MILLS & REEVE

information

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establishing a business in the United Kingdom

types of business vehicle

General

There are a number of ways in which an overseas entity can establish a business or acquire business interests in the UK (these notes refer primarily to the regime in England and Wales but the regimes in Scotland and Northern Ireland are very similar though not identical). The principal methods are:

1 the incorporation of a private limited company

2 the setting up of a branch or place of business (referred to as a "**UK establishment**") in accordance with the Overseas Companies Regulations 2009

3 the establishment of a business by means of joint venture (including a partnership)

4 the acquisition of an existing or any interest in an existing company or business

5 the appointment of an independent agent or distributor.

The decision as to the most suitable type of business vehicle will depend upon a number of factors, including the nature of the intended activities in the UK, taxation and employment issues, and financing and funding considerations.

These notes focus principally on the first two methods: the incorporation of a private limited company or the registration of a UK establishment. The other three methods raise different considerations on which further detailed advice should be sought.

Key differences between a private limited company and a UK establishment

The main differences between a private limited company and a UK establishment (involving the setting up of a branch or place of business) are:

1 *Legal personality:* A company has a separate legal personality, distinct from that of its members. It can therefore contract and sue, or be sued, in its own right. A branch or place of business, on the other hand, remains in law part of the establishing overseas entity

2 *Liabilities*: If a company with limited liability is established, an overseas entity will not normally incur liability for the debts and other obligations of the company in the UK. However, an overseas entity establishing a branch or place of business here will be liable in law for all the debts and obligations of the branch

3 *Tax - General*: A company incorporated in the UK is subject to UK corporation tax on all its profits and gains and (subject to any overseas tax rules) these profits and gains will not normally be liable to tax in the parent company's hands. If a branch amounting to a "permanent establishment" is used to carry on a trade

in the UK, the overseas company is liable to UK tax on the UK trading profits and on certain other UK related income and gains. Potentially, the overseas company is also liable to tax on these profits, income and gains in its own jurisdiction. However, if there is a double tax treaty with the UK, this will usually provide for a credit for the UK tax against the overseas tax

4 *Tax – Branch or Subsidiary?* It is not always easy to choose which of these will be the more favourable *structure* for tax purposes. Recent changes in UK law mean that in many respects the tax treatment of a branch or a subsidiary carrying on a trade in the UK is similar. However, using an unincorporated branch may enable start-up costs and initial trading losses to be set against other profits of the overseas parent and so mitigate taxation in its own jurisdiction. On the other hand, in some circumstances, a UK subsidiary may be eligible for a lower rate of UK corporation tax on its UK trading profits and can access the benefits of the UK's extensive range of double tax treaties.

Incorporation of a private limited company

An overseas company which establishes business activities in the UK through a subsidiary private limited company will need to consider the following points[1].

General

The corporate structure normally adopted for a UK company is that of a company limited by shares which will be incorporated under the Companies Act 2006 (although companies limited by guarantee and unlimited companies are also possible).

Formation of a company limited by shares involves registration with the relevant Registrar of Companies of the constitutional documents of the company (memorandum and articles of association), together with a prescribed form (Form IN01) setting out particulars of the first officers (that is, its director(s) and its company secretary (if one is to be appointed)), the registered office and a statement of the company's share capital on incorporation, accompanied by the relevant fee.

An overseas person wishing to establish a UK company can either establish a new company or buy an existing company "off the shelf" and change its name and, if necessary, its constitutional documents to suit the overseas person's requirements.

Ongoing registration requirements

UK companies are obliged to notify the Registrar of Companies of certain events and, in most instances, failure to do so within the prescribed time limits exposes the company and its officers to fines. The events which must be notified include a change in the company's registered office, the appointment of and any changes in its directors and secretary, any increase in the issued share capital, the passing of certain shareholders' resolutions and any alteration to the company's constitutional documents.

The company must also file with the relevant Registrar each year a copy of its audited annual accounts and an annual return in the prescribed form within certain time limits. Failure to do so exposes the company and its officers to fines.

Constitution - memorandum and articles of association

A company incorporated in England and Wales is governed by two documents: its memorandum of association and its articles of association.

[1] The law governing public limited companies differs somewhat to the law set out in this briefing. If a public limited company is to be incorporated, separate advice must be sought.

The memorandum of association of a company is a snapshot of information about the company on formation. It states simply that the subscribers wish to form a company under the Companies Act 2006, that they have agreed to become members and, in the case of a company with a share capital, to take at least one share each.

The articles of association are the company's principal constitutional document and contain the detailed administrative provisions for the operation of the company. These include provisions in respect of the issue and transfer of shares, the holding of general meetings of the members, the appointment and powers of the directors, the holding of meetings of the board of directors and the giving of notices. It is possible to amend the provisions of the articles of association by special resolution of the shareholders (ie a resolution passed by a majority of not less than 75% of the shareholders).

Statutory regulations prescribe a form of model articles of association for private, public and companies limited by guarantee that are the default articles for companies incorporated under the Companies Act 2006, though it is possible for companies to adapt those model forms to their own requirements.

Share capital

There is no concept of *authorised* share capital (that is the maximum amount of share capital which a company is permitted to issue) and therefore it is not necessary for shareholders to vote to increase the amount of authorised share capital before shares may be issued. Instead the focus is solely on a company's *issued* share capital, which is the aggregate nominal amount of share capital which has been allotted and issued to shareholders. A nominal value is attributed to each issued share and can be any amount and in any currency. The only relation it bears to the actual price at which shares are issued is that a share cannot be issued at a price lower than its nominal value (though shares may be issued partly paid, in certain circumstances). There are no minimum share capital requirements for private companies.

The power to issue further shares is usually vested in the directors by the articles of association, but can be reserved to shareholders. If the company is a private company with only one class of shares in issue the directors have an unlimited power to allot shares of **that class** unless they are prohibited from doing so by the company's articles of association. However any such issue must be in accordance with statutory pre-emption rights, unless such rights have been excluded in the company's articles or disapplied. If a private company has more than one class of shares in issue, or if it proposes to issue shares of a different class, then the directors must be authorised to allot more shares by the company's articles or by resolution of the shareholders.

Members

A private company must have one or more shareholders (who need not be UK nationals or even residents). Members may be individuals or corporations (or any other legal entity) and may hold their shares for their own benefit or as nominees for other persons. However, the company's records will only show the registered legal owners.

Decisions on certain matters are reserved to the shareholders, for example, any alteration of the company's articles of association, certain changes to its share capital (such as sub-division, consolidation or reduction of the share capital) and any change in its registered status (for example re-registration of a private company as a public limited company). A change of the Company's name can be effected by the means provided for by the company's articles, such as a resolution of the directors.

It is not necessary under corporate law for meetings to be held in the UK, although records must be kept at a place in the UK.

Directors

A private company must have one or more directors, who may be individuals or corporations. Companies are not able to appoint directors under the age of 16 and every company must have at least one director who is a living individual.

It is desirable that there should be at least two directors to ensure continuity if one of them resigns or is otherwise unable to act. The articles of association may provide for the appointment of alternate directors to enable directors who are not present at board meetings to appoint representatives to attend in their place. The articles of association usually provide that the business of the company should be managed by the directors and that the directors may exercise all the powers of the company which are not required to be exercised by the members.

Directors' duties

A director's fiduciary and common law duties that are owed to the company have evolved overtime through case law, backed up by additional statutory duties covering matters such as health and safety.
The Companies Act 2006 sets out seven statutory general duties that directors owe to the company. The body of case law that has been built up over many years is also relevant as it is used by the courts to interpret the statutory duties. A directors' codified duties are as follows:

- to act **within his powers** and only exercise those powers for the purposes for which they are conferred
- to act in good faith **to promote the success of the company** for the benefit of its members
- to **exercise independent judgment** subject to any restrictions contained in any agreement entered into by the company or in the company's constitutional documents
- to exercise **reasonable care, skill and diligence**
- to **avoid conflicts of interest**, except where authorised by the board
- **not to accept benefits from third parties**
- to **declare any interest in proposed transactions or arrangements** with the company.

Breaches of these duties may give rise to civil consequences for breach of a fiduciary duty, such as damages, accounting for profits or removal from office. However if a director fails to declare an interest in an existing transaction or arrangement with the company, this is a **criminal offence**.
The Companies Act 2006 allows members and others to challenge board decisions. As a result, directors must ensure that their board practices are in line with their duties.

Secretary

Under English law, a company secretary has an administrative function and has duties imposed on him or her by law. The secretary may be an individual or a corporation which provides secretarial services. A private company is not required to appoint a company secretary (unless its constitutional documents expressly require it to do so), although one may be appointed if desired. If a private company chooses not to appoint a secretary, its directors will have to allocate responsibility for carrying out company secretarial functions as these tasks remain to be performed.

Auditors

A private company must appoint an auditor or auditors for each financial year of the company unless the directors reasonably resolve otherwise on the ground that audited accounts are unlikely to be required (for example, an exemption from the requirement to appoint auditors and to file audited accounts is available for certain small companies where turnover falls below designated thresholds). Private company auditors are deemed to be re-appointed automatically in certain circumstances, although members have a right to prevent such automatic reappointment.

Registered office

A company must have a registered office in Great Britain. This is the official address of the company to which all official correspondence can be sent. A company registered in England and Wales must have its registered office there.

Company name

[2]A company may adopt any name it chooses provided that it does not infringe certain statutory prohibitions. Broadly, a company name will not be registered if:

1 it is identical to another name appearing on the index of company names or differs from another name in a trivial way, ie is effectively the "same as" an existing name;

2 its use would constitute an offence or it is offensive;

3 [3]it includes characters, signs, symbols and punctuation which are not permitted;

4 it would, in the opinion of the Secretary of State, be likely to give the impression of a connection with central or local government;

5 [4]it contains a sensitive word or expression which can only be used if certain tests are satisfied and a statement of support from the appropriate government department or other official body is obtained (for instance, there are limitations on the use of the words “bank” or “holdings”).

The word “limited” must in almost all cases appear at the end of the name of every private limited company.
The restrictions on the use of business names apply to any person carrying on business in the UK under a name that is not their own. This therefore covers all overseas companies carrying on business in the UK.

Establishment and operation of branch or place of business - a UK establishment

An overseas company which establishes business activities in the United Kingdom (other than through a subsidiary company, an agent or a distributor) will, in most instances, be required to register with the Registrar of Companies the setting up of a UK establishment within one month of opening the establishment. You should note that registration is required only for companies wishing to open an establishment in the UK and the rules do not extend to partnerships or other unincorporated bodies.
An establishment is defined broadly as a branch within the meaning of The Eleventh Company Law Directive (89/666/EEC) (“**Directive**”), or any place of business that is not such a branch. The Directive does not define the term branch, however, a place of business would be anywhere that a company regularly conducts business or premises that indicate that a company may be contacted there.
There are separate provisions dealing with the registration of branches of credit and financial institutions which are not covered by this note and separate advice should be obtained where appropriate.

[2] Controls and restrictions which apply to the main part of a company’s name are set out in ‘The Company and Business Names (Miscellaneous Provisions) Regulations 2009’ (SI 2009/1085).

[3] A list of permitted characters, signs, symbols and punctuation is included in 'The Company and Business Names (Miscellaneous Provisions) Regulations2009'(SI2009/1085).

[4] Refer to the ‘Company, Limited Liability Partnership and Business Names (Sensitive Words and Expressions) Regulations 2009 (SI No. 2615).

Setting up and operating a UK establishment

Overseas companies can define their presence in the UK as either a branch or a place of business but both are treated in the same way in terms of registration and filing requirements, as both are considered to be a ‘UK establishment’.

There are three sets of regulations that govern the setting up of a UK establishment by an overseas company. They are:

1. The Overseas Companies Regulations 2009 SI 2009/1801 that set out the registration requirements, impose accounting requirements on such companies and also regulate disclosure of information and formation and execution of contracts. Part 10 of the regulations, relating to trading disclosures, applies to **all** overseas companies, not just those with a registered UK establishment;

2. The Overseas Companies (Execution of documents and Registration of Charges) Regulations 2009 SI 2009/1917 (as amended)[5] that apply to apply to company contracts and deal with company charges; and

3. The Company and Business Names (Miscellaneous Provisions) Regulations 2009 SI 2009/1085 that deal with permitted company and business names.

Registration of a UK establishment

Within one month of opening a UK establishment, an overseas company must deliver to Companies House a completed application form (**Form OS IN01**, Registration of an overseas company opening a UK establishment) and the current registration fee (£20). The information required to be included on this form is summarised in Appendix 1.

If the company is registering its first UK establishment, it must also deliver to the relevant Registrar a certified copy of the company’s constitutional documents (e.g. its charter, statute, memorandum and articles of association) with a certified translation in English if the original is in a language other than English. It must also deliver a copy of the company’s latest set of accounts (with a certified translation in English if the original is in a language other than English) if:

- they are required to be filed under parent law or
- the company is incorporated in an EEA state and is required by its parent law to prepare and disclose accounts but its parent law does not require such accounts to be audited or delivered.

When an overseas company registers a further UK establishment, it is not required to deliver these documents again and may instead state in the return that they have been delivered in respect of another UK establishment (giving the registered number of that establishment).

There is a continuing obligation to notify the relevant Registrar of changes in particulars which have been registered in the prescribed form. The form requires details of the alterations and the date of the alterations to be disclosed.

Accounts and reports

Following registration of a UK establishment, the accounting documents an overseas company must deliver to the relevant Registrar will depend on whether the company is required to prepare and disclose accounting documents

5 Amended by The Overseas Companies (Execution of Documents and Registration of Charges) (Amendment) Regulations 2011 (SI 2011/2194) with effect from 1 October 2011.

under parent law (the law of the country in which the company is incorporated) or not. A fee applies to all overseas companies with a UK establishment that delivers accounting documents to Companies House.

Companies required to prepare and disclose under parent law
An EEA overseas company that is required to prepare, audit and disclose accounting documents and a non EEA company that is required to prepare, audit and disclose such documents, must, under parent law, deliver them to Companies House within three months from the date on which the document is required to be disclosed in accordance with its parent law.

Accounting documents will include the accounts of the company for a financial period; any annual report of the directors; any auditor's report on the accounts and director's report. The accounting documents must be accompanied by a statement containing the following information:

- the legislation under which the accounts have been prepared and, if applicable, audited
- whether the accounts have been prepared in accordance with Generally Accepted Accounting Principles (GAAP) and the organisation which issued the principles
- whether the accounts have been audited and if so whether they were audited in accordance with Generally Accepted Auditing Standards and the organisation that issued them
- if there has been no audit, whether the company is required to have its accounts audited.

A failure to deliver the accounting documents and accompanying statement to Companies House by the due date is a criminal offence committed by every person who was a director before the end of the three month delivery period.

Companies not required to prepare and disclose under parent law
Some overseas companies may not be required to prepare and disclose accounting documents under parent law. However, the company still has a duty to prepare, sign and deliver accounts to Companies House. There are detailed requirements for such accounts and these include the following:

- calculation of a financial year (normally 12 months), accounting reference period and accounting reference data
- individual or group overseas company accounts must be prepared in accordance with the company's parent law, (provided the content of such accounts meets the requirements set out in the Overseas Companies Regulations 2009) or in accordance with international accounting standards (IAS) or the requirements detailed in the Overseas Companies Regulations 2009.

The accounts must be approved by the board of directors and signed on behalf of the board by a director on the company's balance sheet and the directors of the company must deliver accounts to Companies House within 13 months of the end of the relevant accounting reference period unless it is the company's first accounting reference period when adapted rules apply.

Regulation of overseas companies' names
The Secretary of State is entitled to regulate the names under which overseas companies can carry on business in Great Britain. Broadly, if the overseas company's name contains certain restricted words, is offensive, or is the same as or too similar to the name with which an existing company is registered, the company can be required by

the Secretary of State to cease using the name in the UK. It is therefore essential to check the index of company registrations before starting business operations under a particular name. A company would never, of course, be obliged to change its corporate name in its country of registration. A company is **not** required to carry on business under its corporate name provided that the corporate name appears on all official documentation of the branch or place of business. Professional advice should be sought in the event that any other business claims that the company is trading with a name which is already used by that other business in a manner likely to confuse the public.

Trading disclosures

Information to be displayed at business location

Every overseas company which carries on business in the UK must comply with rules requiring specified information about the company (its name and its country of incorporation) to be displayed at every place where the company carries on business (subject to very limited exceptions) and at the address of every person authorised to accept service of documents on behalf of the company.

Information to be included in business communications

An overseas company carrying on business in the UK must include the company's name on a very wide range of the company's documents when they are used in carrying on business in the UK including business letters, order forms, receipts, websites, notices and other official publications and other forms of business correspondence and documentation. If the name of a director is stated in any of the overseas company's correspondence it must name all the directors.

Where the overseas company has a registered UK establishment, it must also include details of where the establishment is registered and its registered number on business letters, order forms and websites. In addition, an overseas company that is not incorporated in an EEA State must include in those documents:

- the company's country of incorporation
- the identity of the registry in which the company is registered in its country of incorporation
- the number with which it is registered in that registry
- the location of its head office
- the legal form of the company
- if the liability of the members of the company is limited, the fact that it is a limited company.

Overseas companies that are not incorporated in an EEA State that refer to their share capital in business letters, order forms or websites must also state their paid up share capital.

Employment considerations

English law draws a distinction between employees and those who are genuinely self-employed. Employees are generally under closer, more direct control of their employer whereas the self-employed tend to operate on a "freelance" and more flexible basis. This distinction also significantly affects an individual's legal rights and tax status.

Whether an individual is an employee or self-employed depends on the circumstances of each case and can be a complicated legal issue. To further complicate matters, a different category known as *workers* are eligible to claim certain employment rights.

The employment relationship is governed by both contractual and statutory rights. Even where an employer is a non-UK company, the contract of employment of an employee who works in England may be governed by English law (subject to any express provision to the contrary), and the employee may also have the benefit of English statutory protection. Even where a different jurisdiction is specified in the contract, certain mandatory rights can not be excluded.

The contract of employment/service agreement

A contract of employment can be oral or in writing. A company's contract of employment for its directors needs to be tailored to reflect a director's dual role of employee and officeholder. These contracts of employment are commonly known as "Service Agreements". Service Agreements are also commonly used for other senior or key employees.
It is essential that all your employees have a written contract of employment and that all your directors have a written service agreement. The reasons for this are numerous but include those listed below.

Certainty
Without a written document, disputes can arise as to the terms.

Protection of the company after termination of employment
This is particularly necessary for senior or key employees. For example, if that employee left and set up in competition, untold damage could be inflicted upon your company from loss of business. You can reduce those potential losses by having a written contract containing carefully drafted clauses protecting confidential information and restricting certain activities after the employment has terminated, for example, preventing the employee dealing with customer's and/or competing with the employer's business. Carefully drafted restrictive covenants will normally be enforceable whereas covenants that are not specifically tailored for the company are highly likely to be unenforceable.

Statutory requirement
In addition there are statutory provisions which require some information to be in writing. In particular, the Employment Rights Act 1996 requires that all employees should be given a written statement of some specific terms of their employment within two months of commencing employment.

Clauses to include in contracts/service agreements to protect the Company

The following are clauses which should be contained in service agreements and in the contracts of employment for your key or senior staff.

1. *Restrictive covenants* – these are the only method of restricting employees from certain activities, for example, competing with the company, once their employment has ended.

2. *"Garden leave" clause* – this clause can be used in conjunction with or as an alternative to restrictive covenants clauses and enables you to require the employee to remain at home during his/her notice period. It is useful in preventing an employee working for a competitor during the notice period.

3. *Pay in lieu of notice clause* – this clause is essential when seeking to rely upon post-termination clauses such as restrictive covenants/confidentiality clauses – it also has significant taxation and other consequences.

4. *Confidentiality clause* – this is important for all employees but particularly for senior or key employees – this is particularly important when seeking to protect confidential information after the termination of employment.

5 *Intellectual property clauses* – for all employees who are likely to invent, design, create technology or make discoveries.

Procedures

Disciplinary and grievance procedures

All employers need to have written disciplinary and grievance procedures. The procedures we recommend are slightly fuller. They are based on the ACAS Code of Practice which is used by Employment Tribunals when assessing whether an employer has treated an employee fairly.

Policies and rules

The following are policies and rules that we strongly recommend you introduce:

1 *Equal Opportunities, including a harassment policy* – this policy sets out the company's position as an equal opportunities employer in that it aims to treat all staff and job applicants equally. In addition to having a policy which all employees are familiar with, it is important that all managers are trained in how to implement it.

2 *Health & Safety* – it is a legal requirement to have such a policy so that all employees are aware of their health & safety obligations.

3 *Maternity/Paternity/Parental/Adoption leave* – employees ought to be able to refer to a document which explains their rights concerning maternity/ paternity/parental/adoption leave and pay.

4 *Family friendly policies* – certain employees (including parents of school-age children) have a legal right to request flexible working arrangements. There are statutory procedures that need to be followed and it is helpful to have these set out in a policy.

5 *Data protection* – employees have certain rights concerning the data kept about them and you should set out how you will handle this data.

6 *Whistle-blowing* – in view of legislation giving special protection to whistle-blowers, it is wise to have a policy dealing with this subject.

7 *Internet/email* – there has been a rise in the number of employees who abuse their right to use email/the internet at work. It is increasingly important to have a policy dealing with this.

8 *Company rules* – this document suggests various rules and regulations that employees should follow. This should be tailored to the needs of your company.

Employees' statutory rights

An employee's statutory rights are diverse, but significant ones include:

1 *A right not to be unfairly dismissed* – this is generally subject to an employee satisfying a qualifying service requirement of 1 year's continuous employment (subject to certain exceptions). This increased to 2 years for employees starting work from 6 April 2012 onwards. Employees unfairly dismissed have a number of remedies, one of which is compensation. There are various levels of compensation, the main one being a compensatory award which is currently capped at £74,200[6].

[6] This amount applied from 1 February 2013, the upper limits are normally increased in February each year.

2 *A right to a statutory redundancy payment* (subject to certain eligibility requirements) – this is generally subject to an employee satisfying a qualifying service requirement of two year's continuous employment.

3 *A right not to be discriminated against* - this right is engaged in nine main areas (or "protected characteristics"): race, sex, gender re-assignment, marital and civil partnership, pregnancy and maternity, disability, sexual orientation, religion and age. Each protected characteristic has slightly different rules, but all prohibit direct and indirect discrimination, harassment and victimisation. In relation to disability, there is also a duty on employers to make reasonable adjustments to accommodate the needs of a disabled employee. In relation to age, unlike in the US, workers of any age are protected. It is important to be aware that unlike for unfair dismissal, there is no qualifying period of service for bringing a discrimination claim, and no upper limit on the compensation that can be awarded.

4 *A right to receive equal pay* for the same work or work of equal value.

5 A right for fixed-term and part-time employees to enjoy equally favourable terms and conditions as comparable full-time employees. From 1 October 2011 agency workers (broadly, workers or employees provided by an employment agency) have enjoyed equal treatment in respect of certain terms and conditions as comparable workers or employees engaged directly by the hirer in comparable roles. This only applies after a 12 week qualifying period. From day 1 of any assignment, agency workers will be entitled to equal access to collective amenities provided directly by a hirer (such as a staff canteen) and are entitled to be informed of permanent vacancies within the hirer in the same way as the hirer's workers or employees.

6 *Mothers have extensive rights to maternity leave* and pay; fathers have more limited rights to paternity leave and pay, but these were extended in 2011 to allow fathers to take additional paternity leave where the mother has returned to work. Both parents have rights to take unpaid parental leave. There are similar rights for adoptive parents.

7 *A right to request flexible working* – this is currently available to parents of school-age children as well as carers of adults. From Spring 2014 it will be available to all employees with six months' service, regardless of their personal circumstances.

8 A right to a minimum wage.

9 *A requirement not to work over an average of 48 hours a week* (subject to certain criteria and with prescribed exceptions).

10 *An entitlement to minimum daily and weekly rest periods* (subject to certain criteria and with prescribed exceptions).

11 *An entitlement to a minimum annual amount of paid holiday* – this is 28 days per annum for full-time workers.

12 Protection of employment in particular circumstances, for example, potentially on a sale of a business;

13 Statutory regulations governing health and safety at work and sick pay.

14 Some of these rights – notably discrimination protection, the minimum wage and the regulations on working time, statutory holidays and health and safety also apply to other workers who do not have employment status.

Immigration considerations

When setting up a business in the UK, it is vital to ensure that staff are entitled to live and work here, regardless of the business vehicle used. Failure to do so can lead to costly delays, particularly where such individuals are key to setting up operations at the start.

Employers must check that all staff are entitled to work in the UK before they commence employment and can be subject to significant civil and criminal penalties if they fail to do so or if they knowingly employ staff in breach of Immigration law.

Depending on their nationality, staff may already have an automatic right to live and work in the UK. Alternatively they may require permission (usually in the form of a visa). The type of visa they will require will depend on the length and purpose of their visit. We have outlined the most common immigration categories and routes of entry to the UK below.

British nationals and persons settled permanently in the UK

British nationals and persons who have settled permanently in the UK (otherwise known as permanent residence holders) are legally entitled to work here without restriction. This means in an employed or self-employed capacity, for any length of time and for any employer they chose.

EEA and Swiss nationals

In general, nationals from the European Economic Area ("EEA") may live and work in the UK without restriction. Nationals from Switzerland enjoy similar rights to EEA nationals. Such persons may enter the UK on the basis of their passport/identity card and do not require a visa. They may if they wish apply for a registration certificate to confirm their right of residence under European law but this is not obligatory. Their family members who are not themselves EEA or Swiss nationals must apply for an EEA family permit (a type of visa) before travelling to the UK. They should apply for a residence card or residence stamp as appropriate once inside.

Nationals of Bulgaria and Romania are currently subject to special arrangements. They may come to the United Kingdom to live or be self-employed but will need to support themselves and their family without recourse to public funds. If they wish to be employed they must seek permission from the UK Border Agency ("UKBA") for the first twelve months of their stay. Thereafter they may continue to work without restriction and may apply for a registration certificate confirming their status. Their non-EEA family members are also subject to particular controls. These special arrangements are due to end on 31 December 2013.

Non-EEA Nationals

Non-EEA and non-Swiss nationals will require permission to work in the UK. Summarised below are the schemes most commonly relied on by such nationals.

The points-based scheme

The points-based system is divided into five tiers, which are in turn divided into sub-tiers.

Tier 1

Tier 1 is the highly skilled tier that is aimed at individuals who will contribute to the UK's productivity and growth. Tier 1 consists of four main categories – exceptional talent, entrepreneur, investor, and graduate entrepreneur. The Tier 1 (General) and Tier 1 (Post-study work) routes were closed to new applicants with effect from 6 April 2011 and 6 April 2012 respectively.

Tier 1 (Exceptional Talent)

This is limited to 1,000 people per year of exceptional talent—the scientists, academics and artists who have achieved international recognition, or are likely to do so. Applicants must be endorsed by a designated competent body and are exempt from English language and maintenance requirements. Tier 1 (Exceptional Talent) will be an appropriate immigration route only in a very limited number of cases. Leave is granted for an initial period of three years and four months and may be extended for a further two years.

Tier 1 (Entrepreneur)
This is aimed at persons who are setting up or being actively involved in the running of one or more businesses in the UK. Applicants must have £200,000 (or in certain circumstances £50,000) held in a regulated financial institution and available to invest in a UK business. They must also satisfy English language and maintenance requirements. Leave is granted for an initial period of three years and four months and may be extended for a further two years, provided that the applicant satisfies further requirements, including evidencing that the investment was made within a prescribed period.

Tier 1 (Investor)
This is aimed at high net worth individuals who can make a substantial financial investment in the UK. Applicants must hold at least £1,000,000 in a regulated financial institution and the monies must be freely transferable to the UK. Alternatively applicants may have personal assets exceeding £2,000,000 and access to a loan of £1,000,000 from a financial institution regulated by the FSA, which is disposable in the UK. The monies should be invested in the UK within a prescribed manner and timeframe. There is an exemption from the English language and maintenance funds requirements. Leave is granted for an initial period of three years and four months and may be extended for a further two years

Tier 1 (Graduate Entrepreneur)
This allows non-European MBA and other graduates to extend their stay after graduation to establish one or more businesses in the UK. It also allows overseas graduates who have been identified by UK Trade Investment as elite global graduate entrepreneurs who intend on establishing one or more businesses in the UK. Further details are beyond the scope of this note.

Tier 2 - Skilled migrants with a job offer
Tier 2 allows employers to sponsor skilled migrants in order to fill posts which cannot be filled by EEA nationals or settled workers. In the majority of cases employers will rely on the General and Intra-company transfer sub-tiers of Tier 2. Employers must register as a licensed sponsor. Once registered, they are permitted to issue eligible migrants with Certificates of Sponsorship (“CoS”). Migrants may then use the CoS to apply for leave to remain.

Tier 2 (General)
This allows employers to sponsor skilled migrants in order to fill posts which cannot be filled by EEA nationals or settled workers. Unless the role is on the published shortage occupation list, in most cases an employer must advertise the post to demonstrate there is not a suitable resident worker willing to perform the role - known as the “resident labour market test” - prior to issuing a CoS. The potential applicant must then score sufficient points to qualify. Points are awarded on the basis of their future expected earnings, qualifications, English language skills; and available maintenance funds. There is a cap of 20,700 on the number of Tier 2 (General) migrants who can come into the UK from abroad with an annual salary of less than £152,100. There is no cap on the number of migrants with an annual salary of £152,100 or above. Leave to remain is granted for an initial period of three years plus one month or the time given on the CoS plus one months, whichever is shorter. Extensions may be granted for a further three year period.

Tier 2 (Intra-company transfers)
This is aimed at multi-national companies who wish to transfer staff from overseas to a branch or subsidiary in the UK. It is divided into four categories. *Long term staff/short term staff* – these categories allow skilled employees who have been employed by the overseas business for 12 months prior to transfer to fill a post in the UK that

cannot be filled by a new recruit from the resident workforce. *Graduate trainee* – this category permits employees who have been employed by the overseas business for 3 months prior to transfer to be transferred to the UK as part of a structured graduate trainee programme. *Skills transfer* – this category permits new recruits to join the UK branch to learn or impart specialist skills or knowledge. Length of stay can be between six months and nine years depending on the category, salary and extensions applied for.

Tier 3 - Low-skilled workers
This tier is intended to fill shortages in low-skilled posts and is currently suspended.

Tier 4 - Students
This tier relates to student visas and is beyond the scope of this note.

Tier 5 - Temporary Workers
This tier is available to workers who wish to work on a temporary basis (between 12 – 24 months) in the UK. Applicant must have a job offer from a licensed sponsor, a valid certificate of sponsorship and sufficient points to be eligible.

Other schemes
UK Ancestry
This is available to commonwealth citizens, one of whose grandparents was born in the UK (including the Channel Islands and the Isle of Man). They must plan to work in the UK and be able to support themselves and their dependants without recourse to public funds.

Turkish Citizens
Turkish citizens are eligible to enter the UK to establish themselves in business under the European Community Association Agreement with Turkey. In addition those who are currently legally employed in the United Kingdom may enjoy further rights including the entitlement to change employers within the same occupation after three years and to work in any type of employment for any employer after four years.

Business Visitors
This is a short-stay category (up to 6 months in most cases). Business visitors are limited in terms of the activities they may carry out whilst in the UK. Aside from limited permissible activities, business visitors should not be "working", ie, interfacing or supplying goods or services to clients whilst in the UK. If they do, they should be sponsored under Tier 2. Permissible business visitor activities include but are not limited to:

- attending meetings or conferences
- arranging deals
- conducting site visits
- undertaking fact finding missions
- installing and erecting machinery too heavy to deliver in one piece on behalf of a foreign manufacturer.

Visitors who are visa nationals will be required to arrange a visa before travelling in this category. Non-visa nationals should be prepared to provide proof on entry that they normally live, work and are paid abroad; that they do not wish to transfer their base to the UK; and that they can meet the cost of a return journey. This may require a letter of support from their overseas employer.

Posted workers
Swiss nationals or Swiss companies conducting business in the UK may send non EEA or non-Swiss employees to the UK to work for up to 90 days without needing to apply for a work permit. Those employees must have been

working for the individual or company in Switzerland or in an EEA member state for a reasonable period of time and will require posted workers authorisation.

Sole representatives of overseas firms
This scheme permits senior employees of overseas companies to establish a wholly owned subsidiary or register a branch in the UK. Leave is granted for an initial period of 2 years.

Visa and Further Leave to Remain Applications

Visa applications are made at the British Embassy or Consulate in the applicant's normal country of residence. Together with their application, applicants must now supply biometric information (i.e. fingerprints) and have a digital photograph taken of themselves. Information can be found on the UK visas website: www.ukvisas.gov.uk . Sometimes applicants may apply under the schemes described above without leaving the UK. This will depend on whether or not they are permitted to "switch" from their current immigration category whilst in country. Application forms and guidance can be found on www.ukba.homeoffice.gov.uk.

Settlement in the UK
After spending five years in certain immigration categories in the UK, individuals and their dependants are eligible to settle permanently in the UK (this is sometimes referred to as permanent residence or indefinite leave to remain). Applicants will be tested on their knowledge of language and life in the UK. After a further 12-month period they may apply for British citizenship at the discretion of the UKBA. Not all immigration categories mentioned in this guidance lead to permanent residence and applicants should check in each case.

Preventing Illegal Working
It is the responsibility of the employer to ensure that its employees are entitled to work in the UK. Breaches of the immigration rules can lead to fines for failing to make adequate checks or to criminal sanctions where an employer has knowingly employed illegal workers. In order to protect themselves from fines, employers must check and retain copies of original documents showing that an employee is entitled to work in the UK prior to the employee starting work. The UKBA has issued guidance on the types of documents or combinations of documents, which will suffice. Where employees enjoy only limited leave to remain, these checks must be repeated every 12 months. Permit checking will not assist an employer who "knowingly" employs illegal workers however.

Please note - the information provided above is for guidance purposes only. Given that the UKBA introduces frequent changes to the immigration rules, employers and applicants are advised to take advice in relation to each separate application to avoid potential breaches of immigration law. In addition the summaries provided here only cover the key aspects of these schemes and applicants should check the exact requirements of each scheme.

Tax considerations

These notes provide a brief introduction to a number of tax issues which apply when a UK subsidiary or branch is established to carry on business in the UK. We look in turn at: corporation tax, value added tax, income tax and payroll taxes.
These notes do not consider the advantages and disadvantages of establishing an intermediate holding company in the UK or elsewhere, or the tax implications of seeking to convert a branch into a subsidiary or vice versa. For the purposes of this note, we focus on the situation where an ***overseas company*** sets up a UK subsidiary or establishes a UK branch. Where an individual or partnership establishes a UK subsidiary or, in particular, a UK branch, some of the UK tax considerations are different and lay outside the scope of this note.

Corporation Tax

In broad outline, United Kingdom corporation tax is payable by:

Type of company	*Scope of UK corporation tax*
A company resident for tax purposes in the UK	Taxable on its worldwide income and gains
A company resident for tax purposes outside the UK	Taxable on: (i) profits of any trade carried on in the UK through a permanent establishment in the UK; and (ii) any chargeable gains in respect of capital assets used or held for the purposes of a trade carried on in the UK through a branch or agency in the UK.

A company, or the permanent establishment of an overseas company, is under a duty to notify HM Revenue & Customs ("**HMRC**") when it comes within the charge to UK corporation tax for the first time (or back into charge after a period of dormancy).

Tax residence of companies

A company is treated as resident for tax purposes in the UK if:

- it is incorporated in the UK
- though incorporated outside the UK, its "central management and control" is in the UK. Normally, central management and control will be located where the Board of Directors meet to direct the business and make policy decisions but if *de facto* control is exercised elsewhere that will determine the company's residence.

A branch in the UK

Where an overseas company is considering carrying on business in the UK without setting up a UK subsidiary, the question of whether UK corporation tax will apply falls into two parts:

- will the overseas company be carrying on a trade in the UK?
- if so, will the trade be carried on through a permanent establishment?

Will the overseas company be carrying on a trade in the UK?

For UK tax purposes, there is an important distinction between two types of business activity: trading and investment. Normally it is obvious whether commercial activity counts as trading or investment. Selling goods or services to customers will be trading; purchasing a property to hold over the long-term to generate rental income is an investment activity. An overseas company carrying on investment activity only may be liable to UK income tax on UK-source income but would fall outside the scope of UK corporation tax and UK capital gains tax.

Further a distinction can be drawn between trading "with" the UK and trading "within" the UK. Trading with persons in the UK does not by itself amount to trading in the UK; however, trading within the UK – provided that this occurs through a permanent establishment which will generally be the case – will result in a liability to corporation tax.

If an overseas company establishes, say, a plant to manufacture and sell goods in the UK, it is obviously trading in the UK. Where a trading operation involves a substantial overseas element, the location of the trade can be harder to determine. It is sometimes believed, in light of certain court decisions, that an overseas company which never – either itself or by an agent – signs contracts in the UK will not be trading in the UK. However, this is mistaken and depending on the nature and scope of the activities in the UK, a trade may still be carried on in the UK even if contracts are signed overseas.

If there is a trade in the UK, will it be carried on through a permanent establishment?
A "permanent establishment" is defined in UK tax law as:

- a fixed place of business in the UK through which business of the company is carried on (including a place of management, a branch, an office, a factory, a workshop, a mine etc, a building site or construction project)

- an agent acting on behalf of the company who has and habitually exercises authority to do business on behalf of the company.

However, where the activities carried on at the place of business or by the agent are only of a preparatory or auxiliary character, a permanent establishment will not exist. Likewise, the actions of an agent of independent status acting in the ordinary course of his business will not constitute a permanent establishment.

In some cases, an overseas company will establish a "representative office". This term, which does not appear in UK tax legislation, is used to refer to an office in the UK through which a trade is not carried on. Typically, a representative office simply promotes the activities of an overseas business, takes orders in the UK but refers them all to the overseas company's head office outside the UK for approval, and all goods and services are supplied from overseas. In these circumstances, the overseas company is unlikely to be trading in the UK.
There are subtle differences between the definition of "permanent establishment" and the standard OECD definition found in many double tax treaties; where there is a conflict between the relevant treaty and UK domestic law, the treaty definition will prevail.

How are the profits of a permanent establishment determined for UK tax purposes?
In broad terms, the establishment is to be treated as if it were a distinct and separate enterprise. Moreover, certain assumptions must be made in determining the establishment's UK tax liability. Broadly, these are designed to ensure that the branch is treated as having an appropriate share of the overseas company's equity capital and is not entirely debt funded. These rules prevent excessive reduction of the establishment's profits through excessive interest deductions.

Tax on profits and profit-extraction
The profits of a UK permanent establishment are taxed at the standard rate of UK corporation tax, which is 23% for the financial year commencing 1 April 2013. In some cases if the relevant double tax treaty contains a non-discrimination clause and various conditions are met it may be possible to be taxed at the smaller companies' rate which can be as low as 20%. The after-tax profits of a UK permanent establishment of an overseas entity can be remitted to the overseas country without any UK tax consequences. The UK has no "branch profits tax".
If an overseas entity trades in the UK through a permanent establishment, it is potentially liable for both UK and its own country's tax on the profits of the UK permanent establishment. However most double tax treaties provide that credit is to be allowed against the other country's tax for UK tax on UK-source income.

Use of losses
If the UK branch makes a loss, this loss may be available in the home country for set off against these profits; in any event, it should be available for set off against future taxable profits of the UK branch.

Subsidiary company

Taxation of profits
Corporation tax is charged on all the income, profits and capital gains of a company resident in the UK. A company incorporated in England and Wales or in Scotland will be treated as resident in the UK for tax purposes. After deduction of allowances and reliefs available, the standard rate of corporation tax is currently 23%. If a singleton

company's taxable profits in any year are below a certain figure (currently £300,000) and certain other conditions are satisfied, the corporation tax rate reduces to currently 20%. This is illustrated in more detail by the table below:

	Rate of corporation tax (1 April 2013 – 31 March 2014)
Profits under £300,000	20%
Profits between £300,000 and £1,500,000	Effective rate of 23.75%
Profits above £1,500,000	23%

If the company has “associated companies”, that is, other companies under common control whether inside or outside the UK, the thresholds at which a company moves from one tax band to the next reduces in proportion to the number of associated companies. So, if there are two companies in the worldwide group, the thresholds are £150,000 and £750,000; if three companies, £100,000 and £500,000; and so on.
Subject to applicable overseas tax rules, the profits (both income and gains) of a UK company would normally be liable to UK tax only and not liable to tax in its parent company’s jurisdiction unless transferred there by way of dividend.

Transfer pricing
Under UK domestic law, transactions between associated persons on non-arm’s length terms which would give either party a UK tax benefit are to be taxed as though arm's length terms had been agreed. The payment of interest and/or management charges at excessive rates, or the charging of prices for goods and services which diverge from open market prices, can be counteracted by these transfer pricing rules. The transfer pricing rules do not generally apply to small or medium-sized companies (that is companies which – with relevant associates – have fewer than 250 employees and either turnover of less than £50 million or net assets of less than £43 million). However, the rules will apply where the related business is in a jurisdiction with which the UK does not have a double tax treaty with a non-discrimination article or, in the case of medium-sized companies only, if HMRC issues a notice imposing their application.
Furthermore, most double tax treaties provide for the profits of a permanent establishment or a subsidiary to be determined on the basis that transactions are carried out on an arm’s length basis.

Financing
Close consideration always needs to be given as to how any UK operation is funded.
A subsidiary can be funded from the overseas country by equity or by a combination of debt and equity. Where the subsidiary is funded by debt, under most double tax treaties, interest paid to the parent would, subject to completion of the requisite forms and delivery of the forms to the UK authorities, be subject to withholding tax at a reduced rate or free from withholding tax.
Any interest paid to the parent on loans to a UK subsidiary will normally, subject to compliance with UK rules, be deductible from the profits of the subsidiary for UK tax purposes. However, UK domestic legislation and most double tax treaties have the effect of preventing a subsidiary from obtaining any benefit by being "thinly capitalised". Interest paid by a UK subsidiary will be treated as a distribution if and to the extent that the terms of the loan were such as would not be entered into between arm's length parties acting for bona fide commercial reasons. Note also that for accounting periods beginning on or after 1 January 2010 the UK’s generous interest deduction rules have been limited by the introduction of a worldwide debt cap. Deductibility of interest for UK tax purposes for UK members of a multinational group is now limited by reference to the consolidated external finance costs of the whole group.

Extraction of profit

Traditionally, the advantage of a UK permanent establishment has been that cash can be transferred to and withdrawn from a permanent establishment generally without any adverse UK tax consequences. Until 6 April 1999, a company resident in the UK, on paying a dividend, had to pay an additional amount (one quarter of the dividend) to HMRC by way of "advance corporation tax" (“**ACT**”). That requirement no longer applies. Non-residents have no UK tax liability on dividends from UK companies. While dividends continue to carry a notional tax credit (equal to one-ninth of the cash dividend), some non-UK individual shareholders are able to recover at most a small portion of this tax credit under an applicable double treaty (typically representing less than 1% of the cash dividend). Since the abolition of ACT, the tax treatment of the extraction of profits from a UK branch and a UK subsidiary has become, in practical terms, much closer.

Naturally, cash may be remitted to the overseas parent through other mechanisms, such as interest, rent, royalties or management charges, and both UK and overseas tax will need to be considered in relation to all such payments.

Use of losses

Whether losses which a UK subsidiary makes can be surrendered to an overseas parent will be a question to be determined by the law of the applicable overseas jurisdiction; however, if the parent is located in the EEA this may be possible in certain circumstances. (Over the last few years, the UK legislation dealing with surrendering losses has been subject to change – based largely on EU law concepts and decisions of the ECJ. The UK legislation on the ability to claim and surrender losses between EU Member States continues to evolve, and bespoke advice should be sought on this topic.)

Intermediate holding company

Additional issues, including treatment in the UK of profits from overseas, will arise if it is proposed to set up a UK subsidiary as an intermediate holding company for operations in Europe. Please ask for further information.

Payment of corporation tax

A system of quarterly payment of corporation tax has been introduced for all UK companies which are not eligible for the smaller companies’ rate of corporation tax. For UK companies which are eligible for the smaller companies’ rate of corporation tax, corporation tax is due 9 months after the end of each accounting period. The definition of “large company” is complex but, broadly, any company whose profits exceeds £1.5 million will be large (and this threshold reduces in proportion to the number of associated companies). Corporation tax self-assessment applies to all concerns within the charge to UK corporation tax and, accordingly, companies are responsible in the first instance for calculating their own tax liabilities.

Value Added Tax (VAT)

VAT is a general turnover tax which applies to the import of goods into the UK and the sale of goods and services in the UK. It is charged each time most goods and services are provided to another person, not solely on provision to the final consumer. VAT is currently at the rate of 20% on most sales made in the UK.

Anyone whose taxable turnover at any time has exceeded a certain level in a year (currently £79,000) or will exceed that level in the next 30 days period is required to be registered for VAT purposes. For most businesses VAT is no more than a cash flow cost because any VAT which they pay on goods or services supplied to them can be recovered either by set off against VAT which they have charged on goods or services supplied by them or by repayment from HMRC. Failure to register promptly or to charge VAT or to keep proper records can give rise to significant penalties.

Whether an overseas entity establishes itself in the UK through a permanent establishment or a subsidiary, it is likely that (except in special circumstances) the entity established should rapidly apply to be registered for the purposes of VAT.

Income Tax

Overseas companies

An overseas company may be liable to income tax (rather than corporation tax) on UK source income other than trading profits. Such income might include interest on intra-group loans, royalties on intra-group intellectual property licences, or rent on intra-group property letting arrangements. The application of UK withholding tax rules and the possible availability of relief under double tax treaties to reduce or eliminate such UK income tax should be considered in all such cases.

Individuals

The income tax treatment of an individual will depend on his residence, ordinary residence and domicile. Until recently there was no statutory definition of "residence" or "ordinary residence" for UK tax purposes and the terms were interpreted by reference to a mixture of statute and case law. HMRC published guidance ("HMRC6") which, while not definitive in all circumstances, was helpful in most cases. From 6 April 2013 a new "statutory residence test" will apply to individuals to determine whether or not an individual is resident for tax purposes in the UK. The aim is to give individuals and HMRC greater certainty over whether a person is "resident" in the UK or outside the UK for tax purposes. Although the detail of the new legislation is complex, there are two key concepts:

- An automatic residence test (satisfied if the individual does not satisfy any of the automatic overseas tests and does satisfy at least one of the automatic UK tests). The most basic automatic UK test is spending 183 days in the UK in a tax year but there are automatic tests which can be satisfied with fewer days in the year if a person has a home in the UK, works in the UK or dies in the tax year;

- A sufficient ties test (where an individual does not satisfy any of the automatic overseas tests or any of the automatic UK tests, but has sufficient ties to the UK in the tax year in relation to family, accommodation, work, spending over 90 days in the UK in either or both of the last two years and/or being in the UK at midnight on more days in the year than any other country. The number of ties – 1, 2, 3 or 4 - needed for an individual to become UK resident for a particular year will depend on the number of days spent in the UK in that year and whether or not the individual is a recent UK resident).

The same legislation has also removed the concept of "ordinary residence" from UK tax legislation.
Where a person is resident in more than one jurisdiction according to the laws of those jurisdictions, an applicable double tax treaty may contain a "tie-breaker" clause to decide the jurisdiction in which he will be regarded as resident for tax purposes.
Under UK law, individuals who are either not domiciled or not ordinarily resident in the UK are, in principle, eligible to apply for the "remittance basis" of taxation in respect of non-UK source income and gains. The essential feature of the remittance basis is that overseas income and gains are not subject to UK tax unless they are brought into the UK. For this purpose, remittance is a broad concept. Once an individual has been

- resident in the UK for seven out of the preceding nine years, a £30,000 charge to UK tax applies

- resident in the UK for 12 or more of the preceding 14 tax years, a £50,000 charge to UK tax applies,

if an election for the remittance basis is made. . In general, this is a complex area of UK taxation on which specialist advice should be sought.
We turn now to some specific comments on the taxation of employment income.

Employees

An employee who is resident in the UK will be taxed on general earnings wherever the duties of employment are performed. An exception for “chargeable overseas earnings” (ie earnings from a non-resident employer in respect of duties performed wholly abroad where the employee is non-UK domiciled) is available to the extent that those earnings are not remitted to the UK if the remittance basis is claimed.

Where an employee is resident in the UK he will be taxed on earnings from duties performed in the UK. He will also be taxed in respect of duties performed outside the UK unless the remittance basis applies in which case those earnings will be subject to UK tax only to the extent that they are remitted to the UK.

An employee who is not resident in the UK will be taxed only on earnings received in respect of duties performed in the UK.

Rates of UK income tax vary from 20% to 50%. Basic rate tax at 20% is charged on the first £32,010 of taxable income in a tax year. Higher rate tax at 40% is charged on the next ‘slice’ of income up to £150,000. Additional rate tax at 50% is charged on income in excess of £150,000 in the tax year. Individuals earning less than £100,000 in the year may be entitled to first claim a personal allowance of £9,440. The benefit of this allowance is tapered down for those earning more than £100,000 so that it is not available at all for those earning in excess of £116,210. The rates, allowances and thresholds set out in this paragraph are those that apply for the tax year 2013/2014.

For historical reasons the tax year in the UK for income tax purposes runs from 6 April to 5 April.

Employers - PAYE

Where an employee of an overseas employer comes to the UK to work for that employer, then provided the employer has a sufficient "trading presence" in the UK the employer will be responsible for the operation of a system known as PAYE (Pay As You Earn). Under PAYE, UK income tax and national insurance contributions are deducted from the pay and certain non-cash benefits of the employee whether paid by a UK branch of the employer or by an overseas office. In the latter case, the UK branch must advise the overseas office of the amount of UK tax to be deducted from each payment, collect the amount deducted and pay over those amounts to HMRC. A single employee may constitute a sufficient "trading presence" in the UK for tax purposes.

Where a UK employer benefits from the services of an employee from abroad who continues to be paid by his overseas employer **and** the employee works under the "general control and management" of the UK employer, the UK employer must operate PAYE.

If there are practical difficulties in operating PAYE then HMRC will require the individual to operate his own PAYE or will assess him directly.

National Insurance contributions

Employees – Primary Liability

Unless EU regulations or a reciprocal agreement provide to the contrary, any person categorised as an employed earner is generally liable for primary Class 1 national insurance contributions (“NICs”) in respect of earnings from his employment if, at the time of his employment, he is:

1 resident in Great Britain

2 present (or but for any temporary absence would be present) in Great Britain

3 (until recently) ordinarily resident in Great Britain.

The fact that a person's contract of employment may be made under foreign law or that his employer may be located overseas is irrelevant. The crucial factor is the location in which that person works.

Where an employed earner is not “ordinarily resident” but would otherwise be liable to pay contributions special rules apply.

Employers – Secondary Liability
In normal circumstances the secondary contributor of NICs will be the employer. However where a person works under the general control and management of a person other than his immediate employer, that person may be treated as the secondary contributor. The secondary contributor is liable to pay secondary Class 1 contributions and collect primary Class 1 contributions if he is either resident or present or has a place of business in Great Britain. This obligation to pay secondary Class 1 contributions and collect primary Class 1 contributions extends to include employers established in other EU member states even though they have no presence or place of business in the UK.

Employer’s NICs at 13.8% on all employees’ earnings above £148 per week (2013/14) is a business cost which cannot be passed on to the employee (except in the case of employer’s NICs which arise in respect of share options or in limited circumstances increases in the value of shares where the cost may be passed on by prior agreement).
Where a liability for primary Class 1 contributions arises but not a liability to secondary Class 1 contributions, the secondary contributions may be paid voluntarily in which case the employer should also collect the primary contributions due. If he declines to do so, direct collection of the primary Class 1 contributions will be arranged from the employed earner.

EU Regulations/Reciprocal Agreements
EU regulations which apply only to EU nationals, almost always prevail over the position under UK domestic law described above.
The fundamental principle underlying the EU regulations is that an employee should only be subject to the contribution law of the state where he is employed (irrespective of where he resides or the location of his employer). The liability of a secondary contributor follows the primary liability of the earner and, in principle, is unaffected by the fact that the secondary contributor may reside in a different state from the earner.
There are reciprocal agreements which govern social security matters between Great Britain and other countries, which need to be considered in detail when and if relevant.

Intellectual property protection

Under UK law, protection is given to the following types of intellectual property:

1 Copyright and database rights

2 Designs

3 Patents

4 Trade marks - brands and logos

5 Domain names and web sites

6 Confidential information or “know-how”

The UK is a member of most of the major international treaties relating to intellectual property. Therefore generally speaking, intellectual property which has been created abroad may receive protection in the UK. Of course much will depend on the circumstances and professional advice in this area is particularly important.

Copyright and database rights

Copyright protection is given in the UK to original literary, artistic, dramatic and musical works as well as to sound recordings, films and television programmes. Computer software and compilations are protected as literary works. Copyright arises automatically on creation of a work. There is no registration procedure nor any legal requirement to use a copyright notice, although the latter is desirable.

Copyright generally lasts for the life of the author plus 70 years. It enables the owner to prevent third parties copying the work or otherwise exploiting it, for instance by importing or selling infringing copies.

Database rights offer protection to a database where there has been a "substantial investment" in obtaining, verifying or presenting its contents.

Designs

There are two types of design protection in the UK: registered designs and unregistered design rights.

Formal registration of a design gives the rights holder the exclusive right to make (or license production of) products incorporating the registered features of shape, colour, ornamentation, lines, contours, texture and/or materials. Such protection lasts for 25 years, if the appropriate renewal fees are paid.

The unregistered design right protects the 3D aspects of industrial articles. It does not require registration and is subject to many exceptions which, for example, allow spare parts for industrial articles to be made by competitors. It is a relatively short-lived intellectual property right – it lasts for a maximum of 15 years.

Patents

A patent, giving the holder a monopoly right to use and exploit a particular product or process, is generally available for novel inventions capable of industrial application. The requirement of novelty means it is crucial that a potentially patentable invention is kept secret until an application is filed.

The patent may, if the appropriate renewal fees are paid, last for 20 years from the date of application.

Applications for UK patents may be made to the Intellectual Property Office or to the European Patent Office in Munich under the European Patent Convention, designating the UK.

Trade marks

Trade mark registration is available for words and/or devices (which include smells, shapes and sounds if they can be represented graphically) provided these are distinctive or capable of distinguishing the owner's goods or services and are not confusingly similar to existing marks.

Unlike many other intellectual property rights, registered trade marks are potentially perpetual provided their distinctiveness is maintained and renewal fees paid.

Even if a mark is not acceptable for registration, protection may be available under the common law doctrine of "passing off". Basically this gives protection to names and logos etc which have acquired a reputation through use in a business.

Confidential information

Generally speaking where information has been disclosed to a party in circumstances where he knew or should have known that it was to be treated in confidence, he will be prevented from disclosing such information or be held liable in damages if he does so. In theory this is so even if there is no contract between the owner of the information and the discloser. However from a commercial point of view an express written confidentiality agreement is usually vital to determine more precisely the obligations of the parties concerned.

Domain names and web sites

Businesses in the UK often trade through international “.com” domain names. The “.co.uk” domain is intended for use by UK businesses and is administered by Nominet UK. Domain names can be purchased through a number of internet service providers and domain name registries.

The rights in web site pages will be protected by copyright, and where appropriate other intellectual property rights discussed above will also be relevant.

Selling and exploiting intellectual property

In the UK many businesses are based on the exploitation of intellectual property, for example software licensing, pharmaceutical developments etc. There are many different ways of selling and/or licensing such rights and again it is important to take advice on the various local issues involved. This is particularly the case because many aspects of UK licensing laws are governed by EC and also local UK Competition Law.

More information about the UK's intellectual property regime can be found on the IPO's website: http://www.ipo.gov.uk.

Data protection and privacy

The UK is generally seen as having a high level of regulation in respect of the use of personal data by organisations. Some multi-national businesses therefore use the UK regime as a benchmark for compliance worldwide. The UK regime is based on EC law, though there are differences between the law's implementation in different EC countries.

In the UK, businesses processing personal information about living individuals are required to comply with certain principles about their use of the data. For example, they must not keep the information any longer than necessary and there are restrictions on transferring the information out of the European Economic Area. Businesses should generally register their use of personal data in the UK with the Information Commissioner's Office (which regulates compliance in the UK).

Businesses should also take account of the UK laws relating to direct marketing and monitoring. More information about data protection and privacy in the UK is available on the ICO's website: http://www.ico.gov.uk

APPENDIX 1

Summary of information to be provided to the Registrar of Companies on Form OS IN01 - Registration of an overseas company opening a UK establishment

1 Information

In relation to the overseas company:

1.1 its corporate name and any alternative name under which it proposes to carry on business

1.2 whether particulars have been delivered previously in respect of another UK establishment, together with the registration number

1.3 whether it is a credit or financial institution

1.4 its legal form;

1.5 the country of its incorporation (not mandatory), the identity of the register in which it is registered in the country of its incorporation and its registration number

1.6 a list of its directors and secretary and certain information about each of them (including name, address, date of birth and the extent of their powers to represent the overseas company together with a statement as to whether they may act alone or must act jointly.

If the company is not incorporated in a EEA state, it must also file particulars of the law under which the company is incorporated; if it is required to prepare or disclose accounts under parent law, the period for which it is required to prepare accounts and the period within which it is required to prepare and publicly disclose its accounts; and, unless this is disclosed in the company's constitutional documents, the address of its principal place of business in its country of incorporation or its registered office, its objects and the amount of its issued share capital.

If the overseas company is not a relevant credit or financial institution or an unlimited overseas company, it must state whether it intends to comply with the accounting requirements set out in Part 5 of the Overseas Companies Regulations 2009 in respect of the establishment to which the return relates or in respect of another UK establishment. If it complies in respect of another UK establishment it must give the registered number of that establishment.

In relation to the UK establishment:

1.1 its address

1.2 the date it was opened

1.3 the business carried on it

1.4 if different from the name of the overseas company, the name in which the establishment is carried on

1.5 a list of the names and service addresses of every person resident in the UK authorised to accept on the overseas company’s behalf any notices or legal claims service of process in respect of the UK establishment or a statement that there is no such person

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1.6 a list of every person authorised to represent the overseas company as its permanent representative in respect of the establishment including details of his name, any former name, his service address, his usual residential address (unless this is the same as his service address, in which case a statement to that effect is enough)

1.7 the extent of the authority of all the persons falling within paragraph 1.6 above, including whether that person is authorised to act alone or whether they must act jointly.

2 Documents to accompany Form OS IN01

The overseas company must file with the registration form:

2.1 a certified copy of its constitution together (if necessary) with a certified English translation; and in the case of an overseas company incorporated in the EEA or an overseas company required by its parent law to prepare, have audited and disclose accounts, copies of the latest accounting documents prepared in relation to a financial period of the overseas company that have been disclosed in accordance with its parent law before the end of the period allowed for delivery of the return or, if earlier, the date on which the overseas company delivers the return.

Get in touch

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