Doing Business in the UK

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GOWLING WLG

Introduction

The UK is at the heart of the global economy, with English law underpinning international commerce and London arguably still the world's leading financial centre.

In this guide our lawyers summarise the main areas companies looking to do business in the UK need to consider, including: company or corporate legislation and set-up options, taxation, employee contracts and statutory rights, intellectual property rights, the UK General Data Protection Regulation and finally UK Merger Control.

The UK has consistently been listed as one of Europe's top destinations for foreign direct investment (FDI) and is currently second in the **EY 2023 UK Attractiveness Survey**, EY's annual ranking of European countries by their ability to attract FDI projects. Despite activity falling in 2022, the report predicts that 'Investment intentions are at a record high and… the UK's attractiveness will improve in the near-term'.

The UK performs well on project value, delivering the highest jobs total in Europe (more jobs per project than Germany or France), a strong R&D performance, and Europe's most 'new' projects.

The IMF European Department says that the authorities are taking steps to boost the UK's growth potential and the "Windsor Framework", and a more measured approach to reviewing retained EU laws, will help reduce Brexit-related uncertainty.

The Department for Business & Trade states that the UK offers a robust, business-friendly environment for businesses to reliably expand, trade and invest. The UK has a mature, high-spending consumer market and an open, liberal economy coupled with world-class talent and a business-friendly regulatory environment. Our language, legal system, funding environment, time zone and lack of red tape helps make the UK one of the easiest markets to set up, scale and grow a business*.

Gowling WLG's UK lawyers have outstanding legal expertise plus, crucially, the in-depth market knowledge our clients need to succeed.

Key contacts for each discipline are listed, If you require further information please get in touch.

**Global Council for the Promotion of Internationale Trade*

Section 1: Corporate

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 US 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 UK market for the "long haul", they commonly decide to create a local legal entity to employ people, enter into contracts and ring-fence liabilities.

Establishing a subsidiary is often seen as a way of providing greater confidence and certainty for building business relationships – whether with employees or business partners.

(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 Registrar of Companies (and the tax authority, HM Revenue & Customs) that they have a UK place of business (a "branch") and register the required particulars of the US corporation and of the branch. All the contracts made by the branch (including with employees) will be entered into by the main US trading entity, which will bear all the related obligations and liabilities.

(c) Accounting aspects

Accounting aspects have an important role to play in the decision making also: subsidiaries must file their own annual accounts at Companies House, while branches must file accounts that will include details of their US parent corporation's finances. Local accountancy advice should always be sought. We can put you in touch with a local accounting firm if this is helpful.

Part 1: Corporate issues relevant to a potential UK subsidiary

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

(a) incorporate and dissolve limited companies;

(b) examine and store company information delivered under the Companies Act (including annual accounts and an annual "confirmation statement", 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.

There are a number of boxes which need to be ticked in order to avoid your name choice being rejected by the Registrar of Companies:

- no two English companies can have the same (or very similar sounding) names (the Companies House website has a service allowing you to check this); and

- a company name cannot contain any sensitive or offensive words.

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.

It would also be worth considering at this stage the possibility of having more than one class of share. Having different classes of share allows different shareholders to have different rights in respect of, for example, dividends, voting and the ability to transfer shares.

The ability to create an ownership structure with different classes of share is especially useful if you are looking to attract private investment as investors may require different rights to attach to their respective shares.

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 for the shares, 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 as from a date yet to be fixed, the use of corporate directors will be restricted.

One of the directors will often be appointed chair of the board of directors, who will also usually act as chairperson 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. The Articles can also provide for a director to participate in a board meeting by means of a telephone conference 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 to act as directors.

You should also be aware that:

- a director who is an individual must be at least 16 years old;
- directors are subject to detailed duties and responsibilities under the Companies Act.

Legislation currently going through the UK Parliament will soon require all new and existing directors to have their identity verified at Companies House.

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 one of the directors but does not have to be 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, 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 £725 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 the UK. This is the address for formal service of legal proceedings and other formal documents. It does not need to be the principal, or indeed any, place at which your subsidiary carries on business, although in practice it frequently is.

We can provide a registered office service to the subsidiary for an annual fee of £725 (£940 for a London address) 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 if it meets the conditions of the small companies exemption. Companies will qualify for a small company audit exemption if they meet two of the following criteria: (i) they have an annual turnover of no more than £10.2 million; (ii) their balance sheet total is no more than £5.1 million; and (iii) they have on average 50 or fewer employees.

An auditor's role is not to act as a book-keeper (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 shareholders ensuring 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. The Companies Act provides default Articles of Association, known as "Model Articles". UK Companies can elect to adopt these in their entirety or create more bespoke articles by excluding or modifying some or all of these Model Articles.

The unaltered form of Model Articles are automatically adopted by a company in cases where a company does not submit any other Articles of Association with the incorporation Form IN01.

When deciding whether to rely on the Model Articles alone, consideration should be given to the wide range of uses the Articles of Association can be put to, and how they can meet the needs of your company.

As the document which governs the proceedings of the company, the Articles of Association can include provisions to cover all manner of subjects such as voting rights, dividend rights, termination of directorships, and the sale of shares.

This can be particularly important if an equity investor is involved. It may be equally important when considering who will be the members of the new company.

For example, it may be important to a potential shareholder that they have an equal number of shares to you. However, through the Articles of Association, you can agree that you retain a majority of the shareholder votes despite having an equal number of shares.

A further document which you may wish to consider creating (albeit one to which the company may not necessarily be a party) is a shareholders' agreement.

Rather than governing the relationship between the shareholders and the company, this document governs the relationship between shareholders. It can be another useful document when determining what rights different shareholders are to have.

As can be seen from the above, the constitutional documents of a company are a critical aspect to the formation of a company. If you would like help or advice in creating a tailored set of Articles of Association or shareholders' agreement, we would, again, be happy to assist.

Articles of association - example provisions

- **Dividends**: this article will deal with the important matter of when dividends are paid, in what proportion and to whom. Different types of shares may carry different rights to dividends.
- **Exit/Liquidation**: these articles dictate how the proceeds from the sale of the company or its liquidation are divided up between the shareholders.
- **Voting rights**: this article details the voting rights attached to each class of shares.
- **Anti-dilution protection**: this article may be included by an investor to protect it against future investments that occur at a lower price per share than the price paid by them at the time of their investment. This article can provide that the initial investor receives additional "bonus" shares if a lower priced investment occurs in the future.
- **Allotment of shares**: this article dictates whether new shares must be offered to existing shareholders before any third party (to prevent dilution of shareholdings).
- **Transfers of shares**: these articles dictate whether shares can be transferred by any of the shareholders and to whom. There is likely to be a list of transfers that are "permitted". If a transfer is not permitted or otherwise approved by the company, the shareholder may be required to first offer their shares to the existing shareholders before selling them to a third party.

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.

UK companies must maintain a register of "persons with significant control". 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 or influence derived from other means such as provisions in the articles or shareholders' agreement which permit them to amend the company's business plan or make additional borrowing. These measures are aimed at preventing the concealment of the identity of those who in reality control the company's actions.

New regulations were introduced in the summer of 2022 creating the Register of Overseas Entities. These require overseas entities that own property in the UK to register with Companies House and provide information about their registerable beneficial owners.

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.

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 appoint auditors and appoint/remove directors.

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 some wholly-owned subsidiaries, the sole member).

Part 2: Alternatives to incorporation

UK establishment

Alternatives to incorporating a UK subsidiary would be to create a UK establishment. An establishment is defined broadly as a "branch" or any place of business that is not such a branch that is located within the UK. 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:

(a) a completed Form OS IN01 (giving details about the company and its officers);

(b) a certified copy of the company's constitutional documents;

(c) a 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).

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.

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 to consist 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.

For advice or further information please contact:

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Section 2: Taxation

General

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

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-UK resident companies not trading through a UK PE are liable to UK income tax at the basic rate (currently 20%) on UK source income other than property income (e.g. UK source interest), subject to relief under an applicable double tax treaty. A non-UK resident company is subject to UK corporation tax on its UK property income (both rental income and profits from a trade of dealing or developing UK land) and gains.

A UK resident subsidiary is subject to UK corporation tax on its worldwide profits (i.e. wherever in the world they have arisen, and whether they are income or capital in nature). In respect of those profits which are also taxable in a non-UK jurisdiction, double taxation relief will normally be available via a relevant double taxation treaty (of which the UK has more than 100) 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 its foreign permanent establishments.

A non-UK company with a UK PE is subject to UK corporation tax on all profits derived from any trade carried on through that UK PE. 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.

In the current financial year the rate of corporation tax is set at 25% (the "main rate") for companies with profits in excess of £250,000. A small profits rate of 19% applies to companies with profits of £50,000 or less, and companies with profits between £50,000 and £250,000 are required to pay tax at the main rate reduced by a marginal relief providing a gradual increase in the effective corporation tax rate.

A UK PE or a UK resident subsidiary must register with HM Revenue and Customs ("HMRC") within three months of commencing business. The UK PE/subsidiary must 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 (on account) payments of corporation tax. The UK PE/subsidiary will need to appoint accountants (or other service providers) to deal with its tax compliance needs.

The UK has a general anti-abuse rule ("GAAR"). This 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 arsenal of HMRC. There are also many specific anti-tax avoidance provisions. For example:

Large groups contriving to avoid creating a UK PE that would otherwise bring a non-UK company into the charge to UK corporation tax may be subject to "diverted profits tax" (DPT) in the UK. The rate of DPT is purposely higher than the UK corporation tax rate (to discourage this sort of contrived behaviour), and is currently 31%.

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.

In spite of this doctrine, the GAAR and specific anti-tax avoidance rules, there remain opportunities for creating tax efficiencies upon which we can advise.

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 UK PE 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 that dividend is therefore not deductible in computing taxable profits.

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

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

Individuals in receipt of dividend income benefit from a tax-free dividend allowance of £1,000 per tax year. The amount of UK tax payable in respect of this income is decided by which of the tax bands the individual is in:

- Basic rate tax payers will pay 8.75% on their dividend income from shareholdings above £1,000 a year;
- Higher rate tax payers will pay 33.75% on their dividend income from shareholdings above £1,000 a year; and
- Additional rate tax payers will pay 39.35% on their dividend income from shareholdings above £1,000 a year.

Payroll taxes

A UK PE/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 payable both by the employee and the employer. The employer deducts the employee's contribution from payments of salary when made to the employee. Different rates apply to different bands of weekly earnings: currently earnings between £242 and £967 per week attract a maximum rate of 12%, and any earnings in excess of that are taxed at a maximum rate of 2%.

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). The employer's liability to NICs depends on the level of the employee's earnings and their national insurance category (currently the highest rate is 13.8%).

Every business is entitled to an annual "employment allowance" of £5,000 to reduce its liability for the employer's contribution.

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

Patent box

The UK's "patent box" regime gives a reduced effective rate of corporation tax (10%) on worldwide income derived from the commercial exploitation of patents. By doing so it provides an incentive to monetize IP rights in the UK – by encouraging companies to retain valuable IP rights in the UK, and by attracting IP investment and commercial exploitation to the UK.

A company will qualify for the reduced rate if it owns qualifying intellectual property rights (broadly, UK and European patents) or holds an exclusive licence in respect of those rights. Income qualifying for the reduced rate includes income derived from the sale of patented items or those incorporating a patent; licensed-in patent rights; and compensation for patent infringements.

The "patent box" regime is in addition to the "research & development tax credit" regime. This regime encourages the creation of IP rights in the UK.

Interest deductions for debt

Interest on debt is generally deductible when calculating profits liable to UK corporation tax. This general rule is subject to various anti-tax avoidance provisions such as transfer pricing and thin capitalisation.

Influenced by the outcome of the OECD's BEPS project, the UK introduced a restriction which caps relief for those groups paying net interest in excess of £2 million. Broadly, a UK corporate group can claim a deduction for net interest but it is capped at 30% EBITDA. An international group has the same cap, but it may elect (for UK tax purposes) to cap its deduction for net interest on a different basis (broadly, by reference to the ratio of its worldwide net interest exposure to its accounting EBITDA).

The restriction includes interest paid to non-related parties. Excluded from the restriction is interest expense incurred to finance public infrastructure (including real estate let to third parties).

Deductions for interest paid to group members and related parties may also be restricted under transfer pricing (thin capitalisation) rules which operates on general OECD principles or under the anti-hybrid regime, which targets certain instruments and arrangements designed to allow either a receipt to be recognised twice in two different jurisdictions or for an income amount to be disregarded in two different jurisdictions.

Value added tax ("VAT")

VAT is a UK sales tax.

The UK PE/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. If the UK PE/subsidiary is registered for VAT and uses the supplies it receives for taxable business purposes, then it will receive credit for VAT it incurs. For most businesses in a supply chain, the impact of VAT is largely neutral, as the business can recover the VAT that it pays on supplies. The exception to this is business that is classified as exempt – and this includes finance and insurance business. VAT is generally chargeable on the importation of goods into the UK.

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

If a person (whether through a UK PE or a subsidiary) makes taxable supplies in the UK and the value of those supplies (ignoring those supplies that are exempt) exceeds at the end of any month:

(a) a specified limit (£85,000 for 2022/23) 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.

A person without a UK VAT establishment is required to notify HMRC and register for VAT where it makes any taxable supplies in the UK.

Where turnover is below the specified limit a person may voluntarily register for VAT (in order to recover VAT charged to it).

Stamp taxes

Stamp duty is payable on any transfer (but not on the issue) of shares in a company and certain other securities (although shares traded on the AIM market are exempt from stamp duty). Stamp duty is charged at 0.5% of the price paid for the shares, subject to the availability of various reliefs and exemptions.

Stamp duty land tax (or its equivalents in Scotland and Wales) is payable on the acquisition of most types of UK real estate. It is charged by reference to the price paid for the real estate (including rent under a lease). It is a liability of the person acquiring the real estate. It is charged at various rates that are applied to slices of the price. In England and Northern Ireland acquisitions of commercial real estate attract rates of up to 5%, and rents are charged at rates of up to 2% of the net present value. Various reliefs and exceptions may be available.

Help is at hand

We would be delighted to guide you through the rules set out above, and to help you manage your tax requirements, liabilities and risks when coming to the UK to do business.

We can provide legal technical advice and help design tax strategies tailored to your business. We can recommend other service providers to help you with your tax compliance obligations.

Where other advisers propose tax-efficient structures for your business or the use of a tax planning scheme, you should always seek legal advice. We provide an independent "tax audit" and review service to ensure you understand and appreciate the tax risks involved.

For advice or further information please contact:

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Section 3:

- Employees
- Data Protection (UK GDPR)
- Intellectual Property
- UK Merger Control
- UK Investment Screening

Employees

The legal framework

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. In the UK, while the employment relationships are governed by contract law it is within a statutory framework. Extensive legislation continues to develop at a rapid pace creating or modifying statutory rights.

England and Wales, Scotland and Northern Ireland each have separate legal jurisdictions and systems. Contract law in each country is largely the same, although there are some differences in Scotland. The statutory employment protection legislation is common to England, Wales and Scotland. While employment law in Northern Ireland is very similar, there are some notable differences particularly with regard to discrimination law addressing sectarian religious belief and political opinions.

The employment contract & status

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 required information about the main terms of the employment on day one of employment commencing which should be updated as and when there are changes to those terms.

There are three main categories of employment status for employment law purposes: employees, workers, and the self-employed. The rights enjoyed by an individual under employment protection legislation flow from their employment status. At one end of the employment status spectrum are "employees" who are afforded the greatest level of protection. Rights which apply only to "employees" include the right to claim unfair dismissal, statutory notice periods, redundancy pay, the rights to maternity/paternity/parental leave and the right to request flexible working.

At the other end of the spectrum are the self-employed who are not entitled to employment protection rights. This category includes those who are genuinely in business on their own account.

Somewhere in the middle are "workers" who are entitled to some key employment rights, including national minimum wage, holiday pay and rest breaks, discrimination and whistleblowing protection, pension auto-enrolment and since 6 April 2020 a Statement of Employment Particulars. Employment status for employment law purposes is not necessarily the same for tax purposes which only has two categories – employed or self-employed.

We can advise you on the difficulties that often arise in identifying the boundaries of these three categories which often appear blurred.

Statutory rights - wages

Employees and workers are entitled to be paid the National Minimum Wage (NMW), which is reviewed on an annual basis in April. The current hourly rate for workers aged 23 and over is £10.42 and known as the "National Living Wage". For workers aged 21 to 22 the NMW rate is £10.18. Lower minimum amounts apply to younger employees and apprentices. The rates are revised annually in April. NMW is robustly enforced by HM Revenue & Customs.

There is a statutory sick pay scheme by which the employer must provide a minimum level of sick pay for up to 28 weeks. Many UK employers offer sick pay schemes that exceed the statutory minimum though this is not mandatory.

Statutory rights - working hours & annual leave

Working time and rest/annual leave periods 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 particular restriction. Employees are also entitled to a minimum of 5.6 weeks' holiday per annum for full-time employees that equates to 28 days each year. 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). Annual leave cannot be paid out except in the year of termination of employment. There are also required daily and weekly rest break requirements. The rest break requirements cannot be contracted out.

When it comes to atypical workers (such as casual workers or those working under a zero hours contract) holiday entitlement can be tricky. We can advise you on the difficulties that often arise in identifying the correct basis for accrual and pay calculations.

Statutory rights - family-friendly

UK law also provides for specific "family-friendly" employment rights which are complex. Pregnant employees are entitled to paid time off for antenatal care appointments. 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 weekly rate of £172.48 (or, if lower, 90% of "normal" pay) for up to a further 33 weeks (rate reviewed annually in April). 92% of the cost can be recouped through the tax system. 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. It is a criminal offence to allow a woman to return to work in the first two weeks following giving birth (four weeks in factory settings). Statutory Adoption leave and pay provisions largely mirror the maternity provisions. Statutory paternity leave and pay of two weeks' salary is also available to fathers who have been employed for more than 26 weeks within 56 days of the birth of a child. It is common for employers to offer enhanced contractual maternity, adoption and paternity pay.

In addition, 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 given year.

Employees also have a right to reasonable unpaid time off to deal with family emergencies. Employees who lose a child are entitled to 2 weeks' parental bereavement leave and (subject to qualifying conditions) pay.

Statutory rights - part time and flexible working

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.

Employees with at least 26 weeks' continuous service have the right to make a request for a flexible working pattern for any reason. The employer must deal with the application in a reasonable manner and may only refuse a request for one (or more) of eight specified (though broad) reasons.

The UK's demand for a flexible workforce and the use of temporary agency workers remains strong. After 12 weeks' service, temporary agency workers have a right to the same basic working and employment conditions and pay as employees recruited directly by the hirer.

Employee benefits

There is no legal requirement for employers to provide for medical insurance but it is not uncommon to do so, particularly for senior employees. This benefit does not have the same importance in the UK as in some other countries and is generally not thought to be crucial to the recruitment process. The National Health Service in the UK is regarded by many employers and employees as adequate. Private medical insurance does, however, offer the individual more flexibility over the speed and timing of treatment.

Employers in the UK are 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 pay mandatory minimum contributions.

Other common benefits include: permanent health and life insurance, employee assistance programmes and share options/ performance related bonuses.

Equality

The law on discrimination is very well established in the UK and is consolidated in the Equality Act 2010. The Equality Act 2010 protects employees and workers from discrimination (direct and indirect), harassment and victimisation 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. Compulsory retirement will amount to a form of age-related discrimination, unless it can be objectively justified.

Diversity training for staff and implementing a diversity/equal opportunities policy to avoid discrimination in the workplace are essential for all companies employing staff in the UK. If an Employment Tribunal finds an employee has been discriminated against they can award compensation, which is uncapped.

Employers must give men and women equal pay, terms and conditions. Gender pay gap reporting requirements for employers with more than 250 employees have been in force since April 2017.

Protected disclosures & anti-corruption

Under the Public Interest Disclosure Act 1998, workers who "blow the whistle" on their employer by making a protected disclosure (a disclosure in the public interest concerning a statutory proscribed relevant failure (for example an alleged criminal offence or other breach of a legal obligation)) have the legal right not to be dismissed, selected for redundancy or subjected to any other detriment for having done so. There is no required qualifying service and compensation is uncapped for claims linked to whistleblowing.

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.

Business transfer and outsourcings

The provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") apply to many mergers, acquisitions and outsourcings in the UK. In simple terms, 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. The employees also have enhanced protection against dismissal if the reason for dismissing them is related to the transfer. TUPE also applies to a "service provision change" (outsourcing or insourcing). It is not possible to contract out of TUPE requirements.

This is a complex area with information and consultation obligations and legal advice should be sought at an early stage on the employment law implications of any transfer.

Collective issues

In contrast to 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 (20 or more redundancies within a 90-day period) 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.

Business protection

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. The reasonableness of a restrictive covenant is judged at the time it was entered into, not when the employer seeks to enforce it. It is important to tailor restrictive covenants to the particular employment and to review them particularly when an employee is promoted.

Termination of employment

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 where the employer has cause to dismiss. 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 they will be entitled to a statutory redundancy payment, provided that they have been employed for at least two years. Broadly speaking, a redundancy situation arises where there is (i) a business closure, (ii) a workplace closure or (iii) a need to reduce the workforce. The entitlement will depend on age and length of service but will not exceed £19,290 (rate reviewed annually in April).

If an employee is dismissed after more than two years' service then they will have the right not to be unfairly dismissed. This applies even where the employer complies with the notice requirements or is entitled to dismiss without notice. 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 £105,707 (rate reviewed annually in April) or 12 months' salary, whichever is the lower.

Fixed-term contracts are possible, but they are subject to specific regulations. Where the fixed term is for two years or more, the fixed-term employee is still entitled to be given protection from unfair dismissal for non-renewal. Regulations also limit the use of a series of fixed-term contracts which take an employee over four years' continuous service. As such, they do not necessarily represent less of a risk than "ordinary" employees.

When it comes to employment law, the best option is always to avoid problems in the first place. Our team can help you to reduce risk while ensuring managers act commercially.

Using overseas workers

Free movement of overseas workers from within the European Economic Area (EEA) to the UK ended at 11.00pm on 31 December 2020. EEA nationals residing in the UK by that time had until 30 June 2021 to apply for immigration status under the EU Settlement Scheme.

The UK immigration system for migrants coming to work, invest or set up in business is largely contained in a points-based system. Some categories that relate to business or employment remain outside of the points-based system (such as the "Representative of an Overseas Business" category). The immigration rules are complex, subject to ongoing change and difficult to navigate. Specialist advice will be needed at the relevant time.

For advice or further information please contact:

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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 trademarks, rights in passing-off (a cause of action essentially protecting unregistered trademarks/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).

IP rights are territorial. The jurisdictional reach of an IP right covering the UK presently depends upon the type of right in question.

Until 31 December 2020, the UK remained within the EU-wide regimes for protection of IP rights but on that date the UK ceased its participation in those regimes, most notably the EU trade mark system, the Community registered and unregistered designs rights system and the Community plant variety rights system. As of January 2021, for each existing EU-wide right the UK automatically created a national UK right of the same scope; for applications for rights that remained pending on 31 December 2020, the applicant had a nine-month window to re-file the application in the UK for a UK national right of the same scope while maintaining the benefit of the same relevant dates as the pending EU application.

For IP rights that were already national in scope (for example, UK and European patents, supplementary protection certificates, UK registered trademarks, UK registered and unregistered design rights, copyright, trade secrets and UK plant variety rights) then existing on 31 December 2020 continued to operate. The UK's participation in the international systems governing multi-jurisdiction applications for patent, registered design and registered trade mark protection also continued after 31 December 2020. The UK is not within the Unified Patents Court and Unitary Patent system.

Since 31 December 2020, the EU/EEA's regional 'EEA exhaustion' regime has not included the UK. This means that the owner of IP rights protecting goods within the remaining EU and EEA countries can enforce such rights to prevent importation into and dealings in the EU/EEA of genuine goods placed on the market in the UK. However, the UK has continued to recognise the placing of genuine goods on the market in the remaining EU/EEA as exhausting the relevant UK rights and the longer-term scope of the UK's exhaustion regime may be developed by the courts. We can assist with navigating the law in this area and advise on how to manage commercial arrangements most effectively in light of them.

We can also advise and assist on the impact of the 'Brexit' changes for all areas of IP.

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 material 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.

Transfers and licences of UK IP rights, as well as agreements governed by English law, should contain the necessary checks and measures to ensure that they are English law compliant. Additionally, transfers of UK IP rights should be registered at the appropriate UK IP registries to ensure that you do not lose certain rights in any future litigation, or lose rights of priority as against third parties acquiring rights in your IP. We can help with this.

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 their own skill, judgment and individual effort (only minimal effort is required) and that it is not copied from other work.

Certain works can be protected as trade secrets/confidential information, which means that they can be monopolised forever (e.g. the Coca-Cola recipe) or at least for as long as you can keep the work secret. A trade secrets strategy should be a critical part of any IP and business plan. It allows you to identify and develop valuable and confidential information relating to your business offering and effectively implement the policies and processes, and deploy the required resources, needed to maintain and extract value from it. Having a robust trade secrets policy also allows you to identify and enforce any misappropriation or misuse of those trade secrets. Our trade secrets lawyers will help you put a trade secrets policy at the heart of your organisation's overall IP strategy enabling you to fully profit from your innovations.

Trademarks are only protectable in the UK where goodwill has arisen in the UK (which usually requires trading activity within and focused on the UK), where they have been registered for the UK, or where they existed as an EU trademark on 31 December 2020 and at the first renewal arising since then have been renewed in the UK. This means that it is possible that the trademark that you currently freely use at home may infringe someone else's trademark when you start to use it in the UK. In addition, the trademark protection that you enjoy at home will not extend to the UK. Therefore you may wish to consider carrying out a trademark search to ensure that you can use your intended trademark in the UK and/or protecting your name and/or logo by registration as a UK trademark (protecting against infringement of the trademark in the UK) or, if you have plans to expand into the rest of Europe, an EUTM.

The ® symbol may be used in the UK in connection with a trademark that is registered covering the UK, and the TM symbol may be used in connection with unregistered trademarks, in order to alert third parties as to your rights. It is worthwhile having brand guidelines in the UK for your business and agencies to use, as it may be easy to lose your UK trademark rights if you do not use your trademarks consistently.

Like trademarks, designs can be registered or unregistered. If you have a potentially valuable and original 2D or 3D design, it may be wise to register and exploit it. We can help in this assessment.

For advice or further information please contact:

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Data protection (UK GDPR)

The UK has the UK General Data Protection Regulation ("GDPR") which is the retained version of the European General Data Protection Regulation 2016, and the Data Protection Act 2018.

The UK GDPR applies to all "controllers" who process personal data in the UK and organisations based outside of the UK but who monitor activities of those in the UK or sell to those in the UK. So even those based outside of the UK can be caught by the legislation. Some parts of the legislation also apply to "processors" of personal data (those entities who process data on behalf of controllers, under their instruction). So it is important to understand in what capacity your organisation handles data, which will be different in different contexts e.g. for employee data, customer data or supplier data.

Some aspects of the UK GDPR are mandatory, for example both controllers and processors have to maintain a 'record of processing'. Controllers have to register with the regulator in the UK and pay a fee (unless they are exempt), controllers must have a privacy notice explaining how they process data and breaches of personal data must be notified to the regulator, and in some instances to individuals too.

Adherence to the other data protection principles requires an analysis of an organisation's data flows to interpret how the requirements of the legislation apply to that particular organisation and its data.

Compliance is more than a tick-box exercise as the legislation demands that controllers are 'accountable' for their processing of personal data. If that was not enough, the GDPR is backed by a regime of enforcement powers exercisable by the regulator, which at its most extreme can result in fines of up to 4% of an organisation's global annual turnover, or £17.5 million. Data breaches are increasingly under the spotlight and the negative press associated with a breach can be as damaging as the internal costs, or any enforcement action.

For advice or further information please contact:

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UK merger control

The UK merger control regime does not impose a legal requirement upon parties to obtain merger clearance from the UK competition authority, the Competition and Markets Authority ("CMA"), before completing a transaction.

Therefore, even if a transaction satisfies the jurisdictional thresholds applicable in the UK (as considered further below), parties are not required to notify, and obtain merger clearance from, the CMA, before completing the transaction.

However, if a completed transaction satisfies the jurisdictional thresholds, the CMA is able to assert jurisdiction to investigate.

If the completed transaction is investigated by the CMA, and found to give rise to competition concerns, then the acquirer can offer remedies to seek to address these concerns, which the CMA may (or may not) accept.

Where an in-depth Phase 2 investigation is opened into a transaction (as considered below), the CMA has the power to impose remedies (i.e. rather than just accepting remedies offered), including requiring the acquirer to "undo" the completed transaction by divesting the acquired business to an independent third party.

For example, having paid a reported $400 million to acquire GIPHY in 2020, Meta subsequently sold GIPHY in 2023 for $53 million, following an order made by the CMA requiring the sale in order to remedy competition concerns resulting from the acquisition.

Jurisdictional thresholds

Under the general jurisdictional thresholds applicable in the UK[1], the CMA is able to assert jurisdiction to investigate a transaction where:

- two or more "enterprises" (i.e. businesses, or part(s) of businesses, including assets) cease to be distinct - or arrangements are in progress or contemplation which, if implemented, will lead to these enterprises ceasing to be distinct - meaning that they are brought under either common ownership, or common control, with the concept of "control" including:
  - a controlling interest (e.g. a shareholding conferring more than 50% of the voting rights in a company);
  - de facto control (e.g. where a party is able to determine unilaterally a company's strategic direction, even though it does not hold the majority of voting rights in that company); and

1. For completeness, certain sector-specific jurisdictional thresholds are applicable in limited circumstances, including, for example, in the context of the water sector in England and Wales.

- the ability to exercise material influence (e.g. where a party is able to materially influence the strategic direction of a company, including its ability to define and achieve its commercial objectives), with the ability to exercise material influence considered on a case-by-case basis, but being generally unlikely to arise in the context of simple minority shareholdings of less than 15%[2]; and

- either the transaction has not completed; or

- the transaction has completed, and the CMA begins its investigation within either (i) four months of completion being publicised; or (ii) the CMA being notified of completion (whichever is the earlier); and

- either the UK turnover of the enterprise being acquired was more than £70 million in its most recent financial year (the "Turnover Test"); or

- the enterprises ceasing to be distinct both supply or acquire goods or services of a particular description and, post-transaction, will supply or acquire at least 25 per cent of those goods or services supplied or acquired in the UK, or in a substantial part of the UK (the "Share of Supply Test").

  In relation to the Share of Supply Test, importantly this is not a market share test, and the CMA has a broad discretion to consider any reasonable description of a set of goods or services (which is not required to constitute a relevant economic market for the purposes of the test). In addition, the Share of Supply Test can be satisfied even if neither the acquirer, nor the target, achieves turnover in the UK.

  For example, asserting jurisdiction on the basis of the Share of Supply Test, the CMA investigated (and ultimately prohibited) the acquisition by Facebook (now Meta) of GIPHY, even though GIPHY at the time did not have any UK turnover.

  As a result, the CMA can (and does) apply the Share of Supply Test flexibly, enabling it to assert jurisdiction to investigate transactions that may not be capable of investigation in other jurisdictions.

Main "theories of harm" considered by the CMA

When considering whether a transaction may give rise to competition concerns, the CMA will compare the prospects for competition with the transaction taking place against the prospects for competition without the transaction occurring.

While the CMA will consider each transaction on its facts, the main "theories of harm" outlined within the CMA's "Merger Assessment Guidelines"[3] are:

- whether the transaction would enable the parties to profitably and unilaterally raise prices post-transaction, or worsen non-price factors of competition (including reducing innovation efforts), with the CMA increasingly focusing upon how closely the parties to the transaction currently compete (and are expected to compete in the future);

- whether the transaction would lead to coordination between competitors post-transaction (or would stabilise any existing coordination between competitors); and/or

- whether the transaction would lead to the foreclosure of rivals where the transaction involves parties active at different levels of a supply chain (or where the transaction involves parties active in different, but related, markets).

2. See, "Mergers: Guidance on the CMA's jurisdiction and procedure, January 2022" (the "J&P Guidance"), footnote 44, which confirms that "[i]n its past decisional practice, the CMA has only rarely found shareholdings of less than 15% to confer material influence on the acquirer". The J&P Guidance is available at: https://www.gov.uk/government/publications/mergers-guidance-on-the-cmas-jurisdiction-and-procedure
3. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1011836/MAGs_for_publication_2021_--.pdf

The CMA is able to consider additional "theories of harm" having regard to the facts of each case, and may consider several "theories of harm" in the context of a single transaction.

When assessing whether a transaction may give rise to competition concerns, the CMA will consider a range of evidence "in the round", and will determine the weight that it places upon different types of evidence, again on a case-by-case basis.

While the evidence assessed by the CMA will vary depending upon the transaction and the affected sector, when assessing closeness of competition (e.g. in the context of a competitor acquiring a competitor) the CMA generally will consider:

- the characteristics of the products and/or services offered by the parties;
- the parties' internal documents (including the extent to which they identify each other as close competitors, and/or indicate that they are expected to compete more closely against each other in the future, as well as how they view other existing competitors);
- the views of the parties' customers and competitors, which the CMA will actively seek in the context of an investigation; and
- evidence of customer switching, and/or the parties' competitive responses to each other over time (e.g. obtained from the parties' records, or compiled using third party data sources, if available).

Submitting a merger notice to the CMA

As notification is voluntary, there is no legal requirement for parties to obtain clearance prior to completion.

However, in view of the risk of completing without clearance, for certain transactions it is advisable for completion to be conditional upon the transaction being notified to, and formally cleared by, the CMA using a so-called "Merger Notice".

Merger Notice

Where a Merger Notice is prepared and submitted to the CMA, the following stages are relevant:

- **Preparation of the Merger Notice**: The Merger Notice requires input from the parties and their advisers (including, in certain cases, economists), having regard to the available evidence and the preferred strategy for seeking to secure clearance. Preparing a Merger Notice typically takes a number of weeks, depending upon the complexity of the arguments and/or evidence, with the parties generally expected to provide the CMA with information requested within its template Merger Notice.[4]
- **Pre-notification discussions**: Once completed, the Merger Notice is submitted in draft form to the CMA. A CMA case team will then engage in "pre-notification discussions" with the parties, based upon the draft Merger Notice. During pre-notification discussions, the case team will seek additional information from the parties, and will require information to be provided before the Merger Notice is confirmed to be "complete". Pre-notification discussions typically last for six to eight weeks, but there is no set timescale in which these must be completed.
- **Phase 1 investigation**: : Once the CMA has confirmed that the Merger Notice is accepted as "complete", the CMA will commence its Phase 1 investigation, and is required to reach its Phase 1 decision within 40 working days. In the context

4. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/884748/merger-notice-template.odt

of the CMA's Phase 1 investigation, it will actively seek views on the transaction from third parties, including the parties' customers and competitors. The CMA is able to stop the Phase 1 40 working day "clock" in limited circumstances (but generally prefers not to do so, if at all possible).

- **Phase 1 decision**:
  - If the CMA does not identify competition concerns during its Phase 1 investigation, the decision will confirm the CMA is not referring the transaction for an in-depth Phase 2 investigation. The transaction will therefore be cleared at the end of Phase 1.
  - However, if the CMA during its Phase 1 investigation forms a reasonable belief that the transaction has resulted, or may be expected to result, in a substantial lessening of competition in a market or markets within the UK for goods or services,[5] it will refer the transaction for a Phase 2 investigation, unless remedies are offered which the CMA considers are capable of addressing its concerns (as considered further below).
- **Remedies**:
  - If the CMA's Phase 1 decision identifies competition concerns, the parties may offer remedies to address these concerns, so as to seek to avoid the transaction being referred for a Phase 2 investigation.
  - If remedies are offered, and the CMA decides that these could be acceptable, it will undertake a detailed assessment of the offered remedies (including a public consultation), and will decide whether to accept the offered remedies within 50 working days of the parties receiving the CMA's Phase 1 decision.[6]
  - If the CMA decides to accept the offered remedies, it will confirm that it is not referring the transaction for a Phase 2 investigation. The transaction will therefore be cleared at the end of the Phase 1 investigation, subject to remedies.
  - If remedies are not offered, or are not accepted, then the CMA will proceed to refer the transaction for an in-depth Phase 2 investigation.

If the CMA decides to refer a transaction for Phase 2 investigation, the CMA has an additional period of up to 24 weeks (extendable by up to eight weeks)[7] within which to consider the transaction and issue its final report. In the context of a Phase 2 investigation, the CMA is ultimately able to impose remedies to address any competition concerns (even if the parties have offered remedies), which could include requiring that a completed transaction is undone (i.e. the acquired business is to be divested to an independent third party). The CMA has a period of 12 weeks (extendable by up to 6 weeks) following its final report within which to decide whether to impose remedies, or accept remedies offered by the parties.

Briefing note

For completeness, if the parties do not believe the CMA has jurisdiction to investigate, and/or the transaction does not result in competition concerns, the parties can notify the CMA of the transaction by submitting a short "briefing note", in order to seek to obtain a degree of comfort that the CMA is not minded to investigate.

5. Subject to very limited exceptions, including for example, the CMA exercising its discretion not to make a reference of a Phase 2 investigation in reliance upon the "de minimis" exception – see, "Mergers: Exceptions to the duty to refer", available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/898406/Mergers_Exceptions_to_the_duty_to_refer.pdf
6. This time period may be extended by up to 40 working days, if the CMA considers there are special reasons for doing so (e.g. if the CMA requires that a buyer contractually commits to a purchase before the CMA accepts the offered remedies).
7. This extension is only available where the CMA considers that there are special reasons why a final report cannot be issued within the 24 week deadline.

The CMA will generally only accept a briefing note where the parties have already entered into an agreement for the transaction. However, the parties can agree that completion of the transaction is conditional upon the CMA's response to the briefing note (e.g. completion of the transaction may be made conditional upon the CMA providing an acceptable response to the briefing note, and not proceeding to open an investigation within a defined time period).

Once the CMA has accepted a briefing note, it may obtain additional information from the parties to enable it to decide whether to open an investigation into the notified transaction. In addition, if the CMA decides not to investigate, it remains able to open an investigation at a later date (e.g. if the CMA receives credible concerns from third parties regarding the transaction), provided that this is opened within the four month time limit noted above.

Investigating completed transactions

As noted above, the CMA is able to assert jurisdiction to investigate transactions that have been completed without merger clearance being obtained.

When investigating a completed transaction, the CMA will often impose a so-called "initial enforcement order", which prevents the integration of the parties' businesses without the prior consent of the CMA. The CMA may also require any integration that has occurred prior to its investigation to be undone[8]. In addition, the CMA is able to require the appointment - at the parties' cost - of a monitoring trustee (to monitor and report on compliance with the initial enforcement order), and/or a hold separate manager (to manage the target business separately from the acquirer's business during the period of the CMA's investigation).

If a party breaches an initial enforcement order, that party will be exposed to risks including a possible financial penalty of up to 5% of the total value of the worldwide turnover of the enterprises owned and controlled by that breaching party.

Merger fee payable to the CMA

Subject to limited exceptions, a merger fee is payable to the CMA once it reaches its Phase 1 decision.

The merger fee payable is dependent upon the value of the UK turnover of the target[9], and the following thresholds currently apply:

Merger fee	Value of the UK turnover of the target
£40,000	£20 million or less
£80,000	More than £20 million, but not more than £70 million
£120,000	More than £70 million, but not more than £120 million
£160,000	More than £120 million

8. For completeness, the CMA may also impose an interim enforcement order in the context of planned acquisitions, although in practice the CMA does so relatively rarely.
9. In the business year prior to either (i) the date of completion of the transaction (in the case of a completed transaction); (ii) the date of the CMA's decision (in the case of an anticipated transaction); or (iii) an earlier business year, if the CMA considers this to be appropriate.

UK investment screening

National Security and Investment Act 2021

On 4 January 2022, the National Security and Investment Act 2021 ("**NSIA**") entered into full force in the UK. The NSIA enables the Secretary of State in the Cabinet Office (the "**Secretary of State**"), acting on behalf of the UK government, to assess investments (including transactions) on national security grounds.

The NSIA empowers the Secretary of State to "call-in" for assessment any "qualifying acquisition", where the Secretary of State reasonably suspects that:

- a "qualifying acquisition" has either taken place, or will take place (if certain arrangements in progress or contemplation are enacted); and

- the "qualifying acquisition" either has given rise to, or may give rise to, a risk to national security.

In addition, certain types of "qualifying acquisitions" will trigger a mandatory notification requirement if the acquirer's level of control in relation to the target entity exceeds specific thresholds, and the target entity has certain activities in any of the following 17 sensitive areas of the UK economy:

- advanced materials;
- advanced robotics;
- artificial intelligence;
- civil nuclear;
- communications;
- computing hardware;
- critical suppliers to the UK government;
- cryptographic authentication;
- data infrastructure;
- defence;
- energy;
- military and dual-use;
- quantum technologies;
- satellite and space technologies;
- suppliers to the emergency services;
- synthetic biology; and
- transport.[1]

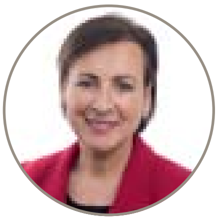
1. The activities are defined within The National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021.

Transactions that are subject to the mandatory notification requirement must obtain approval from the Secretary of State before completion.

Where the mandatory notification requirement is breached, the transaction will be void (although any person affected by this may apply to seek to have the transaction retrospectively validated by the Secretary of State), and relevant individuals (including, for example, directors) may face criminal prosecution or civil penalties. In addition, the acquirer may face a civil penalty of up to a maximum of the higher of (i) £10 million; and (ii) 5% of the total value of the worldwide turnover of the acquirer (including any businesses owned or controlled by the acquirer).

Gowling WLG edited the publication "Foreign Direct Investment Regimes", contributing a chapter addressing the application of the NSIA in the UK, which can be accessed at www.iclg.com, and provides a more in-depth analysis of the implications of the legislation.

For advice or further information please contact:



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