

DOING BUSINESS IN THE UK



GOWLING WLG





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INTRODUCTION



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

The last 12 months have seen a notable increase in the number of US headquartered corporations coming to the UK for the first time. They share a desire to access the European market (the world's largest single market, with over 500 million consumers).

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

Red tape is increasing throughout the world and Europe is no exception - the increased influence over time of the European Union on individual European states has led to an increase in regulation. Thankfully, in the UK, with the exception of certain industries (finance and utilities being the two main examples), the regulatory environment is still relatively "light touch". And the UK Government has committed to reduce the red tape burden on UK businesses still further.

The tax regime here is an increasingly competitive one, with corporation tax due to reduce to just 18% by 2020. There are also many other tax breaks. Where companies are generating their own intellectual property in the UK, for example, there is a generous research and development credits scheme, which is generally accepted to reduce R&D costs by up to 25% (depending on the size of the business). In addition, worldwide profits of UK companies that are attributable to income arising from the exploitation of patented inventions can attract "patent box" treatment and will be taxed at only 10% (although note that the current form of the patent box regime will be replaced in June 2016). These factors combine to make the UK attractive not only as a European holding company location, but also as an IP holding jurisdiction or for a top company in US pre-IPO re-organisations.

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SECTION 1: CORPORATE



Part 1: Corporate Issues relevant to a potential UK subsidiary

LEGAL BACKGROUND

The main legislation dealing with company matters is the Companies Act 2006 ("Companies Act").

Typically, when US corporations come to the UK they will set up either:

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

Why would a corporation prefer one route over the other?

(a) Subsidiary

When corporations decide to enter the European market for the "long haul", they commonly decide to create a local legal entity to employ people, enter into contracts and ring-fence liabilities. The UK has proved to be a very popular entry point into Europe and it therefore makes sense for many US corporations to create a UK

subsidiary to help manage that move. To the extent that the group wants to expand further into Europe, it can either do this via the UK legal entity (setting up a series of European branches) or by creating further subsidiaries in the various other European states.

(b) Branch

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

(c) Accounting aspects

Accounting aspects have a role to play in the decision making also: subsidiaries must file their own annual accounts at the UK Companies Registry, while branches must file accounts that will include details of their US parent corporation's finances. Local accountancy advice should always be sought.

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

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

NAME

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

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

SHARE CAPITAL

Under English law, there is no maximum share capital limit. There is no minimum permitted share capital for a private company (although it must be more than zero). "Thin capitalisation" tax rules may

penalise companies that have a high ratio of debt to share capital. A private company must have at least one shareholder (also known as a "member"), who must hold at least one share.

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

DIRECTORS

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

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

Until now, it has been common for UK companies to have directors that are themselves corporate entities. The law is changing so that by October 2017, with a very few exceptions all UK company

directors must be natural persons, not corporate entities.

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

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

The only formal requirement for board meetings is that at least once a year a meeting must take place (or alternatively written resolutions must be signed by all the directors; see below) in order to approve the annual accounts. Whether board meetings should take place more frequently (and possibly at regular intervals, such as every month or every three months) is a matter for your commercial decision. Articles of Association usually provide for resolutions of the directors to be passed without holding a meeting, by circulating the resolutions for signature by all directors. They can also provide for a director to participate in a board meeting by means of a conference telephone or video conference facility.

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

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

SECRETARY

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

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

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

REGISTERED OFFICE

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

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

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

AUDITORS

A UK company must have auditors, who will be a firm of accountants (unless the company is exempt from the requirement that its annual accounts be audited in accordance with the Companies Act, for example, it meets the conditions of the small companies exemption). For companies whose financial year ends on or after 1 January 2016 they will qualify for an audit exemption if they meet two of the following criteria: (i) they have an annual turnover of no more than £10.2 million; (ii) they have assets worth no more than £5.1 million; (iii) they have 50 or fewer employees. An auditor's role is not to act as book-keepers (although it is permissible for a firm of accountants which provides book-keeping services also to act as auditors) but in effect to represent the interests of creditors and of shareholders and to ensure that the annual accounts have been prepared in accordance with the requirements of the law and of financial reporting standards, giving a true and fair view of the company's position at the financial year-end.

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

CONSTITUTIONAL DOCUMENTS

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

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

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

OTHER FORMALITIES

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

As from April 2016, UK companies must maintain a register of "persons with significant control". From June 2016, the information on this register must be filed at Companies House. Persons with significant control may be the holders or controllers of a substantial minority (over 25%) of the company's shares or voting rights or may have or control the right to appoint a majority of the company's directors. They may also have significant control by other means such as being a dominant customer of or supplier to the company. These measures are aimed at preventing the concealment of the identity of those who in reality control the company's actions.

A UK company must show in all of its business letters, orders, invoices and other business

documents, its name and business address, its country and number of registration and the address of its registered office.

COMPANY MATTERS – SHAREHOLDER THRESHOLDS AND RESOLUTIONS

The key percentage thresholds for a shareholder are as follows:

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

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

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

increase the authorised share capital, appoint auditors and appoint/remove directors.

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

WRITTEN RESOLUTIONS

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

Part 2: Alternatives to Incorporation

UK ESTABLISHMENT

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

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

UK ESTABLISHMENT REGISTRATION, FILING AND DISCLOSURE REQUIREMENTS

If a company opens a UK establishment in the UK then it would need to register its UK establishment with Companies House. Within one month of establishing the UK establishment the following need to be delivered to Companies House:

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

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

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

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

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

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

SECTION 2: TAXATION



GENERAL

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

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

A UK resident subsidiary is subject to UK corporation tax on its worldwide profits (i.e. wherever they have arisen). Double taxation relief will normally be available via a relevant double taxation treaty or unilaterally. In addition, provided certain stringent conditions are met, a UK resident company can elect to operate an exemption from UK tax for all of its foreign permanent establishments. Taxable profits include profit derived from income and also from capital transactions.

With some care over the structure (and subject to any controlled foreign company rules that apply to your group), the profits of a UK company may not be taxable overseas until remitted to its overseas parent by way of dividend.

An overseas company with a UK branch (or other form of permanent establishment) is subject to UK corporation tax on all profits derived from any trade carried on through that permanent establishment. These profits may also be subject to corporate income tax in the company's jurisdiction of residence, although credit may be available in that jurisdiction for the UK corporation tax paid on these profits.

The corporation tax rate for the financial year 2015/16 (i.e. 01.04.15 to 31.03.16) is 20%. This rate will continue in 2016/17.

The rate of corporate tax is due to fall to 19% for the 2017/18 financial year, and to 17% from 1 April 2020.

The "Patent Box" regime currently entitles a company to apply a lower rate of UK corporation tax on worldwide profits earned from its patents in the Patent Box. The lower rate is being phased in and will be as low as 10% from April 2017.

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

Please note that the UK now has a general anti-abuse rule ("GAAR"), which means that arrangements to avoid taxation may be invalidated (even if they would previously have been lawful) if they are deemed to be "abusive". The rule is designed to counteract what was previously regarded as technically lawful but "aggressive" tax planning. The GAAR is an additional weapon in the armoury of HMRC; there are also many specific anti-avoidance provisions. The UK courts have also developed a common law doctrine of "looking through" (i.e. disregarding) artificial arrangements and transactions the sole or main purpose of which is to avoid tax. Nonetheless, there remain opportunities for tax planning on which we can advise as appropriate.

PAYMENT OF DIVIDENDS

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

Repatriation of profit from a subsidiary is by dividend. Dividends can only be paid out of accumulated realised profits, and any losses have to be made good before dividends can be paid.

A dividend paid by a UK resident company is made out of post-tax profits (and is therefore not deductible in computing taxable profits).

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

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

Under current rules, individual tax payers benefit from a tax credit in respect of dividend income and are required to pay a rate of tax in respect of the dividend income at the same rate of income tax the individual is required to pay i.e. basic, higher or additional.

From April 2016, the dividend tax credit for individuals in respect of dividend income will be abolished with a replacement tax-free dividend allowance of £5,000 taking its place. The amount of tax payable in respect of this income will continue to be decided by which of the previously described tax bands the individual is in but the amount of tax payable has been slightly altered as follows:

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

PAYROLL TAXES

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

Subject as set out below, social security payments known as National Insurance Contributions ("NICs") are also payable both by the employee and the employer. The employer deducts the employee's contribution (generally at a rate of 12% or 2% depending on level of earnings, with certain exceptions) from payments of salary when made to the employee but the employer's contribution is made in addition to the employee's and may not be recovered from the employee (so is an additional cost for the employer). Currently employer's NICs are charged at the rate of 13.8% of the gross salary paid to the employee. Every business is entitled to an annual "employment allowance" of £2,000 (increasing to £3,000 from April 2016) to reduce its liability for the employer's contribution.

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

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

VALUE ADDED TAX ("VAT")

VAT is a sales tax designed in compliance with European Union requirements.

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

VAT is charged, very broadly, on all supplies of goods and services made (or deemed to be made) by a business in the UK. Where the customer is registered for VAT and uses the supplies for business purposes they will receive credit for this VAT so that, for most businesses through a supply chain, the impact of VAT is largely neutral as the business can recover the VAT that it pays on supplies.

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

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

Where a person (whether through a permanent establishment or a subsidiary) makes taxable supplies in the UK and the value of those supplies (which is the taxable turnover, i.e. that which is standard or zero rated) exceeds at the end of any month:

- (a) A specified limit (currently £82,000 increasing to £83,000 from April 2016) in the year then ended; or
- (b) There are reasonable grounds for believing that the value of the taxable supplies in the next 30 days will exceed the specified limit,

that person should notify HMRC and register for VAT. There are financial penalties for

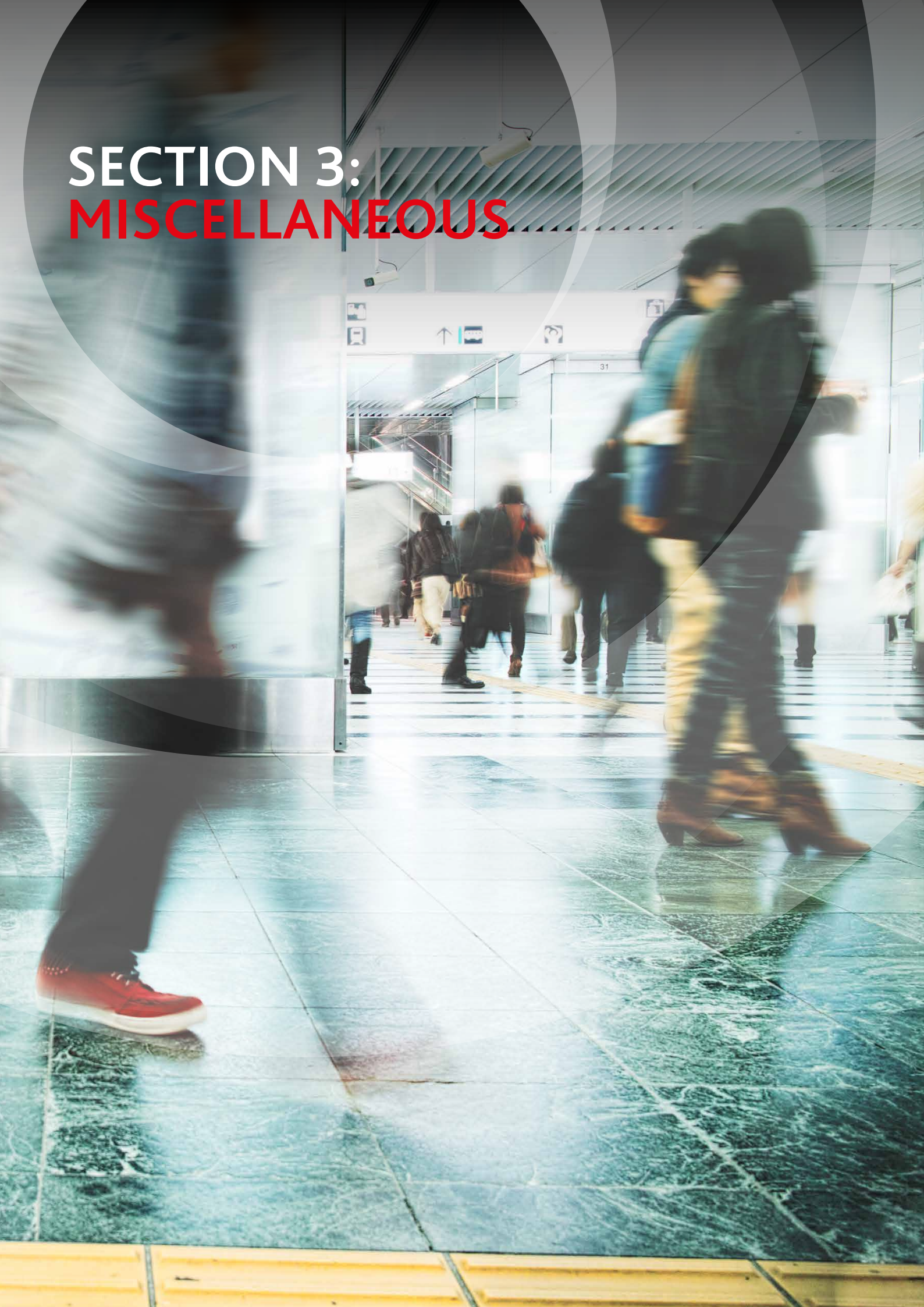
failing to do so. Where turnover is below the specified limit a person may voluntarily register for VAT.

OTHER TAXES

Stamp duty at 0.5% is payable on any transfer (but not on the first issue) of shares in a UK company and certain other securities (with an exception for shares traded on the AIM market).

Stamp duty land tax is payable at a range of rates on transactions involving the transfer or creation of an interest in land or real estate and on transfers of interests in real estate investment partnerships

SECTION 3: MISCELLANEOUS



EMPLOYEES

UK employment law is based on contract. It is part of the "Anglo-Saxon" tradition of employment, rather than the Continental European model which is less "contract-based" and much more state-regulated. An exception is in relation to transfers of undertakings (see page 16).

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

Workers are entitled to be paid the National Minimum Wage, which is reviewed on an annual basis. The current rate for workers aged 21 and over is £6.70. Lower minimum amounts apply to younger employees and apprentices. From April 2016, a National Living Wage rate of £7.20 per hour will apply for workers aged 25 and over (rising to £9.00 per hour by 2020).

An employee is also entitled to statutory sick pay ("SSP") if absent from work due to sickness or injury for up to 28 weeks (subject to qualifying conditions). The rate of SSP is normally reviewed annually and is currently £88.45 per week.

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

UK law also provides for specific "family-friendly" employment rights. Employees, subject to certain qualifying conditions, may have rights to maternity pay, paternity leave and pay, and adoption leave and pay. Specifically, female employees, regardless of their length of service, can take up to 52 weeks of maternity leave, and may be entitled to maternity pay depending upon the level of their earnings and their length of service. Statutory maternity pay is 90% of "normal" pay for the first six weeks of maternity leave and then at the lower rate of £139.58 (or, if lower, 90% of "normal" pay) for up to a further 33 weeks (as from April 2015 - rate normally reviewed annually). Mothers can choose to curtail their maternity leave and opt into "shared parental leave". This enables mothers to elect to convert a portion of maternity leave so that up to 50 weeks' leave and 37 weeks' pay can be shared between both parents. Separately, fathers are entitled to two weeks' paternity leave around the time of birth paid at the statutory rate.

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

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

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

Non-compete provisions and other post-termination restrictions are not generally enforceable as being in restraint of trade. However, an employer may enforce these if they protect a legitimate business interest, go no further than is required, and in addition are reasonable in scope. Non-compete provisions should be tailored to the relevant employee's role to ensure that the provisions are appropriate and reasonable in the circumstances.

Employers in the UK are or will soon be required to enrol all eligible workers into a qualifying workplace pension scheme. Enrolment is automatic for all eligible workers unless they actively "opt out" of their workplace pension. The employer is obliged to match the contributions of enrolled employees up to a minimum rate which currently stands at 4% of a worker's qualifying earnings (this minimum rate is set by the Government and is intended to rise to 8% by 2017).

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

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

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

If an employee's job becomes redundant he/she will be entitled to a statutory redundancy payment, provided that he/she has been employed for at least two years. The entitlement will depend on age and length of service but will not exceed £14,250 (rate reviewed annually).

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

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

Any compensation awarded for a finding of unfair dismissal will be made up of two elements: a basic award (which operates in the same way as the statutory redundancy payment) and a separate award to compensate the employee for loss of income which can be up to £78,335 (rate reviewed annually) or 12 months' salary, whichever is the lower.

As of July 2013, claimants must pay a fee to bring an Employment Tribunal claim.

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

Employers must give men and women equal pay, terms and conditions. Equal pay reporting requirements will be introduced for employers with more than 250 employees sometime in 2016.

The provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") apply to many mergers, acquisitions and outsourcings in the UK. TUPE is the UK implementation of the European Union Acquired Rights Directive. In simple terms, TUPE provides that the employment of the employees working in a purchased business or service provision will transfer on the same terms and conditions of employment (excluding some pension provisions) to the new owner or service provider. It is not generally possible to contract out of TUPE requirements.

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

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

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



DATA PROTECTION

Member States of the European Economic Area are required to implement the 'Data Protection Directive' which is intended to protect the personal data of individuals. This Directive has been implemented into UK legislation by the Data Protection Act 1998 (the "DPA") and is enforced in the UK by the Information Commissioner's Office. Individuals also have the right to take direct action for breaches of the DPA which cause them to suffer any damage or distress.

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

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

notification exemptions apply and, where notification is required, with putting a notification in place;

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

Data protection laws in Europe are currently undergoing major reform. Europe's Data Protection Directive (which is the European legislation that national data protection laws, including the DPA, are derived from) is to be replaced with a new Data Protection Regulation. Compliance will become harder in Europe and consequences of non-compliance riskier - with the potential of fines of up to 5% of global annual turnover. Although not set in stone, the change is expected to come into force during 2017, giving businesses a couple of years to get their compliance arrangements under current data protection laws up-to-date and to prepare for the new regime. If you would like advice on getting ready for the new Data Protection Regulations, our Information Law team is able to assist.

INTELLECTUAL PROPERTY

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

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

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

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

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

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

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

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

- (a) A "unitary patent package" is expected to introduce 1) a patent of unitary scope covering participating Member States of the EU and 2) a Unified Patents Court ("UPC") with jurisdiction to hear disputes regarding the infringement and validity of unitary patents and European patents. The system is unlikely to come into force before 2017. In advance of this, owners of European patents would be well advised to consider the implications of the expected changes for their business, and in particular their strategies regarding a) whether to "opt-out" any existing European patents from the UPC system and b) future patent filings. We can advise and assist in relation to this.
- (b) The European trade mark legislation is being overhauled, pursuant to which it is expected inter alia that CTMs will become known as EU Trade Marks.
- (c) Proposals are under negotiation by European legislators for the creation of a European copyright title that would apply directly and uniformly across the EU.
- (d) Proposals are under negotiation by European legislators to unify the treatment of trade secrets throughout the EU.





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