to the conclusion of the agreement

The E-commerce Regulations stipulate that a supplier must make the following information clear to the recipient of the service prior to the conclusion of a contract:

- the different technical steps that will be followed to conclude the contract
- whether or not the concluded contract will be filed by the supplier and whether it will be accessible
- the technical means of identifying and correcting input errors prior to placing of the order
- the languages offered for the conclusion of the contract

If businesses subscribe to a code of conduct, this should be easily available for electronic consultation as should any terms and conditions, which need to be available in a format which allows the user to store and reproduce them easily.

(c) Conclusion of the agreement

Suppliers must acknowledge by electronic means receipt of each order without undue delay and make available an effective and accessible technical means

allowing the consumer or the business to identify and correct input errors prior to the placing of the order. The order and acknowledgement of receipt are deemed received when accessed by the parties to whom they are addressed.

Data protection

The Data Protection Act 1998 ("DPA") implements the EU Data Protection Directive. The DPA applies as much to personal data obtained and processed over the internet as it does to information obtained by more conventional means. Virtually every e-commerce transaction will involve the transfer of personal data (for example, name, address, and credit card information). The DPA regulates the processing of data that identifies living individuals.

(a) What is meant by processing?

The definition of processing in the DPA is very wide. Its practical effect is that almost any use of data will amount to processing. Processing means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data including:

- organisation, adaptation or alteration
- retrieval, consultation or use
- disclosure of information by transmission, dissemination or otherwise making available
- alignment, combination, blocking, erasure or destruction

(b) What is data?

All information carried over the internet or by e-mail will be defined as data under the DPA. As long as the data relates to an individual who can be identified from the data, the DPA will apply.

(c) What obligations does the DPA impose?

(i) Registration

A person or legal entity which determines the purposes for which and the manner in which personal data is processed is called a "Data Controller". The Data Controller is responsible for compliance with the DPA. Data Controllers who are commercial undertakings must usually notify the Information Commissioner of their "registerable particulars" and pay an annual fee (currently £35). It is an offence to process personal data without being included on the Information Commissioner's register.

(ii) The 8 Principles

There are 8 principles with which a Data Controller must comply. A breach of any of these principles can lead to enforcement or the imposition of a fine by the Information Commissioner. These are discussed in detail below.

(d) What are the 8 Principles?

(i) Data must be processed fairly and lawfully

In order for processing to be fair, data subjects must have access to information as to the identity of the Data Controller or any representative nominated by a Data Controller, the purpose(s) for which the data is processed and any further information, having regard to the specific circumstances in which the data is processed, to enable processing to be fair (for example, any non-obvious purpose for which the personal data is to be used). In addition to the above requirements, personal data must not be processed unless:

- the individual has given consent
- or
- the processing is necessary for the performance of a contract with the individual to protect his/her vital interests, or is required under a legal obligation
- or
- the processing is necessary to carry out public functions

or

- the processing is necessary for the Data Controller's legitimate interests (however, this may not be prejudicial to the interests of the individual)

Stricter conditions will apply to "sensitive" personal data. The explicit consent of the data subject will be required to process information on racial or ethnic origin, political opinions, religious beliefs, trade union membership, physical or mental health, sex life, commission or alleged commission of a criminal offence, or any proceedings related to such an offence.

(ii) Data shall be obtained for specified and lawful purposes

This principle can be satisfied by notifying the Information Commissioner as described above.

(iii) Personal data shall be adequate, relevant and not excessive

This relates to the purposes for which the data are to be processed. For example, if a business is only sending out e-mails to potential customers, then information on postal addresses and telephone numbers would be superfluous.

(iv) Personal data shall be accurate and, where necessary, kept up to date

Data Controllers must take reasonable steps to ensure the accuracy of the information they hold.

(v) Personal data shall not be kept for longer than is necessary

Data should be periodically audited to ascertain which records need to be retained, updated or deleted. Data should not be indiscriminately retained.

(vi) Personal data should be processed in accordance with the rights of data subjects

This principle is only breached if the Data Controller refuses to comply with requests and/or notices to: (1) cease (or not begin) processing of data that is likely to cause damage or distress, used for direct marketing or used for automatic decision making; or (2) rectify, block or erase manual data which is inaccurate or incomplete.

(vii) *Security measures*

The Data Controller must take appropriate technical and organisational measures against unauthorised or unlawful processing of personal data and against the accidental loss or destruction of, or damage to, personal data. The measures taken must be proportional to the harm likely to be suffered if this principle is breached.

(viii) *Transfer outside the EU*

The Data Controller may not transfer personal data outside the EU unless the country or territory to which the data are transferred ensures an adequate level of protection for data subjects. The main exclusions for e-businesses are where consent for the transfer is obtained from the data subject, or where the transfer is necessary for the conclusion of a contract between the parties. One point to note is that the United States does not have equivalent data protection laws, and, unless a US company obtains the voluntary "Safe Harbor" self-certification (currently subscribed to by only a handful of companies) a transfer of personal data to the US would be in breach of the principle, unless an appropriate exclusion applied.

(e) What rights does a data subject have in relation to personal data processed by a Data Controller?

Data subjects are entitled to request access to personal data in respect of him/her upon written request and for a nominal fee of £10. The Data Controller is obliged to provide the data subject with a description of the personal data it is processing in relation to that individual within 40 days of the request. Copies of the data must be provided. In addition, as mentioned above, data subjects may require Data Controllers to cease processing personal data that is likely to harm the data subject, or which is used for the purposes of direct marketing. Individuals have the right to claim compensation for the Data Controller's breach of the DPA.

(f) How can a business reduce the risk of breaching the DPA?

Regardless of the medium in which personal data are being collected, a business should notify the processing of such data to the Information Commissioner. Businesses should consider modifying internal procedures to ensure that data subject requests for access, rectification or removal can be adequately met. Web sites should have comprehensive, visible and accessible privacy policies informing users of the purposes for which personal information submitted to the site will be used. If personal data are to be sent abroad, active consent should be sought to avoid issues under the 8th Principle.

Electronic signatures

New UK regulations came into force recently, implementing the EU Electronic Signatures Directive. Designed to allow electronic authentication to be as legally binding as a handwritten signature, the EU directive aims to make e-signatures admissible in court, and to allow legal documents to be 'signed' over the internet.

The UK regulations require the Secretary of State to establish and maintain a register of UK digital certificate providers and to monitor their activities.

Real estate

Introduction

Real estate in the UK can be acquired either as:

a) freehold

or

a) leasehold

Generally speaking, the freeholder is the absolute owner of the property and his ownership lasts unless and until he disposes of it.

Notwithstanding absolute ownership, freehold property may be subject to restrictions affecting the property in favour of other land (known as restrictive covenants). It may also have the benefit of or be subject to rights over or in favour of other land (known as easements).

Leasehold property results from a freeholder (called a lessor or landlord in this context) granting a smaller interest in the property to another person (the lessee or tenant) who is entitled, usually subject to the payment of a rent, to use and occupy the property for the term of the lease, which could be as short as one year or as long as 999 years. A lease can also be called a tenancy.

Most occupiers of commercial properties hold the property on leases for varying terms and usually between three years and 15 years; relatively few commercial properties are occupied by their freehold owners. It is common for modern commercial buildings to be let for terms of ten or 15 years, as the freeholders of such buildings are often institutional investors (for example, insurance companies and pension funds) who expect their tenants to enter into long-term commitments. However, the parties may agree longer terms where required. Before the UK property crash in the early 1990s, institutional landlords would often not lease prime property for less than 25 years, but now they may be more willing to lease property for 15 years or less.

Leases will usually be assignable by the tenant, as long as the existing tenant can show to the landlord that the assignee will be a good tenant. Under a lease granted before 1996, all successive tenants will generally remain liable on the lease after they have assigned it. However, under a lease granted in 1996 or later, the tenant will have no further liability after the lease is assigned, although the tenant will generally have to guarantee the future obligations of the assignee under the lease.

Compulsory registration system

In England and Wales, title to nearly all real estate (other than leases under 7 years) is registered at the Land Registry. This, in effect, means that title to virtually all property in the UK is guaranteed by the State. This does not mean, however, that title does not have to be investigated by a solicitor, as purchasing a property can be complex.

How does one acquire a property in the UK?

No permissions are required for buying freehold or leasing leasehold property in the UK, although an overseas company may be asked to show that its incorporation documents give it power to acquire and dispose of land. This will usually involve instructing overseas lawyers to provide an opinion confirming this.

Although new residential houses and flats are often sold with the benefit of structural guarantees or structural defects insurance, this does not usually apply to commercial buildings even where they are newly built. It is possible for a purchaser of a recently constructed building to negotiate with the developer to obtain specific warranties or insurance cover relating to potential defects, but in the absence of these the buyer or tenant of the commercial property could find itself having to meet the cost of necessary repairs or remedial work. It is for this reason that prospective purchasers or tenants should always engage a chartered surveyor to carry out a survey of the property, before they commit themselves to purchasing an interest in it.

Real estate transactions are normally negotiated through agents which usually act for the seller or landlord of the property and expect to be paid a fee (known as a commission), which is calculated by reference to the selling price or the initial rental. This fee is usually borne by the seller. Occasionally, the purchaser or tenant engages an estate agent to find him a suitable property or help him negotiate the transaction in which case he should also expect to pay a fee to that estate agent.

Invariably, a solicitor will be instructed on behalf of each of the vendor/landlord and prospective purchaser/tenant of the property. The purchase of a lease (otherwise known as an assignment of lease) or the grant of a new lease will normally be conducted in two stages.

Briefly, the first stage involves the solicitor acting for the vendor/landlord checking the title to the property and drafting a contract for sale (in the case of a residential transaction), or a new lease or an agreement for lease (in the case of a commercial transaction), or a transfer. This is then submitted to the solicitor acting for the prospective purchaser/

tenant with evidence of the title of the vendor/landlord, which may or may not have been registered at the Land Registry. The prospective purchaser's/tenant's solicitor will carry out various searches of official registers and make enquiries of official bodies, including enquiries of the local government of the district in which the property is located. The solicitor will also raise pre-contract enquiries with the solicitor acting for the landlord/vendor covering matters including:

- access to the property
- adverse rights affecting the property
- services and facilities
- structural guarantees
- boundaries
- planning history
- disputes

The prospective purchaser/tenant may need to organise finance for the purchase of the property.

The solicitor will then report to the prospective purchaser/tenant (and the purchaser/tenant's lender, if finance is being obtained) as to whether he is satisfied that the landlord/vendor has good title to the property, that it is not subject to onerous restrictive covenants or easements, and that the results of the searches he has made are satisfactory. If the prospective purchaser/tenant has obtained a firm offer of finance to fund the purchase (assuming this is required) and has received a satisfactory survey of the property he will be in a position to exchange contracts, exchange the agreement for lease or proceed to completion of the new lease or the transfer. Prior to exchange of contracts, negotiations will be "subject to contract", or in other words, there will be no binding contract until exchange occurs.

Exchange of contracts involves each party to the contract signing his part of it and the solicitors for each party arranging for the two parts of the contract to be exchanged.

On exchange of contracts, it is usual for the purchaser of a property for a cash price to pay to the vendor's solicitor a deposit equal to 10% (or, subject to negotiation, a lesser percentage) of the purchase price, which will be forfeited if the purchaser fails to complete the transaction without justification. All risks

relating to the property usually pass to the purchaser upon exchange, so he will wish to take out insurance cover on the property except where an existing lease is being bought, as it is often the freeholder who insures in this case.

In the case of commercial property an "agreement for lease" may be entered into where for example either the tenant or landlord or both parties are carrying out works to the property. However, an agreement for lease will not be entered into in every commercial leasehold transaction and often the parties will go straight to completion of the lease (in the case of the grant of a new lease) or completion of the transfer (in the case of an assignment).

The second stage of the transaction is known as completion. This often takes place within one month from exchange of contracts or such time as is agreed in the Agreement for lease (i.e. a date which is dependant on the date on which the works are completed). The period can be shorter or longer depending on the circumstances. At completion, the balance of any purchase price is paid and ownership of the property is transferred to the purchaser by a document called a "transfer" or "deed of assignment" depending on the nature of the title. If the transaction is the grant of a lease, the lease will be completed by dating the document.

At completion, possession of the property is handed over to the purchaser/tenant. In the case of a purchase, the purchaser's solicitor will wish to ensure that any existing mortgages or charges affecting the property are discharged on completion so that the purchaser obtains an unencumbered title.

Following completion of the purchase or grant of the new lease, the purchaser's/tenant's solicitor will attend to certain formalities, including the payment of stamp duty land tax on the transfer documents or lease (see page 39) and the registration of the purchaser's/tenant's title at the Land Registry (if appropriate).

If the purchase of the property has been funded by a bank or other institution, it will normally wish to take security on the property by means of a mortgage or charge, which will be entered into by the purchaser at completion. The bank or other institution may wish to have its own solicitors attend to the legal formalities.

Further details on leasehold property

Where the property being acquired is leasehold (that is by the grant of a new lease or the assignment of an existing lease) the terms of the lease will require careful consideration. Leases of commercial premises are often lengthy documents which contain complicated provisions. The solicitor acting for the prospective tenant will be able to give detailed advice as to the form of the lease. Where a new lease is being granted then every provision in it can be negotiated, although it should be noted that this can be a lengthy process. Where an existing lease is being purchased, it is not normally possible to change any of its provisions.

Some of the most important provisions are the following:

(a) Rent and terms of rent review provisions

The rent is commonly reviewed on a five yearly basis to the open market rent at the date of the review. Most leases currently contain "upwards only" reviews, so that the rent will not be reviewed to below the rent being paid under the lease prior to such review.

(b) Repairing obligations

These provisions set out which party is responsible for repairing the property or certain parts of it.

(c) Service charges

In, for example, a lease of part of a building, the landlord may covenant to provide certain services for which the tenant must agree to pay.

(d) Restrictions on use

A lease will usually stipulate what the authorised use is.

(e) Restrictions on transfer and subletting

The lease will usually restrict the tenant's ability to transfer or sublet and add conditions to such dealings.

(f) Restrictions on alterations

A lease will often prohibit structural alterations but may permit certain internal alterations subject to the tenant obtaining the landlord's consent.

(g) Forfeiture provisions

It is common for landlords to have a right to forfeit in the event that the tenant breaches a covenant in the lease.

(h) Insurance

Very often the landlord insures the premises and charges the cost of the insurance premium to the tenant.

(i) The Landlord and Tenant Act 1954

Tenants of commercial property are given security of tenure by the Landlord and Tenant Act 1954. At the end of the lease, a tenant will be entitled to be granted another lease at the then current market rent, unless the landlord can oppose renewal on any of the grounds specified in the Landlord and Tenant Act 1954, for example, by demonstrating an intention to redevelop the property or if the landlord requires it for his own use. If renewal is denied, compensation will be payable to the tenant.

In some leases, these security of tenure provisions may be excluded by prior agreement between the parties.

Environmental law

Introduction

The term "environmental law" covers a wide range of legal provisions, both under statute and case law. The provisions apply to a number of issues relating to the protection of the environment including the media of land, water and air as well as flora and fauna dependent upon such media, the prevention of pollution, the preservation of natural resources, the protection of human health and the regulation of activities which could affect the environment.

Principal legislation

The principal UK statutory environmental legislation imposing a liability includes:

- a) Town and Country Planning legislation, which requires planning permission to be obtained before carrying out building or other operations on land or changing the use of land. It contains provisions requiring developers of certain types of projects which are likely to have a significant impact on the environment to carry out an assessment of the environmental effects of the proposed projects when making an application for planning permission for such projects. The environmental effects of a proposed development will of course be an important consideration in the decision as to whether planning permission should be granted for a proposed development.
- b) Part I of the Environmental Protection Act 1990 ("**EPA**"), which provides that the operator of a "prescribed process" (an expression covering numerous industrial processes and activities) must hold an authorisation to carry on the process and operate it in accordance with the conditions attaching to such authorisation. Part I of the EPA is gradually being replaced by the Pollution Prevention and Control Act 1999 which requires a permit to be obtained to carry on any of a range of industrial processes and activities.
- c) Part II of the EPA, which requires a waste management licence to treat, keep or dispose of controlled waste makes it an offence to do so in a manner likely to cause pollution of the environment or harm to human health.
- d) Section 34 of the EPA, which places a statutory duty of care on virtually anyone who produces or deals in any way with waste.
- e) Sections 78A to 78YC of the EPA (inserted by Section 57 of the Environmental Act 1995), which enable the Environment Agency to serve remediation notices requiring contaminated land to be cleaned up.
- f) Part VI of the EPA, which imposes duties on the local authorities to inspect their areas and deal with complaints concerning statutory nuisances and risks to public health. The EPA provides enforcement by means of the service of "abatement notices" on persons responsible or, in their absence, on the owner or occupier of the premises.
- g) The Water Resources Act 1991, which empowers the Environment Agency to take enforcement action relating to illegal discharges of pollution into "controlled waters" which includes rivers and watercourses and waters which flow beneath the ground.
- h) The Control of Asbestos at Work Regulations 2002, which impose a duty to manage the risk of asbestos upon anyone who manages, controls or repairs commercial property. This involves carrying out a risk assessment to establish if any asbestos is or is liable to be in the premises, and produce a written plan assessing the risk and recording the measures taken to manage the risk. The duty to manage asbestos related risk is ongoing, and re-inspections should be undertaken every 6-12 months.
- i) The Finance Act 2000, which introduced the climate change levy. This takes the form of a tax on the use of energy in industry and commerce. However, this is offset by a cut in employers' National Insurance Contributions, and entails no increase in the tax burden on

industry as a whole. The aim of the tax is to help reduce greenhouse gas emissions, not to boost public funds.

- j) The UK, like the rest of Europe, has specific rules concerning the recycling and benign disposal of packaging materials and a very broad range of electrical goods. A UK subsidiary or its parent company overseas may be required to register before it can begin trading and either to join a formal recycling scheme or buy tradable evidence that obligations have been met. These rules are extremely complex and specific advice should be sought.

Liabilities of the polluter

Nearly all the anti-pollution provisions involve potential criminal liability and some impose strict liability, meaning they are punishable irrespective of any lack of intention on the part of the accused. Fines, which can be heavy, are the normal penalty, although in some cases prison sentences have also been imposed, for example, on directors and senior managers.

A "remediation notice" may be served requiring contaminated land to be cleaned up. The notice is to be served on the persons who have "caused or knowingly permitted" the contamination. The expression "knowingly permitted" can mean simply knowing that the land is contaminated and having the power to remedy the contamination. If no such person can be found after reasonable enquiry, the remediation notice may be served on the owner or occupier for the time being of the contaminated land.

A number of provisions permit the relevant regulatory authorities to recover their costs in carrying out cleaning-up and other works from persons responsible for the pollution or contamination or, in some cases, the owner or occupier of the site. These costs can be huge. It is also possible for the regulator to vary, suspend or revoke a licence granted to the polluter which could, for example, lead to the closure of a factory.

Apart from statute, potential liabilities for causing pollution may also arise under common law. Liability can arise under the tort of nuisance, negligence, trespass and the rule in *Rylands v Fletcher* (which imposes liability for the escape of dangerous substances onto neighbouring land). Liability can also arise on the basis of a breach of statutory duty.

In *Cambridge Water v Eastern Counties Leather*, the House of Lords held that common law liability for water pollution caused by chemical spillages would only exist if it was reasonably foreseeable at the time the spillages occurred that the spillages would cause water pollution.

Regulation of financial services

Background

The financial services sector in the UK is regulated by the Financial Services Authority (the "FSA"). The FSA is an independent non-governmental body which has been given powers by FSMA. The FSA is responsible for regulating the whole of the financial services sector, including investment firms (investment managers, stockbrokers and those selling investments), banks, insurance companies and friendly societies. The FSA has four regulatory objectives: the reduction of financial crime, the maintenance of market confidence, the promotion of public awareness and the protection of consumers. In accordance with its regulatory function, the FSA makes rules and provides guidance which are contained within the FSA Handbook.

Regulated activities and authorisation

The general prohibition

Under section 19 of FSMA no person may carry on a “regulated activity” by way of business in the UK unless he is an “authorised person” or an “exempt person” (referred to as the “general prohibition”). The “regulated activities” (and corresponding exclusions) are set out in Part II of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (as amended), and include:

- investment business activities (including dealing in investments (whether as principal or agent), arranging deals in investments, safeguarding and administering investments, the discretionary management of investments, giving investment advice, establishing, operating or winding-up a collective investment scheme (including for example unit trusts, limited partnerships, investment companies with variable capital, but excluding investment trust companies) and sending dematerialised instructions in relation to investments)
- accepting deposits (which covers banking activities and issuing electronic money) (see pages 36 and 37, “Regulation of Banking” for more details)
- insurance business activities (effecting, carrying out, arranging or assisting in the administration and performance of contracts of insurance)
- advising, administering or entering into as a lender, a regulated mortgage contract (essentially first mortgages on residential property)
- establishing, operating or winding-up a personal pension scheme and providing basic advice on such schemes
- operating a multilateral trading facility
- providing funeral plan contracts, or arranging, managing, safeguarding, administering assets or advising on such
- certain activities relating to the Lloyd’s insurance market, such as advising on syndicate participation, managing the underwriting capacity of a syndicate or arranging deals in insurance contracts written at Lloyd’s

To be caught by the restriction in section 19 of FSMA, regulated activities must be carried on in relation to one or more of the “specified investments” in Part III of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (as amended). The list of “specified investments” includes deposits, electronic money, shares, instruments creating or acknowledging indebtedness (e.g. bonds and debentures), government and public securities, certificates giving rights to securities (e.g. depositary receipts), derivatives (futures, options and contracts for differences), contracts of insurance (including both long term and general insurance, which can extend to guarantees and indemnities), units in a collective investment scheme, rights under a stakeholder pension scheme, regulated mortgage contracts, funeral plan contracts and Lloyd’s syndicate capacity and membership.

To be caught by the restriction, the regulated activity must be carried on in the UK, but this has a special meaning which can cover any entity whose registered or head office is in the UK or is managed from the UK, even if the main activities are carried on abroad.

Authorised persons and exempt persons

An “authorised person” or “authorised firm” generally describes a person who has applied for and has been granted permission by the FSA to carry on one or more regulated activities (referred to as a “Part IV permission”) or an EEA firm with passport rights under European legislation entitling it to establish a branch or provide certain services in the UK.

There are also certain persons who are “exempt persons” under FSMA and so do not need to become authorised persons in order to carry on regulated activities in the UK. The list of “exempt persons” can be found in the Financial Services and Markets Act 2000 (Exemption) Order 2001 (as amended), and includes:

- the Bank of England and central banks of other EEA states;

- supranational bodies of which the UK or another EEA state is a member, such as the International Monetary Fund or the European Central Bank
- in relation to accepting deposits, certain municipal banks, local authorities, charities and industrial provident societies

In addition, a person need not be authorised if he, she or it is the appointed representative of an authorised person who takes responsibility for the appointed representative's actions, in accordance with section 39 of FSMA.

Regulation by the FSA

Supervision by the FSA of firms carrying on regulated activities focuses on:

- ownership, by requiring the prior approval of "controllers" of the firm
- management, through the imposition of requirements on "approved persons" within the firm who undertake "controlled functions", essentially management functions, client (or front office) functions and compliance functions
- the financial (or prudential) status of the firm
- conduct of business, through rules governing how and on what terms an "authorised person" should deal with its clients

FSA regulation applies to various aspects of a firm's business. This includes the imposition of a restriction on firms which communicate or approve a financial promotion so that "a person must not in the course of business communicate an invitation or inducement to engage in investment activity". However, persons may only make such communications (or approve the content of such a communication by another person for the purposes of the restriction) provided the communication complies with the rules applicable to financial promotions. The FSA's Conduct of Business Sourcebook within the FSA Handbook imposes various requirements, including a requirement to ensure that the communication is clear, fair and not misleading. Persons who are authorised persons or exempt persons are not subject to the basic restriction on financial promotion.

How to apply for authorisation

An application to the FSA for permission to carry on one or more regulated activities may generally be made by any person or body, whether an individual, a body corporate, a partnership or an unincorporated association.

In granting a Part IV permission (as well as when varying or imposing requirements on a firm's existing Part IV permission), the FSA must be satisfied that the applicant satisfies the "threshold conditions" in relation to the relevant regulated activities. The "threshold conditions" relate to the suitability of the applicant, its resources, legal status, links to other persons which may affect supervision by the FSA and the location of its offices.

The central feature of the application process for Part IV permission is the completion of an application pack by the applicant, although in complex cases the FSA will also seek to foster a dialogue between applicants, their advisers and the FSA. Applicants are required to provide a variety of information, including information about itself, its business plan and individuals within the organisation who will be performing "controlled functions". The FSA has issued guidance notes on the application procedure.

Time and cost of applications for authorisation

The planning of an application and the devising of a business model which complies with the FSA's rules is a substantial exercise which will require significant time to be devoted to it before the application to the FSA can even be submitted. There will then follow a period of consideration by the FSA.

The application cost and the time taken by the FSA to consider applications depends on the complexity of the applicant's business and the extent of any further enquiries the FSA may undertake.

Legislation allows the FSA six months from the date of receipt of a completed application to make its determination. However, in a straightforward case, it may take as little as three months. Where an incomplete application is sent to the FSA, the FSA has twelve months from the initial receipt of the application to make its decision. In devising any timetable, a substantial preparatory period, prior to submission of the application, should also be allowed.

The fee payable by the applicant on or before submission of an application is similarly dependent on the complexity of the application. The fees are currently:

- £1,500 for straightforward applications
- £5,000 for moderately complex applications
- £25,000 for complex applications

European single market

There is an effort within the EU to create a single European market in financial services. The single market European directives establish the legislative framework by which firms may carry on certain activities in another EEA state by either establishing a branch in another EEA state or providing cross-border services into another EEA state, subject to the fulfilment of the conditions in the relevant directive.

The single market directives include, for example, the Markets in Financial Instruments Directive 2004 (“**MiFID**”) (for firms carrying an investment services or investment activities) and the Undertakings for Collective Investments in Transferable Securities (“**UCITS**”) Directive (for UCITS management companies – applicable to certain collective investment schemes).

Collective investment schemes

The regulation of collective investment schemes is a specialist area upon which FFW would be happy to provide specialist advice if you are intending to establish or operate such an arrangement in the UK.

Regulation of banking

General

As mentioned in the preceding section of this report, the banking sector in the UK is now supervised by the FSA.

The essence of regulated banking activity is deposit taking. No person may accept a deposit in the UK by way of business unless authorised by the FSA or exempt. This extends to activities carried out by a person with a base in the UK even if the activities affect those outside the UK.

In relation to banking, there are two main categories of “authorised person” under FSMA. The first is a person who obtains authorisation from the FSA by applying for permission to carry out deposit-taking business and any other regulated activities. The second is a bank authorised in another EEA member state, which may exercise its single European passport and establish a branch or provide cross-border services in the UK.

The process for obtaining authorisation is similar to that for other financial services businesses, but it is usually regarded as a complex application.

Banks incorporated outside the EEA (for example, in the United States, Japan or Switzerland) do not benefit from the single European passport, although they may establish European subsidiaries which can benefit from EU passporting, subject to certain requirements for reciprocity. If a bank incorporated outside the EEA wishes to provide services or establish a branch in the UK (or any other part of the EEA) it will be subject to the normal authorisation procedures in each member state. If that bank applies for authorisation under FSMA, the FSA will obtain a report on the applicant from its overseas banking supervisor, dealing with matters such as prudent management and overall financial soundness. An applicant from a non-EEA state will find it difficult to satisfy the FSA where its home regulator has no arrangement with the FSA for the exchange of information about regulated businesses.

Representative office of a bank

The essence of a representative office is that it does not accept deposits in the UK or carry out active investment business here, but instead confines its activities in the UK to marketing, research and referral of opportunities to its overseas office. The formal regime for establishing a representative office in the UK that existed under the Banking Act 1987 has been abolished. It is now the responsibility of each representative office to ensure FSA compliance. If a representative office carries out regulated activities, such as arranging investment activities, it will need authorisation from the FSA. The FSA also has regulatory responsibility for dealing with any representative office that breaches the prohibitions and restrictions or commits an offence in the same way as it has powers and responsibilities over other UK authorised persons.

Use of a banking name

All the previous restrictions on the use of banking names contained in the Banking Act 1987 have been abolished. Instead the FSA relies on a general prohibition against persons holding themselves out as authorised when they are not so.

Consumer Credit Act 1974 (the "CCA")

This is a complicated suite of legislation which regulates the provision of credit and the hiring of goods to individuals, partnerships and sole traders. Lending and hiring to corporates is not regulated by the CCA. The CCA imposes a licensing regime and controls the form of agreements, methods of advertising and so on. Any credit or hire agreement made with individuals, sole traders, partnerships (of two or three partners) or unincorporated associations will be regulated by the CCA, but if the borrower/hirer is entering into the agreement for business purposes the CCA does not regulate agreements where the loan/rental payments exceed £25,000. There are other exemptions available, depending on the status of the borrower, the purpose of the loan and the security being granted.

Obtaining a licence is not typically an expensive or complicated procedure. Carrying out CCA-regulated business without a licence is a criminal offence. Failure to follow the CCA prescriptions as to the form of agreements, contact or advertisements, etc. can lead to the agreement being unenforceable against the borrower/hirer.

UK taxation

Introduction

The tax aspects of doing business in the UK will depend on who is doing the business and what is involved. The following provides an outline guide to:

- corporation tax (the UK tax on profits of companies)
- income tax
- other taxes

As an overall comment, the Government has made a consistent effort to reduce corporate tax rates in the UK. The main rate of corporation tax has come down from 45% in 1984 to the current rate of 28%. However, income taxation of the individual is increasing with the top rate of income tax due to an increase to 50% from 2010/2011 for income over £150,000.

Corporation tax

A UK resident company is subject to corporation tax on its world-wide profits (income and capital gains). A non-UK resident company is only subject to corporation tax if it carries on a trade in the UK through a permanent establishment and then only on profits attributable to the permanent establishment. A non-UK resident company will not be subject to corporation tax if it only has a representative office in the UK (that is, an office through which no trade is carried on).

A company will be resident in the UK if it is incorporated in the UK. A non-UK incorporated company will be taxed as resident if its central management and control are exercised in the UK.

Such control is usually exercised by a company's board of directors.

There is a straightforward procedure to register for corporation tax purposes. HM Revenue & Customs should be asked to agree, in the case of a representative office, that it is not liable to corporation tax.

(a) How is corporation tax charged?

Corporation tax is charged on the profits of a financial year. The financial year 2009 started on 1 April 2009 and ends on 31 March 2010. This is known as “**FY 2009**”.

(b) What is the rate of corporation tax?

The rate of corporation tax is 28% (FY 2009). A lower rate of 21% applies to companies with profits of less than £300,000 (FY 2009). A marginal relief applies to profits falling between £300,000 and £1,500,000 (FY 2009). Not all types of companies are entitled to the lower rate or the marginal relief.

(c) What are taxable profits?

Taxable profits are generally based on profits in the company's statutory accounts as adjusted for tax purposes. The general rule, subject to certain exemptions, is that expenses are tax deductible if they are incurred wholly and exclusively for trade purposes and are not of a capital nature.

Capital gains are taxed at the same rate as income profits. There is a relief from tax on gains caused by inflation (indexation relief). Tax on gains on certain business assets may be deferred if the proceeds are reinvested in other similar business assets up to 12 months before or three years after the disposal. Capital gains arising on the sale of “substantial shareholdings” (broadly at least a 10% interest) may, subject to detailed rules, be exempt from tax. Capital losses can be carried forward against capital gains without time limit but cannot generally be set against income profits and cannot be carried back.

Dividends received by a UK resident company from other UK resident companies are exempt from tax. Dividends received by a UK resident company from non-UK resident companies are currently taxable but are expected to become fully exempt, with effect from 1 July 2009.

(d) How can a company use trading losses?

Trading losses may be carried forward without time limit against income from the same trade or may be set against any profits of the same or certain previous periods. Losses may be offset against profits arising in group companies (at least 75% owned) in the same period.

(e) Are there any capital allowances?

Depreciation for tax purposes is given according to statutory rules by reference to the type of asset. There is a special 40% allowance for expenditure incurred on qualifying plant and machinery in FY 2009. The general rate of allowances for expenditure on qualifying plant and machinery not within the special 40% allowance is a 20% allowance on a reducing balance basis, although other rates are applicable for particular types of expenditure.

(f) Research and development (“R&D”) tax relief

What is R&D?

R&D is defined by reference to guidelines issued by the UK's Department for Business, Enterprise and Regulatory Reform. Broadly, these guidelines provide that a project which seeks to, for example: extend overall knowledge or capability in a field of science or technology; or create or make an appreciable improvement to an existing process, material, device, product or service which incorporates or represents an increase in overall knowledge or capability in a field of science or technology; or use science or technology to duplicate the effect of an existing process, material,

device, product or service in a new or appreciably improved way (e.g. a product which has exactly the same performance characteristics as existing models, but is built in a fundamentally different manner) will be R&D for tax purposes if the project seeks to achieve an advance in overall knowledge or capability in a field of science or technology, not a company's own state of knowledge or capability alone.

Availability of R&D tax relief

"Qualifying expenditure" has a specific meaning, but expenditure on staffing costs for R&D employees and paying external staff providers for R&D staff, along with materials, water, fuel and power for R&D and software directly used in the R&D are all likely to qualify.

A minimum of £10,000 must be spent on R&D in an accounting period and there is an upper limit of £7,500,000 for small and medium-sized enterprises to the amount which may be claimed.

It is possible for small and medium-sized enterprises to surrender their enhanced R&D tax relief and instead receive tax credits in cash from HM Revenue & Customs.

R&D tax relief is claimable in a company's tax return.

Income tax

Individuals resident and domiciled in the UK are subject to income tax on world-wide income from all sources. This includes income arising from businesses carried on by partnerships and salaries of employees. Non-UK domiciled residents are only taxable on overseas income (such as overseas investment income) to the extent it is remitted to the UK provided that they claim (on an annual basis) to be taxed on the remittance basis and pay the annual remittance basis charge of £30,000. A claim for the remittance basis will result in the loss of the UK personal allowances and CGT annual exemption. If the remittance basis of taxation is not claimed a non-UK domiciled individual who is resident in the UK will be taxed on both UK source and overseas income.

Non-UK resident individuals are taxable only on income from UK sources.

(a) What is residence and domicile?

Broadly speaking, an individual is:

- domiciled in the country where he has his permanent home
- resident in the UK if he spends more than 183 days in the UK in a tax year, or 91 days or more in the UK per tax year averaged over a four year period

Non UK domiciliaries who are not long term UK resident (i.e. resident for less than 7 out of the last 9 tax years) do not need to pay the annual tax charge of £30,000 to claim the remittance basis of taxation.

(b) What are the other relevant factors for calculating an individual's income tax?

(i) The tax year

The tax year for individuals ends on 5 April. For example, the tax year 2009/2010 is from 6 April 2009 to 5 April 2010.

(ii) Rates

The following rates of income tax apply to an individual for the tax year 2009/2010 in respect of earned income:

<u>Taxable Income</u>	<u>Rate of Income Tax</u>
£0 - £2,440	10% (savings starting rate)
£0/£2,440—£37,000	20% (basic rate)
Above £37,000	40% (higher rate)

(iii) Deductions

For the tax year 2009/2010 a personal allowance of £6,475 is available. Deductible items include in certain circumstances, interest on loans used to buy shares in certain companies or partnerships. Certain other payments (for example, charitable donations in the approved form) are also deductible. Pension contributions up to certain limits are deductible from earned income.

(c) What is PAYE?

Pay As You Earn (or "PAYE") must be operated by employers. It is a system of deducting tax from payments to employees. The employer must account for the tax deducted to HM Revenue & Customs and must also provide information for "benefits in kind" provided to employees. Most benefits in kind are taxable (for example, the provision of accommodation (subject to certain exceptions), a car for private use, private health insurance). Each employer must be registered for PAYE purposes.

Other taxes

(a) Capital gains tax

Capital gains tax ("CGT") is payable by individuals (companies pay corporation tax on capital gains). Net gains exceeding £10,100 (for the tax year 2009/2010) which arise from the disposal of assets, are taxed at the rate of 18%. Gains on assets owned at 31 March 1982 can be calculated by reference to their market value at that date, rather than cost. Private cars, principal private residences, tangible movable assets which are disposed of for £6,000 or less, and certain other assets and transactions are exempt. Losses may be carried forward indefinitely.

Non-UK residents are not normally chargeable to capital gains tax.

(b) Entrepreneurs' Relief

Entrepreneurs' relief is available in respect of gains made on the disposal of part of a business or on disposals of assets following the cessation of a business by certain individuals who were involved in the running of the business, provided that certain conditions are met. The first £1 million of gains will be charged to capital gains tax at an effective rate of 10%. Gains in excess of £1 million will be charged at 18%. An individual will be able to make claims for relief on more than one occasion, up to a lifetime total of £1 million.

The way this works in practice is that the gain will be reduced by 4/9, so the effective charge becomes 10% on the remaining 5/9 of the gain.

Example

Sarah sells her trading business and realises gains of £450,000 (before entrepreneurs' relief). She has made no other claims to the relief, and the whole of the gains are eligible for relief. If she claims the relief the gains of £450,000 will be reduced by 4/9ths (£200,000) and £250,000 of the gains will be liable to CGT (subject to deduction of any allowable losses and the annual exempt amount).

(c) Social security taxes

Every working individual aged up to 65 for a man or 60 for a woman must pay social security ("National Insurance") contributions if his or her earnings exceed £6,475 (for the tax year 2009/2010).

Employees' contributions are withheld by the employer under the PAYE system mentioned above. The main rate of contributions is 11% but only on the first £43,888 of the employee's yearly earnings and to the extent they exceed £5,720. The rate of contributions due on all yearly earnings above £43,888 is 1%. Additionally, employers must pay "secondary National Insurance Contributions" in respect of each employee's earnings. These are, broadly, charged at a rate of 12.8% without limit and can therefore be very expensive.

From 6 April 2011 the main, secondary and additional rates of National Insurance contributions will all increase by 0.5%.

An individual who makes adequate provision for a pension by membership of an employer's scheme or by contributing to a personal scheme may seek approval to "contract out" of the state earnings related pension scheme, in which case, the social security contributions are reduced.

There are special rules relating to individuals coming to work in the UK from abroad.

(d) Value Added Tax ("VAT")

VAT is charged on most supplies of goods and services made by companies and other persons in business. The cost of the VAT is passed on to the recipients of these supplies. Additionally, VAT must be paid when goods are imported into the UK. The standard rate of VAT is 15% although this will revert to 17.5% on 1 January 2010. Companies and business persons which have to account for VAT on their services can recover any VAT they incur on their expenses, subject to complex rules. Banks and other financial institutions may not be able to recover all the VAT they are charged. VAT can be charged on the sale or leasing of commercial property. Certain types of supplies are not charged to VAT.

Registration for VAT purposes is compulsory if, in very broad terms, the value of the goods and/or services supplied from the UK exceeds or will exceed an annual turnover threshold (£68,000 from 1 May 2009).

A UK representative office of a foreign corporation can usually register for VAT and recover VAT on expenses, even though it does not make supplies in the UK on which VAT is charged.

(e) Stamp taxes

Stamp duty is chargeable, at a rate of 0.5%, on the purchase of shares in UK incorporated companies.

Stamp duty land tax ("**SDLT**") is chargeable, on the purchase of UK land. The maximum rate is 4% and this applies where the purchase price exceeds £500,000. SDLT is also chargeable, at a rate of 1%, upon the grant of a lease in respect of the net-present-value of lease rentals. SDLT is not payable for residential property transactions valued at less than £175,000 (until 31 December 2009 at which point the

threshold will be reduced to £125,000) . SDLT is not payable for non-residential property transactions valued at £150,000 or less.

(f) Customs duties

The UK has comprehensive duties on imports from countries outside the EU into the UK. Advice may be required on the correct classification of imported goods and on arrangements for the payment of custom (and excise) duties.

(g) Excise duties

The UK levies excise duties on items such as petrol, alcohol and tobacco products.

(h) Local property taxes

These taxes (also known as rates) are charged on the annual value of the property used for business purposes.

(i) Council tax

Council tax is levied by the local authority on the occupants of dwellings. This charge does not depend on the individual occupant's means, although very poor individuals may be entitled to an exemption. The charge is generally between nil and £2,000 per annum depending on the value of the dwelling.

(j) Inheritance tax

Inheritance tax ("**IHT**") is charged on gifts made within 7 years of an individual's death, on chargeable lifetime transfers and on the individual's estate on death. The maximum rate of IHT is 40%. There are various reliefs and exemptions that reduce or remove an IHT charge in some cases. If an individual is domiciled outside the UK only his UK estate is taxable but a non UK domiciled person can be deemed to be UK domiciled for IHT purposes in certain circumstances, for example, if resident in the UK for 17 out of the last 20 tax years. Double tax treaties may also alter the position. There is a separate system for charging IHT on trusts.

(k) Withholding taxes

Withholding taxes arise on employee pay (for income tax and employees' National Insurance Contributions) and on certain interest and royalty payments, in particular, where the recipient of such payments is a non-UK resident. In this case the obligation to withhold tax may be affected by the articles of a double tax treaty between the UK and the country in which the recipient is resident.

Tax planning

There are a number of legitimate methods of arranging the affairs of a business so as to reduce its UK tax liabilities and those of its employees and proprietors. Detailed advice can be provided in the context of particular circumstances.

One area where tax planning may be needed is in respect of equity incentives for employees and directors.

The UK provides a number of tax efficient employee share plans which overseas companies setting up businesses in the UK can take advantage of and implement for their employees resident in the UK. These plans can help in the recruitment and retention of employees and reduce the potential tax and social security costs as part of an overall remuneration package.

Tax advantaged share plans

There are currently four tax advantaged arrangements:

- the Company Share Option Plan (“**CSOP**”) - a discretionary share option plan with tax reliefs for a participant on the exercise of their option
- an Enterprise Management Incentives (“**EMI**”) arrangement - a discretionary share option which provides even greater tax reliefs than a CSOP option
- the Save As You Earn (“**Share Save/SAYE**”) option plan - an all-employee plan which allows employees to save tax efficiently in order to purchase shares at a discount at the end of the savings period

- the Share Incentive Plan (“**SIP**”) - an all-employee plan which allows employers to award shares to their employees tax free and for employees to purchase shares out of their pre-tax salary.

All of the above have limits on the number of options or shares which can be awarded and companies and participants must ensure that they meet certain statutory conditions.

Investment Reliefs

EIS Tax Relief

The aim of EIS relief is to encourage investment by individuals in smaller, higher risk trading companies. In order to reward investors for the risks undertaken, various income tax and capital gains tax reliefs are available provided the criteria for eligibility to EIS relief are fulfilled. The criteria apply to the investee company, the shares issued, the use of the money raised and to the investors themselves. Broadly the investors must not be connected with the investee company. Individuals (including husbands and wives separately) can each claim 20% income tax relief on their costs of investment in EIS Qualifying Companies (up to £500,000 per annum from tax year 2008/2009) against their individual income tax liability for the tax year. The shares in the EIS Qualifying Companies must be held for at least three years and the individuals must subscribe at least £500 a year. Additional reliefs are also available to investors under which they can offset losses arising on the disposal of their shares against income and defer capital gains arising from the sale of their EIS investment.

Example

Initial Investment (net of charges)	50,000
Less EIS relief at 20%	<u>(10,000)</u>
Net cost of Investment	<u>40,000</u>

Venture Capital Relief

The Venture Capital Trust scheme started on 6 April 1995. It is designed to encourage individuals to invest indirectly in a range of small higher-risk trading companies whose shares and securities are not listed on a recognised stock exchange, by investing through

Venture Capital Trusts (“VCTs”). Tax reliefs are available to individuals over the age of 18 but not to companies, trustees or others.

Income tax reliefs:

- Exemption from income tax on dividends from ordinary shares in VCTs up to the permitted maximum of £200,000 (“**dividend relief**”).
- ‘Income tax relief’ at the rate of 30% of the amount subscribed for shares issued in the tax year 2006/2007 and onwards (for subscriptions for shares issued in previous tax years the rate is either 20% or 40%). The shares must be new ordinary shares and must not carry any preferential rights or rights of redemption at any time in the period of five years (three years if the shares were issued between 6 April 2000 and 6 April 2006) beginning with their date of issue. An individual can get this relief for the tax year in which these ‘eligible shares’ were issued, provided that they subscribed for the shares on their own behalf, the shares were issued to them, and they held them for at least five years (three years if the shares were issued between 6 April 2000 and 6 April 2006).
- The income tax relief at 30% is available to be set against any income tax liability that is due, whether at the starting, basic or higher rate.

Capital gains tax reliefs: There are two Capital Gains Tax reliefs:

- Provided that the relevant conditions are satisfied an individual will not have to pay Capital Gains Tax on any gain they make when they dispose of their VCT shares (this is called “**disposal relief**”).
- If an individual invested in eligible shares issued before 6 April 2004, they may be able to treat gains arising on disposals around the time their VCT shares are issued as postponed to a later year (this is called “**deferral relief**”). The individual must have received income tax relief on the investment in VCT shares and the VCT shares must be issued in the period beginning 12 months before and ending 12 months after the gain arises. Deferral relief is not available in respect of investments in shares issued after 5 April 2004.

Investment grants

The UK Government actively encourages overseas businesses to set up in the UK and provides incentives in the form of various grants. These grants can be applied for, providing certain criteria are met.

Further information on support available to overseas enterprises seeking to set up or expand in the UK and the other business incentives can be obtained from:

UK Trade & Investment HQ
UK Trade & Investment Kingsgate House
66-74 Victoria Street
London SW1E 6SW

Tel: +44 (0) 20 7215 8000
Fax: +44 (0) 20 7828 1281

Internet: www.ukinvest.gov.uk
Email: enquiries@uktradeinvest.gov.uk

In addition to UK government assistance, the European Investment Bank makes loans to help development in the EU. These loans are available to overseas investors intending to invest in the UK.

The European Investment Bank provides loans for capital investment projects in industry or infrastructure. Areas which are considered for large loans include:

- regional assistance
- transport
- communications
- environmental protection
- development of industry
- small and medium sized businesses

Further information can be obtained from the European Investment Bank’s website: www.eib.org.

Contact

Remember, the UK actively encourages overseas businesses to set up in the UK. For further information or assistance, please speak to your usual contact at Field Fisher Waterhouse LLP.



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