Business Start ups

Doing business in the United Kingdom

1. Introduction

In 2018, the World Bank ranked the UK as one of the top 10 easiest places in the world to do business, ahead of Sweden, Australia and Canada, and second only in Europe to Denmark. The UK and, in particular London, is still seen as the gateway to Europe. Furthermore, the UK economy has always thrived on international trade – more so than most countries – and the UK's policies continue to be focused on welcoming inward investment and stimulating exports. Only time will tell how the 2016 "Brexit" vote and the transitional agreements made will impact UK companies. As a general rule, overseas businesses do not need permission to establish a presence in the UK, although authorisation will be needed for certain kinds of business such as banking and financial services.

This guide is designed to give an overview of the key legal considerations when doing business in the UK. It is not intended to be definitive, but sets out those items which should be considered from the outset.

If you are thinking of setting up or expanding a business in the UK (whether by way of an independent business or forming a trading relationship with another UK business), Fox Williams would be delighted to assist. We are able to help with the initial incorporation (or acquisition) of a UK business and advise you on the entire life-cycle of that UK business including, where applicable, an eventual exit and sale.

Fox Williams

Fox Williams is a business law firm based in the City of London. Founded some 29 years ago by six partners from leading London law firms, we have 32 partners and approximately 50 further lawyers who act for organisations and senior individuals in The City of London and for UK and international businesses and entrepreneurs.

Our clients choose us because we are, first and foremost, business advisers who help them to achieve what is important to them. We do this by specialising in specific business sectors, (such as financial services, technology and digital, natural resources, fashion and professional services) where we have a deep level of knowledge and find that our clients value a service that combines the quality of high partner access with the cost-effectiveness of leaner legal teams. We are also well-placed to help international businesses navigate the London markets, regulatory and tax regime and wider legal system.

Our legal services include:

- Capital Markets
- Corporate finance and M&A transactions
- Financial services, securities laws and regulatory compliance
- Private equity and venture capital
- A broad range of commercial advice including e-commerce and information technology
- Intellectual property
- Corporate and entrepreneurial tax
- Banking and business restructuring
- Commercial real estate
- Dispute resolution and litigation
- Employment, immigration and pensions
- Partnership law and professional practices.

Our uncompromising commitment to quality means that our competitors are regularly the major City law firms. We aim not only to match them in technical expertise, but also by delivering a pragmatic, more personal and cost-effective service with significant input from partners and other senior lawyers.

Having been founded by entrepreneurial partners as a new type of business law firm, Fox Williams prides itself in understanding first-hand the challenges, risks and rewards involved in starting, building and sustaining a business.

We also appreciate that when time and resources are scarce, legal concerns often take a back seat. However, getting the legal basics right from the start can go a long way in smoothing the road for your business' future success.

Our specialist departments can assist you with all legal aspects of your new venture from the word go. It is never too early to contact us for a free consultation. We pride ourselves in not only offering bespoke legal services but also our ability to provide strategic, practical and commercial advice.

BACKGROUND TO UK LEGAL SYSTEM AND UK BUSINESS STRUCTURES

1.1. The United Kingdom

The United Kingdom consists of England, Wales, Scotland and Northern Ireland made up of three separate legal jurisdictions: (i) England and Wales; (ii) Scotland; and (iii) Northern Ireland. The Channel Islands (which include Jersey and Guernsey) and the Isle of Man form part of the British Isles but are not part of the United Kingdom and they have their own legal system. The information in this guide is based entirely on the law applicable to England and Wales, which consists of both common law (judge-made) and statute law, with, as it currently stands, an overlay of EU legislation.

The UK Government actively encourages foreign investment and there are no exchange controls. There are a number of incentives offered by central and local governments to foreign investors in certain areas and industries. In addition, various areas of the UK (e.g. South Wales, Scotland and NE England) also currently qualify for European development grants. These will not be available after Brexit.

1.2. The European Union

History

The European Economic Community, subsequently known as the European Community and now known as the European Union (the EU), was first established in 1957 by the Treaty of Rome. The organisational and functional details of the EU and key provisions of EU primary law are set out in the Treaty on the Functioning of the European Union (TFEU) while the objectives and principles of the EU (including common foreign and security policy) are set out in the Treaty on European Union (the Maastricht Treaty).

The UK voted to leave the EU in June 2016 and triggered the formal process to leave in March 2017. The UK will remain as one of the 28 Member States of the EU until such time as it has formally withdrawn, which may not be until 29 March 2019 (possibly even later). While the Euro (€) is currently the currency of 17 of the 28 Member States, the UK has retained its own currency, Sterling (£).

Running alongside the EU is the European Economic Area (EEA). This was established on 1 January 1994 between the Member States and Iceland, Lichtenstein and Norway to enable those three countries to participate in the European single market and the free movement of goods and services. It is possible that the UK will become a member of the EEA after it leaves the EU.

1.3. UK Business Structures

An overseas company looking to do business in the UK will need to consider carefully the most appropriate manner in which to achieve this.

It may decide to establish a separate UK entity such as:

- a UK establishment (or branch);
- a UK company; or
- a UK partnership.

Alternatively a business which is not looking to be heavily based in the UK may want to consider entering into a contractual business relationship by appointing an agent, distributor or franchisee and/or licensing intellectual property rights.

Each of these options are considered further below.

2. UK ESTABLISHMENT

2.1. Background

The concept of a UK establishment is an umbrella concept which includes both branches and places of business. The fact that any overseas company is carrying on business in the UK, does not necessarily mean it will have to formally register as a UK establishment: registration is only required where there is some degree of physical presence in the UK. For example, passively investing in property or using an independent agent who conducts business on behalf of an overseas company will not give rise to a place of business for that company; neither will an occasional location such as a hotel where a director may conduct business on visits to the UK. Setting up a warehouse, however, would be.

An overseas company that intends to have an establishment within the UK is required to register with Companies House and comply with certain requirements under the Companies Act 2006 (the “2006 Act”). In addition, a UK establishment is normally seen as a “permanent establishment” in the UK for tax purposes and the overseas company will be liable for UK corporation tax on the establishment’s profits.

The overseas company which sets up the UK establishment is directly responsible for all debts and liabilities incurred by the establishment. As such, the opening of a UK establishment does not provide the protection of limited legal liability which would be afforded by the creation of a UK company.

2.2. Registration Requirements

An overseas company must register as an establishment with Companies House within one month of commencing business in the UK. The filing fee for such registration is £20.

The registration form (OS IN01) requires detailed particulars about the overseas company, its officers as well as details of the establishment together with a copy of the overseas company’s constitution. If the constitutional documents are prepared in a language other than English, a translation must also be filed. Details of the names and service addresses of all persons authorised to represent the overseas company in respect of the establishment must also be included.

It should be noted that all information registered with Companies House is publically available. If there are concerns about making certain information of the overseas company public, it may be possible to create a separate, overseas subsidiary company which can then set up a UK establishment. In such circumstances it is the accounts and particulars of the overseas subsidiary, rather than the main company, which would be filed and therefore open to public inspection.

2.3. UK Establishment Names

When registering a UK establishment, an overseas company can either use its own corporate name (i.e. the name which it is registered within the jurisdiction of its incorporation) or use an alternative name specifically for the UK establishment. Either way, there are a number of restrictions on the name depending on the location of the overseas company.

If the overseas company is an EEA company, it can always use its corporate name subject to a limitation on the length of the name and the prohibition of certain characters, signs and symbols. If the overseas company is not an EEA company, or the overseas company wants to use a different name for the UK establishment, the name must comply with the same requirements as those for registering a UK company (further details of which are set out below).

2.4. Display of name

Business Locations

Each overseas company which operates a UK establishment must display its name and the company of incorporation at every location in the UK at which it carries on business.

Business Communications

An overseas company must include its name, the location of the UK establishment and the UK establishment's registered number on all forms of business correspondence and documentation used for carrying on business activities in the UK, whether in hard copy or electronic form.

If the overseas company is not incorporated in the EEA it must also state:

- the company's country of incorporation;
- details of its registration in that country (i.e. registered number, name of registry (as applicable);
- the location of its head office;
- the legal form of the company; and
- various statements about its current status (i.e. whether it is being wound up or is subject to other insolvency proceedings).

2.5. Continuing Obligations

An overseas company which is required by its home jurisdiction to prepare, audit and disclose its accounts, and an overseas company incorporated in the EEA must file copies of its accounts (together with a translation if applicable) at Companies House within 3 months of the disclosure of the accounts in accordance with its home jurisdiction.

If an overseas company is not required to prepare and disclose its accounts under its home jurisdiction (and is not incorporated in the EEA), it still has a duty to prepare, sign and deliver accounts to Companies House in accordance with the accounting requirements of the 2006 Act, as modified in relation to overseas companies. The duty requires the preparation of accounts for the overseas company as a whole, not just for the UK establishment.

If there is a change in any of the registered particulars (whether relating to the overseas company's details or the particulars of the UK establishment), a return setting out the change must be delivered to Companies House within 21 days of such change.

3. UK COMPANY

3.1. Types of Company

The 2006 Act sets out the definitions and requirements in relation to the formation of a UK company. There are four main types of company which can be incorporated:

- private company limited by shares – the liability of members of the company is limited to the equity they have invested or agreed to invest (i.e. unpaid amounts on issued shares);
- private company limited by guarantee – the members of the company make no equity contribution to the capital of the company, but provide an undertaking to provide a nominal amount in the event that the company is wound up;
- private unlimited company – the members of the company have a joint, several and unlimited obligation to meet any insufficiency in the assets of the company in the event that the company is wound up; and
- public limited company – the liability of the members of the company is limited to the equity they have invested or agreed to invest (i.e. unpaid amounts on issued shares). Only public companies can offer their shares to the public and be quoted on the stock exchange.

For the purposes of establishing a business in the UK, an overseas company is most likely to consider either a private company limited by shares or a public limited company. A brief summary of the differences between these two structures is set out below, followed by other key features of UK companies in general.

3.2. Private Company

The majority of companies in the UK are private companies (especially those which are subsidiaries of other UK or overseas companies). They are subject to far less regulation than public limited companies and are therefore often the preferred entity when an overseas company looks to start business in the UK through a subsidiary.

A private company must have at least:

- one member / shareholder; and
- one natural officer (a director).

There are no requirements as to the amount of share capital or value of each share and the appointment of additional directors or a company secretary is optional.
Once incorporated, a private company can commence trading without requiring the issue of a trading certificate.

3.3. Public Companies

Unlike private companies, public companies are permitted to raise capital by offering shares to the public. In addition, a public company can have its shares listed on the UK's public markets. While it is more common for a wholly owned subsidiary of an overseas company to be incorporated as a private company, some overseas companies elect to create a "PLC" in the expectation that lenders, customers and suppliers will consider them a more substantial enterprise.

A public limited company must have at least:

- one member;
- two directors (one of which must a natural person); and
- a company secretary (who is suitably qualified by holding recognised professional qualifications or having relevant experience).

In addition, a public company's share capital must be not less than £50,000 (or €57,100) of which at least 25% must be paid up at all times. A public limited company cannot commence trading without obtaining a certificate (a "trading certificate") from Companies House that it has satisfied the minimum share capital requirements.

3.4. Incorporation of a UK company

A UK company does not exist and cannot operate/commence trading until a certificate of incorporation has been issued by Companies House. A public limited company must also receive a trading certificate.

To incorporate a UK company, the following items must be filed at Companies House:

- memorandum of association – this is a simple document in prescribed form which simply sets out the subscriber(s) of the company and a statement of intention that such subscriber(s) wish to take at least one share. The purpose of the memorandum is to provide evidence of the intention of the subscriber(s);
- articles of association – these are the constitutional rules of the company which regulate the internal management and running of the company. They typically deal with the transfer of shares, alteration of share capital, procedures for general meetings, voting, appointment and removal of directors, etc. The 2006 Act provides a model set of articles for both private and public companies. Unless a bespoke set of articles are submitted on incorporation, the model articles are deemed adopted by a newly formed company;
- form IN0S – this is a simple form setting out the names of the first directors, the company's registered office and other administrative particulars; and
- fee – all companies can now be incorporated online (with model articles only) for a charge of £15. For guaranteed same-day incorporation the fee is £30 and this rises to £100 if the application of incorporation is submitted in hardcopy.

3.5. UK Company Names

There are a number of restrictions on the names which can be used to incorporate a UK company. Unlike for a UK establishment, these rules apply to all UK companies, regardless of the location of the overseas parent company. A proposed name will not be registered if:

- its use would be offensive or would constitute an offence;
- it suggests a connection with the UK government, a devolved administration, a local authority or certain specified public authorities;
- it includes a sensitive word or expression unless certain tests are satisfied (e.g. "Association" or "Trust") and a supporting statement is submitted with the application form;
- it is the same or similar to another name on the register; or
- it is longer than 160 characters or uses certain prohibited characters, signs, symbols or punctuation in the name.

The successful registration of a company name does not mean that name does not infringe other UK laws – i.e. trade mark law. It is advisable to check the trade mark register of the UK Intellectual Property Office before registering a name.

It should be noted that a UK company can use a different "business" name from the one registered at Companies House and there are separate rules and requirements in relation to the use of such names.

3.6. Officers of a UK Company

Directors

The shareholders of the company have the power to appoint and remove the directors of the company by ordinary resolution (see below). However, following the first appointments, future dismissals and appointments are usually handled by the directors themselves with the shareholders only stepping in if there is a particular concern.

It is the directors who take all the business decisions for the company and enter into contracts on the company's behalf.

A director is not required to reside in the UK and an overseas director will not be deemed a resident of the UK for tax purposes by reason of his appointment alone. However, any natural director:

- must be at least 16 years old;
- must not have been disqualified from acting as a company director; and
- must not be an un-discharged bankrupt.

The directors of a company have the power to manage the company's affairs in accordance with the company's articles of association. In doing so they must adhere to their statutory and common law duties. These include:

- acting within their powers;
- promoting the success of the company;
- exercising independent judgment;
- exercising reasonable care, skill and diligence;
- avoiding conflicts of interest;
- not accepting benefits from third parties; and
- declaring an interest in a proposed transaction or arrangement.

A breach of a director's duties can give rise to personal civil and criminal liability. It is therefore important that directors fully understand their legal obligations to the company. Fox Williams have a great deal of experience advising directors on their duties and can provided further information upon request.

Secretary

A company secretary's main function is to ensure that a company complies with its statutory obligations. While the secretary is not involved in the business decisions of the company, it can enter into contracts on behalf of the company for the purposes of carrying on the administration of the company.

While the 2006 Act removed the requirement for private companies to have a company secretary, a public limited company must have a secretary who is suitably qualified.

3.7. Shareholders

Any person, firm or corporation may be a shareholder of a UK company, whether or not they are resident in the UK.

A company's articles of association (together with the 2006 Act) set out the rules regarding the decision making-process of the shareholders.

Resolutions

Shareholder decisions are made by passing resolutions. There are two types of shareholder resolution:

- Special resolutions – these must be passed by at least 75% of the shareholders entitled to vote on the resolution. Changes to a company's constitution and other structural changes normally require a special resolution.
- Ordinary Resolutions – these must be passed by a simple majority (over 50% of the shareholders entitled to vote on the resolution). Simple business and administration matters which require shareholder approval are often passed by way of an ordinary resolution.

The shareholder resolutions of public limited companies must be passed at general meetings. However, private companies can pass shareholder resolutions at either a general meetings or by way of written resolution subject to one exception: the removal of a director or auditor before the expiration of his period of office must be by way of resolution passed at a general meeting.

General Meetings

A public limited company must hold an Annual General Meeting (AGM) within six months of the end of its financial year. Failure to do so constitutes a criminal offence committed by every director of the company and the company secretary. Private companies are not required to have an AGM unless their shares are trading on a regulated market in an EEA state.

At least 21 days notice of an AGM must be given to all shareholders and directors unless the shareholders have agreed to shorter notice. While the 2006 Act does not specify what business must be considered at an AGM it is usual to:

- consider the company's annual report and accounts;
- declare any dividend;
- elect or re-elect certain directors; and
- appoint or re-appoint the auditors of the company and authorise the directors to agree their remuneration.

Any meeting of shareholders which is not an AGM is known as a general meeting. Again such meetings require 21 days notice but this can be permanently reduced to 14 days by resolution of the shareholders.

3.8. "Persons with Significant Control"

Since April 2016, all UK incorporated companies (other than listed companies which are subject to their own obligations under the FCA's Disclosure and Transparency Rules) are required to keep a register of "persons with significant control" over the company ("PSCs"). This obligation is a means of boosting transparency so that the public may have more information as to who is the ultimate beneficial owner of a particular company of the person who ultimately has the right to control it. A key aim of the PSC regime is to reduce the use of UK corporate vehicles in financial crime.

A company which is required to keep a register of PSCs will be criminally liable for failing to maintain such a register and for failing to take reasonable steps to identify its PSCs.

The obligation to keep a register of PSCs does not generally apply to overseas entities.

3.9 Continuing Obligations

All UK companies are obliged to file various documents with Companies House on an ongoing basis. Each year, a company must file an annual report and a set of accounts. In addition, certain matters must be notified to Companies House from time to time such as changes to any particulars of the company (directors, issued share capital etc.), the grant of any security by the company or the passing of certain resolutions by the company's members. The company is required by way of a "confirmation statement" to certify on an annual basis that the information on the register is accurate and all relevant and required documents have been filed at Companies House.

Failure to comply with the filing requirements of the 2006 Act can constitute a criminal offence and attract fines.

All documents filed at Companies House are available for inspection by the public. In addition, UK companies are obliged to keep and maintain statutory books which contain (among other items):

- a register of members;
- a register of directors;
- a register of company secretaries (if any);
- a register of director's residential addresses;
- a register of charges/mortgages over the company's property; and
- (if elected) a register of people with significant control.

Any member of the public has a right to inspect a company's register of members (although it is possible for a company to seek court permission to refuse access in certain circumstances).

3.10. Auditors and Accounts

Directors of all types of UK companies are required to prepare annual accounts and reports which are sent to the shareholders and Companies House each financial year. The accounts must give a true and fair view of the state of affairs of the company at the end of the financial year and of the profit or loss of the company for that financial year.

Timing

Unless filing the company's first accounts the time normally allowed for delivering accounts to Companies House is:

- six months from the accounting reference date for a public limited company; and
- nine months from the accounting reference date for a private company.

If you are filing your company's first accounts and those accounts cover a period of more than 12 months the time normally allowed for delivering accounts to Companies House is:

- eighteen months from the date of incorporation for public companies;
- twenty one months from the date of incorporation for private companies; or
- three months from the accounting reference date, whichever is longer.

Content

In general, the annual accounts and reports of all public limited companies and substantial private companies should include:

- a profit and loss account and balance sheet;
- a director's report setting out:
  - the names of the directors;
  - the principal activities of the company including the development of and any significant changes to the business during the course of the year and an indication of likely changes in the near future; and
  - the amount of the recommended dividend (if any);
- a business review report which informs members and helps them assess how the directors have performed their statutory to promote the success of the company;
- a statement setting out what the company has done to combat modern slavery and human trafficking (this is a requirement, made pursuant to the Modern Slavery Act 2015, which encourages companies to be more vigilant about human rights abuses within their supply chains); and
- an auditor's report stating that the accounts have been properly prepared and give a true and fair view of the state of the affairs of the company.

Public limited companies which are quoted on a stock exchange are subject to additional annual accounts and reports requirements including the need for a directors' remuneration report containing detailed information on director remuneration and the company's remuneration policy.

Exemptions

Private companies which qualify as "small" or "medium-sized" companies may elect, subject to certain criteria, to comply with simplified requirements for the filing of accounts and reports. Since all filed accounts and reports are available for public inspection, these exemptions can be beneficial for companies wanting to limit disclosure.

"Small" companies are those which satisfy at least two of the following criteria:

- annual turnover of not more than £10.2 million;
- balance sheet total of not more than £5.1 million; and
- employees not exceeding, on a weekly average, 50.

"Medium-sized" companies are those which satisfy at least two of the following criteria:

- annual turnover of not more than £36 million;
- balance sheet total of not more than £18 million; and
- number of employees not exceeding, on a weekly average, 250.

Small companies are only required to file abridged accounts which contain a set of the information that is included in the balance sheet and profit and loss account. Medium-sized companies are still required to deliver a full balance sheet along with a directors' report (including a business review or strategic report), but can file an abridged profit and loss account.

Where a company takes advantage of the above exemptions, the company's balance sheet must contain a statement to that effect, setting out the grounds on which the company is entitled to such exemption.

Small companies which satisfy both of the first two criteria listed are exempt from the requirement to appoint auditors and to prepare and file audited accounts.

4. UK PARTNERSHIP

4.1. Types of Partnership

There are three different types of partnership under UK law:

- general partnerships which are unincorporated partnerships where the partners have unlimited liability for the debts of the partnership. General partnerships are governed by the Partnership Act 1890.

- limited partnerships which are unincorporated partnerships where at least one partner has unlimited liability (the “general partners”) but the other partners can have limited liability (the “limited partners”). Limited partnerships are governed by the Limited Partnership Act 1907.
- limited liability partnerships (LLPs) which are incorporated partnerships where each partner’s liability is limited to his agreed contribution. LLPs are governed by the Limited Liability Partnership Act 2000.

4.2. Common characteristics

Despite the various forms of partnerships available in the UK, there are a number of common characteristics:

- there is no minimum capital requirement;
- subject to a firm’s governing body (like the solicitors regulation authority) there are generally no restrictions on who can become a partner;
- partners can be natural or corporate persons;
- if there is no written agreement governing the partnership, the relevant act (depending on the type of partnership in question) shall apply; and
- UK partnerships are tax transparent. Accordingly, a partner’s income and gains will be seen as accruing to, and will be taxed on, that individual partner directly.

5. TAX

5.1 Taxes on Business Profits

An overseas company carrying on business in the UK can do so through either a branch (a permanent establishment) or a subsidiary.

A UK tax resident subsidiary will be subject to UK corporation tax on its worldwide profits (subject to any applicable double taxation relief). Though such a subsidiary can, in certain circumstances, elect for all its foreign branches (if any) to be exempt from UK tax. A subsidiary will be tax resident in the UK if it is incorporated in the UK or if it is managed and controlled in the UK.

The UK branch of an overseas company which is trading in the UK will be subject to UK corporation tax only on the profits attributable to that branch. The UK branch will be required to recognise the profits it would have made had it been dealing with an independent non-resident company (using transfer pricing principles and methodologies). But in many cases (unlike with a subsidiary) no deduction is available in respect of royalties, interest or other finance costs paid to the overseas company.

A number of non-tax and overseas tax issues, as well as UK tax issues, will drive the choice between a branch and a subsidiary. If a branch is established initially, it can subsequently be converted into a subsidiary without significant UK tax charges arising.

In certain cases, an overseas company might be operating in the UK without creating a UK taxable presence, for example if it is a passive investor in property, in which case it will be subject to UK income tax on any UK source income (such as rental income from a UK property).

A UK partnership (including an LLP) is broadly treated as transparent for UK tax purposes. As noted above, a partner’s profits will broadly be treated as accruing to, and will be taxed on, that individual partner directly. There are, however, a number of specific anti-avoidance provisions that can affect the tax treatment of partners in partnerships.

Businesses in certain sectors, such as oil and gas, may be subject to special rules. The holding of residential property in a corporate wrapper may also give rise to additional tax charges.

A number of different tax incentives are available to UK and overseas-owned companies operating in the UK, in particular aimed at promoting business innovation and supporting research and development.

5.2 Withholding tax

There is no withholding tax on dividends paid by UK tax resident companies. Nor is there any branch profits tax to be withheld.

Withholding tax may apply to certain other payments such as UK source interest, rental and certain royalty payments, depending upon the availability of certain exemptions or double tax relief.

The UK has an extensive double tax treaty network.

5.3 Transfer Pricing/Thin Capitalisation

Transfer pricing rules (which also cover thin capitalisation) apply in relation to non-arm's length transactions between connected persons, and requires profits to be recalculated for UK tax purposes based upon arm's length terms. Particular thought may need to be given to whether royalty payments may need to be made (or deemed for UK tax purposes to be made) from or to a UK branch or subsidiary.

Any overseas transfer pricing policies and documentation would need to be reviewed to ensure they satisfy UK requirements.

These transfer pricing rules may not apply to small and medium-sized enterprises.

5.4 Financing issues

An overseas company may fund its UK subsidiary through equity or debt. Dividends paid on equity are not deductible for UK tax purposes. Deductibility of interest can be restricted on a number of grounds: transfer pricing, thin capitalisation, worldwide debt cap and a number of other anti-avoidance rules. Non-sterling loans may also lead to unrealised FX gains (or losses) for UK tax purposes.

Any capital contributions made to a UK subsidiary will normally be treated as a gift (or a loan if repayable) although in certain circumstances they may be taxable.

5.5 Payroll Taxes

If the business has employees (which includes for these purposes directors, even non-executive directors) in the UK, then a UK branch or subsidiary (and even, in certain circumstances, an overseas company which has no branch in the UK) will be required to operate withholding under Pay As You Earn (PAYE) in respect of all salary, bonuses and other benefits paid/given to those employees. National Insurance contributions (NICs) will also broadly be payable by both the employees (again by deduction under PAYE) and the employer. The employer's NICs may not be recovered from the employee (other than in very limited circumstances).

Special rules apply in relation to share/share option and other equity incentive arrangements entered into with employees and directors. There are various forms of tax efficient equity incentive arrangements but care needs to be taken to avoid unexpected tax charges. Advice should be taken before any such arrangements are entered into.

As soon as an employee is taken on, the business must register for PAYE/NICs and set up a payroll system. There are a number of payroll service providers who can assist in this respect.

5.6 Value Added Tax ("VAT")

Very broadly, VAT is chargeable on all supplies of goods or services made, or deemed to be made, by a business in the UK, and on the importation of goods into the UK from outside the EU (special rules apply for supplies within the EU). Most supplies are standard rated, but some are zero rated or exempt.

An overseas company which makes vatable supplies in the UK will need to register for VAT whether or not it has a UK branch. A UK branch or subsidiary will need to register if it makes vatable supplies above a minimum threshold.

For most businesses, VAT is largely a cash flow and administrative issue; as, if goods or services are received by a VAT registered person and used in the course of their business, then they can usually obtain credit for any VAT they themselves have paid (although such credit is restricted where the business makes exempt supplies).

Special VAT rules can apply, in particular in relation to UK land and digital services.

5.7 Transfer Taxes

Subject to certain exemptions, stamp duty is payable at a rate of 0.5% on the transfer of shares in a UK company. Special rules apply in relation to depositary receipt and clearance services.

Stamp Duty Land Tax ("SDLT") is payable at varying rates on the creation or transfer of an interest in UK land.

Special rules apply on the transfer of interests in a partnership holding real property.

5.8 Other

Business rates will be payable on business premises.

Other taxes and levies may need to be considered depending upon the nature of the business, including insurance premium tax, landfill tax, aggregates levy and climate change levy.

Excise duties and other duties, such as gambling duty, may also be relevant.

6. CONTRACTUAL BUSINESS ARRANGEMENTS

6.1. Agency

An overseas company may wish to appoint a self-employed agent to sell goods or services on its behalf. If so, the overseas company will need to determine:

- whether the appointment is limited to a specific geographical territory (i.e. the UK/Europe etc.);
- whether the agent is to be appointed on an exclusive or non-exclusive basis;
- the scope of the agent's role – often an agent is instructed to negotiate directly with the customer and manage the customer relationship while the goods/services are supplied by the overseas company itself; and
- how the agent will be paid – this can be way of a periodic retainer, an introduction fee or other commission arrangement.

Agency arrangements in the UK are governed by the Commercial Agents (Council Directive) Regulations 1993 (as amended), which were enacted to implement the European Directive on self-employed commercial agents. These regulations contain various mandatory provisions to protect commercial agents (who may be individuals or corporate entities) and include, in particular, minimum notice periods for termination; limitations on the scope and duration of post-termination restrictive covenants; and in many instances the right for the agent to receive an indemnity or substantial compensation on termination of the agreement. As noted earlier, due to Brexit, the future of the Regulations are unclear however, it does appear that it will take some time for any change to occur.

6.2. Distribution

Distribution involves the manufacturer of goods selling them to the distributor who then resells the goods to its own customers. As with an agent, an overseas company will need to determine the applicable geographical territory and/or the grant of exclusivity. However, the distributor will be free to set its own resale price and take any margin received.

There are no specific regulations relating to the appointment of distributors in the UK, but any distribution agreement will need to comply competition law requirements (see 7.3 below).

6.3. Franchising

If an overseas company has developed a business model for the sale of goods or services with an established track record, it may wish to set up various franchises. In doing so, the overseas company (the franchisor) will provide a franchisee with a licence to operate an identical business in a defined location in return for a fee.

At the centre of any franchise arrangement is the concept of standardisation at the highest level: the success of a franchise business depends heavily upon every franchised outlook looking and operating in the same way. To ensure that the business model developed by the overseas company retains its value, a franchise contract will contain detailed requirements on the operation

of the franchise. It is common for a central company to retain control over items which affect all franchises (e.g. advertising) and for each franchise to be charged for these services accordingly.

Again, while there are no specific regulations relating to the appointment of franchisees in the UK, the franchise agreement will need to comply competition law requirements (see 6.3 below).

7. REGULATION OF COMMERCIAL ACTIVITIES

Historically the UK has been regarded as a lightly-regulated jurisdiction. Comparatively this is still true particularly with regard to the establishment of a business entity. However, as the number of EU Directives have increased and the fall out of the credit crunch and recession is fully understood, regulation has become an increasing element of business life in the UK. While much of the new regulation relates to specific industry sectors, and is therefore outside the scope of these notes, key examples are set out below.

7.1. Contract Terms

Sale of Goods and Supply of Services

The Consumer Rights Act 2015 implies certain terms into contracts between a business and a consumer. The legislation ensures that consumers have a base level of protection regardless of the explicit terms of a contract. The key terms which will be implied into a contract are that the goods/services:

- are fit for purpose;
- conform with their description;
- are of a satisfactory quality; and
- are carried out with reasonable skill and care.

In certain limited circumstances, these implied terms will be excluded from the agreement if the contract is for the “international sale of goods”. However, this concept is narrowly defined in the relevant legislation and is unlikely to apply to an overseas company looking to deal directly with customers in the UK.

Unfair Terms

Business Contracts

Attempts to limit or exclude liability under a business contract (i.e. a contract between two businesses rather than with a consumer) are governed by the Unfair Contract Terms Act 1977 (UCTA). UCTA imposes statutory limits on the avoidance of civil liability through exclusion clauses for breaches of contract, negligence, or other breaches of duty. UCTA is only concerned with exclusion clauses, and does not examine whether a contract is unfair generally.

Consumer Contracts

The terms of any consumer contract are regulated by the Unfair Terms in Consumer Contracts Regulations 1994. If a consumer contract is deemed to be unfair it may be completely void and unenforceable against a consumer. In particular, any attempt to exclude the terms implied by SGA (Sale of Goods Act 1979) and SGSA (Supply of Goods Act 1979) will be unenforceable.

Distance Selling

The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 govern consumer contracts which are entered into by distance means i.e. by telephone, online or SMS. Pursuant to the regulations, the consumer must be provided with certain items of information in writing (e.g. a description of the goods and services, the price, delivery costs and delivery arrangements should be provided on the company’s website). In addition, each consumer is entitled to (and must be informed about) a “cooling-off period” whereby they are entitled to cancel the distance contract within a specified period of time (usually seven working days).

Product Liability

Regardless of any contractual limitations of liability, if a product or any of its component parts are defective its manufacturer may be liable for damage under the Consumer Protection Act 1987 (“CPA”) or the common law of negligence. The CPA exists alongside liability in negligence and in some cases a common law claim may succeed where a claim would not be available under the CPA and vice versa.

Under the CPA, non-fault strict liability is imposed on producers, importers and suppliers of defective products where a consumer can show that the defect caused damage without having to prove that the producer/importer/supplier was negligent.

The UK government may prohibit the supply of unsafe goods and can require manufacturers to publish warning notices on goods which are unsafe. In addition, many products must satisfy UK product standards which are often derived from the EU. Failure to meet the applicable standards can result in criminal or civil penalties and expose the manufacturer/importer/retailer to potential product liability claims.

7.2. Data Protection

The UK does not have a specific privacy law but the General Data Protection Regulation (GDPR) along with the Data Protection Act 2018 and the Human Rights Act 1998 give individuals a greater deal of control over how their information is obtained and used.

GDPR, which applies throughout the EU, regulates the use of "personal data" relating to living individuals. Personal data is any information which can be used to identify an individual such as their name, address, health records, hobbies, sexuality, religion etc.

If a business handles personal data, it is required to:

- register with the Information Commissioner and notify them of the type of data collected and what it is used for. This incurs an annual fee, the level of which is dependent on the size of the business' turnover;
- to provide an individual with access to all their personal data held by the company on payment of a fee (generally limited to £10); and
- comply with the principles of the GDPR (unless an exemption applies):
  - processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency');
  - personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes;
  - personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed;
  - personal data shall be accurate and, where necessary, kept up to date;
  - personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes;
  - personal data shall be processed in accordance with the rights of data subjects under the GDPR; ;
  - appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data; and
  - personal data shall not be transferred to a country or territory outside the European Economic Area, unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

It should also be noted that group companies need to ensure that individuals have consented to their personal data being transferred between different group companies in the same way they would if their personal data was being transferred to an external third party.

If an organisation is found to be in breach of GDPR, it may be subject to:

- a warning in writing in cases of first and non-intentional noncompliance;
- regular periodic data protection audits;
- or a fine up to €20 million or up to 4% of the annual worldwide turnover of the preceding financial year in case of an enterprise, whichever is greater;

There are also possible criminal sanctions, but an organization can also suffer significant brand damage even where financial penalties are small.

International data transfers

For organisations operating internationally, compliance with the final Principle above can be crucially important.

The EU Commission has compiled a list of countries or territories which provide adequate protection for the rights and freedoms of data subjects in connection with the processing of their personal data.

Whilst the Commission has made various "positive findings of adequacy", certain territories including the US are found not to offer an adequate level of protection. This causes a major headache for those businesses that have a footprint in the UK and EU. Businesses that have UK subsidiaries, branches, agencies, distributors and those companies that sell directly to customers in the UK and EU (for example, via the Internet) are all affected by this restriction. It means that, for example, a UK subsidiary cannot transfer to its US parent customer data or HR related data such as performance and health records, contact details, salary, bonus levels.

However, the prohibition on transfer of personal data outside the EEA is not absolute. Compliance with EU data protection laws can be achieved in a number of ways so as to permit organisations situated in territories which are found not to offer an adequate level of protection to transfer data from the EU and UK. These include:

- the data subject consents to the transfer;
- the transfer is governed by an approved model contract; or
- following binding corporate rules which are designed to govern transfers between companies forming part of multinational groups of companies.

We can assist in selecting the most appropriate solution for your organisation.

7.3. Competition and Merger Control

Competition

UK competition law is made up of two sets of rules which run in parallel. Anti-competitive behaviour, which may affect trade within the UK, is specifically prohibited by the Competition Act 1998 and the Enterprise Act 2002. Where the effect of anti-competitive behaviour extends beyond the UK to other EU member states, it is prohibited by Articles 101 and 102 of the Treaty on the Functioning of the European Union.

There are two main types of anti-competitive activity which are prohibited by UK and EU law:

- anti-competitive agreements; and
- abuse of dominant market position.

There are certain tests and thresholds which need to be satisfied before any agreement or activity falls within the prohibition, many of which relate to market-share and turnover.

A potential breach of competition laws is investigated and assessed by the Competition and Markets Authority ("CMA"). The CMA has substantial investigative and enforcement powers and breaches of the competition laws can result in a fine of up to 10% of the worldwide turnover. In addition, individuals found to be engaged in anti-competitive behaviour can face criminal sanctions.

Merger Control

The CMA has the power to investigate mergers where two or more enterprises cease to exist and certain turnover tests are satisfied.

Companies looking to merge often notify the CMA in advance in order to obtain pre-transaction clearance. While there is no requirement to do so, this avoids the risk of the merger subsequently being referred for further investigation to the Competition Commission and the transaction being prohibited or subject to onerous conditions.

8. INTELLECTUAL PROPERTY

Under UK law there exists a range of intellectual property rights, with each right giving a different protection and being used for a different purpose. Often, however, more than one type of intellectual property may apply to the same creation.

Intellectual property rights fall into two general categories:

i. registered rights; and
ii. unregistered rights.

There is no worldwide legal protection for registered rights; intellectual property has to be applied for in each country. In Britain, the UK Intellectual Property Office is responsible for registering intellectual property rights.

8.1 TRADE MARKS

A trade mark is a sign that is capable of distinguishing goods and services from others in the marketplace. A sign may include a combination of words, numerals, designs and logos.

Trade marks can exist as registered or unregistered. To register a trade mark in the UK, it must be:

(a) capable of being represented graphically;
(b) distinctive;
(c) capable of distinguishing goods or services; and
(d) not excluded by statute.

Once registered, the right lasts indefinitely provided certain renewal fees are paid.

It is advisable to mark any unregistered trade marks that are being used with ‘TM’. Whilst having no legal significance, this highlights to the public that the trade mark owner is trading under this name and associates the mark with their brand.

The goodwill in an unregistered trade mark can be protected in an action for passing off. To succeed, the trade mark owner must prove that there is sufficient reputation in the mark, that there has been a misrepresentation that could mislead the public by the defendant, and that damage has been suffered. An action for passing off can be difficult to prove and expensive, hence, if possible, trade marks should be registered.

8.2 Designs

Registering a design grants the design owner the exclusive right in the look of their product and prevents anyone else from copying the physical appearance of it. The appearance of a product includes lines, shape, contours, texture and colours.

A registered design must be:

(a) novel;
(b) of individual character; and
(c) not excluded by statute.

Once registered the design right lasts a maximum of 25 years, with registrations renewed every five years.

In contrast, an unregistered design must:

(a) comprise an aspect of shape or configuration of the whole or part of an article;
(b) be original;
(c) be recorded in a design document or the subject of an article made to the design; and
(d) be created by a qualifying person.

Protection for unregistered design right lasts for the lesser of 15 years from the end of the calendar year when the design was first recorded or an article made, or ten years from the end of the calendar year when articles made from the design were first marketed.

8.3 Patents

A patent is a monopoly right to use and exploit an invention relating to a new product or process.

The invention must be:

(a) novel;
(b) involve an inventive step;
(c) be capable of industrial application; and
(d) not be excluded by statute.

To apply for a patent, a patent specification must be submitted to the UK Intellectual Property Office. The specification is a written description, often with drawings of the invention, explaining what the invention does, defining the scope of the patent and setting out important technical details.

A patent can last up to 20 years subject to being renewed annually.

8.4 Copyright

Copyright is a right that relates to the expression of an idea, not the idea itself. Copyright protects creative works such as sound recordings, films, photographs and original artistic, musical, dramatic and literary works.

Unlike trade marks, designs and patents, copyright cannot be registered. Copyright arises automatically on the creation of the work and lasts for 70 years after the death of the author for artistic, musical, dramatic and literary works. In contrast, sound recordings and broadcasts are protected for 50 years from the date of publication.

To evidence that copyright subsists in your materials, mark all copyright works with '©' followed by your name or your company name, and the year of creation. This serves to put third parties on notice that they cannot reproduce your work without your permission.

8.5 Rights in confidential information

It is possible to protect information which is sensitive to a business such as know-how and trade secrets. The law of confidence works by imposing obligations on the recipients of confidential information not to use or disclose it. However in practice the easiest way to impose such an obligation of confidence would be under contract.

To be enforceable, the information must:

(a) be confidential in nature;
(b) have been disclosed in circumstances in which an obligation of confidence arises; and
(c) the unauthorised use of such information would be to the detriment of the person imparting it.

9. EMPLOYMENT

The regulatory environment on employment matters in the UK is less onerous than in many other European countries, but there has been a spate of new employment law in the last few years, much of it resulting from the implementation of European Directives. However, that is not to say that the UK will necessarily revert to a more light touch regime after it leaves the EU.

Whilst this is an area of frequent change, UK employers can give themselves a significant degree of flexibility by having well drafted contracts and policies.

The following is a brief summary of the more important current requirements for regulatory compliance on employment issues in the UK.

9.1. Employment Contracts

Employers are required to provide employees with a written statement of certain key employment particulars (e.g. salary, notice period, holiday entitlement) within two months of commencement of their employment under Section 1 of the Employment Rights Act 1996. Contracts can include additional protection for employer confidential information and intellectual property, while those for more senior employees these tend to have post-employment restrictions.

Although not contractual, it is common for most employers to issue other rules, covering issues such as compliance rules and standards of conduct.

9.2. Holiday Entitlement

Under the Working Time Regulations 1998, employees are entitled to 28 days' paid holiday each year (which may, but usually does not, include the 8 annual public and bank holidays). Employers should make clear whether holiday entitlement includes the public days and whether employees are required to work bank holidays. Employers can, of course, agree a more generous contractual entitlement.

9.3. Minimum Wage

Under the National Minimum Wage Act 1998, all employees (and certain other categories of worker) are entitled to minimum hourly wages depending on their age. The rates are kept under review and typically increase with effect from 1st April each year.

Although not legally required, there is also a recommended minimum wage level for London based workers, known as the London Living Wage, which is set and reviewed regularly.

9.4. Pension and Benefits

There is no requirement to offer benefits such as medical insurance to employees, but employers will have to automatically enrol employees who meet the relevant criteria, on a workplace pension scheme. The Government provides a calculator for employers to identify the date on which this obligation arises and employers have the option, using a state provide scheme or private group scheme, to which minimum contributions must be made.

9.5. Working Time

The Working Time Regulations 1998 impose a limit on working time of an average of 48 hours a week (averaged over a 17-week period), although individuals can choose to work longer than this by agreeing to opt out of the limit, for example by a clause in their employment contract. There are also minimum rest break requirements during the working day, depending on the number of hours an employee works. Special rules apply to shift workers and night workers.

9.6. Sick Pay

There is a statutory entitlement to sick pay for up to 28 weeks under the Social Security Contributions and Benefits Act 1992. The rates are reviewed annually with effect from 6th April each year. In general most employers are more generous, topping up the minimum levels, subject to setting clear rules and limits, to help manage sickness absence.

9.7. Maternity Rights

Female employees are required to take a minimum of 2 weeks' maternity leave and are entitled to 26 weeks' Ordinary Maternity Leave regardless of length of service. These employees may be entitled to statutory maternity pay of up to 90% of their salary for the first 6 weeks and a maximum of £145.18 per week (as at May 2018, these rates are reviewed annually) for the next 33 weeks or 90% of their salary; whichever is lower. Most of this is recoverable by the employer from National Insurance contributions. Employees may choose to take an extra 26 weeks of unpaid Additional Maternity Leave.

9.8. Paternity Rights

Employees with more than 26 weeks employment may take up to 2 weeks paid Paternity Leave. Such employees will be entitled to all benefits except remuneration which is replaced by statutory paternity pay.

9.9. Shared Parental Leave

New parental leave rights have been introduced for babies born on or after 6th April 2015 whereby, new mothers (via birth, adoption or surrogacy) can effectively bring their maternity leave to an end early and share the balance of their maternity leave entitlement as "shared parental leave" with the father/partner who will then have parental responsibility of the child for the rest of the entitlement.

This allows for the parental duties to be more evenly split in the first year of the child's life. Fathers are not obliged to take any shared parental leave that they may be entitled to. Where this option is used, shared parental pay arrangements are also triggered.

9.10 Adoption Rights

Adoption leave mirrors maternity and shared parental leave rights, consisting of ordinary and additional leave and having the same qualification provisions. However, in a joint adoption only one partner is entitled to statutory adoption pay whilst the other has paternity leave entitlement unless shared adoption leave is taken.

9.11. Unpaid Parental Leave

Employees with one year's employment can take up to 18 weeks' leave for each child and adopted child up to the child's eighteenth birthday. Leave is unpaid. In the absence of any agreement between employers and employees, a model scheme is provided which permits leave to be taken in blocks of one week or more, but not more than four weeks in any year. Employers are, of course, free to agree arrangements that are more generous.

9.12. Time Off To Care for Dependants

Employees may also take a reasonable amount of unpaid time off to deal with family emergencies.

9.13. Flexible Working Requests

UK law allows an employee who has been employed for 26 weeks, to formally request flexible working; a change to their place, hours or times during which they work. An employer is required to consider the request and must respond. Any change is then a permanent amendment to the contract (unless another variation is agreed).

9.14. Termination of Employment

Two main potential claims against the employer will arise when an employee's employment is terminated: wrongful dismissal and unfair dismissal. If dismissal is by reason of redundancy (lay off), then the question of the employee's entitlement to a redundancy payment must also be considered.

Wrongful Dismissal

If an employer terminates an employee's contract of employment in breach of that contract, the employee may be entitled to damages for wrongful dismissal. The amount of the claim will usually be the amount that would be needed to put the employee in the position he would have been in had the contract been terminated correctly. Generally speaking, damages cover salary and benefits for the notice period (or until the expiry of the term if a fixed term contract), subject to mitigation.

Notice will either be a period provided in the contract of employment itself, or in the absence of any written term, a period which is considered reasonable, provided that in either case notice is not less than the minimum period implied by law. The statutory minimum period is, broadly speaking, one week for each complete year of service up to a maximum of 12 weeks.

Failure to give notice can result in a claim for breach of contract and mean an employer cannot rely upon any post termination restrictions or restrictive covenants contained in the employee's contract.

If the employer does not honour its obligations under the contract of employment, the employee may sue for damages for breach of contract in Civil Courts or, for sums up to £25,000, in an Employment Tribunal.

Redundancy

An employee with two or more years' employment who is dismissed by reason of redundancy is entitled to receive a statutory redundancy payment from his employer. A redundancy situation will exist where a job disappears because the employer closes down a business or it disappears either because there is less work to do or because fewer employers are required to do it.

The amount of the statutory redundancy payment is calculated by reference to the employee's age, length of employment and pay. The maximum statutory redundancy payment is currently £15,240. In the case of collective redundancies (20 or more employees within a 90 day period) employers are also under a statutory duty to inform and consult with the affected employees through their trade union, if appropriate, or elected representative. The consultation period must last no less than between 30 and 45 days, depending on the number of employees affected. The penalty for failure to consult the appropriate elected representatives is severe, up to 90 days' pay per employee

Unfair dismissal

This claim is open to an employee with two year's continuous employment or more. There are also a number of specific grounds for claiming unfair dismissal which require no qualifying period of employment, e.g. dismissal by reason of pregnancy or for trade union membership.

A claim for unfair dismissal is made to an Employment Tribunal (not the ordinary Civil Courts as wrongful dismissal claims may be). The Employment Tribunal is concerned to find out whether the employee has been dismissed in breach of certain statutory requirements found in the Employment Rights Act 1996.

In order to defeat an unfair dismissal claim, the employer must be able to show, first, that he dismissed the employee for what is recognised to be a "fair" reason and, secondly, that in dismissing for that reason, he acted fairly and reasonably. The five permitted categories are:

- capability
- conduct
- redundancy
- breach of statutory duty
- "some other substantial reason"

Taking "capability" as an example, in reviewing whether the dismissal has been handled fairly the Employment Tribunal will look at factors such as whether the employee was informed of the failings in his performance, whether he was given an opportunity to improve and whether, ultimately, he was warned of the risk of losing his job if he failed to improve. In a redundancy situation relevant factors will include which employees were considered as candidates for redundancy, which criteria were used in selecting a particular employee from that group, whether the employee was warned of and consulted about what was to happen and whether any efforts were made to find another suitable job for that employee.

An employee must bring a claim for unfair dismissal no later than three months from the termination of his employment.

If an unfair dismissal claim succeeds, an Employment Tribunal will award compensation in two parts: the basic and the compensatory awards. The basic award is calculated in almost the same way as a statutory redundancy payment and will not be made if the redundancy payment has already been awarded. The maximum compensatory award is currently £83,682. (This figure is reviewed annually with effect from 1st February each year.)

9.15. Discrimination

Under English law, discrimination is unlawful on grounds of sex, race, disability, age, religion or belief and sexual orientation. Employees may bring a discrimination claim either during their employment or on its termination.

Compensation for breach of the discrimination laws is uncapped. In addition to compensation for financial losses, employees who suffer discrimination can also recover damages of between £900 and £42,900 for injury to feelings.

9.16. Transfers of Undertakings

The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"), which implements the EU Acquired Rights Directive, safeguard employees' rights in the event of the transfer of a business or part of a business.

TUPE provides that in the event of a transfer of a business as a going concern, the employment rights and obligations of the employees of the business will be automatically transferred to the new owner of the business, who will assume those rights and obligations in place of the transferor. TUPE can also apply to the transfer of employees under outsourcing arrangements.

Women and men have the right to earn equal money and receive equal benefits where they are providing work of equal value.

Any pre- or post-transfer dismissals in connection with the transfer will, except in very limited circumstances, be automatically unfair. In addition, TUPE imposes a duty on the parties to a business transfer to inform and consult with employee representatives before the transfer takes effect. TUPE also makes it extremely difficult to change the pre-transfer terms and conditions of employment of transferring employees.

TUPE does not apply where the shareholding of a company is sold, as in that situation there is no change of employer on transfer of a business.

TUPE can have a significant impact on the planning and terms of any business sale. It is not possible to contract out of the Regulations and they can result in significant expense, particularly for the transferee, who will inherit the liabilities of the transferor in relation to the affected employees and who will be liable for unfair dismissals resulting from the transfer. In practice, business sale agreements in the UK tend to include extensive indemnification language dealing with the employee position.

9.17. Restrictive Covenants

The protection of confidentiality and commercial goodwill is governed by common law. During employment, an employee is bound by duties of good faith and confidentiality which require him not to compete with his employer and not to use or disclose confidential information belonging to his employer for his own benefit.

After the employment has terminated (in the absence of any additional contractual provisions) only confidential information in the form of the employer's trade secrets is protected. Otherwise, the employee is free to take advantage of his own professional skill and knowledge, even though they may have been acquired at the employer's expense.

An employer may protect its commercial goodwill and/or other confidential information after the employment has been terminated by imposing a restrictive covenant in the employee's contract to this effect, e.g. restricting the employee's ability to use/disclose confidential information and imposing non-dealing/solicitation restrictions in respect of the ex-employee's customers and staff. However, such covenants must be no wider in duration and scope than is reasonable in order to protect the employer's legitimate business interests. If the covenant is too wide and is therefore unreasonable, it will be void and unenforceable. Courts in the UK will not rewrite terms in order to make them reasonable. Great care therefore needs to be taken when drafting covenants of this nature.

10. PROPERTY (REAL ESTATE)

There are two main ways in which a legal entity can possess and own property in England and Wales: by taking a freehold interest in the property (which is akin to absolute ownership) or by taking leasehold interest in the property pursuant to which the legal entity pays the landlord a specified amount of money (a rent) to occupy the property for a fixed period of time (sometimes up to 999 years).

The law dealing with property in England and Wales is a particularly technical area of expertise. Legal advice should be obtained for any transaction involving property but some key points are set out below.

10.1. Restrictions

There are no restrictions on foreign ownership of property in England and Wales although the impacts on liability to pay stamp duty land tax for residential property does extend to non-residents as well.

10.2. Title

Title to most, but not all properties, is evidenced in official registers held by the Land Registry, a Government agency, in which the owner of a freehold or the tenant of a leasehold interest are noted as the registered proprietor. The official copies of the register are state guaranteed copies of the title which is kept by the Land Registry. Dealings with property take place by written instruments of transfer which are registered at the Land Registry. When a mortgage is created, the mortgage deed is sent to the Land Registry and a record of the mortgage is noted on the title to the property.

Leases of seven years or less in duration cannot be registered at the Land Registry in which case the owner's title is evidenced by the original lease and (if any) a document which transfers the lease from the current tenant to a new owner. However, it is likely that leases of three years' duration or less will become registrable in the future.

10.3. Controls

There are strict planning and building controls in England and Wales, most of which are operated by local authorities. "Development" of property, which includes a material change of use of the property, will require planning permission from the Local Planning Authority. Certain developments are automatically granted planning permission, but these are limited. If the Local Planning Authority consider there to be a breach of planning control they can take enforcement action requiring remedial works within a defined time frame. Other controls on property development include building regulation controls and the listing of buildings with historical interest and those in arrears where the conservation of buildings and their surroundings is required which will impose additional restrictions on development.

10.4. Searches and Enquiries

As a matter of common law, the seller of property has only a limited duty of disclosure to a buyer. It is the buyer's responsibility to find out as much about the property as possible. To this end the buyer seeks information through searches of the relevant Local Authority other official bodies and by raising detailed enquiries of the Seller. The results of these should, together with a building survey and often a valuation, enable the buyer to gather enough information regarding the property and the liabilities attached to it in order to establish whether it wishes to proceed with the transaction.

10.5. Environmental

Situations can arise where the owner or occupier of contaminated land is responsible for its remediation even though it was not responsible for causing the contamination. Accordingly, it is always recommended that, at as a minimum, a desk top environmental audit of the property is be carried out by a qualified environmental consultant or agency.

10.6. Costs and Expenses

In property transactions, each party is usually responsible for its own legal costs and out of pocket expenses unless there is an agreement between the parties to the contrary. Additional out of pocket expenses (disbursements) can include:

- Land Registry fees, which vary according to the purchase price;
- Search fees – it is usual to undertake searches of the local authority and other statutory bodies for information relating to matters such as planning, rights of way, restrictions on use and other matters affecting the specific property or locality;
- Stamp Duty Land Tax, which is a tax payable on the transaction rather than the document by a buyer at pre-determined rates according to the value of the property or the rent payable on the lease of the property;
- Survey – a survey of the property is always recommended to establish its structural integrity and the potential for ongoing repair costs; and
- VAT which may be payable on the price paid for the property, the rent due on the property and on the costs incurred in respect of the acquisition of the property.

10.7. Leaseholds

What is said above applies equally to freehold and leasehold properties. For leasehold properties, the terms of the lease, the title of the landlord to the property, whether appropriate rights have been granted to the tenant and reserved by the landlord, and the consents which may be required from the landlord for such matters as an assignment of the lease, alterations to the property and change of use must also be checked. In England and Wales tenants of commercial leasehold property have various statutory protections and potentially rights to renew the lease on the expiry of the contractual term of the lease.

11. IMMIGRATION

UK immigration law is an ever changing landscape. This is amplified by the current public concerns over immigration control and the developing Brexit position vis-à-vis UK immigration.

Although UK immigration rules change rapidly, they do provide provisions for businesses to set up in the UK and hire non-British workers. Whereas EEA nationals are covered under the provisions of EU law at present, non-EEA nationals and businesses are primarily covered by the UK's points based system which allows business to hire overseas nationals through immigration tiers.

Immigration law can affect businesses setting up in the UK in various ways. Circumstances where immigration advice will need to be considered can include, but are not limited to, acquisitions, mergers, start-ups and when opening up a UK branch.

It is crucial that businesses being set up by non-EEA nationals or business hiring non-EEA nationals (and EEA nationals post BREXIT) have the requisite systems in place to ensure their compliance with UK's complex immigration law. UK Visas & Immigration (the Home Office) enforce the law by inspecting businesses and levying substantial civil penalties on those businesses that are deemed to be non-compliant. Failing to meet duties and obligation imposed under immigration law can also be a major issue for private investors and entrepreneurs, as non-compliance with visa conditions can lead to fines, revocation of visas, and refusals, meaning the holders would need to leave the UK without delay with hefty penalties imposed on business owners.

It is thus essential that businesses seek legal advice to navigate this increasingly complex area of law.

Below is a brief summary of the main UK immigration routes affecting UK businesses and the issues to consider:

11.1 EEA Migration, Free Movement and BREXIT

Nationals of the European Economic Area (EEA) (including Switzerland) enjoy "free movement" treaty rights in European law which are interpreted into UK law by the Immigration (EEA) Regulations 2016.

This means that generally EEA nationals can live and work freely in the UK without restrictions. As such EEA nationals are not required to obtain work authorisation from the UK Visas & Immigration (UKVI) in order to set up a business or engage in economic activity.

Dependants and family members of EEA nationals are also able to acquire similar unrestricted rights under European Law to live, work and study in the UK. Dependants and family members however have to make an application to remain in the UK on this basis and need to meet specified requirements under the Regulations.

Both EEA nationals and their dependants are also able to apply for permanent residence (allowing them to remain in the UK indefinitely and possibly to apply for British citizenship) after completing a period of 5 years of residence in the UK. There are requirements which need to be met in order to qualify for permanent residence.

European free movement laws will be subject to change due to Brexit. Negotiations are ongoing between the European Commission and the UK government, though there are a few proposals which have come to light. These include the requirement to apply for 'Settled Status', whereby EEA migrants may need to apply for Permanent Residence under UK law after the UK has left the European Union. There are also several ongoing concerns about a proposed transitional period after March 2019 and how this will affect individuals who: a) arrive before March 2019 and have not acquired the 5 years residence required in order to apply for permanent residence; or b) arrive after March 2019, but during a proposed transitional period.

Businesses employing EEA workers should keep their policy under review to ensure that this workforce not only remains compliant with UK law, but is also is made aware of options available to them in a timely fashion.

Given the rapidly changing landscape, it is now more important than ever that EEA nationals seek legal advice to discuss the options available to them to enable them and their families to stay in the UK. It is advisable that businesses employing EEA workers review their policy frequently.

11.2 Family and ancestral immigration

There are provisions under the UK Immigration rules to enable non EEA nationals come to the UK as a partner, married or unmarried, of a British citizen or a non-EEA national with Indefinite Leave to Remain in the UK (known as 'settled status'. Minimum salary or cash savings requirements apply, as do English language requirements: these need to be met in order for a settled person to sponsor a non-EEA British partner. If however an individual is able to secure a 'partner' visa, they will be granted leave to remain in the UK for a period of 2.5 years, with an option to extend for another 2.5 years, following which the individual will be able to apply for Indefinite Leave to Remain in the UK.

There are also other routes by which the immediate or second generation descendants of British citizens may register or apply for British citizenship or UK immigration status based on UK ancestry. These routes afford several advantages, such as being able to work, reside and study in the UK without restrictions. These routes also lead to Indefinite Leave to Remain in the UK.

Given that these routes are enshrined in UK domestic immigration laws, Brexit is not expected to have an impact on them.

11.3 The Points Based System (PBS) for non-EEA economic migration

Aside from the routes discussed above, the UK immigration rules are primarily divided into four *operational* Tiers. These being:

a) Tier 1: Private entrepreneurs and investors;
b) Tier 2: Sponsored migrant workers and employees;
c) Tier 4: Students;
d) Tier 5: Temporary workers, such as interns and researchers.

Tier 3 is currently closed and does not include any immigration category.

Please see below for more details:

A) Tier 1

This is a category primarily for private entrepreneurs and investors. This category enables non-EEA nationals to obtain a UK visa by way of either making an investment or setting up a business. An individual can make an application to UKVI for a Tier 1 visa under one of the following sub-categories

i) **Investor**: If an individual has access to £2 million (or £5 million or £10 million) which they wish to invest in the UK; or
ii) **Entrepreneur**: If an individual has access to £200,000 which they will be investing in their own business, or in an established UK business. That business is required to create at least two full time roles for settled workers. Applicants can also be admitted as entrepreneurs if they have been granted access to £50,000 from either a UK government department or a venture capital fund ; or
iii) **Graduate Entrepreneur**: If an individual is a graduate who has been officially endorsed as having a genuine and credible business idea by either a UK Higher Education Institute or the Department for International Trade; or
iv) **Exceptional Talent**: If an individual has been endorsed as a recognised or an emerging leader in fields of science, humanities, engineering, medicine, digital technology or the arts.

Applications under these routes are thoroughly scrutinised by the UKVI and also entail ongoing compliance with the rules whilst in the UK on these visas. Most of these routes also lead to Indefinite Leave to Remain in the UK.

Start-Up Visa:

On 13 June 2018 the UK government announced that a scheme for 'Start-up' visas will be launched from Spring 2019 which will replace the above route for graduates. It will require applicants to have acquired an endorsement form a university or an approved business sponsor.

B) Tier 2

This is a category under which *licensed* employers/businesses can hire and sponsor non-EEA workers. Workers under this route are sponsored to do a particular job for their sponsor, and as such restrictions do apply. Whereas there are several sub-categories under this Tier, business are primarily covered by the following:

i) **General:** New/permanent hires and High Earners;
ii) **Intra Company Transfer:** Temporary transfer to the UK of an existing employee working for a non-UK entity, generally for a maximum period of 5 years.

An employer will first need to obtain a license from the UKVI, authorising them to issue *Certificates of Sponsorship* (CoS or work permits) enabling them to sponsor employees. The licensing process, during which time the business is required to provide evidence that it is active and trading in the UK, and has a commercial need to employ non EEA nation(s), can trigger an inspection from the UKVI, who want to ensure that the business has the requisite human resource systems in place to ensure that they can comply with their duties under UK immigration law as a sponsor of migrant skilled workers.

Tier 2 (General):
Once a license is granted and a business wishes to sponsor a non-EEA worker on a permanent basis, they will usually need to advertise the role in a specified manner to test whether a settled worker can be found from within the domestic workforce. This will usually be required in all cases unless one of the exemptions apply (such as if the role is listed as a *shortage occupation* or if the individual is categorised as being paid a high earner salary under the rules), or if the individual is a student in the UK under Tier 4 and have found sponsored employment.

The job on offer would need to meet the minimum skills requirements and will need to be categorised under one of the Standard Occupational Codes listed in the UK immigration rules. The sponsor will also be required to offer a minimum salary in accordance with the UK immigration rules.

Once a CoS is issued by the employer/sponsor, the individual being sponsored will need to submit a visa application to the UKVI. Individuals can live in the UK as a Tier 2 (General) migrant for up to a maximum of six years. They may however be able to apply for Indefinite Leave to remain in the UK after a period of 5 years residence in the UK as a Tier 2 (General) migrant. Individuals will also be able to bring their dependants to the UK under this category. Generally speaking dependants are free to work and study in the UK without restrictions.

Tier 2 (Intra Company Transfer):
This is a subcategory whereby employers can transfer staff employed in a non-UK entity on a temporary basis to their UK entity for a maximum period of 5 years. Although a sponsorship license is required, this is generally an easier route to bring staff to the UK: the role does not need to be advertised and the eligibility threshold is low. The UK entity will however need to offer a minimum salary set out in the Immigration Rules. Depending on the salary level, it may be the case that the individual will need to have worked for the non-UK entity for a minimum period of 12 months.

An individual however can only reside in the UK for a maximum period of 5 years or 9 years, depending upon the salary being offered. The route also does not lead to Indefinite Leave to Remain in the UK and as such staff being sponsored under this route should be made aware of this.

This route also includes a 'cooling off period', i.e. once an individual has spent the maximum amount of permitted time in the UK, they will, in most circumstances, be barred from applying under any Tier 2 category for a period of 12 months.

Importantly, where employers need to sponsor employees for short term projects, it is important to consider the duration of their UK assignment if they will be required to work frequently in the UK. This is because the cooling off period applies to workers coming to the UK for a period of more than 3 months.

Continued compliance and Penalties:
Sponsors are under an ongoing duty to monitor their sponsored employees and report changes to UKVI. UKVI also reserves the right to make unscheduled inspection visits to check whether the sponsor is compliant with its duties. Failure to comply with these sponsor duties can lead to revocation of the license, substantial civil penalties and damage to reputation, as well as possible cancellation of the visas of all current sponsored employees.

It is thus important that sponsors not only remain compliant with their duties, but ensure that there are appropriate human resource and compliance systems in place. UKVI places a duty on all sponsors to maintain records and make timely reports via the online Sponsor Management System of any change in circumstances. Given the complex nature of sponsorship, employers are advised to seek legal advice so that they can ensure compliance with their duties as a sponsor.

C) Tier 4
Licensed educational institutions are required to sponsor their students, with monitoring and reporting duties similar to those imposed on employers.

The general position is that students may work up to 20 hours per week in term time, and full-time in vacations if studying at degree level or above at a UK University, or up to 10 hours per week if studying below this level. Special arrangements allow more flexible access for PhD students.

D) Tier 5
The Tier 5 category is primarily used for employing temporary workers.

In most cases, the sponsor will be a “third party” such as an approved body, an overseas government or a charitable organisation rather than the direct employer. Primarily, this route is used for employee interns and temporary workers such as researchers working on projects.

11.4 Mergers, Acquisitions and Transfer of Undertaking
Immigration issues also arise in the event of a merger, acquisition, a transfer of undertaking (TUPE) or a transfer of a group of employees.

Given that it is ultimately sponsors who are responsible for their sponsored employees, in the event of TUPE the responsibility would be transferring from one sponsor to the other company. This can bring up a host of issues and it will be critical to determine where the sponsorship responsibility lies, as the transferor or the transferee will have responsibility for submitting reports to UKVI within specified timescales. Failure to do so can result in penalties being imposed, inability to continue to employee affected employees, and possible revocation of the sponsorship licence. As such, it is important that legal advice is sought well in advance of a transfer or change of ownership.

11.5 Right to Work Checks and Illegal Working
UK immigration law places a responsibility to employers to conduct *right to work* checks on an employee’s first day, if not earlier, to determine whether they have the right to work and the correct authorisation to work in the UK. This applies to all employees at a sponsored, regardless of nationality and immigration status. Failure to do so can lead to civil penalties in the event that breaches are discovered, and, in the worst case scenario, criminal sanction, as well as revocation of the sponsor’s licence and curtailment of any sponsored employee’s leave to remain in the UK. It is crucial that employers understand their obligations and if necessary seek training and guidance on how to remain compliant throughout the life of the licence.

This overview is general guidance. It should not be relied upon without first taking separate legal advice. Neither the author nor Fox Williams LLP accept any responsibility for any consequences resulting from reliance on the contents of this document.