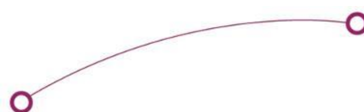
MILLS & REEVE

briefing



March 2018

Establishing a business in the United Kingdom

Introduction: the Brexit factor 2

Types of business vehicle 3
- General 3
- Key differences between a private limited company and a UK establishment 3

Incorporation of a private limited company 4
- General 4
- Ongoing registration requirements 4
- Constitution - memorandum and articles of association 4
- Share capital 5
- Members and people with significant influence or control 5
- Directors 6
- Directors' duties 6
- Secretary 7
- Auditors 7
- Registered office 7
- Company name 7

Establishment and operation of branch or place of business - a UK establishment 8
- Setting up and operating a UK establishment 8
- Registration of a UK establishment 9
- Accounts and reports 9
- Regulation of overseas companies' names 11
- Execution of documents by overseas companies 11
- Trading disclosures 11

Employment considerations 12
- The contract of employment/service agreement 12
- Clauses to include in contracts/service agreements to protect the Company 13
- Procedures 13
- Policies and rules 13
- Employees' statutory rights 14

Immigration considerations 15
- British nationals and persons settled in the UK 15
- EEA and Swiss nationals 15
- Non-EEA/Swiss nationals 16
- Making applications and further leave to remain 18

Anti-slavery and human trafficking legislation 19

Tax considerations 19
Corporation Tax 19
Tax residence of companies 20
A branch in the UK 20
Subsidiary company 21
Payment of corporation tax 23
Value Added Tax (VAT) 24
Income Tax 24
Employers - PAYE 25
National Insurance contributions 25
Intellectual property protection 26
Copyright, database and similar rights 26
Designs 27
Patents 27
Trade marks 27
Confidential information 28
Domain names and web sites 28
Selling and exploiting intellectual property 28
Data protection and privacy 28
APPENDIX 1 29
Summary of information to be provided to the Registrar of Companies 29
on Form OS IN01 - Registration of an overseas company opening a UK establishment 29
1 Information 29
2 Documents to accompany Form OS IN01 30

This briefing note looks at the key legal issues relevant to establishing a business in the UK. It aims to provide an overview and is not intended to be a comprehensive guide to all legal issues. The briefing reflects the law as at 27 March 2018.

Introduction: the Brexit factor

On 23 June 2016 the UK electorate voted to leave the EU, by a relatively narrow but still decisive majority. The UK served formal notice of withdrawal from the EU in March 2017, which means that it will cease to be a member in March 2019. Political agreement was reached on the outline terms of a withdrawal agreement in December 2017 and agreement has recently been reached on a standstill (or transitional) period until December 2020, during which the UK would remain in the single market and customs union, despite no longer being an EU member state.

While the progress of the negotiations have continued to generate some short term uncertainty, we believe that the political consensus in the UK remains strongly in favour of free trade and open access to global markets for goods, capital and services. That is likely to shape the negotiations with the EU, though it does look increasingly likely that the UK will no longer be in the single market and customs union after the end of 2020.

That means that whatever the final outcome of negotiations with the EU, the UK is likely to remain one of the world’s most open economies. That said, leaving the EU may well result in some changes to our domestic legislation, which for the past 40 years has been strongly underpinned by EU law in a number of key areas of law which are covered by this note.

We believe however that any changes are likely to be relatively gradual and broadly pro-business. Depending on the precise terms negotiated, almost every area of English law could be impacted by the UK's departure from the EU in the medium to long-term future. Where possible we have indicated in the body of this note what changes we expect to see, though for the most part it is still too early to say.

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. The regimes in Scotland and Northern Ireland are very similar, though not identical, and so separate legal advice should be taken in relation to those jurisdictions. 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 and 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 UK establishment (whether 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 of its debts and obligations.

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. 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, a UK subsidiary 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, details of any people with significant influence or control over the new company 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. From 26 June 2017, changes to persons with significant influence or control were added to this list.

The company must also file a copy of its audited annual accounts with the relevant Registrar each year, in the prescribed form, within certain time limits; and at least once every 12 months the company must "check and confirm" certain prescribed information in a confirmation statement (**Form CS01**) and notify any changes to the Registrar. 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.

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.

[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 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 per cent 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 this 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 or nil 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 share 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 and people with significant influence or control

A private company limited by shares 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, (in its register of members) will only show the registered legal owners.

As part of the Government's aim to increase transparency in the ownership and control of UK registered companies, all non-listed UK companies are required to take reasonable steps to identify any "people with significant control" (PSC) over the company and to maintain their own register of that information (PSC register). For this purpose, a PSC is, broadly speaking, a person who holds, directly or indirectly, more than 25 per cent of the nominal value of a company's issued shares or voting rights or who otherwise exercises significant influence or control over a company. However, the devil is in the detail and the statutory definition is very complex. The UK Government has published lengthy non-statutory guidance for companies to aid them in complying with their PSC obligations, together with statutory guidance on the meaning of "significant influence or control".

PSC information must be filed with the relevant Registrar of Companies both on the incorporation of a new company and then when there are any changes to the PSC or to the extent or nature of their control over the company.

There are sanctions for non-compliance with the PSC regime which may be summarised as follows:

- Companies and their officers that fail to comply with their new obligations to create, populate and maintain their PSC registers, risk committing **criminal offences**, punishable by a fine and/or up to two years imprisonment.
- PSCs that fail either to respond to information-seeking notices sent by the company, or, to volunteer information about their PSC status (when the company is in default), may also commit **criminal offences**.
- If a company sends out information-seeking notices to suspected PSCs, but they fail to respond, then the company may impose sanctions on such persons' shares/rights. Failure to respond to warnings notices issued by the company may result in restrictions being imposed on the shares/rights in question, for example, in relation to voting, transfer and the right to receive dividends.

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

At present a private company must have one or more directors, who may be individuals or corporations.

Companies are not permitted to appoint directors under the age of 16 and every company must have at least one director who is a living individual.

There are proposals to ban the appointment of new corporate directors, subject to some limited exceptions. Any appointment made in contravention of the proposed prohibition would be void and an offence committed by the company and its officers. A November 2014 Government consultation paper set out possible exceptions to the general prohibition by reference to a number of different types of legal person: group structures including large companies (both public and private); companies in regulated sectors; and other legal entities (including Societas Europaea, limited liability partnerships and corporations sole), but these exceptions have yet to be settled. A further consultation on the exceptions was launched in March 2015. At present it is unclear when, indeed, if at all, the relevant provisions will be brought into force, as implementing legislation is still to be published.

Notwithstanding that corporate law permits private companies to appoint only one person as a director, it may be desirable that there should be at least two directors holding that office in order 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 shareholders.

Directors' duties

A director's fiduciary and common law duties that are owed to the company have evolved over time 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 their 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 director's 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 (though the remedy for breach of the duty of care and skill is only damages). 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 company 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 at all times which 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

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, that is, it is effectively the "same as" an existing name.

2 Its use would constitute an offence or it is offensive.

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 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 "fund").

The following words do not require prior approval: "National", "European"; "Group"; "Holding"; and "International". Registration of a company name does not guarantee that it is available for use in trading. You should also consider trade mark law, discussed under "Intellectual property protection" below.

Note that 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. Registration is only required when there is some degree of physical presence in the UK (such as a place of business or branch) through which business is carried on. You should note that registration is required only by overseas companies wishing to open an establishment in the UK - the rules do not extend to overseas partnerships or other unincorporated bodies wanting a UK presence.

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. As mentioned above, the UK establishment is **not** a separate legal entity, but rather the same legal entity as the overseas company from which it is derived.

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.

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 7 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) that apply to company contracts and deal with UK registration requirements for company charges created before 1 October 2011.

3 The Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015 (SI 2015/17) 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 standard registration fee (£20). The information required to be included on this form is summarised in Appendix 1.

If the overseas company is registering its first UK establishment, it must also deliver to the relevant Registrar of Companies the following additional documents:

- A certified copy of that company's constitutional documents (eg, its charter, statute, memorandum and articles of association) with a certified translation in English if the original is in a language other than English.
- A copy of the overseas 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 (there are different accounting requirements depending on whether the company was incorporated in an EEA state or a non EEA state).

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 Companies about changes in particulars which have been registered in the prescribed form and failure to do so may result in an offence being committed. 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 under parent law (the law of the country in which the overseas company is incorporated) and, if so, whether it is an EEA company (that is, one governed by the law of a country or territory in the European Economic Area). A fee applies to all overseas companies with a UK establishment that deliver accounting documents to Companies House.

There are also specific accounting provisions for credit and financial institutions, but these are outside the scope of this note.

Companies required to prepare and disclose under parent law

An EEA overseas company that is required to prepare, disclose and deliver accounting documents under parent law must 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.

Where an EEA company is required to prepare and disclose, but not deliver, accounts under parent law it is not required to deliver copies of the accounting documents to Companies House.

Where an EEA company is required to prepare and disclose accounts, but not have its accounts audited under parent law, it is not required to deliver an auditor's report with the accounts to Companies House.

An overseas company (incorporated outside the EEA) that is required to prepare, audit and disclose accounting documents under parent law must deliver them to Companies House within three months from the date on which the documents are 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 (on **Form OS AA01**) 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 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 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 date.
- 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.

A failure to deliver accounts to Companies House by the due date is a criminal offence committed by every person who was a director before the end of the period allowed for delivery.

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. An overseas company would never, of course, be obliged to change its corporate name in its country of registration. An overseas 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 overseas company is trading with a name which is already used by that other business in a manner likely to confuse the public.

Execution of documents by overseas companies

The execution by overseas companies of documents governed by the laws of England and Wales such as contracts, deeds and other documents is regulated by The Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009 SI 2009/1917 (as amended) which apply certain provisions of English company law, as modified for overseas companies. Nevertheless, following a recent English Court of Appeal decision, parties to transactions may still wish to check the requirements of the law of the place of a company's incorporation regarding representation and signature if they want to be sure the company is bound.[2]

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 any one 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 UK 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.

[2] *Integral Petroleum SA v Scu-Finanz AG [2015] EWCA Civ 144*

- 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 the amount of their share capital in business letters, order forms or websites must state the 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 cannot 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 customers 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 one year continuous employment (subject to certain exceptions). This increased to two 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 lower of a year's basic wages or £ 80,541[3].

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 or similar 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.

6 **Agency workers** (broadly, workers or employees provided by an employment agency) enjoy 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.

7 **Mothers** have extensive rights to maternity leave and pay; **fathers and partners** have more limited rights to paternity leave and pay, but these were extended in 2011 to allow them to take additional paternity leave and pay where the mother has returned to work. These rights were further extended under a new system of shared parental leave that was introduced in April 2015. Both parents have rights to take unpaid parental leave. There are similar rights for **adoptive parents**.

8 **A right to request flexible working** – this is available to all employees with six months' service, regardless of their personal circumstances.

9 **A right to a minimum wage.**

---

[3] This amount applied from 6 April 2017 and increases to £83,682 with effect from 6 April 2018.

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

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

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

13 **Protection of employment in particular circumstances**, for example, potentially on a sale of a business.

14 Statutory regulations governing **health and safety at work and sick pay**.

15 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 employees 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.

The immigration regime is likely to change when the UK leaves the EU with changes to the current rules providing for free movement for European Economic Area (EEA) nationals. Further details are set out below.

Employers must check that all employees are entitled to work in the UK before they commence employment . Employers can be subject to significant civil and criminal penalties if they fail to do so.

Depending on their nationality, staff may already be entitled to live and work in the UK. Alternatively they may require immigration 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 in the UK

British nationals and persons who have settled in the UK (often referred to an indefinite leave to remain) 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 choose.

EEA and Swiss nationals

In general, EEA nationals currently may live and work in the UK without restriction. This is likely to continue to be the case until the UK leaves the EU. 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. There are some additional restrictions for Croatian nationals.

The rules relating to EEA nationals are expected to change following Brexit. The key points, based on what we know at this stage, are as follows:

- Based on the terms provisionally agreed between the UK and the EU, all EU nationals residing lawfully in the UK prior to the date the UK leaves the EU (expected to be 29 March 2019) should be able to remain in the UK and potentially be able to obtain settled status after five years' continuous lawful residence. The UK intends to agree mirror arrangements with Norway, Liechtenstein, Iceland and Switzerland.

- The UK and the EU have also agreed arrangements for a transitional period between the date the UK leaves the EU and 31 December 2020, which effectively provide for the continuation of free movement during this period and the opportunity for EU nationals arriving during this period to apply for settled status in due course. Again, the UK intends to agree mirror arrangements with Norway, Liechtenstein, Iceland and Switzerland.

- New rules (as yet unknown) are likely to apply in respect of EU nationals arriving in the UK after 31 December 2020 (ie, after the ending of the transitional period).

There may be changes to other aspects of the UK immigration system in light of Brexit. The Migration Advisory Committee, which advises the Government on immigration matters, is due to report on recommendations for the UK immigration system later this year.

Non-EEA/Swiss nationals

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

The points-based system
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.

Tier 1 (Exceptional Talent)
This category is for migrants who are internationally recognised as leaders or emerging leaders in the fields of science, engineering, humanities, medicine, digital technology or the arts. 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 limited number of cases.

Tier 1 (Entrepreneur)
This is aimed at persons who are setting up or 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 UK regulated financial institution and available to invest in a UK business. They must also satisfy English language, maintenance and other 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 for high net worth individuals who can make a substantial financial investment in the UK. Applicants must hold at least £2,000,000 in a UK regulated financial institution and the monies must be freely transferable to 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. There is also an accelerated route to indefinite leave to remain for those individuals who are able and willing to make larger investments.

Tier 1 (Graduate Entrepreneur)
This allows overseas graduates to remain in the UK 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 (usually at graduate level) which cannot be filled by settled workers. In the majority of cases employers will use the Tier 2 (General) and Tier 2 (Intra-company transfer) sub categories. Employers must register as a licensed sponsor. Once registered, they are permitted to issue eligible migrants with Certificates of Sponsorship (CoS) which migrants use to apply for leave to enter/remain.

Tier 2 (General)
Unless one of a small number of exceptions applies, an employer must advertise the post (a process known as the resident labour market test) in order to evidence there is not a suitable settled worker willing to perform the role. The potential applicant must also score sufficient points to qualify. Points are awarded on the basis of earnings, qualifications, English language skills; and available maintenance funds. Minimum skill and salary requirements apply (in most cases the minimum required salary is at least £30,000). There is a cap of 20,700 on the number of Tier 2 (General) migrants who can come into the UK from abroad each year with an annual salary of less than £159,600. Leave to remain is granted for up to five years and 14 days, with the maximum total stay in the category (with an extension) being six years.

Tier 2 (Intra-company transfer)
This is aimed at multi-national companies who wish to transfer staff from overseas to a branch or subsidiary in the UK. The minimum salary that must be paid is £41,500 and in most cases it is necessary for the individual to have worked for 12 months for the overseas linked entity There is also a sub-category enabling graduate trainees to be transferred to the UK as part of a structured graduate trainee programme.

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. Further details are beyond the scope of this note.

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. Further details regarding Turkish nationals are beyond the scope of this note.

Standard Visitor
This is a short-stay category (up to six months in most cases). Visitors in this category are able to carry out permissible business related activities in the UK. They should not “work” in the UK - ie, interfacing or supplying goods or services to clients while in the UK – or receive a salary from a UK source. If they do, they should usually be sponsored under Tier 2. Permissible activities include but are not limited to:

- Attending meetings or conferences
- Arranging deals
- Conducting site visits
- Undertaking fact finding missions
- Specific types of training

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.

There are other visitor and short-term categories which are beyond the scope of this note.

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 two years.

Making applications and further leave to remain

Applications for leave to enter the UK must usually be made at the British Embassy or Consulate in the applicant’s normal country of residence. Together with their application, applicants must supply biometric details.

Applicants who are already in the UK may be able to apply for leave to remain without leaving the UK (eg, extension applications, or “switching” immigration categories).

Settlement in the UK
After spending five years in the UK in certain immigration categories (or less in some circumstances), individuals and their dependants may be eligible to settle permanently in the UK (sometimes referred to as 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 be eligible to for British citizenship. Not all immigration categories mentioned in this guidance lead to permanent residence and applicants should check the eligibility criteria 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. Failure to do so exposes the employer to the risk of civil penalties and criminal sanctions. Employers are required to 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 UKVI has issued guidance on the types of documents or combinations of documents which will suffice.

Please note - the information provided above is for guidance purposes only. Given that the Immigration Rules and related guidance are frequently amended, employers and applicants are advised to seek specific advice in relation to visa applications and compliance obligations. In addition, the summaries provided here cover only the basic aspects of the main immigration categories and applicants should check the detailed requirements of each category.

Anti-slavery and human trafficking legislation

Any corporate entity or partnership, whether UK-based or not, may become subject to recently introduced anti-slavery legislation by commencing UK operations. The Modern Slavery Act 2015 imposes disclosure requirements on organisations that:

- Supply goods or services.
- Together with any subsidiaries, have an annual turnover of £36 million or more.
- Carry on a business or part of a business in the UK.

Affected organisations must publish each year a board-approved slavery and human trafficking statement, giving information about what steps the organisation has taken to ensure that slavery and human trafficking are not taking place either in its own business or within its supply chain.

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 outside the scope of this note.

Needless to say, international tax is an area in which many developments are under way or can soon be expected:

- The Organisation for Economic Co-operation and Development (OECD), with the support of the G20, is undertaking a project to address perceived gaps and mismatches in international tax rules that enable multinational enterprises to avoid or minimise taxation. The BEPS (base erosion and profit shifting) project aims to modernise and standardise the international tax system and the OECD has published a number of reports and recommendations on the subject. The UK government has been an enthusiastic proponent of the BEPS project since its inception and is taking a proactive approach to implementing measures to combat tax avoidance.
- The Brexit referendum on 23 June 2016 has no immediate effect on UK taxation, particularly as the UK remains part of the EU while negotiating its departure. However, in due course, changes will begin to emerge in relation to various areas such as VAT, EU Directives and, in all probability, customs tariffs with some nations.

However, in the brief introduction provided by these notes, we do not provide details of changes in the pipeline or speculate about the possible future effects of Brexit.

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 (except where an election is made for UK exemption for foreign branch income)
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. (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.

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, currently 19 per cent (but, as noted below, this standard rate is due to fall). 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 current standard rate of corporation tax is 19 per cent (but is scheduled to reduce to 17 per cent from 1 April 2020).

Under the “patent box” regime, there is a 10 per cent corporation tax rate available to companies exploiting patented inventions or certain other medicinal or botanical innovations which opt into the regime. Profits attributable to routine manufacturing, development functions and exploiting brand and marketing intangible assets (such as trade marks) are excluded from the patent box.

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.

It is possible for a UK company with a foreign branch (which is not in a tax haven) to elect that its foreign branch profits (or losses) and gains are not subject to tax in the UK.

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.

The UK’s generous interest deduction rules are limited by the Corporate Interest Restriction legislation, which was introduced following developments in the OECD’s BEPS project (see above). These rules only apply to groups with at least £2 million net of UK interest expense.

Broadly, deductions of interest for UK tax purposes for UK members of a multinational group are restricted to 30 per cent of the UK tax EBITDA of group companies in the charge to UK corporation tax (the “fixed ratio” method). Alternatively, instead of using the figure of 30 per cent, a group may elect to apply a percentage based on the net interest expense to EBITDA ratio for the worldwide group based on its consolidated accounts, ignoring amounts

payable to shareholders and related parties, and interest on equity-like instruments (the "group ratio" method). A "modified debt cap" applies in each case to ensure that the net interest deduction does not exceed the total net interest expenses of the worldwide 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.

Non-residents have no UK tax liability on dividends from UK companies and, accordingly, there is no UK withholding tax on dividends paid by a UK company.

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 and relevant anti-avoidance rules will need to be considered in relation to all such payments.

The UK has established a diverted profits tax (**DPT**), which came into effect from 1 April 2015, to tackle the use of aggressive tax planning techniques by multinational enterprises to divert profits from the UK and reduce their UK corporation tax liability. The DPT applies at a rate of 25 per cent in certain circumstances where a foreign company exploits the permanent establishment rules or where a UK company has arrangements in place with a related non-UK entity that reduce UK tax liabilities and those arrangements lack economic substance. There are some exemptions to the DPT, including exemptions for small and medium-sized enterprises and for certain loan relationships: further information is available on request.

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 applies for all UK companies which have taxable profits of more than £1.5 million per annum. Instalments are due in the seventh and tenth months of the current accounting period and the first and fourth months after the end of the accounting period. For UK companies which have annual taxable profits below this level, corporation tax is due nine months after the end of each accounting period.

For "very large" companies (ie, those with annual taxable profits of at least £20 million), the government intends to introduce an accelerated payment schedule with effect from 1 April 2019, requiring these companies to pay tax in instalments in the third, sixth, ninth and twelfth months of the year.

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 per cent on most sales made in the UK. It is possible that the VAT rules may change when the UK leaves the EU, as VAT is an EU-wide tax.

Anyone whose taxable turnover at any time has exceeded a certain level in a year (currently £85,000) 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 they pay on goods or services supplied to them can be recovered either by set off against VAT 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 and domicile. A “statutory residence test” applies 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 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).

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.

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.

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 per cent to 45 per cent. Basic rate tax at 20 per cent is charged on the first £33,500 of taxable income in a tax year (increasing to £34,500 from 6 April 2018). Higher rate tax at 40 per cent is charged on the next “slice” of income up to £150,000. Additional rate tax at 45 per cent 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 £11,500 (increasing to £11,850 from 6 April 2018). 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 £122,000. The rates, allowances and thresholds set out in this paragraph often change on an annual basis.

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.

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.

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 per cent on all employees' earnings above £157 per week (£162 per week from 6 April 2018), 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 that 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, database right and similar rights

2 Designs

3 Patents

4 Trade marks - brands, logos and other branding features

5 Confidential information or "know-how"

6 Domain names and web sites

There are also specific forms of protection available for indications of geographical origin, plant varieties, etc. 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, database and similar rights

Copyright protection is given in the UK to original literary, artistic, dramatic and musical works and similar protection to sound recordings, performances, 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 it can be helpful in enforcing your rights.

Copyright generally lasts for the life of the author plus 70 years, although some types of protection are shorter. 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. This usually lasts for 15 years.

Designs

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

Formal registration of a design gives the right 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.

Unregistered design right protects the shape or configuration 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.

EU law also provides both registered and unregistered protection for designs.

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 for 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. There are possible extensions for pharmaceuticals and plant protection products.

Applications for UK patents may be made through an international application under the Patent Co-operation Treaty, directly to the UK Intellectual Property Office or to the European Patent Office in Munich under the European Patent Convention, designating the UK. A new European system, offering a regional Unitary Patent, is expected to take effect within the next year or so.

Trade marks

Trade mark registration is available at UK and EU level for words and signs (including unconventional signs like shapes, colours and sounds if they can be represented clearly and precisely). These must be distinctive or capable of distinguishing the owner's goods or services, and 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, packaging, 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 recipient. However, from a commercial point of view an express written confidentiality agreement is usually needed to determine more precisely the obligations of the parties concerned. This type of protection can last indefinitely where the information is kept secret.

Domain names and web sites

Businesses in the UK often trade through international '.com' domain names. The '.co.uk' domain is also used by UK businesses and is administered by Nominet UK. Many other top-level domains are available, including the '.uk' domain, although these are less widely used. Domain names can be purchased through a number of internet service providers and domain name registries.

The contents of web site pages will generally 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, collaborative 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. Many aspects of UK licensing are affected by both UK and EU competition law.

Substantial changes are likely to result from the UK's departure from the EU, although the nature of these is currently uncertain. More information about the UK's intellectual property regime and the likely impact of Brexit can be found on the IPO's website.

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 current UK regime is based on EU law, though there are differences between the law's implementation in different EU countries. A new, tougher EU-wide regime is due to take effect in May 2018, offering greater consistency across the EU. The UK is currently planning to introduce these new rules in full, and, while the UK may have more freedom to set its own data protection rules once it leaves the EU, in practice it is likely that UK rules will remain broadly in line with EU requirements.

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 have a clear legal basis for processing the information, they must not keep it any longer than necessary and must comply with restrictions on transferring the information out of the European Economic Area. Businesses are currently required to 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.

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, service address and the extent of their powers (whether limited or unlimited) to represent the overseas company, together with a statement as to whether they may act alone or must act jointly); and

1.7 if it is not incorporated in a EEA state, it must also file:

1.7.1 particulars of the law under which the company is incorporated;

1.7.2 if it is required to prepare, audit and disclose accounts under parent law, and if so, 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

1.7.3 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.

In relation to the **UK establishment**:

1.1 its name and address;

1.2 the date it was opened;

1.3 the business carried on at the UK establishment;

1.4 a list of the names and service addresses of every person authorised to represent the overseas company as its permanent representative in respect of the UK establishment;

1.5 a list of the names and service addresses of every person 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; and

1.6 the extent of the authority (whether limited or unlimited) of all the persons falling within paragraphs 1.4 and 1.5 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 (in addition to the standard registration fee – currently £20):

2.1 a certified copy of its constitution together (if necessary) with a certified English translation; and

2.2 in the case of an overseas company required by its parent law to disclose accounts, copies of the latest accounting documents (with a certified translation in English if the original is in a language other than English) 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.

www.mills-reeve.com +44(0)344 880 2666

Mills & Reeve LLP is a limited liability partnership authorised and regulated by the Solicitors Regulation Authority and registered in England and Wales with registered number OC326165. Its registered office is at Monument Place, 24 Monument Street, London, EC3R 8AJ, which is the London office of Mills & Reeve LLP. A list of members may be inspected at any of the LLP's offices. The term "partner" is used to refer to a member of Mills & Reeve LLP.

The contents of this document are copyright © Mills & Reeve LLP. All rights reserved. This document contains general advice and comments only and therefore specific legal advice should be taken before reliance is placed upon it in any particular circumstances. Where hyperlinks are provided to third party websites, Mills & Reeve LLP is not responsible for the content of such sites.

Mills & Reeve LLP will process your personal data for its business and marketing activities fairly and lawfully in accordance with professional standards and the Data Protection Act 1998. If you do not wish to receive any marketing communications from Mills & Reeve LLP, please contact Ali Gamble on 01223 222217 or email ali.gamble@mills-reeve.com