

Guide to doing business in the UK

OLSWANG



Introduction

This guide outlines the principal areas and issues which will affect a foreign business organisation carrying on business in the United Kingdom ("UK"). The guide discusses methods of establishing a business presence in the UK. It goes on to discuss issues affecting a business as it grows within the UK, through to exit strategies for the foreign investor: a sale or float.

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

As the UK is a member of the European Union ("EU") much of the law in the jurisdiction emanates from EU law. This guide covers EU law to the extent that it impacts on the laws affecting businesses operating in the UK. EU law is a growing area, and there are currently various EU initiatives that may impact on carrying on a business in the future in the UK.

December 2010

Although we endeavour to ensure that the content is accurate and up to date as at the date of the guide, the information contained in it is intended as a general review of the subjects featured and detailed specialist advice should always be taken before taking or refraining from taking any action. The contents of this guide should not be construed as legal advice and we disclaim any liability in relation to its use.

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1. Establishing a presence for your business

1.1 Are there any restrictions on foreign ownership of businesses in the UK? Please describe any restrictions specific to certain sectors.

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

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

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

- [Gambling](#)
- [Life Sciences](#)
- [Media Transactions](#)
- [Restructuring & Insolvency](#)
- [Telecommunications](#)

Olswang can provide sector-specific advice: please refer to the [Olswang website](#) for relevant contacts and further information.

1.3 Are there any exchange controls in the UK?

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

1.4 What UK tax incentives are available to foreign investors?

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

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

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

1.4.1 Income and gains earned overseas

Currently, UK resident individuals who are not domiciled in the UK are liable to UK tax on overseas income and gains only to the extent that they are remitted to or received in the UK. The remittance basis applies to employment income where the employer is not resident in the UK and the duties of employment are performed wholly outside the UK, pensions and investment income arising outside the UK and gains on disposals of overseas assets. The remittance basis also applies to UK residents who are not ordinarily resident in the UK on a more limited basis for example, in respect of employment income for duties performed outside the UK. The remittance basis is not automatic; it must be claimed (unless unremitted foreign income and gains are less than £2,000 in the relevant tax year or in certain circumstances, where the individual has not remitted any foreign income or gains to the UK and has no (or very small amounts of) UK income or gains). Most individuals who are non-UK domiciled or who are not ordinarily resident in the UK who have been resident in the UK for at least seven out of the preceding nine tax years must pay a £30,000 charge in order to be taxed on the remittance basis. Individuals who do not meet these criteria, or who do not make the relevant election, will be subject to UK tax on their worldwide income and gains.

1.4.2 Corporate gains on disposals of substantial shareholdings

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

1.4.3 R & D incentives

Tax incentives exist in order to encourage small, medium and large sized businesses to undertake certain types of research and development. Small and medium sized companies subject to UK corporation tax and which spend at least £10,000 per annum on qualifying R&D expenditure are entitled to:

- 175% relief for qualifying current spending on R&D; and
- in the case of companies in a loss making position, a cash payment of £24 for every £100 spent on qualifying R&D.

Large companies subject to UK corporation tax are entitled to 130% relief for qualifying current spending on R&D.

1.4.4 Incentives to invest in small companies

There are three separate tax incentive schemes which are intended to encourage equity investment in small higher-risk trading companies: the enterprise investment scheme ("EIS"), venture capital trusts ("VCTs") and the corporate venturing scheme ("CVS").

The EIS is available to individuals subject to UK income tax making direct equity investments into unquoted trading companies. The reliefs available include relief from income tax equal to 20% of the investment in shares acquired on issue by a qualifying company, relief from capital gains tax on a disposal of shares which qualify for income tax relief (provided they have been held for at least three years), and deferral of a charge to capital gains tax on the disposal of assets where the proceeds are re-invested in shares in a qualifying company. VCT relief has an upper limit of £200,000 per individual per annum whereas the limit for EIS relief is £500,000 per individual per annum. The reliefs are lost or clawed back if the shares are disposed of within three years of acquisition in the case of the EIS and within five years in the case of VCTs.

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

The CVS scheme is similar to EIS save that it is directed at encouraging trading companies subject to UK corporation tax to invest in small, higher-risk trading companies. The reliefs include relief against corporation tax for qualifying subscriptions equal to 20% of the amount subscribed (provided the shares are held for at least three years), relief (against income or gains) for losses incurred on the disposal of qualifying shares and a relief that postpones chargeable gains on qualifying shares on their re-investment into other qualifying shares.

1.4.5 Share loss relief

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

1.4.6 Intangible assets

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

1.5 What structures are available to foreign investors seeking to establish a business presence? In particular please state the formation mechanics and any registration requirements for each type of structure.

1.5.1 Overview

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

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

Further details are provided below.

1.5.2 Conducting business from outside the UK

There are a number of ways in which doing business in the UK from outside the UK is regulated. Issues concerning VAT and import licences are not covered by this guide, so please contact Olswang for further information. See also **paragraph 3.6.3** for regulations concerning distance sales.

1.5.3 Doing business via the Internet

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

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

Data protection: Notification to the Information Commissioner and compliance with the Data Protection Act 1998 ("DPA") and associated legislation will be of relevance to almost any business operating in the UK. These requirements apply where "personal data" (i.e. information about an identifiable living individual) is to be "processed" in the UK. These requirements may apply even

though the business is established outside the EU – advice should be sought on a case by case basis. Assuming the DPA applies, the business must notify the Information Commissioner of its data processing activities. Notification involves payment of an annual fee of £35 or £500 (depending on the size of the organisation) and disclosure of details including the type of data to be processed, the purposes for which it is to be used and the parties to whom it may be transferred. A notification must be kept up to date (for example if any of these details change) as processing personal data without, or outside the terms of, a notification is a criminal offence.

In addition, the business must comply with all relevant obligations under the DPA which relate broadly to the DPA's eight principles. These include a requirement that data be processed fairly and lawfully and for the purposes for which it was obtained. In practice, this means that the business will need to make it clear to the individual at the point at which the data is collected the purposes for which it will be used and any third parties to whom it may be transferred, obtaining appropriate consent from the individual where necessary.

Where the business intends to carry out marketing by telephone (including automated calling systems), fax, email or SMS to individuals or companies in the UK, or use "cookies" to gather data online it will, in addition to the general obligations set out in the DPA, need to comply with the relevant specific requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003.

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

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

Consumer protection requirements for Internet transactions: The Consumer Protection (Distance Selling) Regulations 2000 apply to the majority of business to consumer transactions over the Internet. These Regulations impose a number of information requirements and give consumers the right to cancel orders and receive a refund during a statutory "cooling-off" period.

B2C transactions over the Internet are also subject to general consumer protection legislation – see **paragraph 3.6.3** for more information on business to consumer relationships.

1.5.4 Do these requirements apply even where the business is based offshore?

Questions of conflict of laws and jurisdiction (i.e. which country's laws govern a contract and which courts have power to hear any dispute over it) arise where a business based outside the EU transacts over the Internet with parties based within the EU. The rules are too complex to

generalise, and advice will need to be taken on a case by case basis. However, broadly speaking "protective" rules such as consumer protection and data protection legislation described above will generally apply where a non-EU business is dealing with parties in the EU.

For specific advice in this area, please contact [Olswang's Internet and E-commerce Group](#).

1.5.5 Setting up a branch or place of business in the UK (a "UK establishment")

A UK establishment is the same legal entity as its parent, with the result that the foreign parent is directly responsible for liabilities incurred by the UK establishment.

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

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

In most cases foreign companies are required to file accounting documents with the Registrar of Companies. The specific filing requirements vary depending on factors such as whether the foreign company is required to disclose its accounts under its parent law, whether it is a credit or financial institution and whether it is an unlimited liability company.

Every foreign company which has registered a UK establishment must, with some exceptions, display at its places of business its name and the country in which it is incorporated. Its name and other prescribed information must also appear on all business letters, websites and other specified correspondence used in its UK activities. There are also restrictions on the name the overseas company can register in the UK. For more information about setting up a UK establishment, please contact [Olswang's Corporate Group](#).

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

1.5.6 Incorporating as a UK subsidiary: a limited liability company

A UK subsidiary of a foreign organisation has a separate legal identity and, unlike a UK establishment, in the absence of guarantees given by the parent, the liabilities of the subsidiary do not become the liabilities of the parent. The liability of shareholders in a limited liability company is limited to the fully paid up amount of the shares. Shares in an English company are usually in registered form but can be in bearer form.

The constitution of an English company is set out in its articles of association and any resolutions and agreements that affect the constitution. The articles of association, combined with provisions

of the Companies Act 2006, set out the internal regulations of the company, the rights and obligations of the shareholders and the duties and responsibilities of the directors.

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

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

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

For further information on setting up a company please contact [Asha Morjaria](mailto:asha.morjaria@olswang.com) at asha.morjaria@olswang.com.

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

Acquisition of existing company

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

Joint ventures

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

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

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

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

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

1.5.8 Entering into partnership arrangements with an existing UK business entity

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

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

For a discussion of the way partnerships are treated for tax purposes see **paragraph 1.6.3**.

1.5.9 Appointing a distributor or franchisee

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

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

Franchises can be particularly useful where a business wishes to maximise brand value using outside resources while still retaining a substantial degree of control.

It is becoming an increasingly popular form of international expansion. In contrast to the US, there is little regulation of franchising in the UK. Potential franchisors should consider the structure and terms of their franchise arrangements at the outset, and consider in particular the relationship between franchisor and franchisee.

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

1.5.10 Appointing an agent

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

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

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

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

For details of the tax treatment of agency agreements, see **paragraph 1.6.4**. Olswang can provide further information on the impact of the Commercial Agents Regulations and on competition law which also affects agency agreements.

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

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

The [Olswang Corporate Group](#) can advise further on the structures available to foreign investors seeking to establish a business presence in the UK.

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

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

1.6.1 Conducting business from outside the UK

If business is conducted from outside the UK, it is possible, with careful planning, to remain outside the scope of UK corporation and income tax. For these purposes it is critical that there is no permanent establishment in the UK. Extreme care needs to be taken in this respect: for example, a single person conducting business in the UK on behalf of a foreign company can constitute a permanent establishment in certain instances, as can a fixed business establishment. However, it

may be possible to avoid this by utilising an independent agent. Even if a business has no permanent establishment in the UK it would still be subject to UK income tax on profits from any trade carried out in the UK.

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

1.6.2 Operating as a UK establishment or a subsidiary

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

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

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

Under UK domestic rules a permanent establishment of a non-UK company is not entitled to the "small companies' rate" of corporation tax (see below) and therefore its UK taxable profits may be taxed at 28%. However, where a non-discrimination article of a double tax treaty applies (to the effect that a permanent establishment must not be less favourably taxed than a company of the taxing state) HM Revenue & Customs accepts that a non-resident company trading through a permanent establishment can claim the "small companies' rate" (although, as with UK companies, worldwide profits and the number of worldwide associated companies are taken into account when deciding whether the rate applies).

A UK subsidiary of an overseas company will (like other UK companies) be subject to corporation tax on its worldwide profits and capital gains. The benefit of the "small companies' rate" of tax (currently an effective rate of as little as 21%) may be available depending on the number of associated (non-dormant) companies within the worldwide group. The subsidiary will generally be eligible for the benefits of the UK's extensive network of double tax treaties.

1.6.3 Partnership

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

UK general partnerships, limited partnerships and limited liability partnerships are all generally transparent for UK tax purposes. An overseas (or UK) corporate partner's share of the profits and gains will generally be subject to UK corporation tax at 28%. As with a UK establishment set up by an overseas company, due to the tax transparent nature of a partnership structure, any losses incurred by the partnership will generally be available to reduce profits of the foreign company (subject to the foreign jurisdiction's rules).

1.6.4 Appointing a distributor, franchisee or agent

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

1.6.5 Incorporating as a European public company

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

The [Olswang Tax Group](#) can advise on specific issues raised by the information set out in this section.

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

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

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

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

The UK's extensive network of double tax treaties generally provide that a corporate recipient of a dividend paid by a UK company will be entitled to a foreign credit for the underlying tax paid by the

UK subsidiary on the profits from which the dividend is distributed. Accordingly, where the foreign company is in a position to utilise foreign tax credits, tax should only be payable to the extent that the foreign country tax rate exceeds the applicable UK corporation tax rate of 28% (subject to small companies' relief).

1.8 Is it possible to relocate staff to the UK? In particular, can foreign nationals live and work in the UK?

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

Immigration law in the UK is a complex area and has been the subject of considerable change over the past year. Specific advice should always be sought when considering employing a foreign national in the UK. More information is available on the UK Border Agency website which can be viewed [here](#).

1.9 What is the social security system in the UK?

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

The employee currently (i.e. for the year 2010/2011) pays employee's NICs at 11% on their yearly earnings (and most benefits in kind) between £5,715 and £43,875 and at 1% on all earnings (and most benefits in kind) above £43,875. The employer currently pays employer's NICs at 12.8% on all the employee's earnings (and most benefits in kind) above £5,715. From 1 April 2011, the rates of employees' NICs are set to increase to 12% and 2% respectively and the rate of employers' NICs is set to increase to 13.8%.

Employers are required to pay the NICs due (together with income tax deducted via PAYE) to their relevant HM Revenue & Customs accounts office each month (or quarterly if average monthly payments are below a certain level). Employers must also produce end of year summaries for HM Revenue & Customs.

The [Olswang Employment Group](#) and [Olswang Tax Group](#) can provide further advice on the matters referred to in **paragraphs 1.8 and 1.9** above.

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

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

There are currently two types of direct interest in real estate, the freehold and the leasehold. Every real estate property has a freehold interest and some properties have a leasehold interest. This terminology applies equally to interests in residential property and commercial buildings. There is a

third type of interest in property, commonhold, though it is currently not regularly utilised in commercial transactions.

Ownership of a freehold lasts forever and means that the property is owned absolutely.

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

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

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

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

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

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

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

From 1 January 2007 it became possible to establish UK Real Estate Investment Trusts (REITs). Companies which have REIT status are generally exempt from tax on profits arising from a property rental business. REITs are required to distribute 90% of their income profits and distributions from a REIT are taxed as rental income in the hands of shareholders. An entry charge is imposed on companies that elect to convert to REIT status. The introduction of REITs is regarded as important to the UK property industry.

A tax known as Stamp Duty Land Tax ("SDLT") is levied on most land transactions at up to 4% of the consideration given. On the grant of a lease, SDLT is generally payable by the lessee at 1% of the net present value of the aggregate rentals payable over the term of the lease.

The [Olswang Real Estate Group](#) can provide advice on any specific issues raised by the information in this section of the guide.

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

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

2. Acquisition of an existing English company

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

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

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

2.2.1 Overview

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

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

2.2.2 Is notification to the competition authorities mandatory?

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

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

Depending on the structure of the transaction, it may fall not under the merger control rules but under the rules for analysing whether agreements have anti-competitive effects. In this instance, a notification to either the OFT or the European Commission is not possible although contact with

the relevant regulatory authority will be advisable where there are likely to be competition concerns.

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

2.2.3 What kinds of investments are caught?

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

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

2.2.4 What are the thresholds for the rules to apply?

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

The first turnover test requires that: (1) both target and buyer must have combined world-wide turnover exceeding €5 billion; and (2) each must individually have EU wide turnover of €250 million. The test will not be satisfied if both achieve more than two-thirds of their EU wide turnover in one and the same EU country.

The second turnover test requires that:

- (1) both target and buyer must have combined world-wide turnover exceeding €2.5 billion; and
- (2) in at least three EU countries their combined turnover must exceed €100 million; and
- (3) each must have an individual turnover exceeding €25 million in each of these three EU countries; and
- (4) each must have an EU wide turnover exceeding €100 million.

Again, the test will not be satisfied if both achieve more than two-thirds of their EU wide turnover in one and the same EU country.

A notification to the OFT may potentially be required where the investment (1) leads to a change of control (under the broader UK test); and (2) the turnover of the UK company which is the subject of the change of control exceeds £70 million; or (3) the buyer and target together account for the

supply or purchase of more than 25% of any type of goods or services in the UK or substantial part of the UK.

2.2.5 What is the timetable for investigations?

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

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

2.2.6 What is the substantive competition test?

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

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

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

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

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

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

Please contact the [Olswang EU & Competition Group](#) for further information.

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

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

On a share acquisition, the buyer acquires a company together with its tax history, including any potential tax liabilities. Accordingly, a buyer would usually undertake a comprehensive due diligence exercise to identify areas where there is a potential exposure to a tax liability. The

identification of such liabilities may lead to a reduction in the purchase price or a retention from the purchase price.

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

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

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

The UK tax regime includes preferential tax laws in relation to holding companies resident in the UK in order to increase the UK's attractiveness as a viable jurisdiction for this purpose. The regime includes a potential tax exemption on the sale of shares in a subsidiary by the holding company (see the information on substantial shareholdings relief in **paragraph 1.4.2**), together with an exemption regime in relation to dividends of UK and non-UK subsidiaries (this exemption is subject to a number of exceptions which need to be considered in light of the arrangements in question).

Again, the [Olswang Tax Group](#) will be happy to advise on any specific queries in this area.

3. Growing your business in the UK

3.1 What sources of financing are available?

3.1.1 Overview

There are a number of potential sources of finance for growing businesses.

These include:

- Business angels;
- Private equity;
- Finance houses and banks.

Further details follow below. In addition, capital can be raised on the UK securities markets and this is discussed separately under "Floating in the UK" in **paragraph 4**.

3.1.2 Business angels

Business angels are private individuals who provide capital to private companies in return for a proportion of the company's share capital, and sometimes a seat on the company's board. Tax incentives are available to the individual through EIS where certain criteria are fulfilled. For more information on EIS relief see **paragraph 1.4.4**.

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

3.1.3 Private equity

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

In the UK, the main providers of private equity are business angels and private equity firms. The majority of these firms are independent, raising their funds for investment from external sources such as banks, insurance companies and pension funds. Captive private equity firms obtain their funds from parent organisations which are usually financial institutions. Increasingly, some of these captives also raise funds from external institutional investors. For institutional investors,

fixed life funds managed through independent and semi-captive limited partnerships are the primary vehicles to invest in private equity. "Corporate venturers" are industrial or service companies that provide funds and/or a partnering relationship to growing companies and can also provide equity capital.

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

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

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

3.1.4 Finance houses and banks

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

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

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

Please contact the [Olswang Private Equity Group](#) and the [Olswang Venture Capital Group](#) for further information in these areas.

3.2 Please describe the regulation of terms of employment in the UK.

3.2.1 Overview

This section of the guide considers the following issues:

- how the employer/employee relationship is regulated;

- whether there are any restrictions imposed on the terms of employment, working conditions and job security that employers can contractually agree with employees;
- whether there are any anti-discrimination protections;
- whether there is a statutory minimum wage; and
- whether there are any requirements to recognise trade unions, employee representatives, employee works councils or other similar collective bargaining arrangements.

3.2.2 How is the employer/employee relationship regulated?

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

Employees in the UK, broadly speaking, have less statutory protection than employees in many other EU countries but considerably more than US employees. There have been many significant additions to this protection in recent years.

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

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

Terms of employment

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

- commencement of employment;
- remuneration;
- place of work;
- hours of work;
- holidays and holiday pay;
- sick pay;
- pensions;
- notice provisions;
- job title; and

- work rules and dismissal, disciplinary and grievance procedures.

Terms are implied into employment contracts by statute (such as a right to minimum notice of termination) and by common law. The most significant implied term is the duty of mutual trust and confidence under common law (such as fair treatment, confidentiality and (on employees) not to compete with their employer during the term of the employment contract).

Working conditions

Maximum working week. Under the Working Time Regulations 1998, workers may not work on average for more than 48 hours per week (calculated over a 17-week reference period).

Employers can ask their workers to consent in writing to opt out of the 48-hour weekly working limit. If workers opt out they must be able to opt in on no more than three months' notice. Workers are also entitled to prescribed daily and weekly rest breaks and there are special rules for those working at night.

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

Rights to time off work. Some workers/employees have certain rights to time off work for specified reasons, including maternity, paternity, parental and adoption leave, time off for jury service and public duties, if they are Armed Forces reservists, employee representatives or trade union representatives or need to take time off to deal with domestic emergencies or care for dependants.

Job security

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

Unfair dismissal

An employee who has been dismissed, or who has been "constructively dismissed" (i.e. has resigned in response to a fundamental breach of their contract by their employer) and who has one year's qualifying service may bring an unfair dismissal claim within three months of the dismissal.

The employer must prove:

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

The employment tribunal can order re-instatement or re-engagement (although such orders are rare) and/or compensation. Compensation generally consists of a basic award, calculated according to age and length of service (to a current maximum payment of £11,400, rising to £12,000 where the effective date of termination of employment is on or after 1 February 2011) and

a compensatory award, which in most cases is capped at £65,300 (increasing to £68,400 in respect of dismissals taking place on or after 1 February 2011). These limits are usually increased annually.

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

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

Employees also enjoy statutory protection if they lose their job by reason of redundancy.

How are redundancies regulated?

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

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

Collective consultation

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

The employer must disclose in writing to the representatives:

- the reasons for the proposals;
- the number and descriptions of employees whom it is proposed to dismiss as redundant;

- the proposed method of selection;
- the proposed method of carrying out the dismissal; and
- the proposed method of calculating redundancy payments.

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

3.2.4 Are there any anti-discrimination protections?

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

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

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

3.2.5 Is there any statutory minimum wage?

All workers must be paid at a rate which is not less than the national minimum wage. The current minimum wage rates are £5.93 per hour for workers aged 21 and over, £4.92 per hour for workers aged 18 to 20 inclusive and for 16 and 17 year olds, £3.64 per hour. The rates are reviewed annually in October. The calculation of an individual's hourly rate of pay and the number of hours worked by the worker are subject to complicated provisions in the relevant regulations. The employer is required to keep written records and provide certain pay statements to the worker.

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

Requirements to recognise trade unions

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

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

Employee representatives

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

Employee Works Councils

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

European Works Councils

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

National Works Councils

A similar, national-level, process applies in the UK to undertakings with 50 or more employees.

If triggered by an appropriate request from employees, the employer must negotiate with a view to setting up the employee representative body and defining its terms of reference. If the negotiations fail, a default model will apply. Employee representatives then have the right to be informed about recent and probable development of the undertaking's activities and economic situation, and to be informed and consulted about the employment situation and prospects, threats to employment, etc.

For more information on any of the issues raised in this section please contact [Olswang's Employment Group](#).

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

3.3.1 Overview

This section of the guide considers the following issues:

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

3.3.2 What kinds of IPR exist?

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

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

- patents.

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

Copyright

Copyright can be enforced to prevent the copying of defined types of cultural, informational and entertainment works. These include software code. Copyright is the exclusive right to carry out certain acts in relation to the work, including copying and adapting it. It subsists in the work automatically, i.e. no registration is required. Copyright subsists in original literary, dramatic, musical and artistic works, some types of database, sound recordings, films, software code, broadcasts or cable programmes and the typographical arrangement of published editions. Acts which infringe copyright include the copying of the whole or a substantial part of the protected item, issuing copies of it to the public, lending and renting copies of it to the public, performing and playing it in public, communicating it to the public (such as by way of broadcast or on the Internet) and adapting it (such as translating it into a different language), in each case without the consent of the copyright owner. Authorising an infringement is itself an infringing act.

Design rights

Design Rights are a diverse collection of rights protecting designs varying from industrial designs for 3-D articles of practical application to designs for product packaging, logos and graphic user interfaces. The design right system in the UK has been changed by the implementation of the European Designs Directive which redefined considerably the scope of UK registered design protection and created Community Design Rights.

Unregistered design rights (UK): UK unregistered design rights protect designs relating to "the shape and/or configuration of whole or part of an article". They generally relate to 3-D designs but not surface decoration. Designs will not benefit from protection if they are considered commonplace in their field.

Unregistered design right is infringed by an unauthorised person making an article exactly or substantially to the protected design, or by making a design document for the purpose of making unauthorised copies. Copying must be proved if infringement is to be made out.

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

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

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

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

Trade marks

Registered trade marks: For registration purposes, a trade mark is any sign capable of being represented graphically and which is capable of distinguishing goods and services of one undertaking from those of another undertaking. This is a fundamental requirement for validity. Such signs can include words, personal names, designs, letters, numerals, slogans, sounds, smells and gestures.

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

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

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

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

Patents

Patents protect inventions which can be industrial processes, pharmaceutical or other chemical products, engineering or electrical products.

A patent can prevent others from exploiting the protected invention for the duration of the patent, and so offers the inventor a monopoly for that period.

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

- new;
- non-obvious; and

- capable of being made or used.

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

3.3.4 How is protection obtained and how long does it last?

Copyright

The duration of copyright varies depending on the nature of the works in question. The copyright in literary, dramatic, musical and artistic works and for most films lasts for 70 years from the end of the year in which the author dies. Software is treated as a literary work for this purpose. The copyright in a sound recording lasts for 50 years from the end of the year in which it was made or, if not released immediately, the copyright expires 50 years after the end of the calendar year in which it was released. Copyright in broadcasts and cable programmes expires 50 years from the end of the calendar year in which the broadcast was made or the programme included in a cable programme service.

The copyright in the typographical arrangement of published edition expires 25 years from the end of the calendar year in which the edition was first published. More complex rules apply to the duration of copyright in films.

Whilst copyright subsists automatically in a qualifying work, it is advisable to put copyright notices on the work. Such notices consist of a copyright symbol ("©"), the owner's name and the year of first publication. A copyright notice may offer further protection outside the UK under international treaties and also establishes a legal presumption in proceedings that the named copyright holder is the proprietor.

Design rights

The duration of protection for any particular type of design depends on which of the three principal design rights applies.

Unregistered design rights (UK): The right arises at the point of design and, as such, does not require any registration. Design rights continue to offer protection for 15 years from the end of the year of recordal/manufacture or 10 years from the end of the year of first marketing, whichever period is shorter.

Registered design right (UK): The right arises through registration with the UK Intellectual Property Office. A design cannot be registered if it has already been published, although a period of 12 months from first disclosure is allowed. This period is intended to enable designers to market-test their design. The right lasts for 25 years, subject to the registration being renewed every five years.

Registered and unregistered Community design rights: Registered design rights can last for 25 years from the point of registration at The Office for Harmonisation in the Internal Market (Trade Marks and Designs) ("OHIM"), provided five-yearly renewals are made. Unregistered design rights last for three years from the point at which they are made available to the public within the EU.

Trade marks

Registered trade marks: UK registered trade mark protection is obtained through filing an application at the Trade Marks Registry of the UK Intellectual Property Office. CTMs are obtained by filing an application either at the UK Intellectual Property Office, or at the CTM Office (OHIM) in Alicante. Once obtained a trade mark registration lasts for 10 years and, if properly maintained, can last indefinitely. Trade mark registrations are vulnerable to cancellation on the ground of non-use.

Unregistered trade marks: Unregistered trade mark protection lasts for as long as the requisite goodwill in relation to a mark can be shown.

Patents

An application to register a UK patent is made to the UK Intellectual Property Office. An application can also be made under the European Patent Convention either at the UK Patent Office or through the European Patent Office. The application specifies in which Convention member countries protection is sought. If granted the patent(s) takes effect under the laws of each specified Convention member country. Both UK and European patent applications may also be made via the International Bureau under the Patent Co-operation Treaty.

A patent may remain in force until 20 years from its filing date though most patents lapse long before that time. After expiry the invention passes into the public domain.

Patent protection in one country will effectively place it in the public domain in every other country where there is no equivalent protection. Patents are territorial rights (i.e. a UK patent will not protect an invention in other territories). A national application can offer "priority" for up to 12 months from the date of filings. This means that an application can be filed in other territories for the same invention and with the same original protection date as the first application.

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

Copyright

The creator of a work is the first owner of the copyright in it. This general rule is subject to an exception where the works are created by an employee in the course of employment, in which case ownership vests in the employer.

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

Design rights

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

Trade marks

Rules on ownership of trade marks are unlike those in relation to other IPRs. "Ownership" is dictated by the identity of the party with whose business the mark is associated and also the

validity of the mark. Registration of a mark can be considered to establish that the registrant is the owner but this will be rebutted if, for example, the mark is held to be invalid. Unregistered trade mark rights are owned by that party whose business is the repository of the "goodwill" associated with the mark, i.e. the business to which the mark is connected. A trade mark owner acquires the right to bring an action in respect of the trade mark from the date of registration of the mark.

Patents

The right to apply for a patent vests primarily in the inventor of the relevant subject matter. Inventions (and the right to obtain protection in relation to them) by employees in the course of normal employment duties, or in the course of employment by an employee with commensurate duties and obligations to further the employer's business (typically in the latter case senior personnel) vest in the employer. As with copyright, where a third party is not an employee but has been engaged to carry out work, any patent rights arising from that work will vest in the third party.

This is, however, subject to the terms agreed in any contract between the parties.

3.3.6 How do I protect confidential information and know-how?

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

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

It is commonly an issue where techniques or processes are under development which might subsequently give rise to a patent application. Patents cannot be granted in relation to inventions which are not "new", so any substantial disclosure before patent protection is applied for can defeat the application, unless the disclosure was made under circumstances of confidentiality (preferably under a written agreement).

The [Olswang Intellectual Property Group](#) can advise further on any specific issues raised by the information set out in **paragraph 3.3**.

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

Corporation tax will apply to the worldwide profits and gains of a UK company, and to profits and gains properly attributable to a non-UK company's permanent establishment in the UK, in each case subject to the impact of any applicable double tax treaty.

As a member of the EU, the UK is subject to a common system of Value Added Tax ("VAT"). This generally requires a business with a turnover of more than £70,000 (for the tax year 2010/2011) per annum to register for and charge VAT on its supplies. VAT returns are typically filed, together with VAT payments (if any), on a quarterly basis. VAT registered businesses are generally entitled to a credit for VAT which is charged to them, which has the effect of reducing the net amount of

VAT payable to HM Revenue and Customs. Broadly speaking, VAT (which is borne by the ultimate consumer) is neutral for many businesses, although differing treatments arise, for example, in relation to the financial and insurance sectors and in relation to property transactions.

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

SDLT is generally payable, by the buyer, on most land transactions at up to 4% of the consideration given. SDLT is payable by a lessee on the grant of a lease at 1% of the net present value of the aggregate rentals payable over the term of the lease.

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

3.5 What are the audit requirements in the UK?

Generally, an auditor's report must be prepared for an English company for each financial year. Exemptions are available for very small companies and dormant companies, and different requirements apply depending on the size of the company and whether the company is listed.

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

3.6.1 Overview

The rules and restrictions on commercial and trading activities generally apply more strictly to Business to Consumer ("B2C") relationships than Business to Business ("B2B") relationships and we have therefore considered these separately below. In addition to the specific regulation of trading relationships, businesses (and in some cases the individuals working in them) will be subject to general UK law, such as the anti-money laundering legislation and also proposed new criminal offences relating to bribery. As at the date of this guide, the Bribery Act 2010 is scheduled to come into force in April 2011 and, because of its broad scope and potentially heavy penalties, we recommend that businesses check that appropriate compliance procedures are in place before they enter the UK.

3.6.2 Business to business ("B2B") relationships

This section considers generally applicable rules and restrictions only, and gives a non-exhaustive list of issues which may be relevant. Competition law considerations are considered at **paragraph 3.7**. Regulated sectors such as financial services, energy, e-communications, broadcasting and gambling are subject to specific restrictions. Olswang can provide detailed advice on these sectors if required.

Except as specified elsewhere in this guide, there are few general regulatory or statutory controls on B2B trading activity. Examples include statutory controls on clauses limiting or excluding liability under the Unfair Contract Terms Act 1977 ("UCTA"), although these controls are less strict, and apply in more limited circumstances, in relation to B2B contracts than in consumer transactions. Contracts for goods and services are subject to a number of statutory implied terms on, for example, quality and fitness for purpose. Business buyers generally have a lower level of protection than consumers and there is greater scope to exclude implied terms in a B2B context.

There are however controls on misleading and comparative advertising under the Business Protection From Misleading Marketing Regulations 2008. Breach of these regulations is a criminal offence.

Data protection issues may be relevant even in a business to business context if information relating to identifiable individuals is concerned. For example, in the sale of a customer database, the contractual arrangements will be subject to the overriding constraints of the DPA and good practice guidance issued by the ICO. Online advertising and trading between businesses is subject to the same information and contract formation requirements as B2C online activity under the E-Commerce Regulations, except that businesses may contract out of the provisions to a limited extent. Other statutory controls on businesses' freedom to contract include obligations to pay interest at a prescribed rate on overdue payments under contracts for goods and services under the Late Payment of Commercial Debts (Interest) Act 1998. This applies unless the contract provides a "substantial" remedy for the creditor.

Other limits on businesses' freedom to contract arise under English common law (for example, contractual clauses providing for the payment of default interest or liquidated damages will be unenforceable if they constitute "penalties"), and there are certain types of contracts which are unenforceable – for example those which are against public policy.

3.6.3 Business to consumer ("B2C") relationships

B2C commercial activities are subject to a far greater degree of regulation than B2B activities. Much of this regulation derives from EU legislation. Consumer protection measures spanning every stage of a transaction include controls on advertising, pricing information for example under the Consumer Protection from Unfair Trading Regulations 2008, implied terms (for example as to quality and fitness for purpose), product liability and guarantees. There are strict controls on the enforceability of exclusions and limitations of liability under UCTA and on unfair terms more generally under the Unfair Terms in Consumer Contracts Regulations 1999 ("UTCCR").

Distance sales (whether conducted by mail order, telephone, the Internet, interactive TV or other distance means) are subject to pre and post contractual information requirements, and customer cancellation rights under the [Distance Selling Regulations](#).

Online advertising and selling activities are subject to additional information requirements under the Electronic Commerce (EC Directive) Regulations 2002. Where contracts are concluded online, suppliers must give specific information, facilitate correction of input errors and acknowledge receipt of orders in the prescribed manner.

B2C activities – particularly marketing – will almost invariably raise data protection issues over the collection, use and transfer of customers' data. It is therefore essential to notify the Information Commissioner and comply with the DPA and, where appropriate, the Privacy and Electronic Communications (EC Directive) Regulations 2003.

Enforcement and sanctions

Breaches of the consumer protection rules summarised above carry a range of legal and commercial sanctions. For example, a term which is unfair under the UTCCR is not binding on the consumer, and could result in an injunction requiring the supplier to remove or amend it. Failure by the supplier to provide consumers with the information required by the Distance Selling

Regulations at the correct time and in the correct manner can entitle the consumer to a greatly extended "cooling off" period during which to cancel the contract. Breaches of the Consumer Protection from Unfair Trading Regulations 2008 and Business Protection from Misleading Marketing Regulations 2008 carry criminal sanctions.

As well as being the UK's competition authority, the OFT is also the main consumer protection enforcement body. Other agencies, for example local trading standards offices and sector regulators, for example OFCOM, also have enforcement powers in particular circumstances. The OFT and sector regulators tend to take a pro-active approach to enforcing consumer protection legislation and publicise alleged breaches. Two particularly high risk issues, and therefore areas where businesses should take particular care with compliance, are the Unfair Terms in Consumer Contracts Regulations 1999 and the Consumer Protection from Unfair Trading Regulations 2008.

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

3.7.1 Overview

This section of the guide considers the following:

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

3.7.2 Basic rules on anti-competitive agreements

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

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

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

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

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

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

3.7.3 Basic rules on monopolisation/abuse of market power

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

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

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

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

3.7.4 What investigatory powers are there?

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

3.7.5 What are the sanctions for breaches?

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

The OFT also has powers to impose fines of up to 10% of worldwide turnover. In contrast to the sanctions available to the Commission, it is a criminal offence for any individual to refuse to supply information or to supply it misleadingly so that individuals may be fined or imprisoned. It is also a criminal offence for an individual dishonestly to agree to a serious infringement of the competition rules.

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

It is also possible, although rare, for a third party who suffers loss as a result of a breach of competition law to bring a private court action for damages against an offending party.

3.7.6 What is the appeals procedure?

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

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

[Olswang's EU and Competition Group](#) can advise further in this area.

3.8 What are the considerations for the acquisition of further real estate, either to satisfy occupational needs or as an investment?

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

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

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

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

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

A term often used in assessing the investment performance of a property is its "yield". This is the income after tax produced by the property at a particular time, expressed as a percentage of the costs of buying the property (the capital outlay). Investors will wish to ensure that the income they receive from the property is sufficient to service and exceed any debt they have incurred in acquiring the property. Various valuation tools are available to assess returns from a property investment. For information on tax aspects, see **paragraph 1.4**.

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

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

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

If the property is occupied under a lease, there will be restrictions in the lease on what the property can be used for.

It is important to ensure that the lease grants permission to run the business from the property. If the property needs to be altered to suit the business, it is also important to ensure that the lease permits this.

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

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

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

3.9 What kind of regulatory factors will impact on any real estate proposals?

When buying property in the UK, it is important to check that it complies with planning regulatory requirements in two key respects. First, in connection with the existing land and buildings and second, in connection with any new buildings or uses proposed after the purchase.

The normal planning requirement is that a planning permission exists to authorise the existence of the buildings and the use of these and any unbuilt land.

The market value of UK real estate depends on buildings and uses being properly authorised by the government. Without this authorisation, an unwary buyer may be paying more for a property than its market value.

The English planning system is essentially one of "development control" by central and local government bodies. This means, subject to certain exceptions, that the "development" of land or buildings requires the prior grant of a planning permission to authorise it. "Development" has a special meaning: generally the carrying out of works (unless they are wholly inside a building) or a "material" change in the use of land or buildings.

If planning permission is not obtained for works or use changes, the relevant government body - the local council, also known as the "local planning authority" - can take enforcement action to require the property owner to stop using the property for the unauthorised use and/or to remove (at its own cost) the unauthorised works. Planning authorities also have power to enter land and carry out works to rectify the situation themselves, to charge their cost of doing so to the property owner and, in a worst case scenario, to commence a criminal prosecution for a failure by the property owner to take action itself.

It is therefore sensible to ensure that planning requirements have been or are being complied with to be certain that land and buildings can be used or developed as envisaged. This usually translates into a check that existing buildings and uses are authorised by a planning permission and similarly, that future buildings and uses are or will be so authorised. If not, further consideration should be given to the price offered for the property and appropriate contractual safeguards should be built into the purchase documentation.

Planning requirements overlap with (but are separate from) a number of other property related controls. The most notable of these are those regulating the actual carrying out of building works (the Building Regulations), those regulating buildings which have a special heritage value (i.e. "listed buildings" and unlisted buildings inside "conservation areas"), health and safety requirements and controls relating to the environment such as the regulation of land contamination (see further, **paragraph 3.10** below).

Under the Planning Act 2008, an Infrastructure Planning Commission has been established to make decisions on planning applications for nationally significant infrastructure projects. These are the large scale facilities that support the economy and vital public services and include railways, large wind farms, power stations, reservoirs and sewage treatment works.

Planning and environmental controls are increasingly used as a tool by government to achieve outcomes matching its wider political aspirations. Key among these are those relating to climate change and in particular, the supply and use of energy and the construction of sustainable buildings and infrastructure. To be successful in developing UK real estate, it is becoming more and more important to be able to demonstrate a proactive and innovative approach towards integrating sustainability considerations into new projects.

Climate change standards are becoming increasingly focused on post-construction (user) sustainability to produce new buildings which deliver whole-life value. Whilst energy performance certificates provide an indicator, local and national planning policies have become the regulators' main control for addressing climate change in real estate. In practical day to day

terms, this often translates into the relevant planning authority's publication of a sustainability checklist of matters to be addressed before a development will be permitted. Successful developers are increasingly required to match the items sought in these lists against their projects to assess which are realistic, deliverable and affordable.

In terms of affordability, it should be noted that the owners of UK commercial property are liable to make a payment - known as "rates" - to the relevant local government (council) body as a contribution to the council's costs of maintaining local amenities such as public parks, libraries, environmental services and similar.

In addition, the Planning Act 2008 establishes a new property tax called the "community infrastructure levy" ("CIL") which - when details of it are finalised - will allow local planning authorities to levy a new tax against property owners who wish to develop their real estate. Buyers should therefore make provision for it in the price they negotiate.

3.10 Are there any potential environmental liabilities in such real estate proposals?

As with planning permission, the existence or otherwise of contamination can directly influence the value of UK real estate.

The contaminated land regime is separate from the planning regime described in **paragraph 3.9** above although the two overlap. Hence, a planning permission will often be subject to a requirement for land contamination to be investigated and if identified, cleaned up at the property owner's cost.

As in many other jurisdictions, there is a contaminated land regime in the UK which exposes owners, occupiers and lenders of UK real estate to potential liability if land is found to be "contaminated".

The regime is primarily contained in Part IIA of the Environmental Protection Act 1990 but also in the 2009 regulations bringing into effect the European-wide Environmental Liability Directive (see further, below).

Under the Part IIA contaminated land regime, liability to clean up contaminated land is allocated in such a way that there is a risk that incoming buyers may acquire liability for contamination which pre-dates their ownership or occupation of a property. This can happen in the following ways:

- (a) The "polluter pays" principle under English law is given effect by imposing liability on anyone who "causes or knowingly permits" contamination to occur or to continue. The accepted view is that the concept of "knowingly permitting" can extend to otherwise innocent owners who become aware of contamination on their property and then fail to take steps to deal with it.
- (b) In circumstances where no-one who can be said to have "caused" or "knowingly permitted" contamination can be found, an otherwise completely innocent landowner (i.e. an owner with no knowledge of contamination on its site) can be held liable.

- (c) The contaminated land legislation is drafted in such a way as to enable sellers or landlords to seek to pass on liability which they may have for historic contamination to their buyers or tenants. This is achieved by contractual risk allocation mechanisms which are recognised as effective (subject to financial covenant strength of the risk transferee) by the contaminated land regime.

A new and additional regime addressing "environmental damage" was introduced under the Environmental Liability Directive on 1 March 2009. This strengthens the regulators' powers to ensure that the "polluter pays" for cleaning up land contaminated after March 2009. Under the Directive, those responsible for carrying out almost any economic activity (persons who are called "operators") can be held financially liable by the regulators for remedying or preventing environmental damage caused by that activity to water, land or protected species/habitats.

In most cases, fault must be shown before liability attaches under the Directive although no-fault liability is possible where, for example, the relevant activities are particularly hazardous.

Therefore, where environmental damage to land or groundwater has been caused recently, liability may attach under both Part IIA of the Environmental Protection Act and the Environmental Liability Directive.

This may be particularly relevant in the context of UK real estate purchased through a corporate acquisition where the company acquired is the "operator" responsible for causing the economic damage.

In addition to the Part IIA contaminated land regime and the Directive, there are separate statutory regimes for water pollution, noise pollution, light pollution, atmospheric pollution, industrial processes and waste. Other environmental laws are contained in the Public Health Legislation and in the Health and Safety at Work Legislation.

Although these laws are contained in legislation, it should be noted that there is a large body of judge-made (common) law creating criminal and civil liability for pollution and environmental damage. A common example of the latter is where damage is caused by the underground or airborne passage of contaminants from one parcel of land to a neighbour's land. Liability may then arise (to the neighbour as opposed to the regulators) in a type of claim called "nuisance".

In light of the above, buyers of UK real estate are recommended to conduct a thorough investigation to ascertain whether property is contaminated and if so, whether it might be contaminating other properties. Where appropriate, further consideration should be given to the price offered for the property and appropriate contractual safeguards should be sought from the person selling (or leasing) the property.

The [Olswang Real Estate Group](#) and the [Olswang Planning & Environmental Group](#) can provide advice on any specific queries about real estate investment in the UK.

4. Floating in the UK

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

Main Market of the London Stock Exchange

This is the best known market in the UK (often referred to as the "full list") and is the traditional market for mature companies with an established trading record. However, the Main Market of the London Stock Exchange is just one of the markets run by the London Stock Exchange plc ("LSE"). It provides a market in "listed securities" under the Financial Services and Markets Act 2000 ("FSMA") (see **paragraph 4.3.1** below) and is a "regulated market" for the purposes of certain EU directives (see **paragraph 4.3.2** below). Two regimes are available to companies: a premium listing, which carries the most stringent admission and continuing obligations requirements and a standard listing, where the requirements are lower.

AIM

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

For further information about AIM, see the [Guide to AIM](#) produced by the LSE in conjunction with Olswang and other advisers.

Other markets

There are also other markets in the UK, both of the LSE and run by other exchanges. For example, in 2007 the LSE opened the "Specialist Fund Market", a dedicated professional market for issuers of specialist vehicles such as single strategy hedge funds, property investment funds and private equity vehicles. Since 2005 the LSE has also operated a market in specialist securities such as debt, convertibles and depositary receipts aimed at professional investors only, known as the "Professional Securities Market".

There is also a London based exchange called "PLUS Markets" which is a relatively young exchange operating both secondary and primary markets. It has two primary markets:

- the "PLUS-quoted" market, which aims to attract smaller companies; and
- the "PLUS-listed" market which is an on-exchange listing destination for companies which are seeking, or have obtained, an official listing of their securities.

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

receipts on the UK Official List. Securities are traded on the NYSE Euronext Universal Trading Platform, which connects all the European Euronext securities markets.

At the moment, the majority of UK quoted companies are admitted to the Main Market with a premium listing or AIM, so we have not covered the admission requirements for the other markets in detail in this guide. For further information on these markets, please contact the [Olswang Corporate Group](#).

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

In order to float with a premium listing on the Main Market, or on AIM, the company's securities must generally be freely transferable and eligible for electronic settlement.

For the Main Market, the company's securities must be admitted to the "Official List" (known as "listing"), an EU regulatory concept, which is explained further at **paragraph 4.3.1** below. The requirements which will need to be met include:

- the company must have published or filed audited accounts for three years up to no more than six months prior to flotation, and should have a revenue-earning record and have controlled the majority of its assets for the same period;
- the company must be carrying on an independent business as its main activity; and
- the company must have an expected total market capitalisation of not less than £700,000.

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

In addition, the company must appoint an adviser known as a "sponsor" which is responsible for providing assurance to the "UK Listing Authority" that the company's responsibilities under the Listing Rules have been met and also advising the company on the UK Listing Authority's rules (see further **paragraph 4.3.1** below).

Generally speaking, the admission criteria for AIM are much less demanding than those for a premium listing on the Main Market, although there are additional criteria for specific types of company. The company must appoint an adviser known as a "nominated adviser" (or "nomad"). The nominated adviser is responsible to the LSE for assessing the appropriateness of the company for admission to AIM and advising the company on compliance with the LSE's "AIM Rules for Companies" (see further **paragraph 4.3.2** below).

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

4.3.1 Regulatory bodies

The regulatory framework in the UK is largely derived from EU legislation, which has sought to harmonise financial services law and particularly rules governing markets and requirements for

prospectuses in the EU. This European law is implemented in the UK by FSMA under which the FSA is designated as the "competent authority" in the UK relating to:

- Listing – the FSA is responsible for maintaining a list of securities (the "Official List"). Securities are admitted to the Official List (known as "listing") only after application to the FSA in accordance with rules made by the FSA known as the "Listing Rules";
- Prospectuses – the FSA is the body designated to approve prospectuses in the UK (see further **paragraph 4.3.2** below for when a prospectus is required). The FSA makes rules known as the "Prospectus Rules" in this regard;
- Disclosure – the FSA is the body tasked with making rules relating to disclosure of price sensitive "inside information" by companies admitted to a "regulated market" in the UK and disclosure of management dealings. These rules are known as the "Disclosure Rules"; and
- Transparency – the FSA is also tasked with making rules to ensure there is adequate transparency of and access to information in the UK financial markets. These rules are known as the "Transparency Rules". They, for example, cover periodic reporting of financial information and disclosure of substantial shareholdings.

In exercising these functions, the FSA calls itself the UK Listing Authority or "UKLA". Under FSMA, the FSA also regulates other market participants (e.g. banks, brokers etc.) and regulates the exchanges such as the LSE and PLUS.

During 2010, the government consulted on plans to reform the regulatory framework in the UK and more detailed proposals are expected in 2011. More information about this is available from the [Olswang Financial Services Regulatory Group](#).

4.3.2 Regulatory regime

Requirement for a Prospectus/Admission Document

Under EU prospectus law, as implemented in the UK by FSMA, unless an exemption is available, a person commits a criminal offence if it:

- makes an "offer of transferable securities to the public"; or
- requests admission to trading on a "regulated market" in the EU (which includes the Main Market of the LSE, but not AIM) unless a prospectus (pre-vetted and approved by the competent authority) is published.

Because the Main Market of the LSE is a "regulated market", a company applying for admission will always therefore need to produce and publish a prospectus. The prospectus will need to be approved by the competent authority of the company's "home state" for prospectus law purposes (the FSA, for companies whose "home state" is the UK). Prospectus law sets out highly detailed content requirements for prospectuses and these will need to be complied with.

Because AIM is not a "regulated market", a prospectus will not automatically be required for admission. A prospectus will only be required on admission if there is an "offer of transferable securities to the public". This depends on a number of factors including the size of the issue and

the number and identity of the persons being offered to, but in practice most companies applying to AIM will structure the issue to fall outside FSMA's detailed prospectus requirements. Instead they will have to comply with the AIM Rules for Companies and produce an "admission document", the content requirements for which are based on (but not as extensive as) those applicable to prospectuses under FSMA. Unlike prospectuses, the AIM "admission document" need not be approved by the FSA and is also not pre-vetted by the LSE.

Continuing obligations

Once admitted to the Main Market of the LSE, a premium listed company must comply with the FSA's Listing, Disclosure and Transparency Rules (as mentioned above, unless the rules of an EU competent authority apply instead). These rules set out detailed continuing disclosure obligations including in relation to ongoing reporting, disclosure of price sensitive information, transactions which require shareholder approval and other requirements (such as a requirement to have a share dealing code for employees known as the "Model Code"). Save for certain Transparency Rules relating to the disclosure of substantial shareholdings, the Listing, Disclosure and Transparency Rules do not apply to AIM. AIM companies are subject to the less extensive "AIM Rules for Companies".

Market abuse

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

Companies Act 2006

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

IPCs – ABI/NAPF

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

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

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

Corporate governance

The Listing Rules require certain listed companies to make a disclosure statement in their annual report and accounts about their compliance with a code of corporate governance, known as the "UK Corporate Governance Code" (or, for accounting periods beginning before 29 June 2010, the "Combined Code"). This Code sets out standards of good practice in relation to board leadership and effectiveness, remuneration, accountability and relations with shareholders in a series of broad principles and more specific provisions.

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

Please contact the [Olswang Corporate Group](#) for further information.

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

4.4.1 Advantages

Access to finance

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

Exit for existing shareholders

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

Shares as currency

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

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

Incentivise staff

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

Public profile

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

4.4.2 Disadvantages

Cost

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

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

Continuing obligations

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

Lack of flexibility

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

Transparency

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

Lack of control

The sale of shares to the public or outside investors obviously involves surrendering a degree of control to outside shareholders whose views must be taken into account. In addition, the wider the shareholder base the more susceptible a company may be to a hostile take-over approach.

Directors' responsibility

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

5. Sale of businesses in the UK

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

Generally, sellers employ business and financial advisers or consultants to assist with the identification and contact of potential buyers. Generally speaking, the marketing of shares in a company is highly regulated under FSMA 2000 and sellers must take specialist advice and engage the services of appropriately qualified and authorised persons to conduct the process.

5.2 Please state how the sale process is managed in the UK.

5.2.1 Overview

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

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

5.2.2 Confidentiality

Ideally, a confidentiality agreement should be entered into before confidential information is provided to a potential buyer. This should be done at an early stage. Even if there is no formal contract, English law provides some protection in that a person cannot take unfair advantage of information received in confidence. However, in order better to protect the information, a written undertaking, often in the form of a confidentiality letter or non-disclosure agreement, is advisable. Sometimes the heads of terms (or "letter of intent") setting out the main principles under which the negotiations are to be conducted will contain confidentiality undertakings which are expressed to be legally binding, unlike the remainder of the document. Unlike some other jurisdictions, heads of terms are not normally legally binding in the UK. They are considered to infer a moral commitment but are normally stated to be "subject to contract".

5.2.3 Competing interested parties

A buyer will often look to protect its position against competing parties with a lock-out or exclusivity agreement which prevents the seller from negotiating with other parties for a certain amount of time. Negotiations between parties are generally made under heads of terms (see **paragraph 5.2.2**).

5.2.4 Due diligence

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

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

[Olswang's Corporate Group](#) will be happy to assist on any specific proposals in this area.

5.2.5 Seller's liabilities, post-sale

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

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

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

Ordinarily, a UK resident seller will be subject to capital gains tax or corporation tax on chargeable gains. The rate of tax for a company is its marginal rate of corporation tax (between 21% and 28%). Individuals are subject to capital gains tax at a flat rate of 18%. "Entrepreneurs' relief" is available to, broadly, officers and employees of companies deriving gains on the disposal of shares or securities in a company which is a "trading company" or a "holding company of a trading group" and in which they have held 5% of the ordinary share capital (with entitlement to 5% of the voting rights) for at least one year preceding the disposal. The relief reduces the effective rate of capital gains tax to 10% on the first £1 million of "qualifying" capital gains. This is a lifetime limit and once used up, the 18% rate will apply. Where the seller is a UK resident trading company, substantial shareholding relief, referred to in **paragraph 1.4.2**, may apply to exempt the gain from corporation tax.

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

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

For more information, please contact the [Olswang Tax Group](#).

About Olswang

Full service, growing influence

We are a full service law firm with strong practices in corporate, commercial, employment, outsourcing, tax, financial services, regulatory and competition, litigation, arbitration, intellectual property, and data protection. We have a team of over 600, including nearly 100 partners, across five European offices.

Pioneering & ambitious

We want to work with interesting, ambitious and leading companies. We want to influence the sectors in which our clients operate, for example through our Convergence consumer survey and our +TECHNOLOGY campaign.

Distinctive personality

We deliver a distinctive and positive personality and have a reputation for innovation. Our culture is collegiate, innovative and fundamentally decent. The firm has been ranked in four of the past five annual Sunday Times "100 Best Companies to Work For".

A responsible business

We are committed to being a responsible business. We understand that the success of our business relies on the relationships we build and the way we interact with our people, our clients, our community and our environment. In 2010 over half of our staff members were actively involved in our Corporate Responsibility work, which included delivering pro bono advice for the Elephant Parade conservation programme.

OLSWANG

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