

Doing business in the UK

A guide to operating a UK business

Table of contents

Introduction	3
Chapter 1 - Business Entities	4
Chapter 2 - Commercial contracts	91
Chapter 3 - Competition law	13
Chapter 4 - Data protection	16
Chapter 5 - Debt finance	19
Chapter 6 - Employment	21
Chapter 7 - Flotations and raising capital	25
Chapter 8 - Intellectual property	27
Chapter 9 - Real estate	31
Chapter 10 - Taxation	33
Chapter 11 - The Bribery Act	37
About Finers Stephens Innocent LLP	38

Introduction

The possible structures for operating a business in the UK are numerous. Whilst many new businesses are structured by incorporating what is known as a private limited company, this is certainly not the only option available. Tax considerations are the most common influencing factor over the form that the ownership of a new business takes, but other issues such as privacy and confidentiality, particularly when it comes to ownership and accounting disclosure, can also have a bearing on how entrepreneurs choose to enter the UK marketplace. The considerations for a pre-existing overseas entity that wants to break into the UK market with a local presence may be different to a new start-up. Invariably, if that overseas entity is inside or outside the EEA this can be a key factor on the preferred business vehicle. For specific sectors there may be other external regulatory issues, for example, professional legal or accounting practices or entities that may have a charitable purpose.

Once the form of ownership of the new business has been settled, then there are the usual commercial matters that any business must attend to:

- financing the business
- sourcing and employing a work force
- acquiring premises
- brand creation and protection
- data protection regulations where employee and customer data may be held
- commencement of commercial arrangements with suppliers and customers, including putting in place trading terms and conditions.

This guide is intended to provide an introduction to doing business in the UK, whether by acquiring an existing business or by setting up a new vehicle, and to some of the key issues that the owner of a new business should consider. Whilst it would be impossible to provide a comprehensive guide on this subject tailored to each individual's circumstances, the intention is that this document will provide an insight into the UK business arena, allowing you to make some informed initial business decisions from the very outset.

At the end of each section we have provided contact details for specialist lawyers. If your enquiry is of a more general nature please contact our Managing Partner, Paul Millett.



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Chapter 1 - Business entities

Corporate bodies

Legal Status

A company is a corporate body recognised in law as having legal personality. A company has the capacity to enter into contracts and undertake liabilities on its own behalf in the same way as any legal person. The Companies Act 2006 is the primary legislation for companies in the UK.

Companies House

Details of a body corporate will be registered at Companies House (the central filing registry for companies in the UK; see www.companieshouse.gov.uk). All companies are required to file details of themselves at Companies House, although the filing requirements will vary according to the type of company that is registered. The register at Companies House is a public register and information can be obtained by any person by paying a small fee.

Types of corporate bodies

There are three types of corporate entities as follows:

- **a company limited by shares**
This is the most common type of company. With this type the liability of the shareholders is limited to the nominal value of shares held by them
- **a company limited by guarantee**
This type of company will have members and not shareholders, whose rights are generally not transferable. These types of companies are commonly used for charities. They do not have a share capital
- **unlimited companies**
Shareholders of these companies have unlimited liability and are most commonly used where their promoters (the person(s) forming it) do not wish to file accounts for the company at Companies House

Terminology of PLCs and Private companies

Companies limited by shares and companies limited by guarantee may be “public limited companies” or “PLCs”. If a company is not a PLC it will be a private company. A PLC must have a minimum share capital of £50,000 (or €57,100) of which a quarter is required to be paid up. A PLC cannot commence trading without a certificate from Companies House, which is obtained upon the PLC satisfying the share capital criteria. A PLC’s statutory obligations will be materially greater than that of a private company, given the increased standing expected of PLCs. A private company may, subject to fulfilling a number of requirements, be re-registered as a PLC.

All UK companies whose shares are publicly traded on an exchange in the UK will be PLCs. It is not normally the case that privately held companies are PLCs although where they are this is normally for marketing reasons.

Liability of Promoters

Promoters are the persons who form a company. Prior to the incorporation of a company any contracts entered into or liability incurred on behalf of the company will be the personal liability of the Promoters.

Directors

A director of a company is any person who occupies the position of a director. It is possible for a person to be regarded as a shadow director even if he does not describe himself as a director. A shadow director is a person in accordance with whose directions or instructions the directors of a company are accustomed to act (but this excludes professional

advisers). Infrequently, the description of director or assistant director is given to a person who does not, in fact, have the status of a director in law, and care must be taken since a person holding himself out to be a director in law may bind the company. Directors may also be employees, but not necessarily so.

Directors of a company owe duties to the company only and so they are not owed to other associated companies (eg holding company or subsidiaries). The duties are set out in the Companies Act 2006 and are broadly speaking fiduciary duties of good faith and honesty and duties of care and skill. Whilst these duties are owed to the company “taken as a whole”, their general purpose is the protection of present and future shareholders and in the case of actual or potential insolvency the company’s creditors. Directors of all companies assume a range of statutory responsibilities. Directors of PLCs have increased statutory responsibilities.

Directors of a company whose shares are publicly traded are subject to greater restraints and wider duties in the course of running their business than directors of an unlisted company. Relevant areas include keeping the market properly informed of developments which could affect the share price, acquisitions and disposals of assets, the allotment of shares and restrictions on dealings in shares. In addition, directors of listed companies may be personally liable (for civil and criminal penalties) for any inaccuracies or misrepresentations in its fundraising documentation.

Constitutional Documents

Articles of Association

The key constitutional document of any company is its Articles of Association. These are its regulations or bye-laws. It is possible for a company to be incorporated adopting articles prescribed by statute (known as the Model Articles, of which there are three versions for (i) private companies limited by shares, (ii) private companies limited by guarantee and (iii) PLCs). Private companies customarily have Articles which adopt the Model Articles but then provide for modifications to deal with the particular requirements of the shareholders/members - eg where shareholders may have different rights to income, return of capital, appointment of directors and voting. Whilst there is nothing to prevent a PLC from doing this it is usual for the Articles of Association of PLCs to exclude all of the Model Articles and be exhaustive in their drafting. Articles of Association of a listed PLC will also need to comply with the applicable rules governing its trading status.

Shareholders Agreement

Whilst not a constitutional document the shareholders of a private company limited by shares may put in place a separate agreement governing certain aspects of the relationship between shareholders, particularly in respect of reserved business matters that may require approval of more than the normal statutory majority. Such a document is private and there is no obligation to file it with the Registrar.

Statutory Books

The statutory books of a company consist of its registers detailing allotments and transfers of shares and details of shareholders, directors, mortgages and directors interests.

The statutory books are ordinarily kept at the registered office of the company and can be inspected by any shareholder. A notice in the prescribed form is required to be filed at Companies House if the statutory registers are kept elsewhere.

Share Capital

As a general principle there is no limit to the number of shares a company may issue, although the directors' may require specific shareholder authority to issue shares depending on the nature of the company. A share can be issued at a premium but not at a discount to its nominal value. The nominal value of a share is the value at which the shares are set from time to time, and can be quite arbitrary (eg £1;1pence).

Certain companies may for historical reasons have a capped authorised share capital (the amount of unissued shares available for issue) which can either be increased by a shareholders' resolution or otherwise removed in accordance with the Companies Act 2006. Such authorised share capital can only be allotted if the Directors of the company have been given power to do so in its Articles of Association or by way of resolution of the shareholders. A private company limited by shares cannot offer its shares to the public. A public company may offer its shares to the public, subject to the rules for doing so (see Chapter 2).

Central to company law is the doctrine of maintenance of share capital. The paid-up share capital of the company forms a permanent fund available to creditors of the company to meet their legitimate claims against the company and it cannot be dissipated nor returned to the shareholders, whether in the guise of dividends or otherwise, without, as a general rule, the Court's approval or, in the case of a private company limited by shares, by way of a solvency statement given by the directors.

Accounts, Accounting Periods and Annual Return

There are rules to determine the length of a company's accounting reference period and changes to it.

A private company has nine months and a public company has six months, from the end of its accounting reference period to file its accounts with Companies House. These may be extended in very limited circumstances and, if not observed, the company is liable to a fine which is strictly enforced. Directors may also find themselves liable in the case of late filing of accounts.

There are detailed rules as to the information to be set out in the accounts of a company and when an audit must be undertaken in respect of a financial year. The reporting obligations on a private company do vary depending on its size (the criteria for which are set out in the Companies Act 2006) such that a small company (ie with a modest turnover, balance sheet and/or work force) can prepare abbreviated accounting information.

Once a year a company must file a Return, known as its Annual Return, with Companies House notifying changes to its directors, company secretary and shareholders. The company is liable to a fine in the case of failure which is also strictly enforced.

Company Names

The names of companies are regulated. The same name cannot be used by more than one company on the Register at Companies House and similar names can be challenged. The use of certain key words, if not prohibited altogether, will need to be justified, and in some cases authorised, before a name will be registered. Once a name has been registered, it remains subject to the law of passing off (see Chapter 6).

Branch Office

A company incorporated outside Great Britain which establishes a place of business here must register at Companies House within one month of doing so. Registration requires the filing of a certified copy of the company's byelaws or constitution and a form setting out the company's directors, secretary and the names and addresses of persons in Great Britain authorised to accept service of process on it here. Changes to this information must also be provided to Companies House. Whilst there are certain relaxations for EEA incorporated entities, an overseas company registered here must also file accounts with the Registrar in the form they would be required to prepare and disclose under their parent law or, if they are not required to disclose such accounting information under their parent law, then they are required to prepare and deliver accounts in accordance with the Companies Act 2006 or International Financial Reporting Standards. Due to the obligation to accept process and to file accounts in the UK, it is often the case that overseas companies try to avoid establishing a place of business here. Often it is preferable to incorporate a UK subsidiary. However, there may be compelling tax reasons for establishing a branch office instead.

There are restrictions on the ability of an overseas company to register with Companies House under its name which is similar to the name requirements for a UK company.

There are also disclosure requirements applicable to overseas companies that carry on business in the UK such that, with limited exceptions, the company's name and country of incorporation must be displayed at each location that the company carries on its business and the address of any person authorised to accept service of documents. The obligations extend to providing certain overseas company information on company correspondence (eg correspondence,

notices, order forms, cheques, receipts, websites), and such obligations are more onerous on entities incorporated outside of the EEA.

Appointing an agent

An alternative for an overseas company to establishing a branch office or incorporating a subsidiary undertaking in the UK is to appoint a local agent. Such arrangement would be contractual, the governing law of which may be determined by the parties.

Partnerships

A partnership is formed where there is a relationship between persons carrying on a business in common with a view to profit. We have three types of partnership:

General Partnerships

Under a general partnership the partners have unlimited liability to creditors of the Partnership on a joint and several basis. Their relationship is governed by the Partnership Act 1890 and by any partnership agreement entered into between the partners. Without a partnership agreement a partnership is said to be “at will” and may be terminated without notice by any of the members. General partnerships have no public filing requirements and their affairs are a matter of privacy amongst the partners. Professional partnerships tend to be general partnerships although increasingly there is a move by them towards adopting limited liability partnership status (see paragraph 2.3 below).

Limited Partnerships

A limited partnership must have at least one general partner and one or more limited partners. General partners will have responsibility for the management of the business and their liability in respect of the partnership will be unlimited. The limited partners must make an investment of capital in the partnership but their liability will be limited to the amount of capital invested, and it is common for limited partners to contribute most of their investment by way of a loan to mitigate risk. Limited partners must be passive investors and cannot take part in the management of the partnership, otherwise they risk being treated as general partners with unlimited liability. Limited partnerships are governed by the Limited Partnerships Act 1907 and by the terms of any partnership agreement.

They must be registered at Companies House otherwise they will be deemed to be general partnerships. They are commonly used as investment vehicles, however difficulties can arise in connection with the management and promotion of these types of partnerships where authorisation or approval may be needed under the Financial Services and Markets Act 2000 (FSMA) since they may constitute Collective Investment Schemes (see below).

Limited Liability Partnerships

This is a form of partnership introduced with effect from April 2001 which is in effect a hybrid between a company and a general or limited partnership. Limited liability partnerships are governed principally by the Limited Liability Partnership Act 2000 and by the terms of any partnership agreement. The partners and the partnership will also be subject to certain provisions of the Insolvency Act 1986, the Financial Services and Markets Act 2000 and the Company Directors Disqualification Act 1986 and have further statutory duties which are generally adapted from the Companies Act 2006, such as the requirement to file annual financial information in relation to the partnership at Companies House which will then be available for public inspection. All of the partners can have their liability limited to a fixed amount whilst at the same time being able to participate in the management of the partnership. However as with general and limited partnerships, they offer a flexible internal structure and will be tax transparent. This means that profits of the partnership will not be subject to corporation tax and partners are taxed on a self-employed basis so that any profits earned by them will not be subject to PAYE or employers' national insurance.

Again limited liability partnerships can constitute Collective Investment Schemes and so may be subject to regulations as to management and promotion (see next page).

Collective investment schemes

The legislation defines these schemes as arrangements where participants collectively invest in property of any kind with a view to receiving profits or income from such property and where the participants do not have day to day control over the management of the property. The establishment, operation, winding up and, depending on certain factors, the management of a scheme are regulated activities within the scope of the legislation and may be carried out only by appropriately authorised persons. There are also restrictions on the promotion of these schemes. There are four types of scheme.

Authorised Unit Trust Schemes

These are schemes authorised by the Financial Services Authority (FSA) and which may be marketed to the public in the UK subject to certain requirements, under which the property is held on trust for the participants. Each scheme will require a manager and a trustee duly authorised and must meet certain other specified requirements.

Open-ended Investment Companies

These are companies with variable capital which meet certain specified requirements including to allow members to redeem their investment for an amount calculated by reference to the value of the property in the scheme. They are also authorised by the FSA and may be marketed to the public in the UK subject to certain requirements.

Recognised Overseas Schemes

These are schemes constituted in another EEA state which, if they satisfy certain requirements, will be “passport” for promotion and management here and schemes which are authorised in a designated country or otherwise individually

recognised by the FSA, all of which may be marketed to the public in the UK subject to certain requirements.

Unregulated Schemes

These include limited partnerships and limited liability partnerships as well as other structures not referred to above including unauthorised unit trust schemes. There are special rules dealing with their promotion, operation and restructuring.

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Chapter 2 - Commercial contracts

Introduction

This chapter covers issues which are relevant when negotiating commercial agreements in the UK:

Commercial Agents

The Commercial Agents (Council Directive) Regulations 1993 apply when an agent for the sale of goods is appointed in the UK, even if the principal is a foreign company. These rules do not apply in the case of a distributor appointment, so it is important to be clear about the nature of the appointment of any representative in the UK territory. The regulations establish a number of rights for the agent, including the right to minimum notice periods for termination (which increase according to the length of the relationship) and, in most cases, a right to receive a payment on termination. Contracts therefore need to be carefully drafted with these statutory rights in mind.

The regulations allow an agent and principal to agree upon whether the termination payment should take be on the basis of "Compensation" or "Indemnity".

The Indemnity basis is supposed to represent the value to the principal of the agent's efforts. The regulations cap the amount payable under an Indemnity to the equivalent of one year's gross commission.

The Compensation basis is supposed to represent the damage to the agent caused by termination. Compensation is not defined as precisely as Indemnity in the regulations and, importantly, there is no cap on the amount payable on the Compensation basis.

Historically the equivalent of two years' earnings was regarded as appropriate for the Compensation basis, unless there was a good reason otherwise. However, more recently the Courts have departed from this rule of thumb, becoming more concerned

with attempting to value the agent's loss of business and goodwill.

Given that liability on the Compensation basis is uncertain and potentially substantial, principals generally prefer the Indemnity basis. However, the Regulations state that the Compensation basis will apply unless there is an agreement to the contrary. It is therefore important that a written agency agreement is entered into to ensure that this issue is properly considered and taken account of in the relationship.

Implied terms in the sale of goods and supply of services

Under UK law, a business entering into a contract involving the sale of goods or supply of services will be subject not only to the express terms included in the contract, but also to certain implied terms as set out by statute. In addition the Court may also be prepared to imply a term into a contract if it is considered necessary to reflect the presumed intention of the contracting parties.

Sale of Goods Act 1979

This Act implies the following terms into contracts for the sale of goods:

- that the goods will be of satisfactory quality - goods will be deemed to be of satisfactory quality if they meet the standards that a reasonable person would expect, taking account of all the relevant circumstances. However, this term will not be implied in respect of any matter specifically drawn to the buyer's attention before the contract was made. This term is implied only where the seller acts in the course of a business
- that the goods will be fit for the purpose for which they were supplied -

this provision applies where the buyer made known to the seller a particular purpose for buying the goods in question before contract. If the goods have only one normal purpose the seller will be automatically taken to know what the purpose is. Again, this term is implied only where the seller acts in the course of a business

- that the bulk of any goods will correspond in quality with any sample - it is implied that the goods actually supplied under the contract will be free from any defect which was not apparent on a reasonable examination of the sample originally provided

Certain implied terms can be excluded when dealing business to business, but not when dealing with consumers (see Limitation of Liability below).

Supply of Goods and Services Act 1982

This Act applies to contracts for the supply of goods, the hire of goods and the supply of services. The terms implied by the Act are:

- that the supplier will carry out a service with reasonable care and skill - the standard of duty has been stated to be that of 'the ordinary skill of an ordinary competent man exercising that particular art'. This term is implied only where the supplier acts in the course of a business and, the Court has held, where the contract does not expressly provide for a subjective standard to be applied
- that the supplier will carry out the service within a reasonable time - this implied term applies only if a time for performance cannot be inferred in any other way. The standard as to what is a 'reasonable' time will be a question of

fact. Again, this term is implied only where the supplier acts in the course of a business and, the Court has held, where the contract does not expressly provide for a subjective standard to be applied

- that the party contracting with the supplier will pay a reasonable charge - this will only apply if it is not otherwise possible to establish the parties' intention as to a fee. What is 'reasonable' will again be a question of fact

Sale and Supply of Goods to Consumers Regulations 2002

These regulations provide further rights for consumers. They state that if the buyer deals as a consumer:

- the circumstances which are taken into account regarding the implied term as to the quality of the goods will include any public statements on the specific characteristics of the goods made about them by the seller in particular in advertising or on labelling
- if the goods do not conform to the contract of sale at the time of delivery the buyer has the right to require the seller to repair or replace the goods, to require the seller to reduce the purchase price of the goods by an appropriate amount or to rescind the contract

Consumer Protection (Distance Selling) Regulations 2000 and the Consumer Protection (Distance Selling) (Amendment) Regulations 2005 (SI 2005/689)

These regulations apply to 'distance selling', ie where goods or services are sold to consumers through the internet, digital television, mail order, telephone or fax. The regulations are not applicable to business to business contracts and there are various exceptions to their application to consumer contracts, such as those involving financial services, land and auctions.

Under these regulations the seller has a duty to provide:

- (a) Prior information - this must include:
- the seller's business name and address
 - a description of the goods or services
 - the price (including all taxes) and arrangements and date for payment, delivery or performance
 - the right to cancel the order
 - the minimum duration of any long-term contract and
 - whether substitute goods will be supplied if the order is unavailable
- (b) Written Confirmation - this must be sent to the consumer unless it has already been provided in writing (for example in a catalogue or advertisement). This confirmation must be provided by the time of delivery or during performance of the contract and must include:
- the requisite prior information (as above)
 - details as to how and when the

consumer may exercise the right to cancel the order, and details as to whether the consumer is required to return the goods

- information as to whether the seller or the consumer is responsible for the costs of returning the goods
- a geographical address to which the consumer may address any complaints and
- details of any guarantees or after-sales services

Other important provisions include:

- Contract Performance - Goods must be delivered, or services provided, within 30 days (beginning the day after the consumer placed the order), unless otherwise agreed with the consumer. The seller cannot oblige the consumer to agree to an extended period
- Cancellation Periods -The consumer must provide the seller with written notice of cancellation of the order within seven days (beginning from the day after that on which the goods were delivered, or in the case of services from the day after the consumer agrees to go ahead with the contract)
- Repayment Period - The consumer must be refunded as soon as possible and within 30 days of the seller receiving written notice of cancellation

Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) (CPR).

These regulations apply to business to consumer practices before, during and after a contract is made and consist of:

- a general prohibition of unfair commercial practices which are deemed unfair if they are not professionally diligent, and materially distort, or are likely materially to distort, the economic behaviour of the average consumer
- prohibitions of misleading and aggressive practices (whether by action or omission) and which cause or are likely to cause the average consumer to take a different decision
- 31 specific commercial practices which are prohibited in all circumstances, such as:
 - claiming to be a signatory to a code of conduct when the trader is not
 - displaying a trust mark, quality mark or equivalent without having obtained the necessary authorization and
 - claiming that a code of conduct has an endorsement from a public or other body which it does not have

Limitation of liability

A business which enters into a contract for the supply of goods or services may wish to exclude or restrict any potential liability arising out of the contract.

In order to rely on a limitation or exemption clause, it is necessary to prove:

- that the clause was a term of the contract
- that the clause covers the loss or damage which has occurred and
- that the clause does not fail under the Unfair Contract Terms Act 1977

The Unfair Contract Terms Act 1977

The Act controls the exclusion or restriction of liability in contract and negligence and applies to any clause purporting to do so. In drafting such a clause it is therefore important to consider what the party's liability would be but for the clause, whether the clause is incorporated as a term, which potential breaches the clause will cover and whether the exclusion/restriction is within the scope of the Act. The extent to which such liability may be excluded or could change the statutory implied terms (referred to above) will depend upon whether the customer is dealing as a business or as a consumer. A party deals as a consumer if he does not enter into the contract in the course of business and the goods are of a type ordinarily supplied for private use or consumption.

(a) Implied terms

The Act provides that no contract term can exclude or restrict the term as to title implied into contracts for the sale or supply of goods by the Sale of Goods Act 1979 or the Supply of Goods and Services

Act 1982. This applies both to consumer and business contracts. A clause excluding or restricting the implied conditions as to description, quality and fitness for purpose will be void against a consumer, and an attempt to exclude these conditions is a criminal offence. These clauses will not be void against a customer who deals in the course of a business but they will be subject to the "Reasonableness Test" described in paragraph (d) below.

(b) Negligence liability

A party relying on a clause which purports to exclude or restrict liability for negligence must be a business. Liability for death or personal injury resulting from negligence can never be excluded or restricted, whether or not the customer deals as a consumer or in the course of business and any such clause will be void. In the case of other loss or damage caused by negligence, such as damage to property, a party may only exclude or restrict its liability for negligence if the term or notice satisfies the Reasonableness Test.

(c) Breach of express terms

Where one party deals as a consumer or on the other party's written standard terms of business, the following contract terms will only be valid if they satisfy the Reasonableness Test:

- clauses which seek to exclude or restrict liability
- clauses which seek to render a contractual performance substantially different from that which was reasonably expected or clauses seeking to allow no performance at all

(d) The Reasonableness Test

A Court will consider the following elements:

- whether the customer knew or ought reasonably to have known of the existence and extent of the term;
- the strength of the bargaining position of the parties;
- whether the customer received an inducement to agree to the term;
- whether the customer had an opportunity of entering into a similar contract with another party but without a term similar to the clause subject to the Reasonableness Test;
- if the term excludes or restricts any relevant liability should a particular condition not be complied with, whether it was reasonable at the time to expect that compliance with the condition would be practicable; and
- whether the goods were manufactured, processed or adapted to the special order of the customer.

(e) Indemnity Clauses

The Act provides that a consumer can only be required to indemnify another person in respect of liability for negligence of the other if the indemnity clause is reasonable.

(f) Guarantees

It is not possible to deprive a consumer of any right against a negligent manufacturer or distributor by anything contained in a written guarantee.

The Unfair Terms in Consumer Contracts Regulations 1999

These regulations apply when the seller is a business and the customer a consumer. They deem unfair, and therefore unenforceable, any contract terms which:

- have not been individually negotiated;
- cause a significant imbalance in the parties' rights, to the consumer's detriment; and
- are contrary to the requirement of good faith (if a term satisfies the requirement of good faith it can be relied upon).

The regulations state that contract terms should be expressed in plain, intelligible language. Any ambiguity will be interpreted in favour of the consumer. If the contract can be performed without the unfair and unenforceable clause, the remainder of the contract will be valid and enforceable.

Retention of title

Depending on the type of product being supplied and the use to which the product is to be put by the customer, it may be possible to reserve to the supplier title to goods which have been delivered until they are paid for by the customer. A reservation of title clause has to be in writing and is normally contained in a supplier's terms of business. In practice, they can be difficult to operate and require careful drafting but when they are successful they can be good security as against all creditors in the case of the customer's insolvency.

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Chapter 3 - Competition law

Introduction

Competition law encompasses two principal aspects: the clearance of mergers and the prohibition of anti-competitive conduct.

Pursuant to the European Union's Merger Regulation (the "ECMR") and the Enterprise Act 2002 (the "Enterprise Act"), European and UK competition authorities have powers to investigate and block certain asset and share acquisitions.

The ban on anti-competitive behaviour has two limbs:

- Article 101(1) of the Treaty on the Functioning of the European Union (the "TFEU") and Chapter I of the UK's Competition Act 1998 (the "Act") prohibit anti-competitive behaviour by businesses and
- Article 102 TFEU and Chapter II of the Act prohibit abuses by dominant companies

Merger Clearances

Prior to completion of an asset or a share purchase (the "Acquisition"), it is necessary to determine which competition authority has jurisdiction to decide whether the Acquisition should proceed.

If certain turnover thresholds are met, the Acquisition will fall within the ECMR, in which case the European Commission (the "EC") has the exclusive power to investigate.

Where the Acquisition does not meet the ECMR thresholds, then it may fall within the jurisdiction of the UK's Office of Fair Trading (the "OFT"). If it does, the OFT is under a duty to refer the merger, which may be anticipated or completed, to the Competition Commission (the "CC") for consideration where it believes that the merger meets the jurisdictional criteria and has resulted, or may be expected to result, in a substantial lessening of competition within any market in the UK for goods or services.

Depending on the circumstances, other national competition authorities, both EU and non-EU, may also have jurisdiction to investigate the Acquisition. This can potentially lead to the need to make multiple applications for clearance.

EC jurisdiction

The ECMR applies to "concentrations" having a "Community dimension." The definition of a concentration is broad and catches cases not only where companies merge fully but also where one company acquires a "decisive influence" over another company. This catches some share purchases and contractual arrangements that will not give the buyer full control over the target.

A concentration will have a "Community dimension" if the following criteria are met:

- the aggregate worldwide turnover of all the parties exceeds €5 billion and
- the aggregate EU-wide and EEA-wide turnover of each of at least two of the parties is more than €250 million and
- the parties do not generate two-thirds of their Community-wide and EEA-wide turnover within one and the same member state.

A concentration that does not meet the above thresholds will still have a Community dimension if:

- the combined aggregate worldwide turnover of all the parties concerned is more than €2.5 billion and
- in each of at least three member states, the combined aggregate turnover of all the parties concerned is more than €100 million and in each of the three member states the aggregate turnover of each of at least two of the parties concerned is more than €25 million and

- the aggregate EU-wide turnover of each of at least two of the parties concerned is more than €100 million and
- the parties do not generate two-thirds or more of their EU-wide turnover within one and the same member state.

Acquisitions falling within the ECMR must be notified to the EC prior to the transaction being implemented and cannot be completed pending clearance. Intentional or negligent failure to notify a concentration prior to its implementation in accordance with the requirements of the ECMR is not a criminal offence but the EC can impose a fine of up to 10% of the aggregate turnover of the undertakings concerned. The validity of any concentration depends on a notification subsequently being made and on the EC taking a favourable decision.

UK jurisdiction

The Enterprise Act provides that an Acquisition falling outside the ECMR may be subject to UK merger control if it is a "relevant merger situation." The latter arises when two or more enterprises (one of which is carried on in the UK or by or under the control of a body corporate incorporated in the UK) cease to be distinct (that is, they are brought under common control or ownership) or there is a proposal that they should do so and if either:

the value of the turnover in the UK of the enterprise being taken over exceeds £70 million and/or

the merger will create or enhance a 25 per cent share of the supply in the UK, or a substantial part of the UK, of any goods or services (the "share of supply test").

In the case of both goods and services, the share of supply test will be satisfied where at least one quarter of the goods or services of any description in the UK, or a substantial part of the UK, will be supplied by one and the same person or to one and the same

person as a result of the merger. The share of supply test is not satisfied if one of the merging parties already supplies or consumes 25 per cent of a particular market unless its share of that market will be increased as a result of the merger.

For an Acquisition that is subject to the UK merger rules, there is no legal requirement to obtain a merger clearance from the OFT in advance of completion. However, the OFT has four months from the date of completion of the Acquisition or the date it became public knowledge, whichever is the later, in which to refer the Acquisition to the CC for a full investigation. Therefore, in cases where there might be competition issues, clearance is usually sought in order to gain legal certainty.

Timetable following notification

Both the ECMR and the UK regime involve a preliminary evaluation followed, if the relevant regulator finds that serious competition issues may result from the Acquisition, by a detailed investigation. Both the EC and OFT expect parties to start discussing their deal with them in advance of filing an application for clearance.

EC

Once the application for clearance has been filed with it, the EC undertakes an initial investigation lasting at least 25 working days from notification. During this period, the EC publishes details of the application in the EU's Official Journal and invites third parties to express their concerns. Before the end of the initial investigation period, the EC is required to decide that:

- it does not have jurisdiction to assess the merger or
- that clearance be granted (which may be conditional on certain things happening, such as not acquiring part of the business in question) or
- a second stage, more detailed investigation should take place.

Second stage investigations must be completed within 90 working days and, at the end of this period, the EC is required to decide whether to grant a clearance (to which the EC may attach conditions or obligations requiring structural changes or imposing behavioural obligations) or prohibit the Acquisition outright.

Should the EC fail to issue a decision in either case, the concentration is deemed to have been cleared.

OFT and CC

The OFT has 20 working days in which to conduct an initial evaluation of the merger. It will then decide whether to:

- refer it to the CC for further investigation or
- accept undertakings in lieu of a reference (in which case the deadline will usually have been extended slightly) or
- let the merger proceed without further investigation.

Following a referral to the CC by OFT, the CC has a statutory period of 24 weeks (subject to extension in some circumstances) to conduct a thorough investigation into and reach its decision.

There are two parts to the CC's investigation. First, it must reach a decision whether or not a substantial lessening of competition will result from the merger. If it finds that this is likely, it must decide whether the competition concerns can be addressed by imposing suitable remedies on the parties. If there are no such remedies available, it must block the Acquisition. If the latter has already completed, divestiture will be ordered and a fire sale may ensue.

In carrying out its investigation, the CC will request written submissions and documents from the parties, obtain third parties' views and request each of the

main parties to attend one or more hearings. The CC has the power to impose fines on parties who fail to supply information when requested to do so. The fines can be up to £20,000 for a one-off failure and up to £5,000 a day for an ongoing breach.

The CC will then publish its provisional findings and the parties and third parties are invited to respond. If relevant, proposed remedies will be published separately and discussed with the parties and interested third parties. The CC's final decision is published in a lengthy report.

Anti-Competitive Behaviour

Anti-competitive agreements

Chapter I of the Act and Article 101 of the TFEU prohibit agreements between two or more undertakings that appreciably prevent, restrict or distort competition, or are intended to do so, and may affect trade in, respectively, the UK and/or EU. Anti-competitive agreements are void and unenforceable either in whole or in part. Parties to them can be fined by the EC or OFT up to 10% of their worldwide turnover.

Agreements (whether informal, formal, written or verbal) which are likely to be prohibited include those which:

- fix purchase or selling prices or any other trading conditions between competitors
- set the resale price of a product or service
- share markets or sources of supply (quotas)
- involve a group boycott of another company.

Whether or not an agreement has an 'appreciable' effect on competition will be determined by, among other factors, the relevant market share of the parties. For the purposes of Article 101, an agreement is unlikely to be considered anti-competitive if

the aggregate market share of the competing parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement or, in the case of non-competing parties, if the aggregate market share of the parties does not exceed 15%. It must, however, not be a price fixing agreement.

Similarly, where Chapter I is concerned, the OFT will not generally impose fines on parties to an otherwise anti-competitive agreement where the aggregate turnover of the parties concerned is under £20 million and provided the agreement does not involve price fixing.

Both Article 101 and the Act provide a legal exemption regime by which anti-competitive agreements are not prohibited, and parties will not be fined, if their arrangement satisfies the conditions set out in the relevant legislative provisions. To qualify the agreement must:

- improve or contribute to economic or technical progress and
- allow consumers a fair share of the benefit and
- not adversely affect competition and
- not include restrictions that are not indispensable to the main object of the agreement.

The EU also has certain so-called block exemption regulations which automatically exempt certain agreements from the prohibition provided they fulfil certain conditions. The most well-known of these are the Vertical Restraints Block Exemption and the Technology Transfer Block Exemption.

If an Acquisition is cleared under the merger clearance rules, it cannot be challenged under the rules banning anti-competitive agreements. However, any restrictions in

supporting agreements (eg, supply agreements) may be caught if they were not cleared as being a necessary part of the merger.

Abuse of a dominant market position

Chapter II of the Act and Article 102 TFEU prohibit a business that holds a dominant position in a market from abusing that position.

A dominant position essentially means that a business is generally able to behave without regard to its competitors and customers in the relevant market. First, the relevant market must be defined correctly to determine whether a dominant position is held and the starting point for this analysis generally requires that a party hold a market share of at least 40%.

Conduct which is prohibited under Chapter II and Article 102 includes:

- refusals to supply
- predatory pricing
- excessive pricing
- discriminatory pricing
- tying/bundling the sale of one product with the dominant product and
- granting loyalty discounts.

Powers of investigation

The EC and OFT have a wide range of powers to investigate businesses if there are reasonable grounds for suspecting that the competition rules have been breached. They can formally request that documents be produced and questions be answered in writing. In cases in which serious breaches of the rules are suspected, they may even carry out “dawn raids” on businesses. The officials may turn up unannounced and search for documents (including electronic

documents) and ask on-the-spot questions on the same. Legally privileged documents cannot be reviewed or taken.

It is a criminal offence, for which the penalty includes imprisonment for up to two years, to obstruct an investigation intentionally, deliberately mislead or give false information or intentionally or recklessly destroy documents.

Other consequences

Under the Enterprise Act 2002, it is a criminal offence for individuals to engage dishonestly in certain “hard-core” breaches of the rules (essentially, engaging in cartel practice). An individual found guilty by a Court can be imprisoned for up to five years and face an unlimited fine.

Company directors whose companies breach competition law may also be subject to director disqualification orders, which prevent them from being involved in the management of a company for up to 15 years.

Third parties adversely affected by an anti-competitive agreement can take action in the Courts against the business concerned to seek a Court order stopping the behaviour and/or damages. They can also, or instead, make a formal complaint to the OFT or EC but this must be detailed and well-reasoned if it is to be considered.

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Chapter 4 - Data protection

Introduction

Data protection laws impose certain standards on the entities (data controllers) who collect and control the use of the personal data relating to individuals (data subjects) regarding the manner in which they collect, use and distribute the data while it is under their control.

What is personal data?

The UK protections only extend to “Personal Data”. Personal data (broadly data relating to identifiable living individuals) is a prime asset of practically every company.

A company may also process “sensitive personal data”. This is personal data which relates to an individual’s racial/ethnic origin, political opinions, religious beliefs, trade union membership, physical/mental health, sex life and criminal record. There are additional compliance requirements for sensitive personal data. Conflicting opinions currently exist whether a photograph of a person constitutes sensitive personal data. In *David Murray v Express Newspapers plc* and another [2007] it was held that if a photograph and the information it contained constituted personal data, it followed that insofar as it revealed the racial or ethnic origin of the data subject, it also consisted of sensitive personal data for the purposes of the Act. Therefore, in the case, the photograph in issue (which was of JK Rowling's son) was sensitive personal data because it revealed his racial or ethnic origin.

Without the collection of personal data, companies would not be able to target their products and services with any degree of accuracy or carry out many of the normal functions of a modern business. However, these commercial realities must now be weighed against the rights of individuals to prevent the unauthorised use and dissemination of their details.

What rules govern personal data?

The law is rapidly evolving to balance these competing concerns and has now been more or less standardised across the European Union. In the UK, the primary piece of relevant legislation is the Data Protection Act 1998 (“the Act”).

The Act sets out the procedure for handling personal data and for registering with the UK Data Protection Commissioner. The Act establishes criminal offences for non compliance.

At the core of the Act are eight “principles” of data protection. These are:-

- Data should be processed fairly and lawfully and may not be processed unless the data controller can satisfy at least one of the conditions for processing set out in the Act
- Data should be obtained only for specified and lawful purposes
- Data should be adequate, relevant and not excessive
- Data should be accurate and, where necessary, kept up to date
- Data should not be kept for longer than necessary for the purpose for which it was processed
- Data should be processed in accordance with the rights of the data subject under the Act
- Appropriate technical and organisational measures should be taken against unauthorised or unlawful processing of data and against accidental loss or damage to data
- Data should not be transferred to any country outside of the European Economic Area unless that country ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data

In June 2009, BSI British Standards launched its first British Standard on personal information management to assist data controllers in putting in place technical and organisation measures that would ensure compliance with the Act. The standard, which was drafted by a panel of experts following a public consultation is not prescriptive but provides a framework for the effective management of personal information. It sets out guidance on matters such as training, risk assessment, and the retention, disposal and disclosure of data.

Transferring personal data out of the EU

For those companies whose business stretches across the Atlantic, or otherwise beyond the EEA, the eighth principle has been of great concern. Transfer of personal data from the EEA to a country without an “adequate level of protection” for the rights and freedoms of data subjects in relation to the processing of personal data, (even if to a subsidiary or parent company) is forbidden. Thus the flow of data to another country from Europe is under threat as the EU may not consider that country to have adequate protection. For example, a US news provider sets up a website, which of course can be seen globally. It collects personal information from registered users of that site which is then transmitted across national borders, analysed and possibly even sold as part of a database. What if some of the registered users are in the UK? Can the US company be pursued by the UK authorities for data protection offences? If the personal data is merely transmitted through the UK on route to the US and is not processed here, there will be no liability. However, if the US company is collecting the data from its UK subsidiary, that is quite a different matter.

Fortunately, there are ways to transfer data outside of the EU lawfully including:

- The data subjects can consent to the transfer; and/or
- The transfer is necessary for:
 - the performance of a contract between the data subject and the data controller or for the taking of steps at the request of the data subject with a view to his entering into a contract with the data controller
 - for the conclusion of a contract between the data controller and a third party which is entered into at the request of the data subject, or is in the interests of the data subject, or for the performance of such a contract
 - reasons of substantial public interest
 - for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings)
 - is necessary for the purpose of obtaining legal advice
 - is otherwise necessary for the purposes of establishing, exercising or defending legal rights
- A US organisation can also sign up to “Safe Harbour” which is a voluntary scheme operated by the US Department of Commerce and recognised by the EU as satisfying the eighth principal of data protection; or
- A US organisation and the EU exporter can enter into a special agreement using standard contractual terms approved by the EU.

The eighth data protection principle applies only to an actual transfer of personal data to

a third country. It does not apply if the data simply passes through a country on the way to a final destination in the European Community, unless some substantive processing takes place in that third country en route. In the context of the electronic transmission of data, this means that even though personal data may be routed through a third country on its journey from the UK to another European Community country, this transit through a non-EU country does not bring the transfer within the scope of the eighth principle.

Data processors

A data processor processes personal data on behalf of a data controller. It is a requirement of the Act that there is a written data processor contract with any third party that processes personal data on behalf of a data controller, for example, an outside payroll organisation or credit card payment centre.

Notification

Unless a business is exempt (and very few are) it will need to notify the Information Commissioner’s Office of its data processing activities before processing. Data controllers are obliged to add their company’s details to a publicly available register and keep those details up to date. Failure to do so is a criminal offence for which company directors can be personally liable.

Fortunately notification is relatively simple and inexpensive. Registration cannot, as yet, be effected online in the UK but the forms may be completed using the standard templates available from the ICO website (<http://www.ico.gov.uk/>) and, once completed online, may be printed off, signed and sent with the appropriate fee to the ICO. A new tiered fee structure came

into force with effect from 1 October 2009; a data controller with an annual turnover of £25.9 million and 250 or more members of staff, and public authorities with 250 or more members of staff, will have to pay initial and annual renewal notification fees of £500. There is an exception for charities and small occupational pension schemes. Other data controllers will continue to pay a £35 fee. Notifications are renewable annually. Each data controller within a corporate group must register as there is no such thing as a parent company registration. The vast majority of data protection prosecutions so far have been for failure to notify but this is not the only offence created by the Act. Indeed, notification is only the beginning of compliance.

Subject access

Data subjects have rights to object to processing and to obtain copies of data processed. This is known as “subject access”. Such requests can be made by employees, job applicants, clients, customers and others about whom personal data is held.

The data subject may, upon making a request in writing, obtain copies of all personal data relating to him/her. Data controllers must comply with requests promptly and, in any event, within 40 days from receipt of the request or from the receipt of the information necessary to enable the data controller to comply with the request. The data controller may not charge a fee in excess of £10 for completing the request. The data subject can request handwritten data stored in a “relevant filing system”, as well as all personal data stored on computer and is additionally entitled to an explanation of why the data is being processed, to whom it will be disclosed and the source of such data.

New legislative changes

Data protection is a rapidly developing area. In 2003 the Privacy and Electronic Communications (EC Directive) Regulations were introduced. These Regulations implement a European Directive which impact greatly on direct marketing.

The Regulations require that “opt-in” prior consent be obtained (eg by asking the data subject to actively tick a box labelled “I consent” rather than merely having the right to “opt-out”) for the sending of direct marketing emails or SMS messages except in certain limited circumstances, for example where there is an existing customer relationship. The Regulations also contain provisions relating to itemised billing and the use of cookies on websites. The regulations governing the use of cookies changed in May 2011. Now, a user or subscriber’s consent is required for a cookie to be stored on their equipment or device. This means that both the use to which the information will be put and how the information can be accessed must be explained clearly. The only type of cookie which is exempt is one which is “strictly necessary” to a service which has been requested by the user or subscriber.

In November 2010, the European Commission issued a Communication to the European Parliament and the Council in which it sets out its approach to revising the EU’s legal framework for protecting personal data

The Communication sets out proposals on how to modernise the EU framework for data protection rules through a series of key objectives. In particular, the Commission wants to:

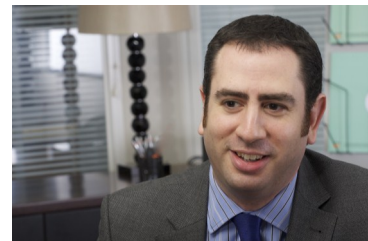
- Strengthen individuals’ rights by increasing transparency for data subjects, enhancing data subject’s

control over their personal data, ensuring informed and free consent and making remedies and sanctions more effective

- Enhancing the single market dimension through greater harmonisation of data protection regulation in the member states
- Revising the data protection rules in the area of police and judicial cooperation
- Ensuring high levels of protection for data transferred outside the EU

The Commission intends to introduce the draft legislation next year.

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Chapter 5 - Debt finance

Types of debt instruments

There are a variety of debt instruments that are commonly used in the UK marketplace. Whilst these will vary on the basis of the types of transactions and the parties involved, those most commonly used are:

Loan agreements or facility letters

The simplest form can be an arrangement between connected parties taking it through to arrangements between unconnected parties on arms lengths' terms. The loan can either be for a specified term or an on demand loan (for example, an overdraft). It should be noted that under English law "on demand" means that the debtor will have a matter of hours in which to pay, ie a reasonable time in which to arrange for the payment rather than a reasonable time in which to raise the money to pay. In relation to loans provided by the large banks in the UK, there is a movement towards choosing agreements based on the Loan Markets Association documents, which is an attempt to provide a reasonable document based on generally agreed terms.

Loan notes/loan stock

These tend to be instruments used by companies to raise funds from specified persons (often investors in that company), on a debt basis rather than equity. There are tax consequences which can arise for the holders of such loan notes/loan stock.

It should be noted that there is no requirement under English law for a contract relating to the provision of the loan to be in writing, unless otherwise specifically required, for example a loan to an individual which is regulated by the Consumer Credit Act 1974.

Types of security

If a debt obligation is to be secured, the following are the main types of security that are commonly used.

Debentures

A debenture (which may also be referred to as a fixed or floating charge) is a document which creates various types of security in one document, commonly over all assets of the debtor.

A "floating charge" is one which floats over the assets of debtor and only attaches to those assets on the occurrence of an event specified in the document. It is not possible for an individual to create a floating charge (other than a very specific case relating to agricultural land). A debenture can be used for a company (whether limited, public or unlimited), a limited liability partnership and a general partner of a limited partnership if that general partner comes within those categories specified above. Floating charges are particularly useful where the assets are required for the debtor to conduct its business eg stock.

Fixed charges

These are charges which are fixed to a particular asset concerned and will normally contain restrictions on what the debtor can do with those assets. For example one type of fixed charge is a legal mortgage over land. However it is possible to grant a fixed charge over other assets of the debtor, including intellectual property rights and cash at bank.

Notwithstanding the fixed charge is expressed to be a fixed charge the Court may find that it is a floating charge if it is shown that the chargeholder did not exert sufficient control over the debtor's ability to deal with that asset.

Set out below are some particular issues that should be considered in relation to taking security over some particular assets.

Debtors

Due to the nature of debtors in the trading business, the need to use the receipts from debtors to run that business it is difficult for a charge holder to establish control or it may actually be commercially unacceptable to exercise that control. The current view in relation to creating a fixed charge over debtors is that the charge holder needs to exert control over the bank account into which the proceeds of those debts are paid. If the account is not controlled by the chargeholder then the charge on debtors would be found to be a floating charge as would the cash itself in the account.

Shares

The general practice is for shares to be charged without having those shares put into the name of the chargeholder, but that charge is protected by a deposit of the certificate representing that share and executed stock transfer form (it is very rare for the chargeholder to have the shares registered in its name as this will give rise to grouping issues). In the UK the shares tend to be of a registered form therefore the certificate is not itself title to the share, the title to the share is evidenced by the entry of the shareholder's name in the register of members. However, when taking security it is imperative to check the register of members to ensure that you have the correct entity granting the security. In addition the chargeholder will expect to receive an executed stock transfer form, with the transferee name left blank. The ability of the chargeholder to deal with the shares and effectively enforce its security will be subject to the constitutional documents of the company whose shares are being charged, so common restrictions allowing directors to refuse to register a transfer of shares and rights of pre-emption should be excluded by amending the articles of association by special resolution.

Rights

It is possible to take security over agreements that the debtor has the benefit of. The form of security is by way of an assignment. However, the chargeholder will only have the same rights as the debtor would have, so the chargeholder will be subject to rights of set off that the counterparty has against the debtor. It must also be checked that the agreement is capable of being assigned, if it is not then consent should be obtained from the counterparty.

It is preferable to require that the debtor gives notice of the assignment to the counterparty, which will govern the priority of any competing assignments of that agreement and to ensure that any payments to be made under the agreement are controlled. It is not possible to assign obligations under an agreement, these can only be transferred with the consent of the party which has the benefit of that obligation.

It is worth bearing in mind that whilst Scotland forms part of the UK it has its own legal system and different ways of constituting security and on that basis should be treated as an overseas jurisdiction.

Guarantees

Whilst not security in the sense of providing security over assets, guarantees are commonly used as a means of providing additional rights against third parties for a debt. The rules concerning guarantees are not set out in statute and are accordingly based upon case law established over a number of years. There are two principles to bear in mind, the first being the guarantee has to be in writing and if it is not it is void and the second is that the Courts will construe a guarantee against the person seeking to rely on it so that if there is any uncertainty in the drafting of the terms of the guarantee, the Court will construe that in favour of the guarantor.

A guarantee sits behind the debt obligation, so if the debt is unenforceable for any reason guarantee will fail. For that reason a well drafted guarantee will include an indemnity, ie a primary obligation to pay the debt which would apply even if the debt were unenforceable.

Registration

There are various requirements to register security, in respect of all UK companies, at Companies House within 21 days of the date of the creation of the security (if it is not registered in that time it is void as against a third party which would include an insolvency officer). In addition if there is land involved that is registered then security over that land would need to be registered at the Land Registry.

Intellectual property rights that have a register, eg trademarks have the capacity to register security.

Financial assistance

For private limited companies prohibited financial assistance for the acquisition of its shares has been abolished. It is still unlawful for public limited companies (whether shares are listed on an exchange or not) to give financial assistance for the acquisition of its shares.

Insolvency and enforcement

This is a complicated area, but the statutory regime is set out in the Insolvency Act 1986 (as amended by the Enterprise Act 2002).

There are various types of enforcement action that can be taken. Prior to the Enterprise Act 2002, the most commonly used method of enforcement was the appointment of an administrative receiver, however that was felt to be too much for the benefit of the chargeholder to the detriment of other creditors (as an administrative receiver would only really take into account the interests of the

person who appointed him).

Under the Enterprise Act 2002 the main insolvency officer that is appointed by holder of fixed and floating charges over the whole or substantially the whole of a company's assets is an administrator (which creates a moratorium restricting the ability of creditors of the company to take action to recover their debts from the company). It is here that the distinction between floating charges and fixed charges becomes important in secured lending. An administrator has to put aside a proportion of realisations from floating charged assets for the benefit of unsecured creditors, which the chargeholder cannot have the benefit of as it has security. This is called the prescribed part and currently the maximum amount that has to be put aside is £600,000.

A holder of a fixed charge only can appoint a receiver to deal with that asset. No moratorium is created and if an administrator is then appointed, the receiver must vacate his office.

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Chapter 6 - Employment

Introduction

For any entity looking to set up or acquire a business or a company in the UK, a basic knowledge of their employees' contractual and statutory rights is a prerequisite for avoiding unnecessary and costly disputes and for generally maintaining workplace morale and productivity. What follows is a basic overview of the contractual and statutory position of UK based employees.

At the outset, while employers in the UK are generally free to employ whom they wish subject to specific restrictions relating to the employment of children and young persons, they will need to ensure that they comply with all necessary immigration requirements and do not discriminate on grounds such as sex, race, nationality, maternity and pregnancy, marital or civil partnership status, gender reassignment, religion or belief, sexual orientation, disability, age or trade union membership. An employer who negligently employs someone who is not entitled to work in the UK can be liable to a civil penalty of up to £10,000, unless they have carried out a number of document checks on that individual before their employment begins.

While there are variations in the legal framework between the four countries of the UK, the cornerstones of the employment relationship between employer and employee in the UK remain the same:

- the express contractual terms agreed between employer and employee, whether orally or in writing
- legislation, both national and derived from the requirements of the European Union, provides a bedrock of minimum rights such as a right to a minimum wage, a statutory right to paid holidays, statutory minimum periods of notice, parental leave entitlements, key

protections from unfair dismissal, discrimination, harassment as well as safeguarding health and safety. Employers, particularly those setting up, also need to be aware of other, more operational, statutory obligations in relation to their employees such as under the Data Protection Act 1998, especially if they are headquartered outside the European Economic Area, payroll obligations (PAYE) to HMRC in relation to deduction of income tax and national insurance from their employees' salaries, as well as employer's liability insurance requirements

- implied terms under common law and
- in some instances collective agreements between an employer and a Trade Union as well as the benefit of other workforce agreements including information and consultation processes under any European or national works council arrangements

Contracts of employment

A contract of employment can come into existence once an individual accepts an offer of employment. Therefore an employer will need to be careful to make sure that any offer is only accepted when it is subject to entering into a fuller written contract or all the terms and conditions in the offer of employment are set out clearly.

Employees must be given a written statement of standard terms and conditions of their employment within 2 months of the commencement of employment. Legislation sets out the basic requirements to be included in the contract and these are the essential commercial and legal requirements, such as the names of the parties, remuneration

details, job title, place of work and holiday, sick pay and pension entitlements for example. As it can be very problematic to vary or introduce new terms of employment during employment, the usual approach in the UK is, however, to ensure that the contract is broader than such basic terms. This is particularly important for senior or key employees, for whom the employer may wish to have extended provisions relating to confidentiality, intellectual property, garden leave, a broader set of duties and reporting obligations, as well as post termination restraints.

It is also usual for an employee handbook to be provided which may set out additional generic contractual terms but is more frequently used to ensure that the employer complies with a range of statutory obligations, for example ranging from the provision of a disciplinary and grievance policy, to the operation of the employees' parental and sick leave entitlements, an equal opportunities statement of practice to general health and safety information. An employer may want to also include its preferred policies in relation to such matters, but not exclusively, as its code of governance or ethics, dress policy, expenses and email and internet usage and monitoring. It is strongly recommended that policies and procedures contained in the employee handbook are stated to be non-contractual, in order to give the employer additional flexibility to change the policy without breaching the employee's contract.

Legislation

Legislation impacts on the contract of employment as described but its greater impact is in preserving and protecting employment and to promote equal treatment by preventing discrimination in certain set areas.

Protection of Employment - Individual

The key statutory protection given to most employees is the requirement, after 51 weeks of service, that their employer must have a fair reason to dismiss them and in doing so follow a fair process, to avoid a finding of unfair dismissal. Employees who believe that they have been unfairly dismissed may bring a claim against their employer in an Employment Tribunal. These Tribunals only hear claims relating to employment matters within certain statutory limitations. Tribunals will consider not only the substance of any claim but also the form and process adopted by the employer. The approach is dependent on interpreting the ACAS Code of Practice, existing case law, the employer's procedures and the individual circumstances of the dismissal. With effect to any dismissals taking place on or after 1 February 2011, an employee who is successful in an unfair dismissal claim can be awarded up to £68,400 by way of compensation for the financial loss suffered as a result of such dismissal, in addition to a much smaller basic award based on length of service. In addition to the anti-discrimination protection set out below, if an employee is dismissed on protected grounds, then the dismissal is automatically unfair, and in the majority of these cases no qualifying period of service is required and compensation is not subject to the cap of £68,400. Dismissal on such protected grounds primarily relate to dismissals in connection with the assertion of various

statutory rights or in connection with the performance of a statutory function, such as dismissals connected with pregnancy, maternity or parental leave, health and safety, being an employee representative on a TUPE transfer or collective redundancy or an employee who is dismissed as a result of making a qualifying protected disclosure ("whistleblowing").

Protection of Employment - Business transfer or Outsourcing

There has been significant development of legislation designed to protect employment in cases where an employer changes as a result of a business acquisition or the transfer of a particular service from one provider to another ("outsourcing"). The Transfer of Undertakings (Protection of Employment) Regulations (known in short as "TUPE") have been in force in the UK following European directives for 30 years. Over recent years the scope of the regulations has been widened by the European Court of Justice and national Courts to cover a range of transfers including assignment of leases, sale and purchase of properties as well as outsourcing contracts. In 2006, TUPE was re-enacted and extended to specifically cover outsourcing arrangements. Relevant employees assigned to a transferring entity will transfer automatically from the outgoing employer to the incoming employer by operation of law. TUPE imposes significant information and consultation requirements that need to be carried out in advance of any transfer, including, in many cases, holding employee representative elections. Other than the change to their employer's identity and occupational pension rights, which are largely excluded, the transferring employees remain entitled to their existing contractual rights including continuity of

service on transfer so that the incoming employer effectively steps into the shoes of the outgoing one. This is a complex area and may involve employers engaged in these activities incurring significant cost especially if they fail to follow the proper information and consultation procedures or otherwise breach the employees' protected rights. A failure to properly inform and consult can lead to an award of 13 weeks gross pay per affected employee. Transfers need to be planned carefully and adequately documented including obtaining appropriate protections from the other party for any breach on their part.

Protection of Employment - Collective Redundancy

If 20 or more employees are to be dismissed for redundancy at one establishment in a 90 day period, an employer must consult with either elected representatives or representatives of an independent trade union (if recognised for collective bargaining purposes) for a minimum of 30 days or, if more than 100 employees are to be dismissed, 90 days, before any dismissal takes effect. The employer must also notify the Secretary of State by submitting a form HR1 detailing the proposed redundancies when it begins its collective consultation process. Failure to do so is a criminal offence.

The format and requirements of collective consultation are complicated and even a procedural failing can lead to a claim being brought against the employer. The maximum award is 90 days gross pay per affected employee for non-compliance, so this can be a very significant sanction, especially when a large workforce is affected.

Equal Opportunities

The Equality Act 2010, much of which came into force on 1 October 2010, brought together and re-stated the previous anti-discrimination legislation in Great Britain. Similar legislation also applies in Northern Ireland. The Equality Act is concerned with outlawing discrimination in respect to certain specified protected characteristics, namely:

- age
- disability
- gender reassignment
- marriage and civil partnership
- pregnancy and maternity
- race
- religion or belief
- sex and
- sexual orientation

The Act also preserves the concept of equal pay for equal work between men and women.

In very simple terms, the Equality Act outlaws direct and indirect discrimination including discrimination by way of association and perception, harassment and victimisation and is extended to the acts of third parties, where they instruct, cause, induce or knowingly help with such unlawful acts. The Act covers the whole employment cycle from recruitment to any post termination acts of victimisation. The ability to positively discriminate is limited, outside of making reasonable adjustments for disabled workers. In practical terms, an employer will need to ensure that they have an equal opportunities policy in place, carry out regular training to ensure compliance with it and deal with any internal complaints of a discriminatory nature fully and sensitively. A successful complaint of discrimination can lead to uncapped compensation being awarded, including an award for injury to feelings. Increasingly, claimants are arguing the mere fact of

bringing a discrimination case will have a detrimental effect on their career and therefore their losses will be even greater due to lost opportunities to find similar alternative work. This is in addition to the reputational damage that such claims can cause for employers.

In addition to the Equality Act, there are further protections for fixed and part-time workers, as well as rights to request flexible working arrangements in certain circumstances.

Common Law

While most terms will expressly set out under the contract, a number of terms have been implied under common law to ensure the business efficacy of the agreement. These include:

- an employee's duty of confidentiality
- an employee's duty to obey lawful and reasonable instructions
- the employer's duty to take reasonable care of the employee's health and safety
- an employee's duty of fidelity (loyalty) to their employer and
- both parties duty to act in a manner that preserves the 'mutual trust and confidence' of the employment relationship

Common law will also be relevant in relation to the enforceability of post termination restraints. The Courts will only enforce such provisions to the extent necessary to protect the employer's legitimate interests, such as confidential information, goodwill and stability of their workforce and only where such restraints are reasonable in terms of their duration, scope and geographical reach.

Agreements with trade unions and workplace consultation and industrial action

Employees have the right to join an independent trade union. Where an employer with at least 21 employees does not recognise a trade union, the union can follow a statutory procedure to obtain recognition. While it is not common to make such a request, once a union is recognised it may have the right to be informed and consulted on a number of issues. The employer and trade union may also enter into collective agreements covering such issues as terms and conditions of employment, conditions of work and disciplinary procedures.

In addition to Trade Union recognition rights, there are also rights for larger workforces to establish European and National Works Councils. A European Works Council requires a workforce of at least 1000 employees, with at least 150 employees in two or more EU member states, provided that a request is made by a sufficient number of employees or their representatives in the appropriate jurisdictions. To request to negotiate an information and consultation arrangement in the UK, commonly referred to as a National Works Council, requires a workforce of just 50 employees in the UK and a request from a minimum of 15 employees. Such requests are not common. Where works councils do exist in a target company or group, both the potential seller and purchaser will need to understand the rights of information and consultation under those arrangements, as they may well affect the timing of any transaction.

Collective disputes are usually resolved through existing consultative and dispute procedures. When threatened with a strike, an employer will need to quickly establish whether the union's actions are lawful. In order to avoid legal action, a trade union must comply with various formalities such as notifying the employer in advance and

carrying out a lawful ballot of its members. If it is not lawful, an employer can apply for an injunction to stop the industrial action.

Conclusion

Employment law is developing in a highly technical way both as the result of new legislation (European and national) and following regular decisions in the Employment Tribunals, the higher appellate Courts and the European Court of Justice. Although there is increasing harmonisation of law throughout the European Union much law is specifically related to each national state.

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Chapter 7 - Flotations and raising capital

Markets

We have four principal markets in the UK:

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

This is the main UK market. Companies must apply to the LSE to have their securities admitted to the Main Market and comply with the Rules of the London Stock Exchange. They must also apply to the FSA to have their securities admitted to the Official List which is governed by the FSA and has its own rules - the "Listing Rules" - published by the UK Listing Authority. There are various admission requirements for listing a company on the Official List which for a listing of equity shares will vary according to whether a company applies for a 'standard' listing or a more onerous 'premium' listing. These include the requirement for a company to have at least 25% of its issued shares in public hands, for a minimum market capitalisation of £700,000 and (for a premium listing only) for 75% of a company's business to have traded for not less than 3 years. Companies will also need to produce a prospectus which complies with the FSA's "Prospectus Rules", which implement the EU Prospectus Directive, in addition to the Listing Rules.

Following listing on the Official List, a company will also have continuing obligations under the Listing Rules, the Rules of the LSE and the FSA's Disclosure Rules and Transparency Rules.

A company admitted to the Main Market may qualify to be included in benchmark indices such as the FTSE UK Index Series.

The Alternative Investment Market (AIM)

AIM was established in 1995 for smaller companies, is the UK's secondary market and is regulated by the LSE. A company applying to have its securities traded on AIM must produce an admission document in accordance with the AIM Rules and, unless certain exemptions apply, the Prospectus Rules. Companies must also retain a nominated adviser and broker, both of which should be approved by the LSE. However companies admitted to AIM will benefit from a more relaxed regulatory regime and there is no minimum trading, market capitalisation or public share ownership admission requirement.

Companies already listed on the nine overseas designated exchanges are able to take advantage of a fast track admission route to AIM by using their existing annual report and accounts as a basis for a dual quotation, and in many cases would not need to produce a separate admission document. This aims to make it considerably easier and faster for overseas-listed companies to access institutional investors in London as well as the wider European capital market. Companies that can take advantage of the fast-track route to AIM are those already listed on the main markets of NASDAQ, NYSE, the Australian Securities Exchange, NYSE Euronext, Deutsche Börse Group, Johannesburg Securities Exchange, NASDAQ OMX Stockholm, Swiss Exchange and TMX Group. Companies using the new route must meet certain criteria including a requirement to have had its securities traded on one of the nine overseas designated exchanges for at least 18 months.

The LSE also operates (i) the Professional Securities Market dedicated to the trading of specialist securities including debt and depositary receipts and (ii) the Specialist Fund Market for the trading of securities in specialist investment funds only, such as hedge funds and private equity companies. Both markets are designed for professional and/or institutional investors.

PLUS Markets plc operates two markets

These markets are independent of the LSE, the PLUS-listed market for companies admitted to the UK Listing Authority's Official List or regulated by an equivalent EU competent authority, and the PLUS-quoted market which is dedicated to unlisted smaller companies.

A company applying to join the PLUS-listed market must comply with the PLUS-listed market Admission and Disclosure Standards and produce an admission document which is compliant with the Listing Rules and, unless certain exemptions apply, the Prospectus Rules.

A company applying to join the PLUS-quoted market must comply with the PLUS Rules for Issuers and, unless certain exemptions apply, the Prospectus Rules. There is no minimum trading, market capitalisation or public share ownership admission requirement and the fees for joining this market are lower than AIM.

Regulatory environment

A company looking to raise capital in the UK will in particular need to be aware of the following:

Regulated Activities

Arranging deals in investments by way of a business carried on in the UK is an activity which is regulated by the Financial Services and Markets Act 2000 (FSMA). A person carrying on such activity (subject to certain exceptions) needs to be authorised to conduct investment business by the Financial Services Authority. A person who arranges deals in investments in the UK when not authorised commits a criminal offence and any contract made with or through an unauthorised person is unenforceable and any funds raised will be returnable.

Prospectus Requirements

An offer for the sale of securities to the public in the UK may subject to certain exemptions require a prospectus approved by the FSA (or in certain circumstances an equivalent authority) to be published by the issuing company and filed at Companies House. The exemptions are broadly where an offer is made to no more than 150 persons, to persons whose business is to purchase or manage investments or where the total consideration of the offer is less than €5m. The rules for the contents of a prospectus are found in the Prospectus Rules and the Listing Rules.

Under the EU Prospectus Directive, a prospectus of a company registered in the EEA which is approved by that company's competent authority may be used in respect of an offer in another member state such as the UK and in certain circumstances a prospectus approved by a non-EEA competent authority may suffice.

Financial Promotion

Any offering document or information memorandum (or any oral offer or website containing relevant information) is likely to be a financial promotion under the FSMA. Unless one of a number of exemptions can be applied, a financial promotion must be approved by a person authorised to conduct investment business by the FSA before it may be circulated. Failure to do so is a criminal offence and any funds raised will be returnable.

Market Requirements

A company which is planning for its securities to be listed or traded on a market in the UK (or overseas) at the time of its fundraising will need to comply with the documentation requirements of the relevant market.

Overseas Law

It is common for fundraisings to be made over several jurisdictions. The laws of each jurisdiction will be different and legal advice will need to be sought from local lawyers on the applicable law.

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Chapter 8 - Intellectual property

Introduction

UK intellectual property law allows overseas intellectual property rights owners to take advantage of the multiplicity of international treaties (such as the Universal Copyright Convention and the Berne Convention) of which the UK and many other countries are signatories. The UK has a highly evolved intellectual property regime which includes the key intellectual property rights set out below. This brief guide is a general introduction and is not intended to be a comprehensive review of the UK's intellectual property regime or of the requirements for obtaining, protecting or enforcing these rights.

Licences and assignments

With the exception of Moral Rights (discussed below), intellectual property rights can be assigned (transferred absolutely) or licensed. Licensing is a flexible tool which enables a rights owner to grant specific or broad rights to others to commercially exploit intellectual property rights, often in exchange for royalty payments.

Licences do not have to be in writing, they can be oral or implied (though this can of course lead to disputes over the terms of the licence). Assignments do have to be in writing, but despite this rule, there have been cases where the Court has deemed IP to have been assigned even without a written agreement.

Compulsory Licensing

There are compulsory licensing schemes for certain patents (eg for flu vaccines during a pandemic). Further, a failure to exploit a patent can leave it susceptible to an application for a compulsory licence (an application for which may be filed in the UK after the expiry of three years following the grant of the patent), although in practice these are rarely granted in the UK.

There are also a number of circumstances where copyright works are available under compulsory licences including, for example, the use of a sound recording in a broadcast.

Compulsory licences are also available for UK unregistered design rights to allow reproduction of articles made to the design during the last five years of the registration.

Enforcement and remedies

In civil matters, a successful claimant is usually entitled to a range of remedies, including an injunction to prevent further sales of the infringement, delivery up or destruction of all the infringing items and damages. In a criminal case, the maximum penalty for criminal infringement of IP rights is 10 years imprisonment.

Trading Standards Officers have a duty to bring criminal proceedings against rogue traders and infringing goods can be seized at the UK border by Customs Officers. Further, civil and criminal proceedings can be brought by rights holders in the UK Courts. Private criminal prosecutions may be commenced by rights holders and, provided those proceedings are conducted properly, the State will usually reimburse the legal costs.

Damages

In a civil infringement case the traditional starting point for damages is to either elect for an account of the defendant's profits or for damages based on a notional royalty. However, the Intellectual Property (Enforcement, etc) Regulations 2006 now provide that, when awarding damages against a person who knowingly infringes an IP right, all appropriate aspects shall be considered including the claimant's loss of profits, unfair profits which have accrued to the defendant, and non-economic

factors such as the moral prejudice caused to the claimant. In addition to such damages, a Court may award additional damages for flagrancy.

Types of intellectual property

Copyright

Copyright can subsist in an original literary, musical, dramatic or artistic work (known as "LDMA" works) and also subsists in other works such as sound recordings, films and typographical layouts. There is no official registration process for copyright works and protection arises automatically so long as the basic criteria are met, such as the requirement that the work be original (meaning that the work has not be copied and is the result of independent effort). The term of protection varies according to when the work was created and the type of copyright work but for LDMA works the term of protection is generally the life of the creator (known as an "author" of copyright, whether or not the creation is literary) plus an additional 70 years from the end of the calendar year in which the author dies.

Moral rights

Authors of copyright works have additional statutory rights known as "moral rights". An author's moral rights include the right:

to be identified as the author of the work;
to object to derogatory treatment of the work; and

to object to false attribution of authorship.

Unlike copyright, moral rights cannot be assigned during the author's lifetime but, in the UK, (unlike in continental Europe from where these rights are derived) they can be waived.

In 2006 moral rights were extended to apply to performers as well as authors. Also in that year a new moral right, the "Resale Right" was introduced to grant artists a share of the proceeds when their work is resold on the professional art market. The Resale Right currently only applies to living artists but will be extended to the estates of deceased artists in 2012.

Trade marks

Registered trade marks guarantee the origin of goods and services. In the UK trade marks can be registered at the Intellectual Property Office (IPO). A UK trade mark falls due for renewal on the tenth anniversary of its filing date, and every 10 years after that date. It is also possible to register a Community trade mark at the Office for Harmonisation of Internal Markets (OHIM) in Alicante, Spain which, for a relatively small fee, offers protection in all member states of the EU including the UK. Furthermore, a trade mark application submitted to the UK IPO or to OHIM under the Madrid Protocol can then be filed in many jurisdictions worldwide.

Passing off

The tort of passing off governs the unauthorised use of unregistered marks and applies where a person trades off the goodwill of another. In order to demonstrate that passing off has occurred, three principal factors must be present:

the claimant must have existing goodwill in the relevant market;

there must have been a misrepresentation by the defendant leading or likely to lead the consumers to believe that the goods or services offered by him are the goods or services of the claimant; and
the claimant must have suffered damage.

Passing off does not therefore provide a monopoly right as would be available with the registered trade mark, where infringement can occur without having to demonstrate that these factors are present.

As with actions for infringement of registered trade marks, innocence is not a defence to an action for passing off,

though the claimant must show that there has been a misrepresentation which is likely to cause confusion, as discussed above.

False endorsement

There is no such thing as a right of personality in the UK but passing off has been extended towards creating a law of this nature. In 2003, the racing driver Eddie Irvine sued the radio station Talk Sport in relation to the appearance of his image in one of their advertisements. The Court held that it was passing off to imply this kind of celebrity endorsement. Prior to this case it was thought that passing off could not apply as racing drivers are not in the business of running radio stations, so have no relevant goodwill. However, in this landmark ruling the Court acknowledged that racing drivers (and by extension celebrities generally) are trading entities in the field of providing personal endorsements. The Court of Appeal confirmed the decision and significantly increased the damages initially awarded in the case. Further, the rapid development of the right of privacy in the UK since the introduction of the Human Rights Act in 1998 could give rise to an additional cause of action in a false endorsement claim.

Database rights

Since 1 January 1998 databases have been protectable not only by copyright but also by a specific database right to protect the investment needed to obtain, verify and present the contents of a database.

In order to obtain protection under the Database Regulations a database must be original by reason of the selection or arrangement of its contents as the authors own intellectual creation. This is a very different test of originality to that used for a copyright work (which, broadly, is merely whether the author has expended his/her

own skill and labour on the project). There must also have been "...a substantial investment in obtaining, verifying or presenting the contents of the database". In a recent case involving William Hill the European Court of Justice (ECJ) interpreted what is meant by the words "investment in obtaining the contents". It held that the phrase referred to resources which were used to find existing independently-created materials and to collect them as a database. It did not extend to the resources used to create the materials which sat within the database.

Database right is infringed if a person extracts or re-utilises all or a substantial part of the contents of the database without the owner's permission. In the William Hill case, it was decided that the concept of "extracting" was a broad one, and that a manual re-copying of a protected database (as opposed to mechanical copying such as downloading or photocopying) could infringe the database right. This remained so even if the alleged infringer had adapted the contents of the database during the process of re-copying.

The database right lasts for 15 years from the end of the calendar year in which the database was completed or, if the database is made available to the public before the end of that period, 15 years from the end of the calendar year in which it was published. However, the term of protection can be complicated by the date at which the database was first created (due to the transitional provisions in the Regulations) and the extent to which the database has been updated during its lifetime.

Design rights

There are now effectively four parallel systems for the protection of designs for products in the UK (five if you include copyright).

Firstly, UK unregistered design rights protect the shape and configuration of an original article but not its surface decoration. Unregistered design right protection also excludes designs which are constructed in order to fit with existing articles (the so called "spare part" exception). Unregistered design rights last for the shorter of either 15 years from the end of the calendar year in which the design was created or 10 years from the end of the calendar year in which articles made to the design were made available for sale or hire.

Secondly, there is an additional unregistered design system available in the UK. This is the unregistered Community design right which is a right that applies across the European Union and lasts for 3 years from the date that the design is deemed to have been made available to the public. Unregistered community designs must be novel and have individual character but features of a design which are solely dictated by the product's technical function are excluded. Although the European unregistered design right only lasts a mere three years, it can apply to the material or ornamentation of a product (so would include surface decorations which are excluded under the UK unregistered design right). Even graphical symbols eg computer icons, can be protected by the European unregistered design right.

In addition to unregistered design rights, there are also two parallel registered design systems available in the UK and

European Community. In the UK, a design must have eye appeal if it is to be registered. A designer who discloses his design has a 12-month period in which to apply for registration of the design. Registrable designs cover the appearance of the whole or part of the product resulting from its features of, in particular, the lines, colours, shape, texture and material of the product. Registered designs can therefore cover surface decoration. In order to qualify for registration, the design must be new and have individual character. It is not possible to register a design in the UK which is concerned only with how a product works or a part of a complex product that is not visible in normal use.

A UK registered design right has a term of five years from the date of grant, which can be renewed by four further periods of five years each on the payment of renewal fees, giving a maximum period of protection of 25 years. Unlike trade mark protection, the term of registered design protection is not renewable beyond the 25 year mark. The procedure for registration is relatively low-cost and quick, making it an attractive form of protection.

European Community registered designs, like UK registered designs, last for a maximum of 25 years from filing, but criteria for registration are broader, for example parts of complex products are registrable and there is no requirement for the design to have an aesthetic quality.

Patents

Patents are used to obtain a monopoly right to protect an invention. As well as the availability of UK patent protection, the UK is also signatory to the European Patent Convention (EPC) which seeks to provide a single route to the grant of a European patent, which then operates as a collection of national patent rights in each of the member countries elected by the applicant.

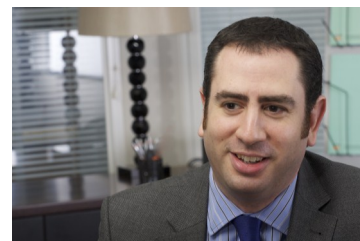
To obtain a patent in the UK the invention must be new, must involve an inventive step, and must be capable of industrial application. However, certain kinds of inventions are not patentable, such as methods of doing business and aesthetic works (the latter being protected by copyright instead). Perhaps most significantly, computer programmes are not generally capable of obtaining patent protection, though they may be overseas. However, in recent years some patents for software have been granted, where the software has been shown to have a "technical effect" (for example increasing the memory available to a computer). Those interested in obtaining a patent relating to software should therefore take specialist advice from a patent agent.

Patents in the UK, as elsewhere in the European Community, have a duration of 20 years from their filing date, subject to payment of renewal fees. In the European Community, there is also now provision for granting supplementary protection certificates (SPCs) in relation to patents for medicinal and plant protection products; in respect of those products which have received a marketing authorisation, SPCs have the effect of extending the related patents for up to five years after expiry of the relevant patent or 15 years from the first such marketing authorisation in the EU, whichever is less.

If a third party is infringing a registered patent, it will be necessary to commence legal proceedings. Usually it will only be possible to stop infringement after the case has got to trial (which can take some time) and the infringer can continue infringing in the meantime. If damages at trial cannot compensate for continuing infringement pending full trial, interim injunctions pending full trial may be available.

Due to the time issues on bringing infringement proceedings, the Patents Act 2004 introduced a procedure whereby the IPO can be requested by anyone to give an official, but not binding, opinion on the issues of validity or infringement. This procedure was put into place in the hope that it would help potential claimants to gauge whether the potential costs of litigation would be merited in a particular case.

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Chapter 9 - Real estate

Types of ownership

In England and Wales, there are two ways of holding real estate: Freehold and Leasehold. Owners of the freehold interest in land own the land outright. Owners of a leasehold interest (a “tenant”) have the exclusive right to use the land granted to them by a lease for a given length of time. A tenant may either take a new lease from a freeholder, having negotiated the terms of the lease with the freeholder, or may take an assignment of the remaining term of an existing lease subject to the terms already negotiated. It is also possible for a leasehold interest to be granted from another leasehold interest, this is known as an underlease. The length of an underlease must be shorter than the leasehold interest from which it is granted and will be subject to any terms and restrictions in it.

In the case of a unit within a larger property, such as an office in an office block, it is possible only to own a leasehold interest of the office, with a freeholder (a “landlord”) owning the freehold of the building. The tenant pays rent to the landlord, along with service charges for insuring, repairing and servicing the building, depending on the terms of the lease. The amount of rent is dependent in part upon the length of the lease. A longer lease, say of 999 years, may be at a low rent (or “ground rent”) with the tenant paying a premium for the lease up front, whereas a lease of 5 or 10 years may have no premium and a higher rent (or “rack rent”).

There is a third category of ownership called Commonhold. This type of ownership is suitable for units within a larger development and is an alternative to owning a leasehold interest. Commonhold combines freehold ownership of individual units (for example flats or offices) and freehold ownership of the common parts

(for example the roof and staircases in the building) by a limited company (a “Commonhold Association”). Membership of the Commonhold Association is limited to the unit owners. There are no restrictions on the owner of a commonhold unit selling their interest and they can also lease their units, subject to legislative restrictions. Commonhold ownership is suitable for residential, commercial and mixed use developments but it is rarely used and if it is used, it is usually in residential developments.

There are no restrictions on foreign individuals or companies buying or leasing real estate. Foreign companies must prove their legal existence and that they have the power to buy or lease real estate. A seller would also normally want confirmation that the transfer deed or lease has been validly signed. A Legal Opinion from a lawyer in the buyer’s country will deal with these requirements.

Lease terms

A lease will define a number of aspects of the landlord and tenant relationship, including:

- the length of time (“the term”) for which a property is held by the tenant
- the extent of the property (including whether the tenant is taking the structure of the property or just the internal area)
- the rent payable and provisions for review of rent
- the rights granted to the tenant to enable them to use the property
- the tenants obligations (such as repair)
- rights reserved to the landlord
- the landlord’s obligations (such as insuring the building)

- whether the parties may terminate the lease at any time (a “break clause”) and
- whether the lease is contracted out of statutory protection under the Landlord and Tenant Act 1954 (see below)

A lease will also contain any requirements for Landlords’ consent with regard to assigning or underletting the property, or altering the property (for example, for fitting out the property prior to moving in).

Procedure for taking an existing lease of an office

As mentioned above an existing lease of an office may be acquired by either taking an assignment of the remaining term of an existing lease subject to the terms already negotiated or by the grant of an underlease.

When taking an underlease of an office, shop or other property, depending on the terms of the existing lease, consent may be required from the landlord before the underlease is granted. This consent is often recorded in a document known as a licence to underlet.

It is also common for a licence to be required from the landlord and head landlord for any works to be carried out to the property, such as fitting out works prior to taking occupation. A tenant may therefore have to negotiate an underlease, a licence to underlet and a licence for alterations, as well as considering the terms of the head lease, before taking an underlease of an office or shop premises.

Landlord and Tenant Act 1954

With business leases, a tenant may be able to stay in the property at the end of the term of the lease by asking for a renewal lease. This depends on whether the lease was “contracted out” of the security of tenure provisions of the Landlord and Tenant Act 1954 (the “Act”), (although certain leases are not subject to the Act, for example, those of less than six months) or not. This is of significance to purchasers of investment property who may find that their tenants are able to stay in the property at the end of their leases. A landlord whose lease comes within the Act will only be able to require the tenant to leave the property at the end of the term of the lease if there are certain grounds for doing so, as set out in the Act.

For a company looking for office premises for short term lets of, for example, one to five years, it is common for landlords to negotiate an exclusion from the provisions of the Act, and for the lease to be “contracted out”. Contracting out is done by the landlord serving a notice on the tenant stating that the lease is to be contracted out of the Act. The Tenant then makes a statutory declaration (a declaration made before an English or Welsh solicitor) confirming that they understand that they will not have a right to remain in the property at the end of the term of the lease

Registration - freehold and leasehold

All freehold land in England and Wales is now subject to compulsory registration at the Land Registry and certain leases must also be registered. The register is in three parts: one giving the title defining each parcel of land, one showing the proprietorship of the land, and one showing any charges (ie, lender’s security), and other

third party rights in relation to the land.

Stamp Duty Land Tax

Most acquisitions of interests in real estate are subject to stamp duty land tax, at rates between 1% to 4% (commercial property) and 1% to 5% (residential property) of the purchase price of the property. The level of tax depends on the purchase price and no tax will be payable on acquisitions of commercial property for a price of less than £150,000 or residential property for a price of less than £125,000.

There are thresholds for each rate of tax and the rate of tax applies to the entire purchase price rather than the portion of the price in each tax band. For instance, the tax on a freehold property purchased for £250,000 will be 1% or £2,500: for a property costing £250,001 the tax will be 3% or approximately £7,500 - an additional £5,000 tax for £1 difference in price. The implications of stamp duty land tax are therefore of importance when negotiating the price of the property.

Leases of real property are charged at 1% on the total rent payable over the life of the lease less a discount of 3.5% pa (but not including the first £150,000 of discounted rent). This calculation is complex and advice should always be sought.

Certain transactions between associated companies are exempt.

Stamp Duty Land Tax must be paid to HMRC by way of a self-assessment tax return within 30 days of completion of the relevant property transaction.

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Chapter 10 - Taxation

UK Corporation Tax

Profits subject to Corporation Tax

A UK resident company will be subject to UK corporation tax on its worldwide profits including capital gains.

An overseas company carrying on a trade in the UK through a branch will be liable to UK corporation tax on all income profits directly or indirectly attributable to the branch and on any capital gains realised from the disposal of chargeable assets used or held for the purposes of the branch. A branch will not normally be subject to UK tax on any profits not attributable to the branch.

If there is a Double Tax Treaty between the UK and the jurisdiction in which the overseas company is resident then the overseas company will generally not be subject to a charge to corporation tax unless it has a "permanent establishment" (as defined in the relevant Treaty) in the UK. A branch operated from either owned or leased premises in the UK will usually be held to be a "permanent establishment".

Under current law, a company will be resident in the UK (and hence subject to UK corporation tax on its worldwide income and capital gains) if it is incorporated in the UK or its central management and control is exercised in the UK. The place at which central management and control is exercised is usually the place where the board of directors normally meets although in exceptional circumstances HM Revenue & Customs (HMRC) is prepared to look beyond the board meetings to the actual day-to-day control of the company, if necessary at control by a dominant shareholder if the directors are accustomed to acting in accordance with his or her instructions.

A company may be a dual-resident company if, for example, it is incorporated overseas but has its central management and control in the UK. In that case, a relevant Double

Tax Treaty may award residence to one of the two relevant jurisdictions. If such a Treaty awards residence to another country, the company automatically will not be resident in the UK.

Rates of tax

A UK resident subsidiary company and a branch will each pay UK corporation tax on their profits. The rates of corporation tax are normally fixed by Parliament annually and the current rates are:

Year ended	2011	2012
31 March		
Standard rate	28%	26%*
Small profit rate	21%	20%

The small profits rate is available for profits of a UK company of not more than £300,000 per annum. A sliding marginal rate is applied for profits in excess of £300,000 but less than £1,500,000 per annum, at which point the standard rate is reached.

The above profit limits are proportionately reduced by reference to the number of associated companies (whether UK or foreign) of the UK company (or the company operating the branch). This reduction is effected by dividing the lower and upper limits by the total number of associated companies, including the company charged to UK tax. For example, in the case of a US company with three existing subsidiaries which forms a new UK subsidiary, the relevant limits will be divided by five.

Strictly speaking, the small profits rate of

corporation tax should not be available to branch operations, but the rate will be applied by concession if a relevant Double Tax Treaty contains a non-discrimination article.

Interest

Interest on loans from the parent company to a UK subsidiary company will be regarded as a distribution (ie a deemed dividend) unless the UK domestic legislation is overridden by a double tax treaty. Treaties only override to the extent that the interest is on arm's length terms and reasonable. The UK does not have a specific "thin-capitalisation" rule in its transfer pricing legislation (which is closely modelled on that of the US) but HMRC has been known to take the view that a ratio of debt to equity of more than 1:1 is not reasonable. However, in assessing whether or not a debt is on favoured terms, it is necessary to consider the interest rate and other terms of the loan as well as the debt/equity ratio.

Interest deduction is subject to an overall group "cap" on interest deductibility. The legislation is horrendously complex but is intended to ensure that the deduction for interest paid by the UK subsidiary does not exceed the amount of external interest paid by the world-wide group (ie it prevents the manufacture of entirely intra-group interest deduction).

A distribution is not a deductible expense in calculating a company's profit for corporation tax purposes.

Since, by definition, a branch is part of the same legal entity as its "parent", there can normally be no deduction of "interest" payments from the branch to its "parent".

Special equity rule for a branch

For transfer pricing purposes, rules ensure that a UK branch of an overseas company is to be treated as having the amount of equity share capital that it would need if it was a separate company operating in the UK in the same or similar conditions and circumstances as the branch. In particular, the branch is assumed to have the same credit rating as the overseas company of which the branch forms part. This effectively limits the amount of third party (eg bank) debt capacity the branch is treated as having and hence the interest deduction it may be able to claim for tax purposes.

Inter-Company trading

It is, generally speaking, easier to control the amount of profit subject to UK tax through the use of a subsidiary company. It must be emphasised, however, that HMRC has power to re-allocate profit on transactions between associated parties, and although use can be made of trade mark royalties, technical service fees, pricing policies etc., it is essential that any such payments be on an arm's length basis.

Initial losses and loss carry forward

One of the main tax advantages of using a branch rather than a subsidiary company may occur when significant start-up losses are anticipated. If a subsidiary is used, those losses usually will not be utilised until the subsidiary becomes profitable. However, if the business is commenced through a branch of an overseas company, the initial start-up expenses and all other losses may be eligible for tax relief in the home state of the overseas company.

A business which is initially started as a branch of an overseas company can subsequently be transferred to a separate UK subsidiary. Provided that this transfer is

properly carried out, UK tax law will allow unused losses incurred to be carried forward indefinitely against the subsidiary's UK taxable profits arising from the transferred business.

Capital Allowances

Both a branch and a subsidiary company are entitled to capital (ie depreciation) allowances in calculating their profits for UK tax purposes.

The depreciation of capital assets calculated for accounting purposes is not a deductible in assessing profits subject to corporation tax. However, a UK company or a branch may be entitled to a specific statutory allowance ("capital allowances") in respect of expenditure on certain capital assets. Capital allowances are usually treated as trading expenses and deducted from profits. Capital allowances apply to various assets including plant and machinery, patents and know-how, scientific research expenditure and ships. The rules relating to available capital allowances vary for each type of asset.

Indirect taxation

Introduction

The UK has a system of indirect taxation encompassing transfer duties (stamp duty/stamp duty land tax) and value added tax.

Stamp duty

Stamp duty is a tax payable on transfers of company shares and certain securities. The duty is paid by the purchaser.

Stamp Duty Land Tax is separately charged on transfers and leases of real property. See Chapter 9 Paragraph 6 for further details.

Value added tax (VAT)

VAT must be charged by a “taxable person” on the consideration for taxable supplies of goods or services made by him in the UK in the course of his business. A trader is a “taxable person” if his taxable supplies exceed the current rate of £73,000 per annum and must register as such with HMRC.

A “taxable supply” is any supply of goods or services other than an exempt supply (principally certain supplies of land or financial services) and tax is charged at:

- zero rate on certain basic supplies such as food
- 5% on domestic gas and electricity
- 20% on any other taxable supply

A registered trader must make a return (usually quarterly) to HMRC recording the VAT charged to customers and the VAT incurred on expenses. The net difference is paid to, or repayable by, HMRC, although not all VAT paid can be taken into account if some exempt supplies are made by the trader.

There are substantial penalties for:

- registering as a taxable trader later than the official date for registration (usually but not necessarily 30 days after first

exceeding the limit of taxable supplies of £73,000 in any 12 month period)

- making late returns to HMRC (these are due 30 days after the end of the relevant quarter)
- errors in returns

The penalties may not be charged if the trader has a “reasonable excuse” which is defined in very narrow terms and a penalty can be reduced by HMRC or the Appeal Tribunal if there are mitigating factors. Advice should be sought in all circumstances.

PAYE and National Insurance Contributions

Income tax due on employees' salaries is collected by the employer and accounted for to HMRC under a scheme known as Pay As You Earn (PAYE). Reporting and accounting to HMRC is usually dealt with monthly. Each employee is allocated a code number which corresponds with tables supplied by HMRC and which enable an employer to calculate and deduct exactly the right amount of income tax. Whilst HMRC still issues the tables in paper form if requested, most employers use computer software or third party bureau to deal with PAYE obligations.

Generally, all employers and employees in the UK are required to make national insurance contributions which the government uses for the provision of certain state benefits (eg basic pensions, medical care and unemployment benefits). Employees normally make a contribution, at the present time, of 12% of their earnings between £7,228 and £42,484 per annum and 1% of all earnings thereafter. An employer must make a contribution of 13.8% of all earnings over £5,720 per annum. For the purpose of employer's contributions, earnings includes the value of cars and most other non-cash benefits provided to employees. The rates may be lower if employees are members of a minimum standard pension scheme provided by the employer and are contracted out of the full State pension benefit. These national insurance contributions are accounted for under the PAYE system together with the income tax due on salaries.

The national insurance contributions position of individuals coming to the UK to work is complex, can be subject to bilateral agreements between countries, and advice should always be sought.

Tax is a complex area and the structure of transactions is often dependent on the tax consequences. Accordingly, we strongly advise that a tax specialist is consulted very early on.

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Chapter 11 - The Bribery Act

The Bribery Act finally came into force on 1 July 2011 which consolidate the antiquated English bribery laws. It also created two new offences, bribery of foreign public officials (Section 6) and failure of commercial organisations to prevent bribery (Section 7). The introduction of the Bribery Act is an important plank in ensuring the lawful conduct of business, which contrary to some misguided commentators does not put UK plc at a competitive disadvantage. It cannot be in the interests of any business (or the stakeholders) to have to pay unlawful sums to obtain business ie to pay bribes. The Act helps to create a level playing field so that business competes on a proper and lawful basis.

Failure of commercial organisations to prevent bribery

The Section 7 offence can be committed by a commercial organisation that carries on business in whole or in part in the UK if it fails to prevent a person associated with it from bribing another person on its behalf either in the UK or abroad.

An associated person is defined by Section 8 of the Act as a person who provides services for or on behalf of the commercial organisation and includes employees, agents or subsidiaries.

The only defence to the Section 7 offence is that the commercial organisation had adequate procedures in place designed to prevent persons associated with it from bribing another. This will have to be proved by the defendant organisation on the balance of probabilities.

Hence, a commercial organisation could face an unlimited fine for acts for bribery carried on abroad, and without its knowledge or intention (although the person or subsidiary doing the bribing must intend to obtain or retain business or an advantage in the conduct of business for the commercial organisation), unless it has

adequate procedures in place to prevent bribery.

Importantly, facilitation payments are not exempt from the legislation (unlike in the US) and although the joint Serious Fraud Office (SFO) /Director of Public Prosecutions' (DPP) prosecution guidance indicates that it is not targeting one-off payments by otherwise reputable firms, repeated facilitation payments will also lead to prosecution if the company has inadequate procedures in place.

Guidance

The Ministry of Justice's (MOJ) guidance about procedures, which relevant commercial organisations can put into place to prevent persons associated with them from bribing, identifies six principles to assist those organisations to determine the level and type of procedures which might be considered adequate. They are:

- proportionality
- top level commitment
- risk assessment
- due diligence
- communication
- monitoring and review

There is no detailed further guidance from either the MoJ or the SFO/DPP as to exactly what specific procedures should be in an organisation's policy, but a reading of the documents makes clear that the procedures will need to be robust if breached, if prosecution is to be avoided under Section 7.

The SFO/DPP guidance confirms that prosecution is to be considered the norm. In addition there will be no settling in period and the Bribery Act will be applied from the moment it came into force last Friday.

Commercial organisations that have not already done so should therefore give priority to ensuring that they have adequate procedures in place and those procedures will need to be bespoke and tailored to the particular organisation and its way of doing business, rather than off the shelf.

Organisations will need to carry out a comprehensive risk assessment (or have someone do it on their behalf) before preparing a policy, and it is important to get it right, as the consequences of a successful prosecution are rather more than just an unlimited fine, including:

- reputational damage
- exclusion from tendering for certain contracts
- a potential Confiscation Order to recover the criminal benefit of any monies obtained as a consequence of corruption or bribery

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About Finers Stephens Innocent LLP

Finers Stephens Innocent LLP is a central London based law firm. We advise national and international companies, family-owned businesses, entrepreneurs, charities and successful individuals from all walks of life.

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Our corporate team advise both public and privately owned companies on a variety of corporate transactions including acquisitions and disposals of companies and businesses together with all associated funding requirements. The team has advised across a range of sectors and provide a “one-stop-shop” full service team, pulling expertise from our tax, employment, banking, intellectual property and real estate teams.

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- commercial contracts
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- banking



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- professional discipline
- sport



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IP and Media

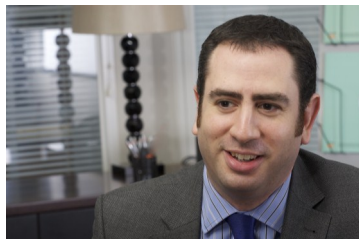
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- libel reading/defamation
- literary estates

negotiations and publishing and royalty disputes



Robert Lands

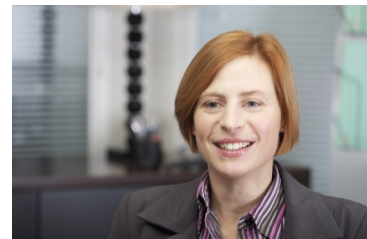
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