A guide to doing business in the UK

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Introduction

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Against a backdrop of difficult global conditions, 2012/13 has been reported as the strongest year in the last three years for UK investment from overseas. Through new investment opportunities, expansion projects and M&A activity, international investors have engaged in a wide range of UK sectors, ranging from software, computer services and media through to biotechnology and financial services.[1]

There have been a number of recent developments in the UK which are reflected in the latest edition of this guide. As part of the Government's plan to make the UK corporate tax system more competitive, 2013 saw a cut in the main rate of corporation tax to 23%, to be followed by further reductions to 21% in April 2014 and 20% in April 2015. This marks a substantial reduction from the 2010 level of 28%. On a pan European level, agreement has now been reached on the adoption of a new unitary patent system and a unified patent court. Although there is some way to go before the process is completed, this could have significant implications for companies owning patent rights, or being at risk of infringing them, particularly pharmaceutical and high tech companies. We also feature important changes on the horizon in European data protection regulation, as businesses look to manage the challenges and opportunities posed by the rapidly increasing volumes of data available to them.

European Union ("EU") initiatives can affect businesses in the UK and throughout the Union, so a broad outlook is needed to navigate trends and developments. With its headquarters in London, Olswang has a network of offices in Belgium, France, Germany, Spain, the UK and Singapore. The firm's international reach is strengthened through its long-established best friends' network of leading independent law firms throughout the world.

This guide outlines some of the principal issues which will affect an overseas business organisation carrying on business in the UK. It discusses methods for establishing a business presence and goes on to review the issues that can affect a business as it grows. The guide finishes with a review of exit strategies for the overseas investor: a sale or float.

1 January 2014

The expression UK is used in the following sections of this guide to mean England and Wales only and an English company is one incorporated in England and Wales. This guide states the legal position in England and Wales. Similar, but not identical, provisions apply in Scotland, Northern Ireland and the other jurisdictions making up the UK.

[1] Source: UKTI Inward Investment Report 2012/13

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Establishing a presence for your business

1.1

Are there any restrictions on foreign ownership of businesses in the UK?

No, although there are regulatory and other requirements discussed elsewhere in this guide.

1.2

Are any governmental or regulatory approvals required to establish a business in the UK?

Yes, although this will depend on the nature of the business. Certain sectors are subject to specific regulation and specific advice should be sought. Examples include:

- **Gambling**
- **Life Sciences**
- **Media**
- **Telecommunications**

Olswang can provide sector-specific advice: please refer to the **Olswang website** for relevant contacts and further information.

1.3

Are there any exchange controls in the UK?

There is no UK exchange control. No authorisation is required either to invest in the UK or to export funds from the UK. However, there are strict controls on money laundering in the UK as in many other jurisdictions.

1.4

What UK tax incentives are available to foreign investors?

There are no UK tax incentives specifically targeted at foreign investors. However, there are various tax incentives/reliefs which are generally available within the UK tax system and these are described below. Unless stated otherwise, the following reliefs act as deductions from income or gains otherwise subject to income tax, capital gains tax or corporation tax in the UK, and therefore will not be applicable unless the foreign investor is subject to such taxes in the UK.

General position

Broadly speaking, subject to double taxation relief and new exemptions for dividends and for profits from foreign permanent establishments, a company resident in the UK is chargeable to corporation tax on its worldwide profits (income and chargeable gains) wherever they arise and whether or not they are received in, or transmitted to, the UK. A company not resident in the UK is broadly chargeable to corporation tax only if it carries on a trade in the UK through a permanent establishment, in respect of profits which relate to that permanent establishment (subject to the provisions of any applicable double tax treaty).

Income tax is charged broadly on the income of other UK residents, whether it arises in the UK or abroad, subject to certain deductions and reliefs for individuals who are not domiciled in the UK (see below). Non-residents are liable to income tax only on income that has a UK source (and then generally only to the extent such tax has been withheld at source or is rental income from UK real estate).

Non-UK domiciliaries: income and gains earned overseas

Currently, UK resident individuals who are not domiciled in the UK are liable to UK tax on overseas income and gains only to the extent that they are remitted to or received in the UK. The remittance basis applies to employment income where the employer is not resident in the UK and the duties of employment are performed wholly outside the UK, and also to pensions and investment income arising outside the UK and gains on disposals of overseas assets.

The remittance basis is not automatic; it must be claimed (unless unremitted foreign income and gains are less than £2,000 in the relevant tax year or in certain circumstances, where the individual has not remitted any foreign income or gains to the UK and has no (or very small amounts of) UK income or gains). Most individuals who are non-UK domiciled or who are not ordinarily resident in the UK who have been resident in the UK for at least seven out of the preceding nine tax years must pay a £30,000 charge in order to be taxed on the remittance basis. The £30,000 annual charge is increased to £50,000 for those who have been UK resident for 12 or more of the last 14 years. Individuals who do not meet these criteria, or who do not make the relevant election, will be subject to UK tax on their worldwide income and gains.

Non-UK domiciliaries are able to remit amounts to the UK without triggering a tax charge provided that the remitted funds are invested in unlisted companies which are trading on a commercial basis or developing or letting commercial property.

Exemption for corporate gains on disposals of substantial shareholdings

Broadly speaking, a gain on the disposal by a company subject to UK corporation tax of a "substantial shareholding" (broadly, at least a 10% interest) in a trading company or a holding company of a trading group is exempt from corporation tax. The disposing company must (i) also be a trading company or a member of a trading group, (ii) have held the shares in the target for at least one year, and (iii) continue to be a trading company (or a member of a trading group) immediately after the disposal.

R&D incentives

Tax incentives exist in order to encourage small, medium and large sized businesses to undertake certain types of research and development. These have been substantially increased in recent years to boost economic recovery. Small and medium sized companies subject to UK corporation tax are entitled to:

- 225% relief for qualifying current spending on R&D; and
- in the case of companies in a loss making position, a cash payment of £24.75 for every £100 spent on qualifying R&D.

Large companies subject to UK corporation tax are entitled to 130% relief for qualifying current spending on R&D but this will be phased out in 2016. From 1 April 2013 they will also be entitled to an "above-the-line" R&D credit of 9.1%. This will be payable to companies which are not liable to corporation tax.

Incentives to invest in small companies

There are currently three main tax incentive schemes which are intended to encourage equity investment in small higher-risk trading companies.

The enterprise investment scheme ("EIS") is available to individuals subject to UK income tax making direct equity investments into unquoted trading companies. The reliefs available include relief from income tax equal to 30% of the investment in shares acquired on issue by a qualifying company up to £1,000,000 per individual per annum, relief from capital gains tax on a disposal of shares which qualify for income tax relief (provided they have been held for at least three years), and deferral of a charge to capital gains tax on the disposal of assets where the proceeds are re-invested in shares in a qualifying company. The reliefs are lost or clawed back if the shares are disposed of within three years of acquisition in the case of the EIS and within five years in the case of VCTs.

A venture capital trust ("VCT") is a special type of quoted investment vehicle which invests in a range of unquoted companies with similar qualifying criteria to those of an EIS company. Individuals subject to UK income tax investing in a VCT are entitled to income tax relief (at a rate of 30%) on amounts subscribed for new shares in the VCT up to £200,000 per individual per annum, an exemption from income tax on dividends on those shares, and an exemption from capital gains tax on the disposal of ordinary shares in the VCT.

A new seed enterprise investment scheme ("SEIS") was launched in April 2012 to incentivise investment in start-ups. It is similar to the EIS but subject to lower investment limits. It provides income tax relief at a more generous rate, 50% of the amount invested.

Share loss relief

Individuals may choose to claim relief against income tax (rather than capital gains tax) for an allowable loss arising on the disposal of ordinary shares in a UK resident unquoted trading company (carrying on its business wholly or mainly in the UK) where those shares were originally subscribed for by the individual in consideration for money or money's worth. Shares quoted on the market of the London Stock Exchange known as AIM are treated as unquoted for these purposes. The relief is known as share loss relief. A similar relief exists for companies.

Intangible assets

A regime for the treatment of expenditure and receipts in respect of intangible assets which applies to companies subject to UK corporation tax was introduced in 2002. The regime provides, broadly, for the amortisation of qualifying capitalised expenditure on intangible assets (including goodwill) in line with generally accepted accounting practice. The regime only applies to intangible assets acquired from an unrelated party, or created, on or after 1 April 2002.

For further advice on UK tax, please contact the **Olswang Tax Group**.

1.5

What structures are available to foreign investors seeking to establish a business presence and how are the structures regulated?

Overview

There are a number of different ways in which a foreign investor can establish a business presence in the UK. It can:

- conduct business from outside the UK e.g. via the Internet from sites hosted overseas
- set up a branch or place of business in the UK (a "UK establishment")
- incorporate a limited liability company as a UK subsidiary
- acquire an existing company in the UK or set up a joint venture company
- enter into a partnership arrangement
- appoint a distributor or franchisee
- appoint an agent or
- incorporate as a Societas Europaea ("SE") if within the EU

Conducting business from outside the UK

There are a number of ways in which doing business in the UK from outside the UK is regulated. For example, there may be issues concerning VAT and import licences. These are not covered by this guide, so please contact Olswang for further information. Rules governing advertising and selling to UK consumers may also be relevant. Examples of UK consumer protection legislation are provided at 3.6.

Doing business via the Internet

There are no specific formation mechanics for a business conducted via the Internet (other than the various commercial agreements needed to give effect to the business, for example hosting agreements and agreements with commercial partners). There are also no general registration requirements, although there may be sector-specific requirements depending on the type of business being conducted. In fact, the EU's E-Commerce Directive (Directive 31/2000/EC) prohibits EU Member States from imposing additional registration requirements on services simply because they are provided online.

Leaving aside any sector-specific requirements which may apply, there are three main sets of compliance requirements which are likely to be applicable to business conducted via the Internet from outside the UK: data protection requirements, general information requirements and consumer protection requirements.

Data protection

Notification to the UK's Information Commissioner and compliance with the Data Protection Act 1998 ("DPA") and associated legislation will be of relevance to almost any business operating in the UK. These requirements apply where "personal data" (i.e. information about an identifiable living individual) is to be "processed" in the UK. These requirements may apply even though the business is established outside the EU. Assuming the DPA applies, the business must notify (i.e. register with) the Information Commissioner. Notification involves payment of an annual fee of £35 or £500 (depending on the size of the organisation) and disclosure of details including the type of data to be processed, the purposes for which it is to be used and the parties to whom it may be transferred. A notification must be kept up to date as processing personal data without, or outside the terms of, a notification is a criminal offence. Prosecutions for failure to notify are relatively common in the UK.

In addition, the business must comply with all relevant obligations under the DPA, including the DPA's eight principles.

The Eight Data Protection Principles

A data controller must handle personal data in accordance with the eight data protection principles. These require that personal data should be:

1	processed fairly and lawfully;
2	obtained only for one or more specified and lawful purposes, and not processed in any manner incompatible with that purpose or those purposes;
3	adequate, relevant and not excessive in relation to the purpose;
4	accurate and up to date;
5	kept for no longer than is necessary;
6	processed in accordance with the rights of data subjects;
7	subject to appropriate technical and organisational security measures; and
8	not be transferred to countries outside the EEA without adequate legal protection.

Where the business intends to carry out marketing by telephone (including automated calling systems), email, SMS or fax to individuals or companies in the UK, or use "cookies" to gather data online it must also comply with the relevant information and consent requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003.

Failure to comply with the requirements of the DPA or the Regulations could result in enforcement action by the Information Commissioner, including forcible destruction of unlawfully obtained data and, in the case of serious breaches, payment of fines of up to £500,000.

The EU data protection regime is undergoing a major overhaul. The proposed new EU General Data Protection Regulation – which at the date of this guide is part way through the EU legislative process – looks likely to replace the current regime by as early as 2016. Although existing data protection rules apply to businesses established outside the EU in certain scenarios, the reforms are expected to clarify that the processing or monitoring of personal data of individuals in the EU will be subject to the rules, regardless of whether the organisation responsible has an establishment in the EU or not.

Top ten changes under the new EU Data Protection Regulation
The final detail is still not set in stone, but more prescriptive rules and tougher sanctions look certain. The reforms are wide-ranging – proposed changes include:

1	anti-trust style fines – up to 2% (or possibly 5%) of an enterprise's global turnover
2	non-EU businesses targeting EU citizens will be expressly caught
3	new requirement for a Data Protection Officer (or designated representative, for non EU businesses)
4	"one stop" regulation for EU multinationals
5	current data protection principles amplified, with new principles added (e.g. data portability, Right To Be Forgotten)
6	new requirements for Privacy by Design and Privacy Impact Assessments
7	new data breach notification requirements
8	stronger rules on consent and transparency documentation
9	direct obligations and liabilities for data processors
10	stronger obligations for supplier selection, contract terms and governance

For more detail, see **Olswang's Guide to the EU's Data Protection Regulation**.

General information requirements
Businesses must comply with numerous obligations relating to the provision of information about their organisation, products and services. The precise obligations will vary according to the circumstances. For example, under company legislation, companies operating in the UK are required to provide their company name and (in some cases) other prescribed information on their websites and on all business letters, including emails. Some information requirements only apply to certain sectors (for example the Provision of Services Regulations 2009), some apply according to the platform or medium used (for example the E-Commerce (EC) Directive Regulations 2002) and some apply only to consumer-facing activities. There are additional information requirements for regulated sectors.

Consumer protection requirements for Internet transactions
Two sets of rules apply specifically to B2C Internet transactions. The Electronic Commerce (EC Directive) Regulations 2002 impose information requirements and requirements relating to the ordering process. The Consumer Protection (Distance Selling) Regulations 2000 also impose a number of information requirements and give consumers the right to cancel orders and receive a refund during a statutory "cooling-off" period.

In addition, B2C transactions over the Internet are also subject to general advertising and consumer protection legislation – examples of UK consumer protection legislation are provided at 3.6.

Do these requirements apply even where the business is based offshore?
Questions of conflict of laws and jurisdiction (i.e. which country's laws govern a contract and which courts have power to hear any dispute over it) arise where a business based outside the EU transacts over the Internet with parties based within the EU. The rules are too complex to generalise, and advice will need to be taken on a case by case basis. However, broadly speaking "protective" rules such as consumer protection and data protection legislation described above will generally apply where a non-EU business is dealing with parties in the EU.

For specific advice in this area, please contact **Olswang's Internet Team**.

Setting up a branch or place of business in the UK

An overseas company planning to expand into the UK may choose to set up a branch or place of business through which to carry on business (a "UK establishment"). Since a UK establishment is the same legal entity as its parent, the overseas parent will be directly responsible for liabilities incurred by its UK establishment.

The Companies Act 2006 (together with associated regulations) is the main piece of legislation governing UK establishments of overseas companies. Under the regulations, a foreign company must, within one month of opening a UK establishment, register prescribed particulars of the foreign company and the UK establishment with the Registrar of Companies (the authority responsible for the administration of English companies) including, for example:

- a certified copy of the foreign company's constitutional documents together with a certified translation if they are not in English;
- details of the directors and secretary of the foreign company; and
- the name and address of every person resident in the United Kingdom who is authorised to accept service of documents on behalf of the foreign company in respect of the establishment.

In most cases the foreign company is required to file accounting documents with the Registrar of Companies in respect of each financial period. The specific filing requirements vary, depending on factors such as whether the foreign company is required to prepare and disclose accounts under its parent law, whether it is a credit or financial institution and whether it is incorporated in a state in the European Economic Area.

A foreign company with a UK establishment will usually be required to display, at its places of business in the UK, its name and the country in which it is incorporated. Its name and other prescribed information must also appear on all business letters, websites and other specified correspondence used in its UK activities. There are also controls on the name the overseas company can register in the UK. For more information about setting up a UK establishment, please contact **Olswang's Corporate Group**.

For details of the tax treatment of UK establishments set up by foreign companies, see 1.6.

Incorporating as a UK subsidiary: a limited liability company

A limited liability company is a stand-alone entity with a legal identity separate from its shareholders. Unlike a UK establishment, in the absence of a parent company guarantee, the shareholders will not usually be responsible for their subsidiary company's liabilities; the liability of the shareholders will usually be limited to the fully paid up amount of their shares in the company. Shares in an English company are usually in registered form but can be in bearer form.

The constitution of an English company is set out in its articles of association and any resolutions and agreements that affect the constitution. The articles of association, combined with provisions of the Companies Act 2006, set out the internal regulations of the company, the rights and obligations of the shareholders and the duties and responsibilities of the directors.

A private company is only required to have one shareholder and one director, although it is usual to have at least two directors. There is no maximum number of directors and there are no legal requirements for any director to be a British resident or national. However a company must have at least one director who is a natural person. Private companies are no longer required to have a company secretary (although they may still choose to have one).

An English company must have a registered office in England and Wales which can be its principal place of business or the office of its accountants or lawyers. The company must keep its statutory books (including its minute book, registers of members and directors etc.) at the registered office or at an alternative location in the UK notified to the Registrar of Companies. Legal proceedings can be validly served on the company at its registered office address.

The filing and reporting formalities for a subsidiary are more onerous than those for a UK establishment and generally include the annual filing of audited accounts of the subsidiary. More information about UK audit requirements is included at 3.5. An annual return (giving, amongst other things, details of the share capital, the voting rights attaching to the shares, shareholders and directors) must also be filed with the Registrar of Companies each year. Documents filed with the Registrar of Companies, including the accounts, generally form part of the public record and are therefore open to inspection by the public (although provisions have recently been put in place enabling directors to keep their residential addresses confidential). Changes in any of the information filed with the Registrar of Companies as well as certain other transactions, such as security granted by the company over its assets, must be notified. Fines can be imposed for failure to comply with these obligations.

For further information on setting up a company please contact **Olswang's Corporate Group**.

Acquiring an existing company in the UK or setting up a joint venture company with an existing UK business entity

Acquisition of an existing company

One method of acquiring an existing company is to buy the shares of the company that owns the target business or assets (usually referred to as a "share purchase"). If shares in a company are purchased, all its assets, liabilities and obligations are acquired, even those the buyer does not specifically know about. The shares will be transferred to the buyer by means of a stock transfer form. Given that it is the shares in the company, rather than its assets, which are transferred, the business carried on by the company will generally simply continue, although this will be subject to, for example, any change of control provisions in contracts which the target company has entered into.

Joint ventures

The term "joint venture" has no specific meaning in English law. It describes a commercial arrangement between two or more economically independent entities which may take a number of legal forms.

In England, there is no legislation relating specifically to joint ventures. The relationships between the parties involved will depend on the structure chosen. In almost all joint ventures, the first choice to be made is whether or not a separate legal entity will be established as a vehicle for the joint venture. Forms of joint venture include:

- a purely contractual co-operation agreement;
- a partnership (or limited partnership);
- a corporate structure, e.g. a jointly owned company ("JVC"); and
- a limited liability partnership.

A JVC is the most commonly used legal form for joint ventures where an ongoing business is to be conducted. In the UK, JVCs typically take the form of a private company limited by shares.

There may also be competition (or "antitrust") issues to consider when forming a joint venture (see 3.7 for further information).

Entering into partnership arrangements with an existing UK business entity

Almost all forms of business can take the form of a general partnership which can be created where two or more partners carry on a business together with a view to profit. Although, generally speaking, partnerships are not as strictly regulated as companies, in practice the partnership structure is not frequently used for business ventures by companies in the UK, particularly as the liability of the partners will not be limited, a partnership will not be a legal vehicle in its own right and the structure is, in some respects, relatively cumbersome.

Limited liability partnerships were introduced as a new type of vehicle in 2001. They have the advantage of legal personality separate from that of their members and generally have the benefit of limited liability for members. The separate structure of a "limited partnership" may also be available, although this tends to be used for specialised purposes (particularly venture capital investment vehicles).

For a discussion of the way partnerships are treated for tax purposes see 1.6

Appointing a distributor or franchisee

Businesses outside the UK can make use of distribution or franchise agreements.

The appointment of a distributor is regulated by the general principles of contract law. Although it is advisable, there is no legal requirement for a distribution agreement to be in writing. Distribution agreements can raise complex competition (antitrust) issues in relation to, in particular, exclusivity, pricing and customer restrictions. Competition issues are covered in more detail at 3.7.

Franchises can be particularly useful where a business wishes to maximise brand value using outside resources while still retaining a substantial degree of control. It is becoming an increasingly popular form of international expansion. In contrast to the US, there is little regulation of franchising in the UK. Potential franchisors should consider the structure and terms of their franchise arrangements at the outset, and consider in particular the relationship between franchisor and franchisee.

Franchise agreements can raise competition issues, on which Olswang can advise further.

Appointing an agent

An agency agreement may be a preferable alternative to a distribution agreement. The key aspect here is that the agent is merely an intermediary between the supplier and the customer. The agent will not be party to the contract between supplier and customer, nor will it have any rights or obligations under it.

Generally there are two types of agents. Marketing agents have the power merely to seek contracts for the supplier, while sales agents have the power to enter into contracts on behalf of the supplier. The agency agreement can be exclusive, sole or non-exclusive, which will determine whether anyone else has the power to represent the supplier.

Agency relationships for the sale of goods are regulated by the Commercial Agents (Council Directive) Regulations 1993. Under the Regulations agents owe a number of duties, for example, to use reasonable diligence and care and to avoid conflicts of interest.

The Regulations also enhance the position of agents in relation to remuneration and notice periods. Many aspects of the Regulations cannot be contracted out of or at least may only be altered in favour of the agent. It should be noted that, although the Regulations transpose an EU Directive, certain aspects (particularly with regard to the compensation of an agent on termination of the agency) take a different approach to the legislation adopted by other EU Member States.

Details of the tax treatment of agency agreements can be found at 1.6. Olswang can provide further information on the impact of the Commercial Agents Regulations and on competition law which also affects agency agreements.

Incorporating as a European public limited company (Societas Europaea ("SE"))

The SE was created in 2004 as a form of public limited company available to entities at least two of which have a presence in different EU member states. There are a number of ways of forming an SE and minimum capital requirements apply. In practice relatively few SEs have been registered in the UK to date.

The **Olswang Corporate Group** can advise further on the structures available to foreign investors seeking to establish a business presence in the UK.

1.6

What tax considerations should be taken into account in deciding upon a business structure?

Each of the business structures described at 1.5 will have distinctly different tax implications, which may or may not be appropriate depending on the relevant facts.

Conducting business from outside the UK

If business is conducted from outside the UK, it is possible, with careful planning, to remain outside the scope of UK corporation and income tax. For these purposes it is critical that there is no permanent establishment in the UK. Extreme care needs to be taken in this respect: for example, a single person conducting business in the UK on behalf of a foreign company can constitute a permanent establishment in certain instances, as can a fixed business establishment. However, it may be possible to avoid this by utilising an independent agent. Even if a business has no permanent establishment in the UK it would still be subject to UK income tax on profits from any trade carried out in the UK unless a double tax treaty prevented such liability.

Even though there may be no liability to UK income or corporation tax, it is still possible, depending on the nature of the business, that a foreign company may be required to register for VAT in the UK and charge UK VAT on its supplies to the extent that these are treated as made in the UK for VAT purposes.

Operating as a UK establishment or a subsidiary

The most common question facing companies looking to set up operations in the UK is whether to do so through a UK establishment or a subsidiary.

A UK establishment of a foreign company will generally be subject to corporation tax in the UK if its activities amount to a trade carried on in the UK through a permanent establishment for tax purposes. However, it may be possible, depending on the facts, to create a UK establishment which is not a permanent establishment and therefore is not subject to corporation tax, for example where the UK establishment carries out activities of just an auxiliary or preparatory nature. Assuming there is a permanent establishment, the amount of profits properly attributable to it will be subject to corporation tax. Corporation tax is generally payable either within nine months of the end of the accounting period or, for large companies, by quarterly instalments, the first of which is payable in the seventh month of the accounting period in question. The benefit of a UK establishment structure is that usually (subject to the foreign jurisdiction's rules) losses incurred by the UK establishment can be set against other profits of the foreign company, in contrast to losses of a subsidiary which cannot be set off except in limited circumstances.

The existence of the "check the box" regime in the US has effectively extended the ability to offset losses against other profits of a US company to qualifying (i.e. private) corporate subsidiaries of that company, and therefore, for US corporates, a UK establishment structure may not be necessary to achieve this result.

Under UK domestic rules a permanent establishment of a non-UK company is not entitled to the "small companies' rate" of corporation tax (see below) and therefore its UK taxable profits may be taxed at 23% (the rate will be reduced to 21% from April 2014 and to 20% from April 2015). However, where a non-discrimination article of a double tax treaty applies (to the effect that a permanent establishment must not be less favourably taxed than a company of the taxing state) HM Revenue & Customs accepts that a non-resident company trading through a permanent establishment can claim the "small companies' rate" (although, as with UK companies, worldwide profits and the number of worldwide associated companies are taken into account when deciding whether the rate applies).

A UK subsidiary of an overseas company will (like other UK companies) be subject to corporation tax on its worldwide profits and capital gains, subject to specific exemptions and double taxation relief. The benefit of the "small companies' rate" of tax (currently an effective rate of as little as 20%) may be available depending on the number of associated (non-dormant) companies within the worldwide group. The subsidiary will generally be eligible for the benefits of the UK's extensive network of double tax treaties.

Partnership

It is possible for a foreign company to enter into partnership arrangements with existing UK business entities, either through a foreign partnership or a UK partnership. Assuming that the partnership carries on a trade in the UK, the foreign company will usually be treated as having a permanent establishment in the UK through the agency of its UK partners (if it does not already have a permanent establishment in its own right), and will therefore be subject to UK corporation tax on its share of the profits of the partnership.

UK general partnerships, limited partnerships and limited liability partnerships are all generally transparent for UK tax purposes. An overseas (or UK) corporate partner's share of the profits and gains will generally be subject to UK corporation tax at 23%, 21% from April 2014 and 20% from April 2015. As with a UK establishment set up by an overseas company, due to the tax transparent nature of a partnership structure, the partner's share of any losses incurred by the partnership will generally be available to reduce profits of the foreign company (subject to the foreign jurisdiction's rules).

Appointing a distributor, franchisee or agent

The tax implications of the appointment of a distributor, franchisee or agent depend on the nature of the contractual relationship with the foreign company. A distribution or franchise agreement with a UK distributor or franchisee would not typically give rise to a taxable presence in the UK. Whether or not a UK agent gives rise to a taxable presence in the UK will depend on the facts. If the agent has the power to, and habitually does, conclude contracts in the name of the foreign company, then the agent may constitute a permanent establishment of the foreign company and give rise to a UK taxable presence for the foreign company. An important exclusion in this respect is where the agent is truly independent from the foreign company.

Incorporating as a European public company

The tax implications of incorporating an SE are the same as for incorporating a UK subsidiary as referred to above, assuming that the SE is registered in the UK.

The **Olswang Tax Group** can advise on specific issues raised by the information set out in this section.

1.7

How will dividends earned on shares in a UK subsidiary be treated for tax purposes?

The UK does not impose any withholding or other tax in respect of a UK resident company declaring or paying dividends.

Although there is no withholding tax on UK dividends, a dividend is accompanied by a tax credit equivalent to one-ninth of the amount of the dividend. Depending on the terms of the relevant double tax treaty, a very small part of the tax credit may be payable to a non-UK resident parent company.

The taxation of the recipient on receipt of the dividend is dependent on the tax laws applicable in the jurisdiction of the recipient.

The UK's extensive network of double tax treaties generally provide that a corporate recipient of a dividend paid by a UK company will be entitled to a foreign credit for the underlying tax paid by the UK subsidiary on the profits from which the dividend is distributed. Accordingly, where the foreign company is in a position to utilise foreign tax credits, tax should only be payable to the extent that the foreign country tax rate exceeds the applicable UK corporation tax rate.

1.8

Is it possible to relocate staff to the UK?

The ability to require employees to relocate will generally depend on the terms of their contract and any local laws which apply to them where they are currently working.

Immigration law in the UK is a complex area and specific advice should always be sought when considering employing a foreign national in the UK. More information is available on the **UK Government's Home Office website**.

1.9

What is the social security system in the UK?

In the UK, if the employment falls within the relevant thresholds (which are relatively low – see below) both employees and employers contribute to the social security fund by paying National Insurance contributions ("NICs"). Employers are required to deduct their employees' contributions at source via the statutory Pay As You Earn system ("PAYE"), which is also the system for deducting income tax from employment income.

The employee currently (i.e. for the years 2013/2014) pays employee's NICs at 12% on their yearly earnings (and most benefits in kind) between £7,755 and £41,450 and at 2% on all earnings (and most benefits in kind) above £41,450. The employer currently pays employer's NICs at 13.8% on all the employee's earnings (and most benefits in kind) above £7,696.

The **Olswang Employment Group** and **Olswang Tax Group** can provide further advice on any questions relating to the UK system.

1.10

What types of interest in real estate exist in the UK?

Real estate, otherwise known as land and buildings, can be held either directly or indirectly.

There are currently two types of direct interest in real estate, the freehold and the leasehold. Every real estate property has a freehold interest and some properties have a leasehold interest. This terminology applies equally to interests in residential property and commercial buildings. There is a third type of interest in property, commonhold, though it is currently not regularly utilised in commercial transactions.

Ownership of a freehold lasts forever and means that the property is owned absolutely. In rare circumstances, there can be two freeholds to the same piece of land.

With a leasehold interest (lease), the ownership is limited in time. The term of a lease can vary from a few days through to hundreds or even thousands of years. Certain types of leases can be brought to an end immediately. A landlord, who usually holds the freehold interest in the property, grants a lease to a tenant who holds the leasehold interest.

A lease places a number of obligations in favour of the landlord upon the tenant. The most important is the payment of rent to the landlord. Rent reflects the value of the leasehold interest that the landlord has granted to the tenant. Often, tenants will also pay a "service charge" to the landlord. A service charge is a reimbursement by the tenant of expenses incurred by the landlord in maintaining communal parts of a property used by more than one tenant. Other usual obligations include repairing and decorating the property and a requirement to obtain the consent of the landlord before the tenant carries out alterations to the property or sells its leasehold interest to a third party.

Generally speaking, the longer the term of the leasehold interest, the greater the capital outlay to buy the interest, but the less onerous the obligations in the lease and the lower the rent. Most leases contain a right for the landlord to terminate the lease if the tenant fails to comply with its obligations or suffers an insolvency event. Tenants should be particularly careful of such a right where the lease has a high capital value.

The acquisition of a freehold interest also usually requires a capital outlay. Having a freehold provides the owner with greater control over the property than having leasehold where the tenant's control is restricted by its obligations in the lease.

For those wanting to have an indirect interest in property, ownership of shares in quoted property companies provides an option, although investors are sometimes concerned that the share price does not fully reflect the value of the property assets in the company.

Indirect investment can also take the form of owning a stake in a corporate vehicle that holds real estate. Examples include limited partnerships and property unit trusts, each of which has particular tax implications for the investor.

There is also the "qualified investor scheme", open to the professional investor.

From 1 January 2007 it became possible to establish UK Real Estate Investment Trusts (REITs). Companies which have REIT status are generally exempt from tax on profits arising from a property rental business. REITs, which must be publically listed vehicles, are required to distribute 90% of their income profits, and distributions from a REIT are taxed as rental income in the hands of shareholders. Following recent reform of the rules governing REITs the entry charge previously imposed on companies electing to convert to REIT status has been abolished. The reform of the REITs regime has been widely welcomed by the UK property industry.

A tax known as Stamp Duty Land Tax ("SDLT") is levied on most commercial land transactions at up to 4% of the consideration given (the rate can be as high as 7% on residential property priced at over £2,000,000 or 15% if acquired by a company or other non-natural person, subject to limited exceptions). Residential property valued at over £2 million and held by a company or other non-natural person is also subject to an annual tax. The annual charge is based on value bands, for example, if the value is over £20 million, the annual amount payable is £140,000. If the value is over £2 million and up to £5 million, the annual amount is £15,000. Again, limited exceptions apply. On the grant of a lease, SDLT is generally payable by the lessee at 1% of the net present value of the aggregate rentals payable over the term of the lease.

The **Olswang Real Estate Group** can provide further advice on any questions relating to real estate in the UK.

1.11

Are there any restrictions on foreigners entering into real estate transactions in the UK?

No, although there are strict controls on money laundering in the UK, as in many other jurisdictions.

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2
Acquisition of an existing English company

2.1

Are there any restrictions on foreign ownership of securities in the UK?

No, although there are strict controls over who may market securities and other instruments and investments to UK or overseas investors if they do not fall within a number of specific categories, for example "sophisticated investors" or "high net worth individuals". These are beyond the scope of this guide, but Olswang will be happy to advise on any specific proposals you may have.

If the acquisition relates to a UK public company, the City Code on Takeovers and Mergers will usually apply and an offer will need to be made in accordance with the rules set by the Panel on Takeovers and Mergers. Where a private company is being acquired, the transaction will usually be effected by means of a share purchase agreement between the buyer and the seller. For more information about the transaction process, please contact our **Corporate Group**.

2.2

What merger control rules apply to mergers, acquisitions and joint ventures in the UK?

Overview

Merger control laws exist both at the national level and at the EU level. In particular, this guide covers the following:

- is notification to the competition authorities mandatory?
- what kinds of investments are caught?
- what are the thresholds for the rules to apply?
- what is the timetable for investigations?
- what is the substantive competition test?
- are there any rights of appeal against competition authorities' decisions?

Is notification to the competition authorities mandatory?

Mergers, acquisitions and joint ventures in the UK may require either compulsory notification to the European Commission under EU merger control rules or voluntary notification to the Office of Fair Trading ("OFT") under the Enterprise Act 2002.

Although the UK regime is voluntary, in practice a large number of deals are pre-notified in order to give parties legal certainty. The OFT can, and does, review mergers on its own initiative and can refer deals to the Competition Commission. Following a detailed investigation, the Competition Commission has the power to unravel completed transactions where these would result in a "substantial lessening of competition".

Depending on the structure of the transaction, it may fall not under the merger control rules but under the rules for analysing whether agreements have anti-competitive effects. In this instance, a notification to either the OFT or the European Commission is not possible although contact with the relevant regulatory authority will be advisable where there are likely to be competition concerns.

Olswang can provide you with further details of these rules, which are summarised at 3.7.

What kinds of investments are caught?

To the extent that a transaction falls under the EU merger rules then all investments which "confer the possibility of exercising decisive influence" over a UK company (or other business entity) are caught. In practice, this will occur where the investment leads to a change of control. It could consist of the acquisition of a majority shareholding or the acquisition of a minority stake, if accompanied by veto rights over matters of strategy such as the appointment of senior management or approval of the business plan.

To the extent that a transaction falls under the UK merger rules then all investments which cause two companies to cease "to be distinct" are caught. This is a more sensitive test than under the EC regime and will be satisfied where the investment confers an ability materially to influence policy (typically on the acquisition of around 15 to 20% of voting rights), an ability to control policy (which may arise on the acquisition of, say, 30% of voting rights) or a controlling interest (on the acquisition of a majority of shares carrying voting rights).

What are the thresholds for the rules to apply?

A notification to the European Commission will be compulsory where the transaction involves a change of control and both target and buyer satisfy either of two alternative turnover tests. This automatically excludes OFT jurisdiction. The turnover of subsidiaries, parents and sibling companies is included in this assessment.

Turnover tests under the EU rules	
First turnover test requirements	1) both target and buyer must have combined world-wide turnover exceeding €5 billion; and 2) each must individually have EU wide turnover of €250 million. The test will not be satisfied if both achieve more than two-thirds of their EU wide turnover in one and the same EU country.
Second turnover test requirements	1) both target and buyer must have combined world-wide turnover exceeding €2.5 billion; and 2) in at least three EU countries their combined turnover must exceed €100 million; and 3) each must have an individual turnover exceeding €25 million in each of these three EU countries; and 4) each must have an EU wide turnover exceeding €100 million. The test will not be satisfied if both achieve more than two-thirds of their EU wide turnover in one and the same EU country.

A notification to the OFT may potentially be required where the investment (1) leads to a change of control (under the broader UK test); and (2) the turnover of the UK company which is the subject of the change of control exceeds £70 million; or (3) the buyer and target together account for the supply or purchase of more than 25% of any type of goods or services in the UK or substantial part of the UK.

What is the timetable for investigations?

The European Commission has 25 working days (five weeks) to make an initial assessment and a further 90 working days (slightly longer than four months) if the transaction is likely to be problematic (subject to possible extensions).

Depending on the type of notification made to the OFT, it will generally conduct an initial examination within either 20 or 40 working days (four or eight weeks respectively). Where the transaction is potentially problematic and is referred to the Competition Commission, it will examine the deal in more detail. It generally has 24 weeks (around five and half months) to do so.

What is the substantive competition test?

At the EU level, transactions which "significantly impede effective competition in particular as a result of the creation or strengthening of a dominant position" will not be permitted. In the UK, the test is whether they will result in a "substantial lessening of competition".

The regulatory authorities seek to assess whether the transaction may have a detrimental effect on rivalry between businesses. They will look at a number of factors, including the combined market shares of buyer and target, the ease with which competitors may enter the market or expand their activities, whether the transaction is expected to deliver efficiencies benefiting consumers, and whether it would result in competitors having difficulties accessing supplies or distribution outlets.

Are there any rights of appeal against competition authorities' decisions?

It is possible to appeal a European Commission decision on a point of law or procedure. Appeals must be brought within two months of the decision and, if a streamlined appeals procedure is used, a final ruling can be expected after approximately one year. Appeals not making use of this special procedure will take significantly longer.

A specific right of appeal against decisions of the OFT or the Competition Commission is set out in the Enterprise Act 2002. An appeal must be brought within four weeks of the original decision.

The provisions do not lay down a formal timetable within which an appeal must be heard but parties can normally expect a final ruling within six months in straightforward cases.

Please contact the **Olswang Competition & Regulatory Group** for further information.

2.3

What are the principal tax considerations when acquiring a company in the UK?

The buyer of a company will be liable to pay stamp duty or stamp duty reserve tax ("SDRT") on a transfer of shares in the target company at 0.5% where the consideration exceeds £1,000.

On a share acquisition, the buyer acquires a company together with its tax history, including any potential tax liabilities. Accordingly, a buyer would usually undertake a comprehensive due diligence exercise to identify areas where there is a potential exposure to a tax liability. The identification of such liabilities may lead to a reduction in the purchase price or a retention from the purchase price.

Typically, a buyer will also seek protection against such potential liabilities through tax indemnities and tax warranties contained in the share purchase agreement. The purpose of the tax indemnities is to apportion tax liabilities of the target so that pre-completion liabilities remain the responsibility of the seller, whilst post-completion liabilities are the liability of the buyer.

The primary function of the tax warranties is to elicit information, with any claims made in respect of tax usually being dealt with under the separate tax indemnities. As warranties are normally subject to disclosure, the effect of the tax warranties is to flush out information about the tax profile of the target company by way of disclosure. Accordingly, the disclosure process forms an important part of the due diligence exercise of identifying potential tax liabilities.

A further consideration on acquiring a company in the UK is whether the shareholding should be held directly or through an intermediate holding company. An intermediate holding company could be located in the foreign jurisdiction of the buyer, the UK, or in a third territory. For example, US companies have often historically held shares in European subsidiaries through a Netherlands holding company. The appropriateness or otherwise of an intermediate holding company, and the best location for that company, depends on the circumstances of each scenario.

The UK tax regime includes preferential tax laws in relation to holding companies resident in the UK in order to increase the UK's attractiveness as a viable jurisdiction for this purpose. The regime includes a potential tax exemption on the sale of shares in a subsidiary by the holding company (see the information on substantial shareholdings relief at 1.4), together with an exemption regime in relation to dividends of UK and non-UK subsidiaries and an exemption for profits of non-UK permanent establishments (these exemptions are subject to a number of exceptions which need to be considered in light of the arrangements in question).

Again, the **Olswang Tax Group** will be happy to advise on any specific queries in this area.

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OLSWANG

3

Growing your business in the UK

3.1

What sources of financing are available?

There are a number of potential sources of equity and loan finance available to businesses in the UK. An overview of some of the main options is set out below.

Business angels

Business angels are private individuals who provide capital to private companies in return for a proportion of the company's share capital, and sometimes a seat on the company's board. Tax incentives may be available to the individual where certain criteria are fulfilled. More information on incentives to invest in small companies is included at 1.4.

There are a number of networks of business angels. The idea behind them is to provide a source of low cost capital by effecting introductions between businesses seeking finance and the business angels. Effectively a private investor will invest an amount of money into a company in return for shares in that company. These companies will be privately owned rather than quoted on a stock exchange.

Private equity

Private equity is capital invested into potentially high growth unquoted companies for the medium to long-term in return for an equity stake in those companies. The term "private equity" is sometimes used in the UK, as in the US, to refer only to the buy-out and buy-in investment sector. In the rest of Europe, the term "venture capital" is often used to cover all stages, i.e. it is synonymous with "private equity", whereas in the US "venture capital" refers only to investments in early stage and expanding companies.

In the UK, the main providers of private equity are business angels and private equity firms. The majority of these firms are independent, raising their funds for investment from external sources such as banks, insurance companies and pension funds. Captive private equity firms obtain their funds from parent organisations which are usually financial institutions. Increasingly, some of these captives also raise funds from external institutional investors. For institutional investors, fixed life funds managed through independent and semi-captive limited partnerships are the primary vehicles to invest in private equity. "Corporate venturers" are industrial or service companies that provide funds and/or a partnering relationship to growing companies and can also provide equity capital.

Private equity houses vary greatly, with some specialising in particular sectors, deal sizes and regions. It is therefore important to target the most appropriate source of equity finance for the business and to propose a structure that will suit both the needs of the business and those of the venture capitalist. Private equity is invested in exchange for a stake in the company and, as shareholders, the investors' returns are dependent on the growth and profitability of the business. Private equity managers realise their returns through selling their stakes in investee companies.

Typically, private equity funds will be looking for compound returns in excess of 25% a year. They will also have an understanding of potential exit routes which will enable them to realise their investment at some point. In the past this has been for the most part by way of flotation or trade sale. However, secondary buy-outs, whereby the original investor sells to a new investor, are now far more common and represent a significant proportion of all private equity transactions.

Private equity funding should bring with it more than just money. The funder may have knowledge of the industry that will be useful and, in all cases, the funder will know how to realise its investment which should be beneficial to both the funder and the management team it is backing.

Please contact the **Olswang Private Equity Group** for further information in this area.

Equity markets

Larger companies may be able to raise capital on the UK's equity markets. This is discussed separately under "Floating in the UK" in section 4 of this guide.

Finance houses and banks

Overdrafts and loans are the most common forms of financing available to businesses and can provide a simple and effective way of financing the growth of a business.

The first consideration is the gearing of the business (what proportion of financing is to be in the form of debt). This will depend on a number of factors including the cost of capital, how risky the business is and how much security the company can offer lenders. The amount of debt banks are prepared to offer, and the interest rates they charge, will partly depend on how well secured the debt is.

The business will need to establish the most appropriate mix between overdraft facility and loans. An overdraft facility can be used to finance cashflow fluctuations and to provide contingency financing. Loans can be used to provide fixed term financing, for example, to buy fixed assets, such as plant.

Fund management firms, insurance companies and pension funds

Over recent years there has been a reduction for some prospective borrowers in the availability of traditional bank lending as a result of tighter lending criteria from financial institutions, increased regulation and higher capital requirements which are being imposed. Fund management firms, insurance companies and pension funds are beginning to fill this gap by providing new debt or refinancing existing loans directly with borrowing companies. These types of lenders tend to hold long-term debts to match their liabilities, thereby often offering longer maturities than banks. They also tend to structure loans with fixed rates of interest and include clauses to discourage borrowers from prepaying early. There are disadvantages to this type of lending as most of these lenders lack the administrative abilities of financial institutions to deal with numerous drawdowns or repayments and are therefore unlikely to be able to provide borrowers with overdraft or revolving facilities.

There are a lot of new regulations due to come into force in order to regulate this area of the market and there are on-going discussions across the EU and the G20 to ensure that any regulation is proportionate, so that it balances the systemic risk of non-bank lenders in the market-place whilst encouraging these alternative sources of finance.

Invoice discounters

Invoice discounting is a form of short term borrowing to improve a company's working capital and cashflow. It allows a company to draw against its sales invoices before the customer has actually paid (usually in the region of about 80-90% of the value of the invoice). An invoice discounter will charge a monthly fee as well as interest on the amount borrowed against sales invoices and will take a floating charge over the book debts of the relevant company as security for the money it is lending. Responsibility for raising sales invoices and for credit control stays with the business, although the invoice discounter will require regular reports on the sales ledger and the credit control process which can be quite onerous for a borrower.

Invoice discounting is targeted at larger companies with established systems and an expected annual sales turnover in excess of £500,000. It enables companies to quickly inject capital into their business, without having to deal with banks or sacrifice equity. It is a quick way to free up money, without changing established credit control procedures and unlike a bank overdraft, it is flexible and grows alongside the business. In the current economic climate, it is one of the fastest growing forms of commercial borrowing, both for small and mid-size companies.

Asset backed lenders

Asset backed lending is any kind of lending secured by an asset. In this context it is usually used to describe lending to companies using assets not typically used in other loans, such as inventory or plant and machinery. It is usually considered when other lending routes are not feasible or immediate capital is required, therefore it is often accompanied by fairly high interest rates, although these tend to be lower than an unsecured loan as the bank will take security over the relevant assets and can seize these on an event of default. This type of lending is often used to allow a company to bridge a financing gap it may have between the timing of payments it receives and expenses it is due to pay.

An asset backed facility will generally have a revolving credit limit that fluctuates based on the actual receivables balance that the company has on a day to day basis, thereby allowing a company to borrow more than it might otherwise have been able to. However, an asset backed lender needs to monitor and audit the company to monitor the accounts receivables and a lender will usually mitigate its risk by controlling who the company does business with. As from January 2014, further reporting requirements to the European Central Bank are being introduced for these securities to be accepted as collateral by the European Central Bank, so lenders will be even more keen to monitor the company.

Retail bonds

A bond is a promise (an IOU) from a borrower to an investor to repay capital, usually with interest paid periodically. Retail bonds are issued in small denominations (typically a minimum of £1,000) and bought by private individuals. This contrasts with wholesale bonds which are issued in denominations (typically around £100,000) only accessible to institutional investors such as pension and sovereign wealth funds. A retail bond allows companies to access funding from private investors. The bonds are flexible and can be outstanding for any period set by the company. Retail bond issuers become more visible, gain publicity and through the process they can create better relationships with customers and staff.

There are two types of bond in the market place, tradable and non-tradable. Tradable retail bonds are listed on the London Stock Exchange Regulated Market and/or the London Stock Exchange Order Book for Retail Bonds. The issue process involves a high standard of disclosure and transparency (similar to listed shares) and is therefore costly and administratively burdensome. The UK Government is consulting on changes due to be brought in during the course of 2014, but these will not simplify the process significantly.

Non-tradable retail bonds are issued to customers and staff of 'passion brands'. The capital of the bonds is repaid on a maturity date and interest is paid in vouchers, discounts or products. These retail bonds fall outside the regulation of the London Stock Exchange. They are not onerous to issue and enable smaller businesses to raise funds directly from customers in ways which build upon and strengthen the business' brand. Investors invest not on the basis of credit ratings but based on their own level of trust in the brand. A retail bond which is non-tradable enables a business which wants to borrow to do so without going to a bank. This reduces fees, avoids the need for a business to fit in with bank credit policies and enables the company to set its own terms rather than being subject to the standard forms of documents used by banks. Businesses which pay interest in vouchers or goods also obtain a cashflow benefit since funds are not required to be found to pay interest in cash from time to time. If interest is paid in goods or vouchers these have the added benefits of turning over stock or driving further business to the company. However, offering securities in private companies to UK investors may give rise to some potential regulatory issues.

Government incentives for lending to small and medium enterprises

The UK Government has launched a number of schemes to encourage investment in small and medium enterprises through non-bank channels, such as the Business Finance Partnership, intended to provide co-investment with the private sector through managed funds which lend directly to small and medium enterprises on fully commercial terms. Other incentives to encourage lending to small and medium enterprises include the Business Bank, the Enterprise Finance Guarantee Scheme and the Funding for Lending Scheme and the National Loan Guarantee Scheme.

Please contact the **Olswang Finance Group** for more information in these areas.

3.2

How are terms of employment regulated in the UK?

Overview

This section of the guide considers the following:

- how the employer/employee relationship is regulated;
- whether there are any restrictions on the terms of employment and working conditions that employers can contractually agree with employees;
- potential issues around terminating employment;
- whether there are any employer obligations regarding employee pensions;
- whether there are any anti-discrimination protections;
- whether there is a statutory minimum wage;
- whether there are any requirements to recognise trade unions, employee representatives, employee works councils or other similar collective bargaining arrangements; and
- the Government's plans for the reform of employment law.

How is the employer/employee relationship regulated?

As well as being regulated by the individual employee's contract of employment, employment in the UK is regulated by a wide range of statutory and regulatory protection. In broad terms, these protections apply to those employed in Great Britain, whether they are British or not, and regardless of the law governing their contract of employment.

Employees in the UK, broadly speaking, have less statutory protection than employees in many other EU countries but considerably more than US employees.

As well as covering employees in the strict sense, some of the relevant regulatory provisions apply to those whom employers might think would be independent contractors, such as workers, agency workers and those otherwise engaged personally to provide their services.

Are there any restrictions on the terms of employment and working conditions that employers can contractually agree with employees?

Terms of employment

There is no requirement that a contract of employment be in writing but it is prudent to ensure that it is so that issues such as confidentiality, restrictive covenants and intellectual property rights, if appropriate, can be covered. There is, however, a statutory requirement that employees are provided with certain written particulars of employment.

Particulars of employment to be given in writing include, for example, details on:

- commencement of employment;
- remuneration;
- place of work;
- hours of work;
- holidays and holiday pay;
- sick pay;
- pensions;
- notice provisions;
- job title; and
- work rules and dismissal, disciplinary and grievance procedures.

Terms are implied into employment contracts by statute (such as a right to minimum notice of termination) and by common law. The most significant implied term is the duty of mutual trust and confidence under common law which applies to both employers and employees.

Working conditions
Maximum working week: Under the Working Time Regulations 1998, workers may not work on average for more than 48 hours per week (calculated over a 17-week reference period). Employers can ask their workers to consent in writing to opt out of the 48-hour weekly working limit. If workers opt out they must be able to opt in on no more than three months' notice. Workers are also entitled to prescribed daily and weekly rest breaks and there are special rules for those working at night.

Minimum holiday entitlement: A worker is entitled to 5.6 weeks' paid leave each year. A "week" is the worker's average working week, and therefore amounts to 28 days for a full-time worker. Employers are permitted to include bank holidays as part of a worker's entitlement if workers do not work on those days. In general, holiday entitlement cannot be replaced by payment in lieu except on termination of the employment contract. Pay for holiday taken in excess of entitlement cannot be recouped by the employer unless the contract specifically so provides.

Rights to time off work: Some workers/employees have certain rights to time off work for specified reasons, including maternity, paternity, parental and adoption leave, jury service and public duties, if they are Armed Forces reservists, employee representatives or trade union representatives or to deal with an emergency involving a dependant.

What potential issues are there around terminating employment?

Unfair dismissal
As well as a right to minimum notice of termination (see above) employees may also enjoy a right not to be unfairly dismissed.

An employee who has been dismissed, or who has been "constructively dismissed" (i.e. has resigned in response to a fundamental breach of their contract by their employer) and who has two years' qualifying service may bring an unfair dismissal claim within three months of the dismissal. For employees whose employment commenced before 6 April 2012, the qualifying period of service is only one year. The employer must prove:

- that the reason for dismissal falls within one of the specified statutory permissible reasons (including conduct, capability, redundancy or some other substantial reason); and
- that it was fair and reasonable in all the circumstances of the case for the employer to dismiss the employee for the reason or reasons given.

The employment tribunal can order re-instatement or re-engagement (although such orders are rare) and/or compensation. Compensation generally consists of a basic award, calculated according to age and length of service (subject to a current maximum of £13,500) and a compensatory award, which in most (but not all) cases is capped at the lower of twelve months' pay and a prescribed maximum figure (currently £74,200). These limits are usually increased annually.

A dismissal is automatically unfair in certain circumstances (for example, where the reason or main reason for dismissal is pregnancy or a reason related to pregnancy, or other specified grounds such as whistleblowing and employee representative status). In such cases, the employee does not always require any qualifying period of service to bring a claim. In the case of whistleblowing, compensation is uncapped.

The procedural fairness of the dismissal is governed by the ACAS Code of Practice on Disciplinary and Grievance Procedures (the "Code"). Broadly, ACAS is a Government funded but independent organisation involved in improving relations and resolving disputes between employers and employees. The Code provides employers and employees with basic practical guidance concentrating on the key principles that underpin the fair handling of disciplinary and grievance situations in the workplace. Employment tribunals take the Code into account when considering the fairness of a dismissal or the conduct of a grievance and are also able to adjust any awards made in relevant cases by up to 25% for unreasonable failure by either the employer or the employee to comply with the Code. The Code is not applicable to dismissals by reason of redundancy or expiry of a fixed-term contract, although a fair procedure must still be followed in relevant cases.

How are redundancies regulated?
Redundancy is potentially a fair reason for dismissing an individual. For a business reorganisation or redundancy dismissal to be fair there will need to be, among other things:

- a genuine reason for dismissal;
- a fair selection process, based on appropriate selection pools and objective criteria;
- a search for alternative employment within the employer's organisation;
- consultation on all these matters; and
- warning of dismissal.

Collective consultation
Broadly speaking, if an employer proposes to make 20 or more employees redundant in a period of 90 days or less, it has an obligation to consult with appropriate representatives of the affected employees. Consultation must begin in good time, and no later than 30 days before the first dismissal if between 20 and 99 employees are to be dismissed, and no later than 45 days before the first dismissal of employees if the number is 100 or more.

The employer must disclose in writing to the representatives:

- the reasons for the proposals;
- the number and descriptions of employees whom it is proposed to dismiss as redundant;
- the proposed method of selection;
- the proposed method of carrying out the dismissal;
- the proposed method of calculating redundancy payments; and
- certain details relating to its use of agency workers.

The consultation must discuss ways of avoiding, reducing the number of, and mitigating the consequences of, the dismissals, and must be undertaken with a view to reaching agreement with the representatives.

Business transfers and outsourcing
In some circumstances, the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") will apply to protect the employment rights of certain employees where a business or part of a business transfers to a new owner. TUPE will also apply where there is a "service provision change" – in essence, where a service provided in-house is outsourced or where a contract to provide a particular service ends and is either given to a new contractor or the service in question is taken in-house to be undertaken by the former customer itself.

In very broad terms, where TUPE applies:

- employees employed in the business or in the provision of the relevant service transfer to the new owner or service provider on the same terms and conditions of employment;
- there are significant limitations on an employer's ability to change those terms and conditions;
- the new owner or service provider inherits the outgoing employer's "rights and liabilities" arising from those employees' contracts of employment;
- additional unfair dismissal protections apply; and
- there is an obligation to provide prescribed information to and, in some cases, consult with appropriate representatives of affected employees.

TUPE is a particularly complex area of employment law in the UK and specific advice should be sought on whether and how it might apply to particular circumstances.

Are there any employer obligations regarding employee pensions?

New pension requirements were introduced with effect from October 2012 for employers in the UK. As a result, employers are required to auto-enrol their UK-based "eligible jobholders" into a pension scheme and, for the first time, will be obliged to make pension contributions on their behalf amounting to 3% of pay. "Eligible jobholders" can include temporary and fixed term workers as well as full time employees who meet certain age and earnings thresholds. Workers who are not eligible jobholders do not need to be auto-enrolled, but may, depending on their age and earnings levels be able to opt into a pension scheme and have contributions paid on their behalf as well. Each UK employer has been given a staging date, based on the size of its PAYE scheme at October 2012, with the largest employers required to enrol staff first, and smaller employers given designated dates between now and 2017. For further information about UK pensions law, please contact **Olswang's Pensions Team**.

Are there any anti-discrimination protections?

Workers (including employees) and job applicants are protected against discrimination because of age, sex, race, disability, marital and civil partnership status, pregnancy and maternity leave, sexual orientation, gender reassignment and religion or belief. In most cases, protection is against direct and indirect discrimination, harassment and victimisation.

Employees who work under fixed-term contracts and workers who work part-time also enjoy some specific protections against detrimental treatment. Equal pay provisions in discrimination legislation require that men and women receive equal pay for equal work.

Unlike liabilities for unfair dismissal, compensation for discrimination is unlimited and exposure, particularly in relation to disability discrimination claims, can be substantial.

Is there any statutory minimum wage?

All workers must be paid at a rate which is not less than the national minimum wage. As at the date of this Guide, the minimum wage rates are £6.31 per hour for workers aged 21 and over, £5.03 per hour for workers aged 18 to 20 inclusive, for 16 and 17 year olds, £3.72 per hour, and for apprentices under 19 or in the first year of their apprenticeship, £2.68 per hour. The rates are reviewed annually in October. The calculation of an individual's hourly rate of pay and the number of hours worked by the worker are subject to complicated provisions in the relevant regulations. The employer is required to keep written records and provide certain pay statements to the worker.

Are there any requirements to recognise trade unions, employee representatives, employee works councils or other similar collective bargaining arrangements?

Requirements to recognise trade unions
Collective agreements between unions and employers are reasonably common in public services and in certain industries, such as energy, transport, manufacturing and construction, and may affect contract terms.

If a trade union is not already recognised, there is a statutory procedure whereby the employer can be obliged to recognise a trade union if a majority of the relevant work force wishes it. Such applications are relatively rare.

Employee representatives
Employee representatives are required for consultation purposes for certain redundancy processes (collective redundancies where an employer proposes to make redundant 20 or more employees in a period of 90 days or less) and on the transfer of a business from one entity to another under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (see above). Employers are also required to consult with employee representatives over health and safety matters.

Employee Works Councils
Until recently, there was little statutory provision in the UK for the participation or involvement of employees in the affairs of the organisation in which they work. However, there is now legislation about both European-level and national-level works councils.

European Works Councils: If requested to do so by the requisite number of employees, all undertakings or groups employing at least 1,000 workers in the EEA with at least 150 in each of at least two relevant member states, are required to establish a European-level information and consultation procedure or works council.

National Works Councils: A similar, national-level, process applies in the UK to undertakings with 50 or more employees. If triggered by an appropriate request from employees, the employer must negotiate with a view to setting up the employee representative body and defining its terms of reference. If the negotiations fail, a default model will apply. Employee representatives then have the right to be informed about recent and probable development of the undertaking's activities and economic situation, and to be informed and consulted about the employment situation and prospects, threats to employment, etc.

What are Government plans to reform employment law in the UK?

The Government has recently undertaken a programme of reform of employment law. The most significant reforms in the past twelve months include the introduction of fees for bringing claims in the employment tribunal and revision of the tribunal's rules of procedure. Looking ahead, future proposed reforms include revising the current maternity and paternity leave regime and extending the statutory right to request flexible working arrangements to all employees.

For more information on any of the issues raised in this section please contact **Olswang's Employment Group**.

3.3

How are intellectual property rights ("IPR") protected in the UK?

Overview

This section of the guide considers the following issues:

- what kinds of IPR exist;
- what each kind of IPR protects and what would infringe the right;
- how protection is obtained and how long it lasts;
- who owns it, and the position regarding IPRs created by employees and those commissioned to do work;
- how confidential information and know-how are protected; and
- enforcement

What kinds of IPR exist?

There are a number of ways in which IPR can be protected in the UK. These depend on the nature of the right in question. The principal forms of IPR which operate in the UK are:

- copyright;
- design rights;
- trade marks; and
- patents.

What does each kind of IPR protect? What would infringe the right?

Copyright
Copyright protects the expression of an idea, as opposed to the idea itself. It can be enforced to prevent the copying of different categories of cultural, informational and entertainment works. These include software code. Copyright is the exclusive right to carry out certain acts in relation to the work, including copying and adapting it. Copyright does not provide a monopoly right, merely a way of preventing copying taking place. It subsists in the work automatically, i.e. no registration is required. Copyright subsists in original literary, dramatic, musical and artistic works, some types of database, sound recordings, films, software code, broadcasts or cable programmes and the typographical arrangement of published editions. Acts which infringe copyright include the copying of the whole or a substantial part of the protected work, issuing copies of it to the public, lending and renting copies of it to the public, performing and playing it in public, communicating it to the public (such as by way of broadcast or on the Internet) and adapting it (such as translating it into a different language), in each case without the consent of the copyright owner. Authorising an infringement is itself an infringing act.

Design rights
Design rights are a diverse collection of rights protecting designs varying from industrial designs for 3-D articles of practical application to designs for product packaging, logos and graphic user interfaces. There are four types of design right, which confer either UK or European-wide protection:

Unregistered design rights (UK): UK unregistered design rights protect designs relating to "the shape and/or configuration (whether internal or external) of the whole or part of an article". They generally relate to 3-D designs but not surface decoration. Designs will not benefit from protection if they are considered commonplace in their field, or must be a particular shape so as to perform their function or fit with another article.

UK unregistered design right is infringed by an unauthorised person making an article exactly or substantially similar to the protected design, or by making a design document for the purpose of making unauthorised copies. Copying of the original must be proved if infringement is to be made out. Secondary liability is also possible, where an importer has knowledge of or a reason to believe that the imported articles have been copied.

Registered design right (UK): UK registered design right has the effect of protecting the "appearance of the whole or part of a product resulting from the features of, in particular, the lines, contours, shape, texture or materials of the product or its ornamentation." It can protect 3-D articles, items of surface decoration and logos, etc.

A design can only be validly registered in respect of new designs that possess individual character. It is unnecessary for there to be copying for a UK registered design to be infringed. UK registered design rights are infringed where the design (or one which does not give a different overall impression) is used by another party without the permission of the owner of the UK registered design.

Registered and unregistered Community design rights: Community design right provides protection in respect of qualifying designs concurrently in all EU member states. Like the UK registered design right, Community design right protects "the appearance of the whole or part of a product resulting from its features and, in particular, lines, contours, colours, shape, texture of the materials or ornamentation." This definition applies to both registered and unregistered community design rights.

The test for infringement of a Community registered design is the same as for UK registered designs, but the Community unregistered design, also requires copying to be shown in order for infringement to be made out.

Trade marks
Registered trade marks: A trade mark must be registered in respect of a defined list of goods and services. For registration purposes, a trade mark must be a sign capable of being represented graphically and which is capable of distinguishing goods and services of one undertaking from those of another undertaking. This is a fundamental requirement for validity. Such signs can include words, personal names, designs, letters, numerals, slogans, sounds, smells, gestures and distinctive colours.

A registered trade mark is infringed by anyone using an identical or similar sign to the registered trade mark in the course of trade in relation to goods and services without the owner's consent. The following acts infringe a registered trade mark:

- using a mark which is identical to a registered mark in relation to identical goods or services;
- using a mark which is identical to a registered mark in relation to similar goods or services provided there is a likelihood of confusion on the part of the relevant consumer;
- using a mark which is similar to a registered mark in relation to identical or similar goods or services provided there is a likelihood of confusion on the part of the relevant consumer; and
- using a mark which is identical or similar to a registered mark in respect of any goods or services where the registered mark enjoys a reputation and its use without due cause takes unfair advantage of or is detrimental to the mark's reputation or distinctive character.

Protection can be sought either by registering a mark in the UK or by registering a Community Trade Mark (CTM), a single trade mark registration that provides protection in all member states of the European Union. Due to its unitary character, if an action for infringement of a CTM is brought in the appropriate EU jurisdiction, it is possible to obtain an injunction to prevent use of the infringing trade mark throughout the entire EU.

Unregistered trade marks: It is possible to assert and enforce trade mark rights in relation to marks which are not registered under the tort of passing off in the UK. This requires that goodwill connecting a mark to a business be shown, that there is confusion or misrepresentation in the use of that mark and its source and that damage is suffered by its owner as a result.

Patents
Patents protect inventions which are capable of industrial application. Patents can cover industrial processes, pharmaceutical or other chemical products, engineering or electrical products and potentially software products. There are some categories that are exempt from patent protection including mathematical formulae and pure discoveries.

A patent can prevent others from exploiting the protected invention for the duration of the patent. It offers the proprietor of the patent a monopoly for that period but does not mean that the proprietor of the patent can work the invention free of infringing third party rights.

For a patent to be granted to the invention in question, it must be:

- new;
- non-obvious; and
- capable of being made or used in industry or agriculture.

It is not necessary to show that an infringer is copying or has knowledge of the patent protecting the invention for infringement to be made out.

How is protection obtained and how long does it last?

Copyright		
Type of right	**Duration**	**How protection is obtained**
Literary (including software), dramatic, musical and artistic works	70 years from the end of the year in which the author dies.	Arises automatically. It is advisable to put copyright notices on the work. Such notices consist of a copyright symbol ("©"), the owner's name and the year of first publication. A copyright notice may offer further protection outside the UK under international treaties and also establishes a legal presumption in proceedings that the named copyright holder is the proprietor.
Sound recording	70 years from the end of the year in which it was made or, if not released immediately, 70 years after the end of the calendar year in which it was released.	
Broadcasts and cable programmes	50 years from the end of the calendar year in which the broadcast was made or the programme included in a cable programme service.	
Typographical arrangement of published edition	25 years from the end of the calendar year in which the edition was first published.	
Films	70 years from the death of the last of principal director, composer or author.	

Design rights		
Type of right	**Duration**	**How protection is obtained**
UK registered and Community registered	25 years, subject to the registration being renewed every five years.	Through registration with the UK Intellectual Property Office ("UK IPO") or the Office for Harmonisation in the Internal Market (Trade Marks and Designs) ("OHIM"). A design cannot be registered if it has already been published, although a grace period of 12 months from first disclosure is allowed. This period is intended to enable designers to market-test their design.
UK unregistered	The shorter of 15 years from the end of the year of recordal/manufacture or 10 years from the end of the year of first marketing.	No registration required. The right arises at the point of design.
Community unregistered	Three years from the point at which the design is made available to the public within the EU.	No registration required. The right arises at the point of publication within the EU.

Trade marks		
Type of right	**Duration**	**How protection is obtained**
UK registered and Community registered	10 years, but can be renewed indefinitely. Trade mark registrations are vulnerable to cancellation on the ground of non-use once they have been registered for five years.	Through filing an application at the UK IPO or OHIM.
UK unregistered	Protection lasts for as long as the requisite goodwill in relation to a mark can be shown.	Automatic

Patents		
Type of right	**Duration**	**How protection is obtained**
UK Patent	20 years from filing date (subject to annual renewals).	Through filing an application at the UK IPO. Patent protection in one country will effectively place it in the public domain in every other country where there is no equivalent protection. Patents are territorial rights (i.e. a UK patent will not protect an invention in other territories). A first national application can offer "priority" for up to 12 months from the date of filings. This means that an application can be filed within that 12 month period in other territories for the same invention and with the same original protection date as the first application.
European Patent Convention ("EPC")		Through filing an application at the European Patent Office. An EPC application specifies in which Convention member countries protection is sought. If granted, the patent(s) takes effect under the laws of each specified Convention member country. Applications which subsequently translate into UK or European patent applications may initially be made via the International Bureau under the Patent Co-operation Treaty.
Unitary patent (not expected to come into force until at least 2015)		Through filing an application at the EPO and electing for the granted patent to have unitary effect across the contracting states. The Unitary patent, on current plans, will take effect across 25 contracting states as a single right

Who owns the IPR? What about IPR created by employees and those commissioned to do work?

Copyright
Usually the creator of a work is the first owner of the copyright in it. This general rule is subject to certain specific exceptions, including where the works are created by an employee in the course of their employment duties, in which case ownership automatically vests in the employer. Special rules apply to films, broadcasts, sound recordings and typographical arrangements.

There is no such exception for circumstances where a work is created by a third party commissioned to do so. The commissioner of the work will not normally own the legal title to any copyright in that work, unless a contract provides otherwise

Design rights
The rules governing ownership of Community design rights are broadly the same as those in relation to copyright. UK unregistered and registered design right is similar, with the exception that a commissioner of a design for money or money's worth is deemed to be the owner of any unregistered or registered design rights arising.

Trade marks
Rules on ownership of trade marks are unlike those in relation to other IPRs. "Ownership" is dictated by the identity of the party with whose business the mark is associated and also the validity of the mark. Registration of a mark can be considered to establish that the registrant is the owner but this will be rebutted if, for example, the mark is held to be invalid. Unregistered trade mark rights are owned by that party whose business is the repository of the "goodwill" associated with the mark, i.e. the business to which the mark is connected. A trade mark owner acquires the right to bring an action in respect of the trade mark from the date of registration of the mark.

Patents
The right to apply for a patent vests primarily in the inventor of the invention claimed in the patent application, or their successor in title. Inventions (and the right to file a patent right in relation to them) by employees in the course of normal employment duties, or in the course of employment by an employee with commensurate duties and obligations to further the employer's business (typically in the latter case senior personnel) vest in the employer. As with copyright, where a third party is not an employee but has been engaged to carry out work (such as a consultant), any patent rights arising from that work will vest in the third party. This is, however, subject to the terms agreed in any contract between the parties.

How do I protect confidential information and know-how?

Techniques and processes which are not patented, and the substance of which is not inherently discernible through their application, can be protected as proprietary know-how or confidential information.

This is not a formal IPR (in the sense of being a registrable asset or being capable of assignment). It is a contractual or common law right which arises through the use of confidentiality (or non-disclosure) agreements and obligations where relevant know-how or information is made available. For the law to be effective the information in question must have a necessary "quality of confidence" (i.e. not be common knowledge, obvious or trivial) and be imparted under circumstances giving rise to an obligation of confidence (e.g. employer/employee, under terms of confidentiality or where it was reasonably understood to be a confidential disclosure).

It is commonly an issue where techniques or processes are under development which might subsequently give rise to a patent application. Patents cannot be granted in relation to inventions which are not "new", so any public disclosure before a patent application is filed can defeat the application, unless the disclosure was made under circumstances of confidentiality (preferably under a written agreement). The information can be protected for as long as it remains confidential, although this is subject to a number of practical constraints.

How do I enforce my intellectual property rights?

IPR owners can bring infringement proceedings in the UK High Court. Additionally, there is now a specialist Intellectual Property Court called the IP Enterprise Court, which is intended to provide a cheaper and simpler means of resolving IP disputes. The IP Enterprise Court has a limit on damages of up to £500,000, and a cap on recoverable costs of £50,000.

Agreement has recently been reached on the establishment of a Unified Patent Court. This court is expected to operate from 2015 and will have the potential to offer a single enforcement action across the contracting Member States of Europe. Unified Patent holders will be able to bring proceedings in one jurisdiction in order to seek pan-European relief.

For further information on the protection of intellectual property rights in the UK, please contact the **Olswang Intellectual Property Group**.

3.4

What taxes could impact a business as it grows in the UK?

Corporation tax

Corporation tax will apply to the worldwide profits and gains of a UK company, and to profits and gains properly attributable to a non-UK company's permanent establishment in the UK, in each case subject to the impact of any applicable double tax treaty and specific exemptions. More information about the tax considerations of operating as a UK establishment or subsidiary can be found at 1.6.

Transfer pricing and tax reputation

If a UK company is part of a group, the tax treatment of transactions between it and other group companies may be governed by the UK's transfer pricing legislation. This is based on the "arm's length principle", which states that transactions between related parties should be conducted on the terms and conditions which would exist if they were not related. It is mandatory for a UK company to comply with the UK transfer pricing rules if it is part of a group of companies with more than 250 employees worldwide and also having either a consolidated balance sheet of over €43 million or an annual turnover of over €50 million.

A number of international investors have recently been under the spotlight over their UK tax payments with the media focussing particularly on transfer pricing practices. Unfortunately this has resulted in adverse publicity for some of these investors and has also increased pressure on the UK tax authorities to be seen to be doing a lot more to tackle aggressive transfer pricing practices. A direct consequence of this pressure is that tax authorities are likely to increase the number of transfer pricing adjustments for UK transactions that are caught by the UK transfer pricing rules resulting in a higher risk of double taxation. With this in mind it is important that investors setting up UK companies carefully consider appropriate transfer pricing policies to apply to related party transactions, particularly if their UK activities are likely to be negatively impacted by adverse publicity.

Unusually for a UK law firm, Olswang has a dedicated full service transfer pricing team that advises and prepares transfer pricing documentation for UK companies. For more information, please contact our **Transfer Pricing Team**.

Value Added Tax

As a member of the EU, the UK is subject to a common system of Value Added Tax ("VAT"). This generally requires a business with a turnover of more than £79,000 (for the tax year 2013/2014) per annum to register for and charge VAT on its supplies although this threshold has been removed for businesses not established in the UK but making supplies in the UK which must now register for VAT even if their UK supplies fall below the threshold. VAT returns are typically filed, together with VAT payments (if any), on a quarterly basis. VAT registered businesses are generally entitled to a credit for VAT which is charged to them, which has the effect of reducing the net amount of VAT payable to HM Revenue and Customs. Broadly speaking, VAT (which is borne by the ultimate consumer) is neutral for many businesses, although differing treatments arise, for example, in relation to the financial and insurance sectors and in relation to property transactions.

Stamp Duty and Stamp Duty Land Tax

Stamp duty or SDRT generally apply to transactions involving the acquisition (rather than the issue) of shares in UK companies at the rate of 0.5% where the consideration exceeds £1,000.

SDLT is generally payable, by the buyer, on most land transactions at up to 4% of the consideration given. Higher rates apply to high value residential property (see 1.10 above). SDLT is payable by a lessee on the grant of a lease at 1% of the net present value of the aggregate rentals payable over the term of the lease.

Various reliefs are available in respect of stamp duty and SDLT in certain circumstances.

3.5

What are the audit requirements for UK companies?

The Companies Act 2006 generally requires UK companies to prepare accounts for each financial year and for those accounts to be audited. This is subject to specified exemptions (for example, exemptions from the audit requirements available to certain small and dormant companies). The audit exemptions have recently been extended to cover subsidiaries (of any size) of EEA-incorporated parent undertakings, if they satisfy a number of conditions. These include unanimous consent from the subsidiary's shareholders; inclusion of the subsidiary in the consolidated accounts of its parent undertaking; and the parent undertaking providing a statutory guarantee of the subsidiary's outstanding liabilities as at the end of the relevant financial year.

The annual accounts generally need to be sent to the company's members and also filed with the Registrar of Companies, with public companies being subject to additional requirements to lay their accounts before the company's members in general meeting. Late filing with the Registrar may result in automatic civil penalties for the company and also criminal sanctions for the company's directors.

3.6

Are there any significant rules or restrictions on commercial and trading activities in the UK?

Overview

The rules and restrictions on commercial and trading activities generally apply more strictly to Business to Consumer ("B2C") relationships than Business to Business ("B2B") relationships and we have therefore considered these separately below. In addition to the specific regulation of trading relationships, businesses (and in some cases the individuals working in them) will be subject to general UK law, such as the anti-money laundering legislation and also criminal offences relating to bribery. The Bribery Act 2010 is broad in scope, has wide territorial application and carries potentially heavy penalties in the event of breach. We therefore recommend that businesses check that appropriate compliance procedures are in place before they enter the UK. For more information, please see **Olswang's Bribery Act 2010 Practice Note** or contact our **Fraud and Investigations Team**.

Business to business ("B2B") relationships

Except as specified elsewhere in this guide, there are few generally applicable statutory or common law controls on B2B trading activity. A non-exhaustive list of examples is set out below.

Regulated sectors such as financial services, energy, e-communications, broadcasting and gambling are subject to specific restrictions – contact us for specialist advice on these areas. Competition law considerations are considered at 3.7.

Aspects of B2B trading which are subject to controls		
Issue	**Applicable controls and legislation**	**Impact**
Misleading advertising	*Business Protection from Misleading Marketing Regulations 2008* Deceptive B2B advertising is prohibited	Criminal liability.
Appointment of agents (goods only)	*Commercial Agents (Council Directive) Regulations 1993* Various implied duties for both principal and agent. Provisions on indemnity or compensation for agent at end of agency	Agency arrangements will need to reflect any non excludable aspects of the statutory regime.
Sale and supply of goods and services	*Sale of Goods Act 1979* *Supply of Goods and Services Act 1982* Implied terms as to title, quality, skill and care etc.	Certain implied terms are non excludable; some are excludable subject to reasonableness.
Personal data	*Data Protection Act 1998* Where a commercial arrangement involves the transfer or handling of personal data (e.g. a customer database) the parties will be subject to various constraints and obligations under data protection legislation.	The commercial arrangement will need to be compliant with the parties' legal obligations, to avoid the risk of enforcement action.
Late payment interest	*Late Payment of Commercial Debts (Interest) Act 1998* Interest of 8% above base rate applies to late payment of B2B debts for goods and services, unless the parties agree a "substantial" alternative remedy There are controls on the maximum payment periods which parties can agree on before statutory interest starts to accrue.	Contract terms on late payment interest are void unless alternative remedy is "substantial".
Exclusions and limitations	*Unfair Contract Terms Act 1977* Certain types of liability are non excludable (death and personal injury due to negligence). Other negligence liability exclusions or limitations must pass the test of reasonableness. Contractual liability exclusions or limitations contained in a party's written standard terms must pass the test of reasonableness.	An exclusion or limitation will be void if it breaches the UCTA requirements.
Penalties	Payments which are penal in nature are unenforceable under the common law. Examples of provisions which have the potential to be challenged as penalties include liquidated damages and service credits. Provisions which are a genuine pre-estimate of loss, as opposed to payments which are primarily designed to deter a breach, are more likely to be enforceable.	Enforceability must be considered case by case. Provisions which are penal in nature are unenforceable.

Business to consumer ("B2C") relationships

B2C commercial activities are subject to a far greater degree of regulation than B2B activities. Much of this regulation derives from EU legislation. Consumer protection measures span every stage of a transaction from advertising, pricing information, the ordering process, the terms of the contract, return and cancellation rights, implied terms about the product or service through to product liability and guarantees.

See the table below for a non exhaustive summary of key consumer protection legislation.

Examples of UK consumer protection legislation		
Issue and legislation	**Key compliance points**	**Impact**
Plain English *Unfair Terms in Consumer Contracts Regulations 1999*	Terms need to be clear and consumer-friendly. Avoid legal jargon like "indemnity" and "force majeure". Avoid small print.	Legal jargon is potentially non binding on consumer. Enforcement bodies may require amendment of terms and conditions.
Unfair terms *Unfair Terms in Consumer Contracts Regulations 1999*	Avoid potentially unfair terms specified in the "grey list" in the Regulations. Avoid any term which is unfairly detrimental to the consumer. Avoid conflicts with other statutory rights, remedies, etc.	Unfair term is non-binding on consumer. Enforcement bodies may require amendment of terms and conditions.
Misleading actions/omissions *Consumer Protection From Unfair Trading Regulations 2008*	Ensure content of advertising, promotions and terms and conditions is not misleading to the "average" consumer. Take special care when targeting children and other vulnerable audiences.	Potential criminal liability. High priority for enforcement.
Cooling off rights (non faulty goods/ content/ services) *Consumer Protection (Distance Selling) Regulations 2000 [until June 2014]* *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 [from June 2014]*	For digital content/services, structure terms and order process to avoid cooling off rights arising. For goods, ensure cooling off information is provided in correct format at the right stage in the transaction.	Digital content/services: unnecessary exposure to cooling off risk if rights are not disapplied. Goods: cooling off rights only excludable in limited cases; significant extension of returns period if information requirements/ timing not complied with.
Compliance information Various sources including: *Electronic Commerce (EC Directive) Regulations 2002, Distance Selling Regulations 2000, Companies (Trading Disclosures) Regulations 2008*	Transparency requirements include information about the supplier, the product or service, the transactional process, guarantees and consumer rights.	Sanctions for omitting compliance information range from criminal to civil enforcement, and in some cases commercial consequences (e.g. extended cancellation rights) .
Implied terms *Sale of Goods Act 1979* *Supply of Goods and Services Act 1982*	Implied terms as to title, quality, fitness for purpose, reasonable skill and care, etc	Certain implied terms are non excludable; some are excludable subject to reasonableness. Express terms must not conflict with statutory implied terms.
Use of personal data *Data Protection Act 1998* *Privacy and Electronic Communications (EC Directive) Regulations 2003*	Personal data must be handled in accordance with the requirements of the Act and the Regulations. In the context of B2C marketing and transactions this will include compliance with information and consent rules, avoiding "purpose creep" and ensuring transfers to any third parties are legitimate.	Sanctions for breaches of data protection rules include undertakings and in serious cases fines of up to £500,000. See paragraph 1.5 above for proposed changes to the EU data protection regime and sanctions.

Data protection compliance and risks

Data protection is a key area of EU regulation to keep on the radar. Data protection requirements pervade all B2B and B2C trading activities which involve the processing of data about identifiable individuals. At the date of this guide, the EU data protection regime is being overhauled. A draft Regulation is expected to be adopted by 2014 and could become directly effective in the UK and all other Member States by 2016. Although the detail of the new rules is still being negotiated, overall the regime will be more prescriptive than the current rules and fines of up to 2% of global turnover are proposed for a wide range of breaches. More information about the data protection regime is included in the section on doing business via the Internet at 1.5.

3.7

What rules apply in the UK in relation to anti-competitive agreements and monopolisation or abuse of market power?

Overview

This section of the guide considers the following:

- the basic rules on anti-competitive agreements;
- the basic rules on monopolisation/abuse of market power;
- what investigatory powers there are;
- sanctions for breaches; and
- the appeals procedure.

Basic rules on anti-competitive agreements

Section 2 of the Competition Act 1998 prohibits agreements, concerted practices and decisions by trade associations which have an effect on trade within the UK and which appreciably restrict competition within the UK. "Concerted practices" involve co-ordination falling short of an agreement.

Article 101 (1) of the EU Treaty prohibits similar agreements where there is an effect on trade between two or more EU countries. This test is interpreted widely and can catch what are apparently UK-only agreements.

Clauses in agreements which infringe these rules will be void and unenforceable and may attract a fine unless they satisfy certain criteria for exemption. The criteria for exemption seek to permit agreements whose benefits outweigh their detrimental effects.

There is no formal procedure for submitting notifications to the European Commission or the OFT, so that parties themselves (together with their legal advisers) must make their own assessment as to whether their agreement infringes the rules and/or satisfies the exemption criteria. Informal guidance may be available from the competition authorities.

Examples of agreements which will infringe the rules include agreements between competitors: to fix prices; to share markets; to limit output; to limit sales; or to exchange price information. Clauses which will infringe the rules in agreements between wholesalers (or manufacturers) and distributors include those to fix minimum resale prices and those which impose export bans.

It is also a criminal offence under UK law, punishable by a fine or imprisonment, for "any individual" (which therefore includes directors) to be involved in cartel arrangements. This has resulted in prosecutions and prison sentences for individuals involved in cartels.

Basic rules on monopolisation/abuse of market power

Section 18 of the Competition Act 1998 prohibits companies from abusing a "dominant" market position if it may affect trade (and competition) within the UK.

Article 102 of the EC Treaty prohibits identical conduct where there is an effect on trade between two or more EU countries.

The restrictions apply only to companies which are dominant. A dominant company is one which has such a position of power in the market that it can behave to an appreciable extent independently of competitors, customers and ultimately of consumers. This requires a detailed analysis of the structure of the market and the companies operating in it but there is a rebuttable presumption that companies with market shares in excess of 50% will be dominant.

The rules catch practices such as bundling, charging unfair or "predatory" prices, discriminating between customers, and offering discounts or other favourable terms so as to tie-in customers. There is no exhaustive list of "abusive conduct," and business practices which are otherwise acceptable in the absence of dominance can be caught if their effect is to "impair undistorted competition".

What investigatory powers are there?

Both the OFT and the European Commission have extensive investigatory powers including the right to demand the supply of specified documents or other information and to search business premises without advance warning. Both the European Commission and the OFT may search the homes of senior management.

What are the sanctions for breaches?

The European Commission has the power to impose fines of up to 10% of a company's world-wide turnover and the power to impose restrictions on a company's business practices. It also has the power to fine up to 1% of world-wide turnover for refusals to supply information or for supplying misleading information, and the power to order a company to be broken up. This latter power is used very rarely.

The OFT also has powers to impose fines of up to 10% of worldwide turnover. In contrast to the sanctions available to the Commission, it is a criminal offence for any individual to refuse to supply information or to supply it misleadingly so that individuals may be fined or imprisoned. It is also a criminal offence for an individual dishonestly to agree to a serious infringement of the competition rules, though there are currently proposals to remove the requirement to prove dishonesty in a bid to increase the number of criminal cartel cases prosecuted in the UK.

Both the Commission and the OFT have leniency programmes which offer immunity from fines in return for providing evidence of infringements.

It is also possible for a third party who suffers loss as a result of a breach of competition law to bring a standalone private court action for damages against an offending party. Alternatively, third parties may bring 'follow-on' damages actions in the Courts in reliance on prior infringement decisions of the OFT and the Commission.

What is the appeals procedure?

Similar grounds for appeal exist as for decisions made under the merger control rules described at 2.2. If appealing from either a decision of the European Commission, the OFT or the Competition Commission, the appeal should be submitted within two months of the contested decision.

Appeals of European Commission decisions to the Court of First Instance can take one year if the streamlined procedure is used. An appeal of an OFT or Competition Commission decision to the Competition Appeal Tribunal can take six months in straightforward cases.

Olswang's Competition & Regulatory Group can advise further in this area.

3.8

What factors need to be considered on the acquisition of further real estate, either to satisfy occupational needs or as an investment?

Acquiring real estate as an investment

As with all investments, the investor will expect a financial return. There are two main types of return an investor will expect to receive from real estate: capital return and income return.

Capital return is the extent to which the capital value of the property increases. For example, an investor may actively manage a property to increase the value of a property so that the investor may sell for a price above what he paid.

An investor will also be acquiring real estate for the income it produces i.e. the rent received from the tenants of the property. Such rent is usually fixed for the first five years, and then is subject to what is known as a rent review. This is a procedure by which the landlord and the tenant seek to agree, or have determined, the rent that a hypothetical tenant would at that time pay for the property if it were available in the market, taking account of various factors specified in the lease and rents chargeable for similar properties in the market.

The rent review is often drafted so that the new level of rent cannot fall below that previously payable. This rental floor ensures a minimum return for the investor that is an important foundation stone of the investment market.

An "indirect property investor" (for example, in a property company or other property holding vehicle) will focus on the return it makes on its investment in the equity of the company or vehicle after any tax has been paid.

A term often used in assessing the investment performance of a property is its "yield". This is the income after tax produced by the property at a particular time, expressed as a percentage of the costs of buying the property (the capital outlay). Investors will wish to ensure that the income they receive from the property is sufficient to service and exceed any debt they have incurred in acquiring the property. Various valuation tools are available to assess returns from a property investment.

Acquiring real estate for occupation

The considerations will be very different when acquiring real estate to satisfy occupational needs. Business occupiers will often prefer to take a leasehold over a freehold interest. The initial capital outlay is likely to be minimal, and occupiers will often want the commitments under their leasehold interest (described at 1.10) not to last beyond five or 10 years.

The trend today is for many occupiers to want flexibility, to be able to leave a property if their business no longer requires it. Many occupiers want to spend as little extra money on a property as possible, and the serviced offices market offers space for the occupier who wishes to enter a property and start trading immediately. He will pay a regular sum of money that will cover all his expenses.

The possibility of the large unforeseen expense is one of the concerns for a tenant taking a lease. In section 1.10 of this guide we mention that leases impose obligations on tenants which may require a capital outlay, for example, to comply with regulatory requirements affecting the property. Where a tenant may only have a short term interest in a property, this is particularly disconcerting. Tenants who only wish to occupy a property for a short period should seek to restrict opportunities for the landlord to demand that a tenant incurs large capital sums.

If the property is occupied under a lease, there will be restrictions in the lease on what the property can be used for. It will be important to ensure that the lease enables the tenant to run its business from the property. If the property needs to be altered to suit the business, it will also be important to ensure that the lease permits this.

Leases normally allow tenants to sell their leasehold interest, or to grant a further lease for a shorter period of time to a third party. It is advisable that these arrangements give sufficient flexibility to offload the property in case the business no longer requires it.

It is also important that the business is able to support the rental and other spending commitments that the tenant makes to the landlord. The landlord may be able to terminate the lease if these commitments are not performed.

Whilst many occupiers have leasehold interests, many also have freeholds. Although there is an initial capital outlay with freeholds (which may well require third party financing and interest commitment), freehold owners are not lumbered with the kind of obligations and restrictions found in leasehold ownership.

For more information about acquiring real estate in the UK, please contact our **Real Estate Group**.

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4
Floating in the UK

4.1

What markets are available in the UK to float securities in a business?

Main Market of the London Stock Exchange plc ("LSE")

This is the best known market in the UK (often referred to as the "full list") and is the traditional market for mature companies with an established trading record. It provides a market in "listed securities" under the Financial Services and Markets Act 2000 ("FSMA") and is a "regulated market" for the purposes of certain EU directives (see 4.3 for more information). Two listing regimes are available to companies: a premium listing, which carries the most stringent admission and continuing obligations requirements, and a standard listing where the requirements are lower. In 2013, the LSE launched a new segment of the Main Market for companies which are not yet eligible for premium or standard listing, known as the High Growth Segment. This has EU regulated market status but sits outside the listing regime. It is a transitional segment designed to assist mid-sized European trading businesses that can demonstrate significant growth in revenues and which aim to join the premium segment of the Main Market over time.

AIM

This market of the LSE is designed for smaller, growing companies. Unlike the LSE's Main Market, it is a market in "unlisted" securities under FSMA and is not a "regulated market" for EU purposes. The admission and continuing obligations regime is therefore not as stringent as for a premium listing on the Main Market. Companies seeking admission to trading on AIM are not required to have a trading record.

For further information about AIM, see the **Guide to AIM** produced by the LSE in conjunction with Olswang and other advisers.

Other markets

Other markets also operate in the UK, both of the LSE and run by other exchanges. For example, in 2007 the LSE opened the "Specialist Fund Market", a regulated market for highly specialised investment entities seeking to target institutional, professional and highly knowledgeable investors only. Since 2005 the LSE has also operated a market in specialist securities, such as debt convertibles and depositary receipts, aimed at professional investors. This is known as the "Professional Securities Market".

In addition to the LSE, other London based exchanges include the ICAP Securities and Derivatives Exchange (ISDX) which operates both secondary and primary markets. It has two primary markets:

- the "ISDX Growth Market", which aims to attract small and mid-cap companies; and
- the "ISDX Main Board" which is an EU regulated market for all types of companies which are seeking, or have obtained, an official listing of their securities.

In 2010, NYSE Euronext launched a new market in London ("NYSE Euronext London"). This market is aimed at international issuers listing shares and depositary receipts on the UK Official List.

The information in this guide focuses on UK quoted companies admitted to the LSE's Main Market with a premium listing or AIM. For further information on these or other markets, please contact the **Olswang Corporate Group**.

4.2

What criteria must be satisfied in order to float with a premium listing on the Main Market or on AIM?

For a premium listing on the Main Market, the company's securities must be admitted to the "Official List" (known as "listing"), an EU regulatory concept, which is explained further at 4.3 below. Examples of the requirements which will need to be met include the following:

- the company must have published or filed audited accounts for at least three years prior to flotation, and should have a revenue-earning record and have controlled the majority of its assets for the same period;
- the expected total market value of securities to be listed must be at least £700,000; and
- to ensure sufficient liquidity in the shares, there is a "free float" requirement that at least 25% of the shares listed are held by the public.

Special admission criteria apply to some companies such as mineral companies and scientific research based companies.

In addition, the company must appoint an adviser known as a "sponsor" which is responsible for providing assurance to the Financial Conduct Authority that the company's responsibilities under the Listing Rules have been met and also advising the company on the Financial Conduct Authority's rules (see 4.3 for further information).

Generally speaking, the admission criteria for AIM are much less demanding than those for a premium listing on the Main Market, although there are additional criteria for specific types of company. The company must appoint an adviser known as a "nominated adviser" (or "nomad"). The nominated adviser is responsible to the LSE for assessing the appropriateness of the company for admission to AIM and advising the company on compliance with the LSE's "AIM Rules for Companies").

4.3

What is the regulatory environment for issuers of securities publicly traded on an investment exchange in the UK?

Regulatory bodies

The regulatory framework in the UK is largely derived from EU legislation, which has sought to harmonise financial services law and particularly rules governing markets and requirements for prospectuses across the EU. In the UK, responsibility for the regulation of financial markets lies with the Financial Conduct Authority ("FCA"). The role of the FCA includes:

- Listing – the FCA is responsible for maintaining a list of securities (the "Official List"). To be admitted to the Official List, a company will need to satisfy the eligibility criteria set out in the FCA's Listing Rules and it will also be subject to continuing obligations after listing;
- Prospectuses – the FCA is the body designated to review and approve prospectuses in the UK (see the following section for more information on when a prospectus is required). The FCA makes and enforces rules known as the "Prospectus Rules" in this regard; and
- Transparency and Disclosure – the FCA is also tasked with making rules to ensure there is adequate transparency of, and access to, information in the UK financial markets. These rules are known as the "Disclosure and Transparency Rules". They, for example, cover periodic reporting of financial information, disclosure of substantial shareholdings and disclosure of price sensitive "inside information".

Regulatory regime

Requirement for a Prospectus/Admission Document
Under EU prospectus law, as implemented in the UK, unless an exemption is available, a person commits a criminal offence if it:

- makes an "offer of transferable securities to the public"; or
- requests admission to trading on a "regulated market" (which includes the Main Market of the LSE, but not AIM)

unless a prospectus (pre-vetted and approved by the FCA or other competent authority) is published.

Because the Main Market of the LSE is a "regulated market", a company applying for admission will always therefore need to produce and publish a prospectus. Prospectus law sets out highly detailed content requirements for prospectuses and these will need to be complied with.

Because AIM is not a "regulated market", a prospectus will not automatically be required for admission. A prospectus will only be required on admission if there is an "offer of transferable securities to the public". This depends on a number of factors including the size of the issue and the number and identity of the persons being offered to, but in practice most companies applying to AIM will structure the issue to fall outside the detailed prospectus requirements. Instead they will have to comply with the AIM Rules for Companies and produce an "admission document", the content requirements for which are based on (but not as extensive as) those applicable to prospectuses. Unlike prospectuses, the AIM "admission document" need not be approved by the FCA and is also not pre-vetted by the LSE.

Continuing obligations
Once admitted to the Main Market of the LSE, a premium listed company must comply with the FCA's Listing Rules and Disclosure and Transparency Rules (as mentioned above, unless the rules of an EU competent authority apply instead). These rules set out detailed continuing disclosure obligations including in relation to ongoing reporting, disclosure of price sensitive information, transactions which require shareholder approval and other requirements (such as a requirement to have a share dealing code for employees known as the "Model Code"). Save for certain Transparency Rules relating to the disclosure of substantial shareholdings, neither the Listing Rules nor the Disclosure and Transparency Rules apply to AIM. AIM companies are subject to the less extensive "AIM Rules for Companies".

Market abuse
The UK has strict rules on insider dealing and market abuse which are set out in the Criminal Justice Act 1993 (in the case of the criminal law offence of insider dealing) and the Financial Services and Markets Act 2000 (in the case of the civil law offence of market abuse). The Main Market of the LSE, AIM and the ISDX markets are included in the designated markets to which these provisions apply. The insider dealing and market abuse offences are complex, but, broadly, (in the case of insider dealing and market abuse) make it an offence to unlawfully disclose inside information in relation to securities admitted to such markets and, in some cases, in relation to derivatives related to those securities, or to deal on the basis of inside information; or (in the case of market abuse) make misleading statements or give a misleading impression in relation to such securities, or undertake other types of market manipulation or abuse. Although the criminal law insider dealing offences have been difficult to prosecute in the past, the FCA, which is the prosecuting authority for these offences as well as the civil law market abuse offences, is expected to prosecute alleged insider dealers increasingly in the Criminal Courts, where the maximum sanction is 7 years imprisonment.

Companies Act 2006
The Companies Act does not directly affect offerings of securities or listings as such. However, the act governs general corporate issues which are relevant during the flotation process, such as the ability of companies to allot shares and the length of service contracts for directors.

IPCs – ABI/NAPF
IPC stands for "Investor Protection Committee" and is a generic name given to organisations such as the Association of British Insurers and the National Association of Pension Funds. These bodies represent institutional investors who make up a significant percentage of equity investors in UK markets.

Their stated purpose is to protect shareholder rights and they produce guidelines and codes of best practice on areas such as share options and management incentivisation, pre-emption rights, director remuneration and service agreements.

Most listed companies (whether on the Main Market or AIM) comply with the guidelines and codes which apply to them, since if they do not, the IPCs may recommend their members to vote against relevant resolutions at annual and other general meetings of the company.

Corporate governance
The Listing Rules require certain listed companies to make a disclosure statement in their annual report and accounts about their compliance with a code of corporate governance, known as the "UK Corporate Governance Code". This Code sets out standards of good practice in relation to board leadership and effectiveness, remuneration, accountability and relations with shareholders in a series of broad principles and more specific provisions.

Although there is no equivalent requirement for AIM companies to comply with the UK Corporate Governance Code, in practice many do to a certain level and the LSE has indicated that it considers the Code a standard that AIM companies should aspire to. Two of the IPC bodies (the Quoted Companies Alliance and NAPF) have produced guidance designed for AIM and smaller quoted companies and the QCA guidelines in particular have become a widely recognised benchmark for SME corporate governance.

Please contact the **Olswang Corporate Group** for further information.

4.4

What are the advantages and disadvantages of floating in the UK?

Advantages

Access to finance
With a ready market in which to buy and sell shares and the comfort of dealing on markets which impose disclosure obligations on quoted companies, individuals and institutions are far more willing to invest in a quoted company's shares than they are in the shares of a private company. Therefore, a flotation can provide a company with access to equity funding in amounts not available from the current shareholders, directors or private equity firms.

Exit for existing shareholders
Often flotations are seen as a way for existing shareholders to realise some or all of the value of their shareholding. For example, an owner/director may hold a majority of the shares in a company, and may wish to liquidate some or all of that holding to provide ready cash in order to reap the benefits of his labours. Alternatively, a private equity investor may need to dispose of a holding in a company in order to liquidate a fund or make its returns target. A trade sale may not be available or an owner/director may not wish to cede control and so a flotation is one option.

Shares as currency
Because of the ready market in a quoted company's shares, the company can use its shares to make acquisitions for which it would otherwise have paid cash.

A potential seller of a company or business is far more likely to accept shares in a quoted company as consideration for the transfer of that company or business than shares in an unquoted company, largely because it is easy to value the consideration shares and a market can be found for them when the seller wants to sell the shares and realise cash proceeds.

Incentivise staff
Quoted companies can offer share options as an incentive/reward to employees, which are easy to sell as shares, in a quoted plc, once the options are exercised. Shares in a private company or unquoted plc will not have a ready market and so the shares, or options in them, will be less attractive as an employee incentive.

Public profile
A quotation will inevitably mean that the company and its products receive more extensive coverage in the press and potentially other avenues such as analysts' reports. This can help sustain demand and liquidity in the shares.

Disadvantages

Cost
Getting to market and then complying with the continuing obligations of a quoted company is expensive. In addition to the fees of external advisers, there is the value of the management time which will need to be invested in a flotation.

Companies need to calculate whether the benefits of a quotation for them will outweigh the costs of doing so.

Continuing obligations
These are onerous for premium listed companies, but less so for AIM companies. However, in both cases, companies will be subject to far greater day to day control over their actions than unquoted companies. They will need to make a number of announcements to the market on what they may consider to be unimportant matters e.g. the grant of options, signing a new commercial deal (if significant), and the appointment and resignation of directors. Quoted companies generally have to invest more in management information systems and take a more rigorous approach to compliance procedures than prior to flotation.

Lack of flexibility
Quoted companies need to ensure they comply with the rules regarding disclosure and approval of substantial transactions or transactions with related parties. In addition, since after quotation the directors are accountable to external investors, due diligence on potential acquisition targets is more relevant and can add to the time taken to complete corporate deals. This may lead to a perceived lack of flexibility or a reduction in the ability of a company to react quickly to commercial opportunities.

Transparency
Because quoted companies are subject to much greater accountability to outside shareholders, the directors lose much of the privacy and autonomy they may have enjoyed when running an unquoted company.

Lack of control
The sale of shares to the public or outside investors obviously involves surrendering a degree of control to outside shareholders whose views must be taken into account. For example 2013/14 will see the introduction of new requirements for the company's policy on directors' remuneration to be put to shareholder vote at premium listed company annual general meetings for the first time. As an additional factor, the wider the shareholder base the more susceptible a company may be to a hostile take-over approach.

Directors' responsibility
Directors of quoted companies operate in a highly regulated arena and have responsibilities not only to other directors and shareholders, but also to regulatory and governmental authorities. They must also adhere to market practice and codes of good practice. The disclosure of salaries, options, related party contracts etc. and the lack of freedom to run the company as they see fit may put some directors off a flotation. Please contact the **Olswang Corporate Group** for further information.

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5
Sale of businesses in the UK

5.1

How do sellers identify and contact potential buyers in the UK?

Sellers often employ business and financial advisers or consultants to assist with the identification and contact of potential buyers. Generally speaking, the marketing of shares in a company is highly regulated and sellers must take specialist advice and engage the services of appropriately qualified and authorised professionals to conduct the process.

5.2

How is the sale process managed in the UK?

Overview

Issues which commonly need to be dealt with on the sale of a business include:

- confidentiality;
- competing interested parties;
- due diligence; and
- seller's liabilities post-sale.

Confidentiality

A confidentiality agreement should be entered into as early as possible in the process, before confidential information is provided to a potential buyer. If there is no formal contract, English law provides some protection in that a person cannot take unfair advantage of information received in confidence. However, in order better to protect the information, a written undertaking, often in the form of a confidentiality letter or non-disclosure agreement, is advisable. Sometimes the heads of terms (or "letter of intent") setting out the main principles under which the negotiations are to be conducted will contain confidentiality undertakings which are expressed to be legally binding.

Competing interested parties

A buyer will often look to protect its position against competing parties with a lock-out or exclusivity agreement. This will prevent the seller from negotiating with other parties for a certain amount of time.

Apart from any agreed confidentiality or exclusivity provisions, negotiations between parties are generally conducted under heads of terms which are not normally legally binding in the UK. Heads of terms are usually considered to infer a moral commitment and are normally stated to be "subject to contract".

Due diligence

The buyer will begin the process of due diligence (gathering information) after the preliminary agreements (heads of terms, confidentiality agreement, lock-out agreement etc) are settled.

Due diligence usually focuses firstly on important assets and title to those assets. Other information on specialist areas will also be gathered. The due diligence may have an impact on the negotiation process, in particular the purchase price and the warranties and indemnities the buyer will seek to protect itself.

Seller's liabilities post-sale

A seller's liabilities post-sale will be covered in the sale and purchase agreement, generally through warranties and indemnities given to the buyer about the business. These are usually qualified by a disclosure letter and caps on damages.

For a seller, the process of disclosure is one of the most important aspects of the deal, as it can significantly decrease its potential exposure under the warranties. Good management of the process will be critical in ensuring that the information provided to the buyer is accurate and that all relevant matters are included in the disclosure exercise so that the risk of a claim for breach of warranty is reduced as far as possible.

Olswang's Corporate Group will be happy to assist on any proposals in this area.

5.3

What are the principal tax considerations when selling a company in the UK?

On a sale of a company in the UK, the primary concern is the taxation of any gain made on a disposal of the shares. The tax treatment of this disposal will depend on the tax rules which apply in the jurisdiction of the disposing company.

Ordinarily, a UK resident seller will be subject to capital gains tax or corporation tax on chargeable gains. The rate of tax for a company is its marginal rate of corporation tax (between 20% and 23%). Individuals are subject to capital gains tax at a rate of 28%, unless they are liable to income tax at only the basic rate in which case they pay capital gains tax at a lower rate of 18%. "Entrepreneurs' relief" is available to, broadly, officers and employees of companies deriving gains on the disposal of shares or securities in a company which is a "trading company" or a "holding company of a trading group" and in which they have held 5% of the ordinary share capital (with entitlement to 5% of the voting rights) for at least one year preceding the disposal. The relief reduces the effective rate of capital gains tax to 10% on the first £1 million of "qualifying" capital gains. This is a lifetime limit and, once used up, the 28% or 18% rate will apply. Where the seller is a member of a trading group, substantial shareholding relief, referred to at 1.4, may apply to exempt the gain from corporation tax.

As the buyer will acquire the company together with its tax and other liabilities, it is common practice for the buyer to seek protection against such liabilities through tax indemnities and tax warranties. Accordingly, the seller will generally be responsible for any pre-completion tax liabilities of the company.

Other concerns for a seller will be (i) to consider any capital gains tax de-grouping charges (which arise where a company has acquired assets intra-group and leaves the seller's group within six years of the transfer of the relevant asset); some of these gains can be treated as part of the consideration for the sale of the seller's shares and potentially benefit from the substantial shareholding exemption; and (ii) to ensure that, as a commercial matter, so far as possible, the seller gets value for any tax losses within the company (or at least credit for such tax losses in relation to any indemnified pre-completion tax liabilities). Sellers will also, of course, want to consider carefully the availability of some of the reliefs discussed at 1.4 applicable to share disposals, e.g. the EIS capital gains tax exemption and share loss relief.

For more information, please contact the **Olswang Tax Group**.

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About Olswang

OLSWANG

Olswang is a pioneering firm with a distinctive approach to business law and a progressive culture. Thanks to our connected, committed and commercial people, we have become the law firm of choice for leading entrepreneurs and innovators and have established a commanding reputation for truly changing the face of business. Headquartered in London, Olswang has an international presence spanning Belgium, France, Germany, Spain, the UK and Singapore.

We break the mould in legal services. As a leading relationship management firm, we constantly strive to initiate improvements, for our clients and the industries they work in. We align our services to the way our clients think about the future. Above all, we help our clients stay connected, stay informed and stay sharp within their fields. Our people are our business. Working with the very best companies calls for ingenuity, verve and sharp judgment. Our clients rely on our capability, but they value our distinctive personality and culture. We know that if our people reach their potential, then our clients can, too.

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