ADDLESHAW GODDARD

DOING BUSINESS IN ENGLAND AND WALES

Introduction and legal system

England has a long history of international trade and welcomes investment and business interests from all over the globe. A presence in the jurisdiction is often the first step for any company or investor looking to expand internationally.

Political structure

The United Kingdom of Great Britain and Northern Ireland (UK) is a constitutional monarchy made up of the legislature (Parliament), the executive (Government) and the judiciary. Traditionally the UK has had one of the most centralised political systems in Europe, this structure of checks and balances having evolved over centuries.

Parliament, which is located in Westminster, is one of the oldest continuous representative assemblies in the world. It is made up of the House of Commons, the House of Lords and the monarch, the role of whom is almost entirely ceremonial. Members of Parliament (**MPs**) are elected to sit in the House of Commons by the majority of voters in a constituency. The majority of constituencies are in England, and, although power to determine some domestic policy was devolved to bodies in Scotland, Wales and Northern Ireland in 1995, the Parliament in Westminster represents the interests of the UK as a state.

The House of Lords is the unelected upper chamber which scrutinises and debates proposals from the House of Commons.

Government is formed from the political party with a simple majority of MPs represented in the House of Commons (or a coalition of parties where one party has failed to get the required majority).

Legal system

The legal system in England and Wales can be distinguished from most other European countries in that there is no civil code but rather a system of common law. Common law is created by the judiciary through the decisions of courts creating a system of precedent. The precedent system means that cases with the same material facts should be decided in the same way and that the lower courts should follow the decisions of the higher courts.

It is often said that the UK has no constitution, whereas in fact, the main difference from many other European jurisdictions is that the constitution is neither entirely written down nor wholly codified. However, with the passage of time an increasing amount of the constitution has been codified in the form of various Acts of Parliament (also known as statutes).

Statute can be in the form of primary or secondary legislation. Primary legislation is an Act of Parliament which must be approved by the House of Commons, the House of Lords and finally given Royal Assent (i.e. the symbolic approval of the monarch) before it becomes law. Primary legislation may contain the power to make secondary legislation (such as statutory instruments) which is often used to provide more detail on provisions contained within the primary instruments. Secondary legislation may not need to be approved by Parliament before becoming law.

The role of interpreting legislation is for the courts. However, a fundamental principle of the legal system in England and Wales is that Parliament is sovereign and, as such, legislation will override any conflicting principle of common law.

Although the people decided to leave the European Union in a referendum in June 2016, for the time being the United Kingdom remains a member of the EU and, therefore, EU law is applicable in England and Wales. EU law is incorporated either directly in the case of EU regulations or through implementing legislation enacted by Parliament in the case of EU directives. The European Court of Justice (**ECJ**) is the supreme court in England and Wales on matters relating to EU law, and its decisions are binding on all courts.

The Supreme Court of the United Kingdom was established under the Constitutional Reform Act 2005. It replaced the Law Lords, based in the House of Lords, so the highest civil court in the UK is now clearly and formally separated from Parliament.

Economy and government

Like most developed countries, the UK was hit hard by the economic and financial crisis.

The big change in the UK economy since the referendum in June 2016, has been the sharp decline of sterling. Therefore, manufacturers have faced higher prices for some raw materials, which in turn has increased the prices of goods leaving factories. The period immediately following the EU referendum was met with a lowering of external expectations of growth and weaker external indicators of activity. The average forecast by HM Treasury for gross domestic product (GDP) growth in 2017 was revised down in July 2016 to 0.8% from 2.1% in June 2016. However in December 2016, the Office for National Statistics

(**ONS**) reported that the latest GDP estimate showed that the UK economy grew by 0.5% in Quarter 3 (July to Sept) 2016, only slightly slower than the 0.7% estimate for Quarter 2 (Apr to June) 2016.

The downturn severely impacted public finances, a situation exacerbated by government borrowing related to the rescue of the financial sector. Public debt rose sharply and further room for any fiscal stimulus was limited. In the Spring Budget in 2017, the fiscal forecast showed that the spending envelope contained an extra £26bn. The Chancellor chose not to use this leeway, saving it instead to enable the UK to have a "strong, stable platform for Brexit". The Office for Budget Responsibility (OBR) in November 2016 predicted that growth would slow towards the end of 2016 and into 2017.

In January 2017, the IMF increased its UK forecast and expected the economy to grow by 1.5% in 2017. However, they predicted a slowdown in the following year and downgraded growth in 2018 from 1.7% to 1.4%.

UK trade prospects after Brexit will depend on business reorienting its efforts towards faster growing non-EU markets, notably in the tradable services area where the UK has relative strengths. The proportion of UK trade going to the EU27 countries could fall from around 44% now to only around 30-35% by 2030. Free trade deals may help this strategic shift in the longer term, but UK businesses should not wait for these before taking action to explore new markets beyond the EU.

Restrictions and regulations

Historically, England and Wales have generally recognised foreign investment as one of the key factors in economic growth and the creation of wealth. Not surprisingly, therefore, there are no significant trade or investment barriers and no restrictions on the transfer of capital or repatriation of profits.

However, some key sectors are subject to tight regulation most of which are attributable to the implementation of EU Directives and / or Regulations and it remains to be seen what impact Brexit will have on them. The key objective of regulation in these sectors is to guarantee the smooth operation of markets and above all the protection of customers. Sectors covered include the financial services industry and utilities such as energy, water and telecommunication. Specialist regulatory bodies have been set up with responsibility to enforce rules in their respective sector. Importantly, in all cases, regulations are applied on a non-discriminatory basis.

The financial services industry is strictly regulated by the Financial Services and Markets Act 2000 (**FSMA**) and its subsidiary legislation.

The Financial Conduct Authority (**FCA**) is the regulator responsible for the conduct of firms authorised under the Financial Services and Markets Act 2000 (**FSMA**). The FCA is also responsible for the regulation of conduct in retail and wholesale financial markets, supervision of the trading infrastructure that supports those markets and the prudential regulation of firms not regulated by the PRA. The Prudential Regulation Authority (**PRA**) is the regulator responsible for the micro-prudential regulation of systemically important firms, including banks and insurers. These firms are referred to as PRA-authorised firms and also as dual-regulated firms because, while the PRA regulates prudential issues, the FCA acts as these firms' conduct regulator.

The PRA is a subsidiary of the Bank of England (BoE). The Financial Services Act 2012 also established the Financial Policy Committee (**FPC**) as a committee of the Court of the BoE. The FPC has responsibility for macro-prudential regulation; the regulation of the stability and resilience of the system as a whole. The FPC does not have direct regulatory responsibility for any particular type of firm. The FPC has a toolkit of macro-prudential powers that it can use to remedy emerging problems affecting UK financial stability.

Great importance is attached to free competition including between domestic and non-domestic businesses. Legislation prohibits certain anti-competitive practices and in particular the exploitation of a dominant position. The Competition and Markets Authority (**CMA**) is the principal regulator responsible for the enforcement of competition law. Because a merger, acquisition or joint venture may reduce competition, the transaction may be subject to either the merger control regime at national or EU level, depending on the size and geographical reach of the businesses concerned.

At national level, there is no general pre-notification requirement. In practice, because the CMA may nonetheless call (non-notified) mergers in for review, many parties notify so as to avoid uncertainty, particularly given the CMA's far-reaching powers to investigate and, ultimately, to block a merger. The CMA may also require a party to sell off part of its business, as a condition for clearing the merger, or require the merged entity to behave in a way that safeguards competition. The CMA also has powers to prevent or reverse steps taken towards integrating the businesses before it completes an investigation. If the proposed merger or acquisition or joint venture meets certain turnover criteria, then pre-notification to the European

Commission is mandatory. The European Commission has 25 working days to decide either to clear the merger or to commence an in-depth investigation. There is complete freedom of capital movement and current account transactions, not only with member states of the EU but with all other countries; no authorisation is required. However, just as in most jurisdictions, the movement of capital is subject to strict money laundering controls.

Foreign investment policy

According to the World Bank, the UK accounts for 4 percent of global GDP and is a significant player in trade in services (namely, financial services and other business activities) which represent 37 percent of UK total exports and 23 percent of UK imports. It is the European leader for inward investment, with London being Europe's most attractive city for foreign investment. According to Ernst & Young's annual attractiveness survey in 2015 there was a 11% rise in foreign backed UK projects despite an overall decline in business services projects across Europe. The power of London in the global financial services industry remains a significant attraction to foreign investors and it is also emerging as a global technology hub as the demand for digital technologies and talent across Europe strengthens further.

The government plays an active role in attracting foreign investment and operates a very open and (as far as possible) unrestrictive approach to investors.

Although there is very little restriction on foreign investment, companies must observe monopoly and merger laws. Other restrictions may arise where some industries are nationalised or part centralised (such as some transport and energy interests), and banking, insurance brokers and other finance concerns may have to comply with the requirements of the FCA (see above).

Types of business vehicles

Forms of business vehicle

Private companies limited by shares (Limited, Ltd or ltd) are by far the most common form of registered entity in the UK, benefiting from the limited liability of their members and flexibility afforded by the Companies Act 2006. Only public limited companies (PLC, Plc or plc) may offer their securities to the public and, therefore be admitted to trading on a public market such as the main market of the London Stock Exchange (**LSE**) and, although members' liability is still limited, such entities are subject to much more regulation and scrutiny.

The Companies Act 2006 (**CA06**) is the key statute to which all types of company must adhere.

Private Limited Companies

There are around 3.1 million private limited companies registered with the Registrar of Companies at Companies House.

In terms of incorporating a private limited company it must, as a minimum, have at least one director, at least one shareholder, and a constitution in the form of articles of association. A private limited company need not have a company secretary.

The shareholders are the ultimate owners of the company. Shareholders may or may not be entitled to receive a dividend on their share(s) depending on the constitution of the company and any decision of the board to declare a dividend assuming that there are profits available to do so.

Directors, or board members, manage the company on behalf of its shareholders. If a director is also a shareholder, it is important that the two roles are conducted separately. In any event, directors must comply with their fiduciary duties. Many of these duties have been codified in the CA06, but some remain in the common law, and directors powers may also be limited by the constitution of the company.

The articles of association are a company's primary constitutional document and govern how a company should be operated. Modification to the articles of association can only be made by shareholders passing a special resolution (which requires at least 75% of shareholders to vote in favour).

Prior to the introduction of the CA06, a company's memorandum of association was used to set out the objectives or purpose of the company. This could restrict a company from certain activities, including dealing with certain third parties, making certain investments or borrowing or lending of money beyond certain thresholds. If the company does anything which is restricted by the objects clause, the company would be considered to be acting beyond its powers (ultra vires). Since the introduction of the CA06, many companies have chosen to remove their memorandum of association altogether (again by special resolution) and, thereby, remove any restrictions on their objectives.

A private limited company cannot offer shares to the public. If a private limited company wishes to raise capital, it can do so by issuing more shares "off market" (subject to the provisions in the articles of association) or increase its gearing by taking out loans. Alternatively, it can convert itself into a public limited company, offer shares to the public and, in all probability, seek admission of those securities to trading on a public market.

Public Limited Companies and the main market

There are a number of alternatives for companies seeking to have their securities publicly traded. The most popular markets are both run by the London Stock Exchange (**LSE**).

The Main Market

A listing on the main market of the LSE carries with it internationally recognised prestige and a heightened public profile. There are over 1,230 UK and International companies trading on the main market across 40 sectors. These companies, with a combined market value of £4.5 trillion, come from all over the world.

A main market listing also affords the company a trading platform for its shares, increased access to capital to fund development and growth and facilitates the provision of equity incentives to its employees. However, these benefits must be weighed against the loss of control by the company of its shareholder base, the stringent requirements of transparency and the potential volatility of its share price.

As the main market is a designated EU regulated market, a listing brings with it a raft of further regulation in order to protect investors. Assuming eligibility requirements are met (see below), two applications must be made: firstly to the UK Listing Authority (UKLA, a part of the FCA) which admits securities to the Official List following approval of a prospectus and compliance with the Disclosure Guidance and Transparency, Prospectus and Listing Rules which enact many of the EU Directive minimum standards for such a market. Secondly, a company must apply to the LSE to seek admission of its securities to trading on the main market itself.

In order to be admitted to the main market, a company must meet certain basic eligibility criteria, including that it is legally capable of offering shares to the public and have a minimum market capitalisation of £700,000, be able to run a business independently of any controlling (30%+) shareholder, a three year trading history and ensure that 25% of its shares will be in "public" hands on admission. After admission, there are further continuing obligations with which the company must comply, primarily to ensure that the market is informed of latest developments and to guard against the creation of a false market in the company's shares, thereby preventing the possibility of market abuse occurring – these obligations mainly derive from the EU Market Abuse Regulation. In certain circumstances, a company will need to appoint a sponsor (usually an investment bank) to assist it in ensuring that it complies with its obligations in certain circumstances.

AIM – the Alternative Investment Market

AIM was launched in 1995 as a platform for smaller and expanding enterprises looking to raise funds. It is not a regulated market, rather the market provider (the **LSE**) also acts as its regulator. AIM currently supports over 970 companies with a total value of approximately £84 billion.

In comparison to the main market, AIM has less stringent eligibility requirements: there is no minimum market capitalisation required, nor a need for a trading record or prescribed level of shares to be held in public hands. However, a company is required to have a Nomad (nominated adviser) at all times, the role of which is to ensure that it complies with the AIM Rules. As the AIM market is considered to be a multi-lateral trading facility, an AIM quoted company must also comply with the EU Market Abuse Regulation. In addition, UK incorporated main market and AIM listed public companies must comply with the CA06.

Unlisted public companies

Conversely, just because a company is registered as a public company, it does not necessarily follow that its shares have been admitted to a public market. An unlisted plc may have chosen to be public to be able to boast the "plc" moniker, or the company may have de-listed from a public market and not re-registered as a private limited company. Unlisted plcs can, in restricted circumstances, offer shares to the public in order to raise funds, but must carefully follow the CA06 provisions and Prospectus Rules.

Partnerships

The following three forms of UK business structure are referred to as "partnerships" but each has important differences:

- general partnerships
- limited partnerships (**LPs**) and
- limited liability partnerships (**LLPs**)

The first two structures are not separate legal entities but are descriptions of a relationship which exists between the partners. LLPs however are bodies corporate with separate legal personality and are more similar to companies than to partnerships (albeit with many significant differences from actual companies).

General partnerships

A partnership is a legal relationship arising from two or more persons (including bodies corporate) carrying on a business in common with a view to making a profit. Partners in a partnership act as agents of one another and have unlimited liability. Partners are jointly liable for the debts and obligations of the partnership and jointly and severally liable for wrongful acts committed by the partnership.

There is no formal formation procedure for a partnership and it is possible for parties inadvertently to enter into a partnership relationship which will be governed by the Partnership Act 1890.

LPs

The Limited Partnerships Act 1907 provides a form of registered partnership which limits the liability of the limited partners. An LP is not a separate legal person in its own right unless registered in Scotland as a Scottish LP (a topic outside of the scope of this guide).

At least one partner in an LP must be the "general partner" responsible for the day-to-day running of the partnership business. The general partner(s) has unlimited liability for the debts and obligations of the partnership. In contrast, the other partners ("limited partners") are only liable for the debts and obligations of the firm to the extent of the capital they have contributed to the partnership (so long as they do not participate in the management of the firm). Taking a hedge fund as an example, the general partner would be the manager of the fund with the investors playing a passive role as limited partners.

As with a general partnership, a partnership technically ceases to exist and a new partnership is formed on a partner joining or leaving.

LLPs

LLPs were introduced by the Limited Liability Partnerships Act 2000 and are particularly popular vehicles in the professional services industry.

An LLP is a body corporate requiring registration at Companies House and is a legal person separate from its members. In order to incorporate an LLP there must be two or more persons associated for carrying on a business with a view to profit. An LLP is capable of owning and charging assets, entering into contracts and incurring liabilities. The members of an LLP are its agents.

Despite affording limited liability to its members in the same way as a limited company, an LLP's constitutional document (**Members' Agreement**) is not required to be publicly filed (or, indeed, written) and LLPs are not subject to any capital maintenance regime (although the principles of wrongful or fraudulent trading do apply and it is possible for a liquidator, in certain circumstances, to "claw back" assets which have been distributed to members in the two years prior to an LLP becoming insolvent). The LLP therefore provides the flexibility of a partnership with the limited liability of a limited company. As with any limited liability entity, a lender or other counterparty may try to negotiate personal guarantees directly from the members.

As an LLP is a legal entity in its own right and not simply a relationship between persons, a change in the membership of an LLP does not create a new LLP. A number of regulations apply general corporate and insolvency law to LLPs including many provisions of CA 2006. As a limited liability entity, an LLP is also required to keep public registers of its members and file statutory accounts.

General partnerships, LPs and LLPs are "transparent" for tax purposes in that profits are only taxed at member level (according to the tax regime applicable to each member) and not at the level of the LLP. Please see the taxation section for further information on the taxation of partnerships, LPs and LLPs.

Joint ventures

A joint venture (**JV**) is where two or more companies (or entities) come together for strategic reasons, such as pooling resources or expertise, saving costs and entering new markets either in terms of product or location. Long or short-term, a key consideration when setting up a JV is the structure of the venture itself. The parties must consider whether the venture will be on a contractual or collaborative basis where the parties involved enter into agreements setting out the benefits and burdens. Recently, however, there has been a rise in the use of vehicles such as private limited companies and LLPs for JV purposes, especially in the private equity industry.

Where a company is chosen as the vehicle for the JV, the parties generally also enter into a shareholders agreement. This agreement sets out the various parties' rights and obligations including, the division of power among the directors, the management team, remuneration, shareholders' rights and provisions as to transfer of shares such as drag-along and tag-along rights. One reason for including the detailed arrangements between the parties to a shareholders agreement is that the company's articles of association will have to be filed with the Registrar of Companies and will, therefore, be publicly available. This consideration does not apply where an LLP is chosen, as an LLP's Members' Agreement is a private document which does not need to be filed.

Other key provisions of a shareholders agreement will deal with the termination of the venture. This can be done by general consensus between the parties or by sale of one party's shares where drag-along and tag-along rights will usually play a part. However, termination can often be a contentious issue, especially in the case of a deadlock, and parties should be diligent is putting termination provisions in writing prior to finalising their JV arrangements.

Taking security and charging of assets

Compared to many other jurisdictions, taking security in England and Wales is relatively easy and inexpensive.

A number of different security interests exist under English law including liens, pledges, mortgages and charges. The security interest which is most appropriate to a particular asset will depend on what that asset is, the level of protection required by the security taker and the degree to which the security granter needs to maintain possession and use of the asset during the life of the security. For example, it will not be appropriate to take a pledge, which requires the delivery of possession of the asset to the pledgee, over an asset which the pledgor needs to use in its business. Similarly, it will not be appropriate to take a legal mortgage, which requires a transfer of ownership of the asset to the mortgagee, over assets of a business which are subject to high turnover such as trading stock.

The most commonly used security interest under English law is the equitable charge. Such a charge enables the chargor to realise the charged asset to satisfy the secured liabilities but does not require the chargor to take possession of the asset allowing it to be used in the chargee's business.

A charge can be fixed or floating. Assets which are subject to the floating charge are permitted to be used (and disposed of) in the ordinary course of business of the charging company until a specified event occurs at which time the floating charge will crystallise and the chargor will be prohibited from dealing with the assets any further. A floating charge is most appropriate for assets which will change over the life of the security, such as trading stock. It is possible to take a floating charge over a single asset, a class or classes of assets or all the assets of a company.

The key characteristic required to create a fixed charge is that the chargee must have sufficient control over the asset. Without sufficient control being exercised in practice during the life of the security, the charge is likely to be characterised as a floating charge.

Whilst separate security can be taken over individual assets, it is also possible under English law to create several different types of security interests in a single document, known as a debenture. This would usually include a floating charge expressed to be over all (or substantially all) of the assets of the chargee which are not subject to other security interests under the terms of the debenture. This inclusion is designed to facilitate the appointment of an administrator by the security taker to the charging company as a method of enforcement and realisation of the security.

All security created by an English company, LLP, or the general partner of an LP (where the general partner is a company) will need to be registered at Companies House within 21 days starting the day after the date of creation of the security. Failure to register securities at Companies House will render it void as against a liquidator, administrator or other creditor of the company with security over the same asset and the amount secured remains outstanding but becomes immediately due and payable. It is usual market practice to attempt registration of all security created by such entities. In addition, the security may need to be registered at certain asset specific registers such as the Land Registry and the UK Intellectual property Office. A number of specific statutory provisions apply to registration of security granted by general partnerships and LPs (where the general partner is not a company).

Overseas companies are no longer required to register any security they create over assets located in England and Wales at Companies House but must register any charges created over land (including buildings) situated in England and Wales at the Land Registry.

As a general principle, provided an asset has some value and the security taken over it has been properly registered and perfected and is not capable of being set aside (and subject to the priority position), a chargee will be protected on the chargor's insolvency to the value of the secured asset (or, if less, the amount secured). The rules of priority between secured creditors are complicated due to the different types of security interest and methods of perfection. For mortgages and charges created by companies, essentially, priority in respect of the same type of charge will depend upon the date of creation (or the date registered if required to be registered in certain specialist registers). Fixed charges will take priority over floating charges. Floating charges will also rank behind expenses of the insolvent chargor's estate and a number of unsecured creditors, including contributions to occupational and state pension schemes and the salary of employees for work done in the four months before the insolvency date up to a maximum of £800 per person. In addition, (following the Enterprise Act 2003), a percentage of the floating charge assets must be ring-fenced for payment to unsecured creditors ahead of payments to the floating charge holders. This is known as the "prescribed part". The maximum amount which could be required to be set aside for the unsecured creditors is currently £600,000. Priority and recovery rates can also be affected by contractual arrangements between secured creditors.

Employment

Employee relations

In most sectors, the employee relations climate is stable. There are notable exceptions, particularly the transport and public sectors, which have experienced high levels of industrial unrest in recent months. In addition, following Britain's vote to leave the European Union (**EU**) in 2016, there is uncertainty about how the future relationship with the EU will impact on jobs and trade in certain sectors, in particular the financial services and retail sectors. The climate is unlikely to improve during the two year period in which Britain negotiates its exit from the European Union (due to end in March 2019).

Relevant employment statutes

There is a wealth of regulation governing the employment relationship in the UK, and every year sees the introduction of new legislation creating or changing rights.

The main employment laws are set out in the Employment Rights Act 1996 (**ERA**), the Equality Act 2010 (**EA**), the Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUP**E) and the Trade Union and Labour Relations (Consolidation) Act 1992 (**TULRCA**).

The ERA provides protection against unfair dismissal. An employer can only fairly dismiss an employee where there is a prescribed fair reason and a fair dismissal procedure. An employee with two years' service can claim compensation for unfair dismissal (currently capped at the lower of 52 weeks' actual gross pay or £80,541) although the cap and the service requirement can be lifted in certain circumstances). The ERA also (amongst other things) gives redundant employees the right to receive statutory redundancy pay, and confers on employees the right to periods of time off work for family and other reasons.

Protection in the UK against discrimination mainly derives from European Legislation. The EA consolidates all of our existing discrimination legislation into one Act which provides protection against discrimination because of age, disability, gender reassignment, marital or civil partnership, pregnancy or maternity, race, sex, sexual orientation and religion or belief. The EA also confers the right for women and men to be paid equally.

TUPE provides protection for employees who are affected by a transfer of an undertaking or a service provision change. Any dismissal by reason of the transfer will be unfair unless it is for an "economic, technical or organisational" reason entailing changes in the workforce. An employer must inform and consult about any transfer to which TUPE applies. TULRCA also requires employers to consult with employees facing redundancy where 20 or more employees are to be dismissed at the same establishment within a 90-day period. Employers face penalties of up to 13 weeks' or 90 days' pay per employee for failing to consult under TUPE / TULCRA respectively.

Employee and management representation in corporate transactions

Employees have no freestanding right to management representation. However, rights to collective consultation can arise on:

- a transfer of employment under TUPE which can apply on a corporate disposal of assets or outsourcing situation. There an employer must consult with any appropriate trade union or employee representatives of affected employees or, in their absence, provide for elections of those representatives, in advance of the transfer of the employment to the buyer or new provider of services
- a proposal to make at least 20 employees redundant at the same establishment within a 90-day period
- a written request by at least 10% of employees in a single undertaking, which triggers a process of negotiation between employer and employee to put in place an information and consultation agreement
- on certain types of changes to pension benefits, in particular defined benefit or final salary schemes
- certain health and safety issues and
- a formal process exists for agreeing collective bargaining arrangements with a formally recognised trade union

Finally, employees also have rights to information (but not consultation) on a corporate takeover to which the City Code on Takeovers and Mergers applies.

Termination of individual employment contracts

An employee is entitled to a minimum statutory notice period of one week after four weeks' continuous service. That increases after two years' service to two weeks with a further week's notice for each year of service up to a maximum of 12 weeks' notice after 12 years. A longer contractual notice period will override the statutory minimum and it is relatively common for notice periods of at least one month, increasing to three to six months (or longer) for senior employees.

If dismissed on the grounds of redundancy, an employee is also entitled to a statutory redundancy payment from his or her employer. This payment is calculated in accordance with a set formula based on the employee's age and his length of service. The maximum payment is capped currently at £14,670 from 6 April 2017.

Finally, an employee with more than two years' continuous service at the date of their dismissal is entitled not to be unfairly dismissed. A fair dismissal will be one which is for a fair reason – which includes redundancy, capability and conduct – and where the employer follows a fair procedure before dismissal. A fair procedure will include following the ACAS Code of Practice which sets out key principles of fairness and an unreasonable failure to follow that Code may result in an increase in compensation by up to 25%.

The remedy for an employee who has been unfairly dismissed is typically compensation which is made up of a basic award – calculated using the same formula for a statutory redundancy payment – and a compensatory award. The latter is currently capped at £80,541 from 6 April 2017 and is to reflect the employee's loss of earnings or projected earnings following the unfair dismissal. An employee may also seek an order for reinstatement or re-engagement by the employer, although an employer can refuse to do so and instead pay further compensation.

There are certain reasons for dismissal – such as pregnancy, making a protected (or "whistle-blowing") disclosure and trade union membership – which do not require an employee have two years' qualifying service for them to be afforded protection and where there is no statutory cap on the potential compensatory award.

Redundancies and mass lay-offs

Individual redundancies are regulated by the unfair dismissal regime. Redundancy is a potentially fair reason for dismissal and the employer needs to follow a fair process before dismissal.

A collective redundancy is triggered where an employer proposes to dismiss 20 or more employees at one "establishment" within a period of 90 days or less. The primary obligation is on an employer to consult with any trade union or appropriate employee representatives of affected employees, or in their absence, provide for elections of those representatives. Specific information must be provided in writing to representatives to enable consultation with the employer. Consultation must take place in good time before the first notice of dismissal which is at least 30 days in advance, increasing to 45 days if there are 100 or more proposed redundancies. Consultation must be meaningful and undertaken with a view to reaching agreement, although agreement need not be reached.

Failure to comply with the statutory duty to collectively consult may result in a protective award of compensation of up to 90 days' pay for each affected employee. This would be in addition to unfair dismissal where there was a failure to individually consult.

An employer must also make a formal notification to the relevant Government department – currently the Department for Business Energy and Industrial Strategy – at the start of the consultation process.

Foreign employees: work and residency permits

Most foreign employees from within the EU, wider EEA and Switzerland do not require sponsorship or residency permits to work in the UK, although residency permits can be obtained. Croatian nationals in certain circumstances need permission from the UK Visas & Immigration before they can take up employment. There is uncertainty as to what arrangements will be put in place once Britain exits the EU in 2019.

Foreign employees from outside the EU, EEA and Switzerland require a visa which gives them permission to work in the UK. The UK operates a points based immigration system, with five different tiers for employment and study. Where an applicant is eligible under Tier 1 (which is for investors, entrepreneurs and exceptionally talented individuals in the fields of science and the arts) they do not require sponsorship from a UK employer. Other employees do require sponsorship to apply for a work visa, and work visas will only be issued for skilled employment.

The length of time to obtain a visa varies widely depending on the country from which the application is made. This can range from two weeks to a few months. The visa fees vary depending on the type of visa, working visas typically cost around £500.

Taxation

Overview

The UK taxes both income and capital gains (called "chargeable gains") of individuals and companies that are tax resident in the UK. Non-resident individuals and companies can be subject to UK tax if they carry on a trade through a UK branch or permanent establishment. Non-residents without a UK branch or permanent establishment can also be taxed on their UK profits if they are a developer/trader of UK property or on their capital gains if they are made from UK residential property.

The UK also imposes VAT at 20% on supplies of goods or services and transfer taxes on the purchase of land interests and on transactions in shares and other securities.

Corporation tax

Generally speaking, companies are subject to corporation tax rather than income tax and capital gains tax. Corporation tax is charged on income, profits and gains at the following rates:

FINANCIAL YEARS STARTING ON OR AFTER	RATE
1 April 2015	20%

1 April 2017	19%
1 April 2020	17%

Patent Boxes and other reliefs: Before June 2016, the UK operated a concessionary 10% rate of corporation tax for companies exploiting patented products or certain other medicinal or botanical innovations. Following an agreement with Germany, the UK has submitted for OECD approval a proposed new patent box regime that restricts the 10% rate to UK-source profits. This proposal has been approved and new rules apply to patent box claims made after 1 July 2016.

A variety of other reliefs from corporation tax are also available, including a system of tax credits based on the amount of expenditure certain companies incur on 'research and development'. The government has recently announced that they intend to simplify this system further to make it more accessible for companies carrying out research and development in the UK.

Corporate groups

The UK does not have a true consolidation regime for direct taxes, and individual members of groups of companies are generally assessed to corporation tax in their own right. However, companies may "surrender" current-year losses to other members of the group to set against the taxable profits of the recipient. From April 2017 the rules on use of losses will be changed so that losses arising after that date can be carried forward and surrendered by a company within its group (currently, losses can only be carried forward within the individual loss-making company). However, prior year losses will only be capable of sheltering 50% of an individual company's current year taxable profits that exceed that company's allocated share of a £5 million allowance (currently there is no restriction).

Transfer pricing rules (see below) can redistribute profits within a group.

Self-assessment

Taxpayers in the UK must assess how much tax they must pay, rather than HMRC.

For companies, this is done by completing a Company Tax Return and sending it to HMRC through one of the approved online forms, either from HMRC or from a commercial provider of accounting software. A Company Tax Return is due within 12 months of the end of the company's chargeable accounting period (which cannot exceed 12 months).

A different self-assessment procedure applies for individuals, the self-employed, sole traders and partners.

Individuals

Individuals are subject to tax at the following rates:

- **Income tax** is payable at three main rates of 20%, 40% and 45%. Taxpayers are entitled to an annual personal allowance on which no tax is paid which, from April 2017, will be £11,500, as well as small £1,000 allowances for micro-entrepreneurs. The 20% rate (called the basic rate) applies to taxable income (i.e. above the personal allowance) up to £43,000 (£45,500 from April 2017) the 40% rate for higher rate taxpayers to income in excess of this amount up to £150,000 and the 45% rate for additional rate taxpayers to income in excess of £150,000. The personal allowance is reduced by £1 for every £2 of income earned by an individual in excess of £100,000.

- **Income tax on dividend income** is payable at a rate of 0% for the first £5,000 of dividend income (falling to £2,000 from April 2018), and thereafter at a rate of 7.5% for basic rate taxpayers, 32.5% for higher rate taxpayers and 38.1% for additional rate taxpayers.

- **National insurance** is payable by employees at a rate of 12% of employment income received where that income is above £155 per week but less than £827 per week above which the rate drops to 2% (class 1 NICs). National insurance at a higher percentage (currently 13.8%) may also be payable on a range of benefits provided by an employer to an employee (class 1A NICs). Self-employed individuals currently pay class 2 NICs at a rate of £2.80 per week but these are being abolished from April 2018. They also pay class 4 NICs which are paid at a rate of 9% on profits over £8,060 but less than £43,000 per annum, above which the rate drops to 2%. The Chancellor of the Exchequer announced that the rate of class 4 NICs would rise to 10% from April 2018 and 11% in 2019 but this has proved to be politically controversial and has been postponed indefinitely.

- **Capital gains tax** is charged at the rate of 20%, with a lower rate of 10% applying to individuals who are taxed on income at the basic rate, save to the extent that any gains, when added to the individual's taxable income for the relevant year, exceeds £31,785 (£45,000 from April 2017), where the 20% rate applies. Higher rates at a maximum of 28% apply to carried interest and gains on residential property. Most tax payers are entitled to an annual exemption. For the tax year 2016/2017, the annual exemption is £11,100.

Entrepreneurs' relief can reduce the capital gains tax rate to 10% for up to £10m of qualifying gains over the lifetime of each individual. This relief applies to employees and directors of a company who hold more than 5% of the ordinary share capital and voting rights in that company for at least a year. Investor's relief has the same 10% rate but applies to non-employed investors in an unlisted company who hold their shares for 3 years.

After 1 April 2017, different rates of income tax may apply in Scotland for non-savings, non-dividend income.

Partnerships and LLPs

Although partnerships, limited partnerships, and limited liability partnerships are treated differently for most legal purposes, for many UK tax purposes they are all treated as "tax transparent" if they are carrying on a business. This means that the partners are assessed to tax as if they were carrying out the business of the partnership (and consequently earning the profits and gains) in accordance with their partnership shares.

Individual partners will pay income tax and capital gains tax (at the rates above) on their share of the profits, and corporate partners will pay corporation tax (at the rates above) on their share.

Tax residence

A company is UK tax resident if either of the following is true:

- It is incorporated in the UK or
- It is centrally managed and controlled in the UK. This test looks at where the strategic decisions of the company are made, which may not be the same place where the day-to-day operations take place.

The UK has entered into a number of double tax treaties which may affect where a company is treated as being tax resident.

The residence test for individuals is more complex, and we recommend you seek tax advice where you are unsure about the tax residence of an individual (whether they are carrying out a business or are your employees or contractors). In very broad terms, an individual will be resident in the UK where any one of the following tests are met:

- He or she spends at least 183 days in a tax year in the UK
- Certain other day count tests are met or
- The individual has "sufficient ties" to the UK. This includes an assessment of the individual's familial, work, and accommodation ties.

Taxation of non residents

Businesses and individuals not resident in the UK for tax purposes are not subject to UK tax on their worldwide income, but only on certain items of income and gains. A business or individual will be taxed in the UK on:

- income (but not capital gains) from UK-situated commercial property (including real estate and intellectual property)
- income and capital gains from UK-situated residential property
- income from UK employment and
- income they earn from a trade carried on through a "permanent establishment" (broadly equivalent to a branch or agent) in the UK.

The UK may consider some types of land development or land sales to give rise to trading income, and may impose corporation tax (or income tax) in those circumstances. Therefore it is important that acquisitions of UK land are structured and documented carefully to ensure an unintended UK tax exposure does not arise.

Dividends

There is generally no UK withholding tax on dividend payments made by a UK company.

The payment of dividends is not a deductible expense in calculating the taxable profit of the payer.

Dividends received by a UK company are, in practice, generally not subject to corporation tax. However, the rules providing for this exemption are complicated, apply differently for small companies, and in some circumstances can apply vaguely: we recommend you seek tax advice where the treatment of a dividend paid to a UK company is unclear.

Interest

Interest payments made from a UK borrower to a person outside the charge to UK corporation tax are prima facie subject to withholding tax at 20%. This withholding tax may be reduced or eliminated under the terms of any relevant double tax treaty or where the lender is a parent company of the borrower and is resident in another member state of the European Union.

Interest payments are generally deductible in calculating taxable profits. However, there are a number of qualifications to this general rule:

- **EBITDA ratio** — from April 2017 a complex set of new rules will restrict the disproportionate allocation of interest to the UK within a multinational corporate group. Broadly speaking, where a UK group has an interest-to-EBITDA ratio of more than 30% and more than the worldwide group's ratio, interest deductions over the 30% ratio will be disallowed.

- **Thin capitalisation** — where a UK subsidiary is "thinly capitalised", i.e. its debt-to-equity ratio is high, HMRC may argue that a third party lender would not have lent that amount and hence the UK subsidiary is not entitled to a tax deduction in respect of such finance costs. The UK does not operate any safe harbours in terms of acceptable debt-to-equity ratios.

- **Distributions** —in some circumstances interest can be recharacterised as a distribution and so not deductible. Generally, this is where the interest is linked to the performance of the paying business or has other equity-like characteristics.

A "worldwide debt cap" rule is currently in force. This disallows interest deductions where UK net debt of a group exceeds 75% of the group's worldwide gross debt. However, this will be repealed with the introduction of the EBITDA ratio.

Royalties

Royalties paid by a UK resident to a person outside the charge to UK corporation tax will prima facie be subject to withholding tax at 20%. However, this withholding tax may be reduced or eliminated under the terms of any relevant double tax treaty or where the recipient is a related company resident in another member state of the European Union.

Profits of a foreign subsidiary

The profits of a foreign subsidiary are not automatically imputed to a UK-resident parent company. However, where a tax avoidance motive to a foreign subsidiary's affairs can be shown by HMRC, a foreign subsidiary may have certain of its profits apportioned between its shareholders and the appropriate share imputed to any UK person with a 25% or greater interest in the controlled foreign company. This charge is subject to a number of conditions and exceptions, and only applies to a company which is (a) resident outside the UK for tax purposes and (b) either controlled by a person resident in the UK or where at least 40% of the company is controlled by a UK resident person and a person which is not resident in the UK controls at least 40% (but less than 55%) of the company and (c) subject to a lower level of taxation (broadly the rate of tax paid by the company is less than 75% of the equivalent UK liability using UK rules) or has profits or a profit margin over a certain threshold.

Transfer pricing rules

The transfer pricing rules are designed to prevent the export of profits to other countries through artificial inter-company pricing arrangements or excessive interest, royalties or management charges and to ensure that all goods or services provided to (or acquired from) group companies, associates or affiliates are neither sold at an under-value nor purchased at an over-value. HMRC will scrutinise very closely any arrangements between a UK company and non-UK companies within the same group to ensure that an appropriate level of profit is being earned by the UK company.

Where the transfer pricing rules apply, the basic rule is that the taxable profits of the potentially advantaged company are to be computed as if the arrangements had been made on an arm's length basis. These rules are intended to bring the UK legislation more closely into line with the arm's length principle in the OECD Model Tax Convention.

The UK has committed to introducing significant changes to its transfer pricing rules based on the conclusions of the OECD's Base Erosion and Profit Shifting (**BEPS**) project, though draft legislation has not yet been proposed.

Payroll taxes

Income tax and national insurance contributions on employment income are accounted for by employers to HMRC under the Pay As You Earn (**PAYE**) system. The employer deducts income tax (at the income tax rates above) and employee's national insurance contributions from the employee's income and pays the deductions to HMRC on behalf of the employee. The current employee's national insurance contributions (which are deducted from salary) is set out at 'individuals' above.

Employers are also required to pay employer's national insurance contributions, which cannot be deducted from salary, in respect of each employee. The rate of employer's national insurance contributions for the 2016/17 tax year is 13.8%.

Deductions are made from each payment of employment income (and the relevant amount accounted for by the employer to HMRC), rather than paying tax in one lump sum. Generally the employees will be paid on a monthly basis and each pay day will receive a pay slip setting out the amount he or she has been paid in gross, the tax and national insurance contributions deducted from gross pay, and any other deductions from the gross pay leaving the net pay.

VAT

The UK imposes value-added tax in accordance with the European Union's VAT directive. Broadly, businesses supplying goods and services are required to charge the recipient VAT at 20% on the supply. This VAT is passed on to HMRC, less a deduction for any VAT paid by the business on supplies made to it.

Broad exemptions from VAT apply where shares or businesses are transferred, for financial services and derivatives, and for certain types of real estate. Making exempt supplies of these sorts may mean that a business is restricted in the amount of credit it can obtain for the VAT it has paid itself on supplies made to it.

Taxation on imports and exports

Import duties are levied at varying rates on imported goods in accordance with the common customs tariff of the European Union (**EU**). The amount of import duty payable depends on a number of factors including: condition, origin, source, end use, valuation and description. There usually is no import duty on goods which originate in EU countries.

The impact of import duties may be limited by advance planning. The goods may be subject to a temporary suspension of duty; it may be possible to source the goods in a country to which the EC accords tariff preference; the end use of the goods in the EC may qualify the goods for a reduced or zero rate of duty. If the imported goods are subject to duty there are also a number of reliefs which may be available to avoid payment or obtain repayment of duty if the goods are to be re exported or if they are being re imported after earlier exportation.

It remains to be seen what impact Britain's exit from the European Union will have on import and export duties.

Double tax treaties

The UK has an extensive tax treaty network. Generally, these treaties will provide protection from double taxation and reductions in UK withholding tax rates. Most UK tax treaties will have anti-abuse provisions and the UK courts have held that it double non-taxation is against the purpose of UK's treaties.

Transfer taxes

The UK applies a number of transfer taxes:

- Stamp duty is charged on the purchase of shares, stocks and securities at a flat rate of 0.5%. Stamp duty reserve tax is also chargeable at a rate of 0.5% on agreements to transfer stock or chargeable securities but is 'franked' (i.e. cancelled) by the payment of stamp duty. A 1.5% stamp duty reserve tax charge may apply to certain transactions involving bearer instruments or issues/transfers of shares and other securities to depositary schemes or clearance services.

- Stamp duty land tax (**SDLT**) is charged on the purchase of interests in land in England, Wales, and Northern Ireland. SDLT applies at a variety of rates:

  - for residential land, banded rates apply from 0% to 15% on the portion of consideration that falls within each band. (e.g. 0% is charged on the first £125k of consideration and 12% only on the portion that exceeds £1.5m.) An additional 3% rate is payable from 1 April 2016 on each band on the purchase of second homes and buy-to-let properties

  - for commercial land, a rate of 5% applies on the portion of the consideration over £250,000

  - for the purchase of leases, any premium payable is subject to the commercial rates above and, in addition, the net present value of the rent receivable over the term of the lease is subject to SDLT at 1% or 2%

  - for residential land worth more than £500,000 purchased by a company or other non-natural person (for example a collective investment scheme), SDLT is payable at a flat rate of 15% (if no relief applies). Relief from this 15% flat rate is available for certain classes of property developers or traders.

In addition to the above, where non-individual persons (including corporates) own interests in residential property valued at more than £500,000 they will be subject to an annual tax at that property (the amount of the tax being dependent on the value of the property). At 1 April 2016 the amount of the tax was £218,200 for properties valued at over £20m and this will rise to £220,350 from 1 April 2017.

Different tax rates apply to land in Scotland for transfers taking place after 1 April 2015, when the land and buildings transaction tax replaced stamp duty land tax. From April 2018, different rates may also apply in Wales.

Anti-Avoidance

The UK has a number of anti-abuse or anti-avoidance rules. In particular:

- Targeted anti-avoidance rules (**TAARs**) apply to disapply certain tax treatments, usually where there has been a purpose of generating a tax advantage. These rules vary depending on the purposes of the regimes they protect.

- A general anti-abuse rule (**GAAR**) was introduced in 2013, and is designed to counteract tax advantages arising as a result of abusive avoidance schemes. The GAAR applies to all taxes in the UK.

- The diverted profits tax (**DPT**) was introduced in 2015, and is designed to ensure that businesses do not avoid having a permanent establishment in the UK, though it may apply more broadly.

- UK courts take a purposive approach to interpreting tax legislation, applied to the facts "viewed realistically". Historically this approach has been used to disallow aggressive or artificial tax planning.

- There are also a wide variety of sanctions for companies or their advisors that engage in unlawful tax evasion, as well as rules designed to bring any newly designed tax avoidance schemes to the attention of HMRC. The prevailing approach appears to be that as the overall rates of taxation in the UK fall, the focus on anti-avoidance increases.

In addition to the above, groups with a turnover in excess of £200 million or a balance sheet in excess of £5 billion are obliged to publish annually a 'statement of tax strategy' that includes an overview of their approach to taxation and their attitude towards HMRC. This reflects the growing importance of attitudes to taxation in matters of corporate governance.

Dispute resolution

Litigation

Civil proceedings in England and Wales are conducted in the County Courts or in the High Court. High value or complex claims (usually those in excess of £100,000) are heard in the High Court which comprises three divisions: the Queen's Bench Division, the Chancery Division and the Family Division. Commercial disputes are heard by specialist judges in either the Chancery Division or the Commercial Court (within the Queens' Bench Division). Additionally, as from late 2015, high value (above £50 million) or particularly complex financial disputes may be placed into the "Financial List" to be heard by judges with specialist financial expertise.

Civil cases are generally heard at first instance by a single judge and, whilst the process of litigation is largely managed by the parties, the judge exercises considerable control over the way in which cases progress and what evidence is put before the court.

The court has powers to grant a wide range of interim remedies during the course of proceedings and may grant interim relief in respect of legal proceedings in other jurisdictions. Weak cases may be disposed of through summary judgment and strike outs. Remedies awarded by the courts commonly include damages, declarations, injunctions or orders for sale and interest may be awarded on money judgments.

The winning party is usually able to recover its reasonable and proportionate costs from the other side, but the court has discretion to decide the extent to which costs are payable by one party to another. Parties are encouraged to settle disputes out of court; proceedings are frequently "stayed" to allow the parties to mediate, with a view to settling.

English judgments can be enforced in Europe under the Brussels Regulation. Outside the EU, various reciprocal arrangements allow for the recognition and enforcement of English judgments internationally.

There are proposals from government and the judiciary to set up an "online court" for low value claims. This is unlikely to happen until 2018 at the earliest.

Arbitration / alternative dispute resolution

Businesses can use alternative means to resolve disputes in England, as follows:

Arbitration

Businesses can agree to use arbitration to resolve disputes in their agreements. If a dispute arises, the parties appoint one or several arbitrator(s) to decide their claims, who then conduct the arbitration in private in accordance with the chosen arbitral rules. The arbitrators are appointed by the parties or by an arbitral institution. The arbitrators apply the relevant law to the dispute and issue an arbitral award. This can be enforced internationally under the New York Convention. Arbitration in England is supported by the Arbitration Act 1996, which enables ready enforcement of arbitral awards and support for the arbitration process from the courts.

Adjudication

Adjudication is compulsory for construction disputes in England, and was created by statute in 1996. An adjudicator is appointed by the parties, or by a third party institution. The 1996 Act requires the adjudicator to conduct the adjudication within strict time limits, and he issues an adjudication award. His decision can be "appealed" to the Courts, or to arbitration.

Expert determination

Expert determination is the resolution of a dispute by an expert applying his expertise to issue a decision. In England it is used for disputes which require specific expertise, such as financial disputes resolved by an accountant, or property valuation disputes by a surveyor. It is used only when the parties agree that it may be used, and there is no right of "appeal" in relation to the expert's decision.

Mediation

Mediation is negotiation facilitated by a neutral mediator, who works with the parties confidentially and on a without prejudice basis to get them to agree. The parties record any agreement in writing. Mediation is encouraged by the English courts to resolve disputes: the courts having powers to "stay" civil proceedings while the mediation takes place and to penalise parties who fail to mediate by restricting the costs that they may be awarded if they win at trial.

Competition

Mergers, acquisitions and certain structural alliances (including some joint ventures) may be subject to merger control rules, either at a European Union (EU) or national level. The EU Merger Regulation (**EUMR**) catches only the largest transactions which may affect competition at the EU level, whilst the UK rules focus on transactions which may affect competition within the UK.

Transactions caught by the EUMR are automatically excluded from the application of Member State merger rules, including the UK's (subject to the possibility in limited circumstances of a reference back to one or more national regulators). Transactions that do not trigger the EU rules may be subject to the UK rules.

This guide considers:

- which transactions are caught by the EU and UK merger control regimes
- the procedure for notifying transactions
- timetables for investigation and
- the test for assessing whether the transaction can be cleared

Please note that different rules apply to mergers in certain sectors such as newspapers and broadcasting, water and sewerage, railways, health and defence sectors; these are not covered in detail in this guide. The Secretary of State for Business, Innovation and Skills can intervene where public interest considerations arise - currently only in relation to mergers involving national security, media and newspapers and the stability of the UK financial system.

Type of transaction covered by the rules

The EUMR applies to transactions that bring about a lasting change in control in the companies or undertakings concerned, whether by the acquisition of sole control, the acquisition of joint control or a change from joint control to sole control. Control means having the possibility of "exercising decisive influence" over a company or undertaking. This can occur through the acquisition of (a) a majority shareholding; (b) a minority shareholding where, for example, this is accompanied by veto rights over strategic matters (such as the budget, business plan and appointment of senior management); or (c) where it is likely that minority shareholdings will vote together due to strong common interests, resulting in joint control.

In 2014, the Commission put forward a proposal to complement the EUMR with a light touch system for reviewing the acquisition of minority shareholdings that may be prima facie problematic from a competition point of view. Following widespread concern expressed during public consultation, the issue is being examined further and there is currently no timetable for its introduction.

The UK rules apply to transactions that cause two "enterprises" to "cease to be distinct" by being brought under common ownership or control. Control is acquired where one enterprise acquires in another enterprise:

- legal control (a controlling interest - usually through acquisition of more than 50% of the shares carrying voting rights) or
- de facto control (the ability to control policy – which may be possible with the acquisition of 30% of the voting rights) or
- material influence over another enterprise (the ability to materially influence the target's policy – for example through directorships and/or minority shareholdings which allow the acquiring enterprise to block special resolutions - acquisitions of shareholdings as low as 15% may be examined)

Because "enterprise" is very broadly defined, a wide variety of business acquisitions are covered by the rules (for example an asset acquisition of leasehold properties may qualify).

Size thresholds

There are two alternative turnover-based thresholds at EU level. The first is that:

- the combined worldwide turnover of all the undertakings (i.e. the purchaser or purchasers, including all members of their company group, and the target) is more than 5 billion Euros and
- the EU turnover of each of at least two of the undertakings is more than 250 million Euros

The second (alternative) EU threshold is that:

- the combined worldwide turnover of all the undertakings concerned is more than 2.5 billion Euros and

- the EU turnover of each of at least two of the undertakings is more than 100 million Euros and
- in each of at least three EU countries, the combined turnover of all the undertakings is more than 100 million Euros and
- in each of at least three of those same EU countries, each of at least two of the undertakings has a turnover of more than 25 million Euros

The EU rules do not apply where each of the undertakings achieves more than two thirds of its EU turnover within one and the same EU country.

Under the UK rules, the transaction must also meet at least one of two alternative thresholds. These are either that:

- the value of the UK turnover of the undertaking being taken over exceeds £70 million or
- as a result of the merger, the merged entity will supply at least 25% of all the goods (or services) supplied (or acquired) in the UK or a substantial part of the UK; or where one party already has a 25% share, this share will be increased by the merger

Notification to the relevant authority

Transactions that trigger the EU rules must be notified to the European Commission (DG Competition) for investigation. Implementation of the transaction is automatically suspended until the Commission has completed its review. There is no filing fee for notifications under the EU rules.

Under the UK rules, there is no obligation to notify a qualifying transaction for prior clearance, but the CMA has a residual power to investigate a non-notified merger (if it becomes aware of it through its market intelligence function) and to either clear it or refer it for in-depth (**Phase 2**) review within four months from the date when it becomes aware of it, or the date the transaction is completed (whichever is the later). Parties that do not seek clearance run the risk of an in-depth investigation and, ultimately, possible remedies, which may include unwinding the merger.

The CMA has powers to suspend and unwind integration steps and other steps that constitute pre-emptive action in completed and anticipated mergers, from the outset of a "Phase 1" inquiry. The CMA may enforce such interim measures by way of financial penalties on merging parties who breach any CMA orders, subject to a penalty cap of 5% of aggregate group worldwide turnover. It may also apply for a court order to enforce compliance. (At Phase 2, if orders or undertakings are not in place, further integration is automatically prohibited by the relevant legislation, unless the CMA has given consent).

Merger fees, which are payable in respect of relevant merger situations (whether notified by the parties or called in for review by the CMA), currently range between £40,000 to £160,000 depending on the size of the transaction.

Timetable for investigation

At EU level, DG Competition has 25 working days from notification either to grant Phase 1 clearance or launch an in-depth "Phase 2" investigation. DG Competition will commence a Phase 2 investigation if it has 'serious doubts' as to whether the transaction is compatible with the common market (by not significantly impeding effective competition in the common market). Phase 2 investigations must be completed within 90 working days (extendible by no more than a total of 20 working days).

Under the UK rules there is a statutory 40 working day time limit for Phase 1 investigations which commences on the first working day after the CMA has confirmed to the parties that:

- for voluntary notifications, the parties have submitted a valid merger notice or
- for own-initiative investigations (where the parties have chosen not to notify the merger), the CMA has sufficient information to enable its investigation to begin

The CMA has 24 weeks from the date of the reference to complete a Phase 2 investigation (but this may be extended by up to 8 weeks).

In certain limited circumstances it may be possible to get advance informal advice from the CMA on transactions that are confidential, where there is a good faith intention to proceed with the transaction and there is a genuine issue as to whether the deal might be referred for Phase 2 investigation.

The CMA Board (which normally delegates decision-making powers to a high-ranking CMA officer) is responsible for Phase 1 decisions and an Inquiry Group (drawn from a pool of independent panellists appointed to the CMA) is responsible for Phase 2 decisions.

The test for assessing whether the transaction can be cleared

DG Competition must prohibit acquisitions that would significantly impede effective competition in the EU. The creation or strengthening of a dominant position is one example of this.

The test under the UK rules is whether the transaction may result (anticipated mergers) or has resulted (completed mergers) in a substantial lessening of competition in any market in the UK for goods or services. It is applied at both Phase 1 and Phase 2, but there is a difference in the way it is applied at each stage. At Phase 1 the CMA must have a reasonable belief that it is or may be the case that competition is substantially lessened, whereas at Phase 2 the CMA requires a higher level of probability of an anti-competitive outcome, by applying a "balance of probabilities" test. In practice, at Phase 1 the analysis focuses on the extent to which the parties compete with each other prior to the merger, the ease of market entry and expansion, the existence of buyer power and any potential co-ordinated effects on competition resulting from the merger.

Under both EU and UK regimes formal commitments or undertakings may be given at Phase 1 or Phase 2 in order to meet specific competition objections. The final decision on the transaction may therefore be an unconditional clearance, clearance subject to conditions, or prohibition.

Restrictive agreements and practices

The UK and EU competition rules contain two core provisions that are applicable to restrictive agreements and practices in England: a prohibition on anti-competitive agreements and a prohibition on abuse of dominance. The UK and EU rules on these are very similar, but the UK prohibitions apply to agreements and conduct which affect trade within the UK, whereas the EU prohibitions apply only to agreements or conduct that may affect trade between EU countries.

The CMA may enforce both the UK and EU prohibitions within the UK. The sectoral regulators hold concurrent competition powers in respect of the energy, water, telecommunications, broadcasting, postal, rail, civil aviation, financial services and healthcare sectors in the UK. The CMA has the power to take Competition Act cases from the sector regulators where it is better placed to proceed with the case. DG Competition can enforce the EU rules against companies or undertakings in the UK. There are further provisions under both sets of rules for investigations to be conducted into markets or sectors where there are concerns that competition is not working as it should be. These are not covered in this guide which considers, in relation to the core provisions:

- prohibitions on anti-competitive agreements
- prohibitions on abuse of dominance
- enforcement by the competition authorities
- sanctions and remedies for breach

Prohibitions on anti-competitive agreements

Section 2 of the UK Competition Act 1998 (CA98) and Article 101 of the Treaty on the Functioning of the EU (**TFEU**) prohibit agreements and concerted practices between companies and decisions of trade associations which appreciably restrict competition within, respectively, the UK or the EU. An agreement for these purposes may be a formal, legally binding agreement or it may be an informal arrangement or even an unspoken understanding. Examples of restrictive agreements include agreements between competitors to fix prices, to share markets or customers, and to limit production or sales. The prohibition can also apply to direct or indirect exchanges of commercially sensitive information between competitors, for example, information on prices, costs, volumes, market shares, customers or suppliers. However, the prohibition does not apply to arrangements entered into between companies where they form (part of) a single economic unit. The most obvious example of this is an agreement between a parent and a subsidiary company.

Competition law is not intended to stifle legitimate business activities. To this end, there are sets of rules called block exemptions which exempt certain categories of agreement (such as supply and distribution agreements, research and development agreements, specialisation in production agreements and transfers of technology) from the scope of the prohibition, provided they comply with specified conditions. The parties must have relatively low market shares in order for an agreement between them to benefit from block exemption. There are also rules providing "de minimis" exemption for certain small agreements which are unlikely to have an appreciable effect on competition.

If an agreement cannot benefit from one of the block exemptions, it may still meet the criteria for an individual exemption. It is up to the parties to an agreement to make this assessment for themselves, as it is not possible to notify agreements for individual exemption by the competition authorities. The exemption criteria are that the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress, whilst allowing consumers a fair share of the resulting benefit. The agreement must not impose on the parties any unnecessary restrictions, nor enable the parties to eliminate competition to a substantial extent.

In addition to the section 2 and Article 101 prohibitions on anti-competitive agreements, the UK Enterprise Act 2002 makes it a criminal offence for individuals to engage in serious cartel activity (agreements between competitors designed to fix prices, share markets, limit supply or production, or to rig or fix tendering procedures). The offence does not cover arrangements that are made openly, as it requires an element of "secrecy" on the part of the directors.

Prohibitions on abuse of dominance

Section 18 CA 98 and Article 102 TFEU prohibit companies from abusing a dominant position on a market in the UK or EU, respectively. A dominant company is one which has sufficient market power that it can behave to an appreciable extent independently of competitors, customers and/or suppliers. There is a rebuttable presumption that companies with a 50% or more market share are dominant. A company is unlikely to be dominant with a market share below 40%, but may be depending upon the structure of the market and relative strength of competitors. The assessment of dominance thus requires detailed market analysis.

It is not prohibited for a company to be or to become dominant in a market (subject to merger control rules). The prohibition controls how a dominant company behaves in its dealings with third parties. A dominant company is under a special responsibility not to unfairly exclude competitors or to unfairly exploit its customers or suppliers. "Abuse" may consist of refusals to supply products, charging unfair or predatory prices, imposing unfair trading terms or conditions, discriminating between customers on equivalent transactions or forcing customers to buy products which they do not want in order to obtain a product they do want (tying or bundling).

There are no exemptions from the prohibition on abuse of dominance but a dominant company may have an objective justification for behaving in a particular way, for example a refusal to supply may be justifiable on the basis that the customer is a bad credit risk.

Enforcement by the competition authorities

The competition authorities have considerable powers to investigate breaches, including the power to demand the production of documents, require answers to questions and to carry out on-the-spot investigations, with or without notice, at company premises or at the homes of senior management. Further, the CMA has the power to conduct surveillance operations in the case of suspected cartel offences. Obstructing an investigation can result in a fine or (under the UK rules) a period of imprisonment for the individual concerned.

Sanctions and remedies

Breach of competition law in the UK can have severe consequences for companies and individuals. Company directors may be disqualified for up to fifteen years if their company breaches the rules and the director's conduct contributed to the breach of competition law, or he had reasonable grounds to suspect (or he ought to have known) that the conduct of his company constituted a breach but he took no steps to prevent it. In addition, companies may face:

- fines of up to 10% of annual group worldwide turnover
- orders to cease or modify infringing behaviour
- invalidity of anti-competitive agreements, which cannot be enforced against other parties and

- the risk of compensation (damages) claims from affected third parties

Individuals found guilty of committing the cartel offence are liable for up to five years imprisonment and/or an unlimited fine.

Both DG Competition and the CMA operate leniency and settlement programmes. The leniency programmes offer immunity from fines or reductions in fines to be imposed on companies, in return for providing evidence of infringements and cooperating with the ongoing investigation. The UK leniency programme extends immunity to individuals who might otherwise be subject to criminal/personal penalties.

In addition to any sanctions imposed by the competition authorities, companies that breach competition law risk private damages claims by the victims of competition breaches seeking compensation for losses suffered as a result of the breach. Recent reforms at EU and UK level aim to make it easier to bring such claims, for example through class actions.

Intellectual property

Patents

Patents protect new inventions. An invention will only be capable of patent protection if it is considered to be new, inventive, capable of industrial application and not specifically excluded from patent protection. The invention has to consist of a novel technical solution when compared to other similar inventions available. A UK registered patent gives the owner the exclusive right to use the patented invention and to stop others from copying, manufacturing, importing or selling that invention in the UK.

There are different ways to obtain registered patent protection in the UK. The first is to file a patent application directly at the UK Intellectual Property Office. A patent application must be made before the invention has been made public and the application will be examined in the light of earlier patent rights to see whether it meets the criteria required for registration. The examination process for a UK patent is not quick and can often take in the region of four years. The UK is also a member of International and European patent registration systems, so it is possible to apply for registration of a patent under an International or European patent, by specifically designating the UK.

Legal proceedings for the enforcement of a patent are often technically complex. The owner of a patent will be entitled to bring proceedings for the infringement of the patent if it is used by a third party without permission. The owner may succeed in preventing future use of the invention and in obtaining damages or, as an alternative to damages, an account of profits in respect of the infringement (and / or orders for delivery up / destruction etc). Proceedings can be brought in the High Court or the Intellectual Property Enterprise Court.

A registered patent can last up to 20 years subject to the payment of annual maintenance fees (due from the fourth anniversary of when the patent was filed), and provided that it is not successfully invalidated. If annual maintenance fees are not paid, the patent will lapse. After a patent registration has been renewed for the maximum period of 20 years, the patent will expire.

Trademarks

A UK registered trademark may be any sign that can be represented graphically and is capable of distinguishing the goods or services of one undertaking from those of another. Signs that can be protected as trademarks include words, logos, device marks, product packaging, certain types of product shapes and sounds.

The owner of a registered trademark in the UK is granted the exclusive right to use the protected sign in relation to the goods/services specified in the registration. A registered trademark can be used to prevent a third party from using the identical sign in relation to the sale of the identical goods/services to those covered by the trademark registration. In addition, a registered trademark will also allow the owner to prevent a third party from using a confusingly similar trademark in relation to the sale of identical, or similar, goods/services, if that use is likely to result in customer confusion. The owner of a valid UK trademark right will be able to bring proceedings for trademark infringement in the High Court or the Intellectual Property Enterprise Court and to apply for an injunction preventing further use of the trademark and damages or, as an alternative to damages, an account of profits for infringement (and/or orders for delivery up/destruction etc).

Trademark protection in the UK can be obtained in different ways. The applicant can apply to register the trademark on the UK Trade Marks Register, by filing an application at the UK Intellectual Property Office. It is also possible to obtain registration of a Community Trade Mark registration through the European Union Intellectual Property Office (**EUIPO**), or an International trademark registration which designates the UK through the World Intellectual Property Organisation (**WIPO**).

Once a trademark has been successfully registered, either on the UK, Community or International Trade Marks Registers, it will be an enforceable trademark right for a period of 10 years from the date of filing of the original trademark application. Once this 10 year period has expired, it will be possible to renew the trademark registration for subsequent periods of 10 years, subject to the payment of the appropriate trademark renewal fees and provided that there are no grounds for having the registration cancelled, such as non-use.

Registered and unregistered designs

In the UK, there are two systems of design protection: registered and unregistered.

Registered designs

A registered design protects the appearance of the whole or part of a product resulting from features such as the lines, contours, colours, shape, texture or materials of the product or its ornamentation. A registered design simply protects the appearance of a particular product, not the way in which it works which might be protected by means of a patent. The owner of a registered design has the exclusive right to use that design, including making, offering, selling, importing or exporting any product to which the design has been applied and the right to allow others to use the design in this way.

To be capable of valid registration as a registered design, a design must be novel on the date of application, that is the design must not be identical, or very similar, to a design that has already been made available to the public. The design must also possess individual character, so that it produces a different overall impression to any earlier design that has been made available to the public. To register a design in the UK, an application must be filed at the UK Intellectual Property Office, and the appropriate application fees must be paid. An application can cover more than one product at a time, provided the products are for products that fall within the same design classification.

The owner of a registered design will be able to prevent third parties from making, offering, selling, importing or exporting a product to which the design, or a design that gives the same overall impression, has been applied without permission. The owner will also be entitled to damages or in the alternative, an account of profits in respect of any infringement. Infringement proceedings for a registered design can be brought in the High Court or the Intellectual Property Enterprise Court.

Once registered, a UK registered design will be protected for a period of five years from the filing date of the original design application. It is possible to renew the design registration, subject to the payment of the appropriate renewal fees (and provided it is not invalidated), for further periods of five years up to a maximum of 25 years following the registration of the design. After 25 years, a registered design passes into the public domain, and the original owner cannot prevent others from using the design.

As a member of the European Union, it would also be possible to apply for a Registered Community Design, which is a design registration covering all 28 member states. The system of registered design protection is the same as in the UK.

It would also be possible to use the Hague system to apply for design registration in a number of different countries at the same time through a single application.

Unregistered designs

An unregistered design right automatically protects the internal or external shape and configuration of an original design. The right simply allows you to prevent unauthorised copying of that design. The right only applies to the shape and configuration of a particular product, and so will not arise for two-dimensional designs such as textile designs, which could be protected by means of a registered design. An unregistered design right will last either for a period of 10 years from the first marketing of the particular design, or 15 years from when the original design was first recorded, whichever is earlier. The right arises automatically on the original creation of the design in question. In case of challenge, you will need to be able to prove the date on which the design was created and also the date on which the product was first sold in the UK.

During the first five years of the lifetime of an unregistered design right, the owner is entitled to stop third parties from copying the design without permission. In the last five years, third parties are entitled to ask for a licence of right to use the design.

The European Union also has its own system of unregistered design, which is outside the scope of this brief overview.

Copyright

Copyright protects original literary, dramatic, musical and artistic works (including illustration and photography), published editions of works, sound recordings, films, broadcasts. Copyright is also used to protect computer programs and, in certain cases, it can be used to protect databases, if the arrangement of the information can be said to be sufficiently original. There is no requirement for artistic merit but the work must be original to attract copyright. Broadly two elements comprise originality in the UK – the work must not be copied and an author must have expended more than negligible labour, skill and effort in the creation of the work. The copyright owner has a number of exclusive rights over certain uses of the work which include the rights to copy, adapt, distribute or perform the work in public. The original author will also have the right to be identified as the creator of the particular work. Copyright will be infringed if the whole, or a substantial part, of the copyright work is used by a third party without permission (unless what is done falls within the scope of exceptions to copyright permitting certain minor uses). Proceedings for infringement of copyright in the UK can be brought in the High Court or in the Intellectual Property Enterprise Court, and the owner will be able to prevent the use of the protected work and obtain damages or, as an alternative to damages, an account of profits for the act of infringement (and / or also orders for delivery up etc).

There is no official registration system for copyright in the UK as there is for patents, trade marks and registered designs. The right arises automatically from the date of creation or recording of the work in question, in a material form, be that a drawing on a piece of paper, a story saved on a computer hard-drive or the date on which a programme is first broadcast.

Ultimately, to be able to enforce your copyright, you will have to prove that the work in question existed on a particular date, and there are various ways that this can be independently provided, such as mailing a copy of the original work to yourself by recorded delivery, or by depositing copies of the copyright work with your bank or solicitor. The period of copyright protection enjoyed by the copyright owner will vary depending on the nature of the work that is the subject of the copyright. For a literary, dramatic, musical or artistic work, copyright will remain protected for a period of 70 years after the death of the author. Copyright protection for sound recording lasts for 70 years from when it was first communicated to the public. Broadcasts will enjoy copyright protection for 50 years from the end of the year of the making of the broadcast. Finally, the copyright in a published edition of a particular work will be protected for a period of 25 years from the date it was first published.

Marketing agreements

Agency

Agents are intermediaries engaged to act on behalf of a "principal" to facilitate the conclusion of contracts between the principal and prospective customers/suppliers. Agents are independent of the principal and may be self-employed individuals or businesses. They primarily fall into two classes: 'sales' agents who have authority to bind a supplier to contracts with third parties, and 'marketing' agents, who do not have power to bind the supplier contractually, but may have varying degrees of authority to solicit and refer third parties to the principal. In either case, the agent typically receives a commission on contracts concluded by the principal as a result of the agent's efforts. The agent may be appointed for a territory on a non-exclusive, an exclusive, or a sole basis. (In an exclusive agency the principal cannot appoint other agents for the territory and may not seek customers itself, whereas in a sole agency the principal cannot appoint other agents but may itself seek customers.)

Using agents can be attractive to suppliers as a means of developing a wide marketing and support network for their products without incurring the overheads associated with employing a full sales team, whilst retaining a measure of control over the destination of those products. However, many agency relationships are closely regulated to protect agents. In England, Scotland and Wales, agency relationships for the sale of goods are regulated by the Commercial Agents (Council Directive) Regulations 1993 (as subsequently amended) (**Regulations**). Equivalent legislation applies in Northern Ireland.

Under the Regulations, agents are afforded a range of protections and rights, including for example, a legal right to commission, and a minimum period of notice prior to termination. The agent is also normally entitled to receive a payment on termination of the agency. This may be made on either an indemnity basis or a compensation basis and must be calculated in accordance with the relevant formula in the Regulations. Unless the indemnity alternative is specifically chosen in the agency agreement, the compensation alternative will apply by default. Either way, these payments can be substantial. In addition, in some circumstances the agent retains a right to commission on transactions concluded after the agreement has been terminated.

Many aspects of the Regulations cannot be contracted out of, and some provisions may only be altered if the change operates in the agent's favour.

Distribution

The appointment of a distributor (sometimes referred to as a "reseller") is regulated by the general principles of English contract law. Under a distribution agreement, the supplier or manufacturer sells his products to the distributor who then re-sells the products in his own right on to his customers, after applying a mark-up. Again, these can be non-exclusive, exclusive or sole.

As with agency arrangements, the use of distributors can enable the supplier to develop a wide marketing and support network and gain the benefit of local market knowledge relatively cheaply. The onus for promoting the business, and the risks associated with developing the business, are typically borne by the distributor. In addition, the Regulations (referred to above) do not apply to distribution agreements, so there is generally no requirement for the supplier to pay compensation on termination of the agreement (although agreements framed as distribution agreements but which are, in substance, agency agreements will be treated as the latter by the courts).

However, distributors typically have more autonomy than agents over the marketing of the products and European competition law limits the extent to which suppliers may restrict their distributors' activities. For example, restricting distributors' pricing is not permitted in principle, although recommended or maximum resale prices may be permitted in certain limited circumstances. Similarly, terms preventing distributors from supplying products to customers in another distributor's territory, at least in response to unsolicited requests are, as a general rule, not permitted. This means that within an exclusive distribution network distributors cannot be guaranteed absolute protection from competition from other distributors in the network.

Franchising

Franchising can be adopted as a strategy for maximising brand value while retaining a significant degree of control. Generally, it entails a franchisor who has developed a brand and business model permitting independent franchisees to use that brand and business model in return for the payment of a fee (which may be a flat periodic fee, or a royalty based on the success of the franchise, or a combination of both). The franchisor typically also provides training, support and materials (such as uniforms) to the franchisee. Whilst the franchise is an independent business, the franchisor will typically seek to impose various requirements on the franchisee to ensure a consistent format across all franchised businesses.

There is little in the way of formal regulation of the franchising industry in England, although certain principles of competition law applicable to distribution agreements and/or brand and knowhow licensing may also apply to franchise agreements, so care should be taken to ensure that a franchise arrangement will not in fact breach the competition rules. The franchising industry imposes a form of "self regulation" providing a layer of informal rules. The British Franchise Association requires its members to comply with the European Code of Ethics for franchising, under which the franchisor is required (i) to have operated a pilot operation before launching the franchise (ii) to be the owner of all relevant branding and trade marks and (iii) to provide the franchisee with initial and continuing training.

All marketing and distribution/reselling arrangements have the potential to give rise to competition risks, so competition advice should be taken before entering into any of these types of arrangement.

E-commerce

A number of regulations govern the conduct of e-commerce in England and Wales, in particular the Electronic Commerce (EC Directive) Regulations 2002 (**E-Commerce Regulations**) and the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (**Consumer Contracts Regulations**).

The E-Commerce Regulations mainly apply to businesses engaged (with both consumers and other businesses) in selling and / or advertising goods and services over the internet, by e-mail, or via text messaging, as well as to businesses that store or convey electronic content for its customers. The key provisions require businesses to: (a) provide specific information to its customers about the business; (b) comply with certain requirements in relation to the process of, and steps involved in, concluding online contracts; (c) clearly identify any "commercial communications" (making the nature of such clearly recognisable), the underlying business making the communication, and the details of any promotional offers / competitions; and (d) ensure that any unsolicited commercial communications sent by e-mail are clearly and unambiguously identifiable as such as soon as they are received.

The Consumer Contracts Regulations apply only to contracts between businesses and consumers and only in circumstances where the consumer is not physically present at the point of sale (i.e. over the internet, by e-mail or by telephone or mail ordering). They require businesses to give clear and comprehensible information in relation to the terms and mechanics of the contract, such as pricing and other costs (delivery, for example), a description of the main characteristics of the goods or services sold and arrangements for payment, delivery and performance. Specific obligations are also imposed on the business, and corresponding rights are given to consumers, mainly in relation to performance, delivery and cancellation. For example, consumers have the right to withdraw from the contract, even after the goods have been delivered, or the services provided, subject to certain timescales. The consumer is entitled to receive a full refund within 14 days for a cancelled contract.

Note that consumer laws in the UK were substantially overhauled by the Consumer Rights Act 2015, most elements of which came into force in October 2015. Consumer law in the UK is complex and it is advisable for businesses to seek advice on their terms and conditions of sale to consumers.

Data protection

The Data Protection Act 1998 (DPA) sets out the legal framework under which the processing (including the obtaining, holding, use and disclosure) of personal data is regulated in England. There are eight principles which must be observed by businesses that process personal data. The requirement to process personal data fairly and lawfully and the requirement to keep it secure are the two which often have the most practical impact. The DPA also contains a number of rights for individuals, such as a right of access to the personal data that is held on them. On 4 May 2016, the EU adopted the General Data Protection Regulation (GDPR), an update to the EU law from which the DPA is derived. The new law will directly apply across the EU from 25 May 2018 and adds an extra layer of complexity to data protection requirements in the UK irrespective of Brexit. Businesses must comply with the new rights and obligations in the GDPR and will be exposed to new tough sanctions and fines as high as €20 million or 4% of worldwide turnover, whichever is highest. Key changes are discussed in more detail below.

Businesses that use personal data for direct marketing purposes also need to comply with the Privacy and Electronic (EC Directive) Regulations 2003 (PECR). The PECR set out specific privacy rights for electronic communications and impose compliance requirements on businesses in relation to: marketing calls, emails, the use of fax, texts, cookies, automated calling systems and customer privacy regarding traffic and location data. Previously, only businesses were liable for nuisance call fines, however from Spring 2017, PECR is due to be updated and directors will become directly liable, being subject to a personal fine of up to £500,000 if found to be in breach of the PECR. The proposed update is being introduced by the Department of Culture, Media and Sport subject to finalising the consultation on PECR which closed on 23 February 2017.

The Information Commissioner's Office (ICO) is responsible for overseeing compliance with the DPA and related legislation and has powers to issue substantial monetary penalties to businesses that fail to comply. The ICO also provides guidance and consultations on the GDPR to assist businesses to meet the new requirements. A useful guide on the GDPR and the ICO's 12 steps plan to prepare for GDPR can be found on the ICO's website: https://ico.org.uk/for-organisations/data-protection-reform/overview-of-the-gdpr/.

Personal data means data relating to a living individual (data subject) who can be identified from that data. Special rules apply to the processing of sensitive personal data, such as information about the individual's racial / ethnic origin, physical / mental health or condition, sexual orientation or their commission / alleged commission of a criminal offence(s).

A data controller is the person or legal entity who determines the purposes for which, and the manner in which, any personal data is processed. Unless they fall under one of the limited exemptions, data controllers are required to 'notify' the Information Commissioner if they process personal data. Under section 61 of the Data Protection Act it is a criminal offence for a business to fail to notify where required to do so and to fail to keep its notification up-to-date. Using the ICO's online self-assessment tool, businesses are now able to determine if they need to 'notify'. The questionnaire is easy to complete and businesses are able to register immediately online. An annual notification fee of £35 is due from those businesses who process personal data (although the fee is higher for organisations with a turnover of £25.9 million and 250 or more employees).

(https://ico.org.uk/for-organisations/register/self-assessment/)

The ICO maintains a register of data controllers which is accessible via its website:

(https://ico.org.uk/about-the-ico/what-we-do/register-of-data-controllers/).

A **data processor** is a business that processes personal data on behalf of the data controller. A data processor does not have any rights to use the personal data for its own purposes. All of the obligations in the DPA are directed at data controllers and, subject to a few minor exceptions relating to criminal offences, data processors have no statutory responsibility under the DPA for the personal data that they process.

Under GDPR the definition of personal data has been expanded to include: "*any information relating to an identified or identifiable natural person 'data subject'; an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that person*".

The definition of sensitive data has also been updated to include genetic data, biometric data and data concerning sexual orientation. The GDPR imposes additional compliance obligations on both data controllers and processors within the EU. Further to this, the roles of data processor and data controller have been clearly defined, for example, a processor who processes data beyond the controller's instruction will be considered a joint controller. Data controllers must ensure adequate contracts are in place to govern data processors and must have a legal basis for processing and collecting personal data. Data processors can also be held directly liable for the security of personal data.

The General Data Protection Regulation – what it means for your business

The GDPR will come into force on 25 May 2018 and seeks to harmonise data protection across the EU. It applies to organisations established in the EU and those located outside the EU who monitor EU data subjects or offer goods or services to EU data subjects. It will therefore apply to organisations located in the UK despite Brexit, and businesses should make sure that their current systems and controls are compliant.

We highlight the following key aspects of the Regulation:

- Consent - individuals will be afforded more rights to decide how their data may be processed and their rights to opt in and opt out of such processing. Where processing data is based on consent, the Data Controller must be able to evidence the consent.

- Data Breaches - Data Controllers must report personal data breaches to the ICO no later than 72 hours after having become aware of the breach. An individual who has suffered damage can claim compensation from the Data Controller or the Data Processor.

- Record Keeping - each Data Controller is responsible for maintaining a record of its own processing activities and any processing carried out on behalf of the Data Controller. Businesses should ensure they have systems that keep clear records of all data processing activities in the event that they are called upon for review.

- Right to Object - individuals must be advised of their right to opt out of direct marketing which must be explicitly brought to their attention (such as including a clear statement or tick box).

- Profiling - an individual has the right not to be subject to a decision based solely on automated processing, including profiling. Profiling for marketing purposes will always require explicit consent.

- Data Subject Access Requests - the time limit to comply with a DSAR has been reduced from 40 calendar days to one calendar month. The ability for a firm to charge up to £10 per DSAR must be processed free of charge.

- Right to Erasure - an individual has a right to request for their data to be deleted. The Data Controller must delete personal data on request and can only be retained where there are legitimate grounds or a legal obligation to retain the data.

- Data Portability - the GDPR introduces a new right of data portability. This right allows for the data which the individual provided to the Data Controller to be provided to the individual in a structured format, to allow it to be transmitted to another Data Controller.

- Privacy Notices - under GDPR privacy notices must be more transparent, using clear and plain language, and easily accessible.

- Privacy Impact Assessments (**PIA**) - GDPR introduces a mandatory requirement for PIAs to be carried out in certain situations. PIAs will need to contain a description of the processing and the purpose of the processing and would need to identify any risks to the personal data and the rights and freedoms of the individuals, and the measures and safeguards to mitigate such risks.

- Privacy by Design - when developing, designing or using products, services or applications which involve processing personal data, Data Controllers and Processors should adopt internal policies and measures to ensure personal data is protected. Businesses should begin to build these requirements into future business plans now.

- Supplier Management and International Transfers - GDPR will directly regulate Data Processors for the first time. There must be clearly defined areas of responsibility between the Data Controller and the Data Processor.

- Data Protection Officer - a Data Protection Officer (**DPO**) may need to be appointed. This does not need to be a standalone role but the DPO should report to the highest level of management and must be informed about all data protection issues within the organisation.

Under GDPR data processors can be now be held directly liable for security of personal data and for breaches of their obligations, whereas under the previous regime the burden fell exclusively on the data controller. Businesses will therefore face stricter requirements whether they act as data processors or controllers, and will need to carefully consider their data protection arrangements to ensure compliance with the new provisions.

Where a breach occurs due to unlawful processing by a data processor, the data controller is jointly and severally liable for the damage if it, too, was in some way responsible. This also works the other way; a data processor can be liable for breaches caused by its data controller. Fines can be awarded against both controllers and processors who fail in their data protection duties (although it leaves it to national authorities to decide the actual level of fines).The Council has called for fines of up to two percent while the Parliament's version would have increased that to five percent. In apparent compromise, they agreed on two categories of fines:

- €10 million or 2% of the company’s global annual turnover (whichever is higher) for breaches of Articles 8, 11, 25 – 39, 42 and 43 or

- €20 million or 4% of the company’s global annual turnover (whichever is higher) for breaches of Articles 5, 6, 7 and 9, 12 – 22, 44 – 49 and 58.

Article 83(2) sets out the following factors when deciding whether a fine should be imposed and the amount of the fine:

- the nature, gravity and duration of the breach

- whether the breach was intentional or negligent

- the degree of responsibility of the controller or processor, and any history of previous breaches

- the technical and organisational compliance measures that were in place

- the degree to which the organisation has co-operated with the authorities to try to remedy the breach

- the categories of personal data affected by the breach

- the manner in which the breach became known to the supervisory authority and the extent the controller or processor notified the breach

- compliance with any corrective powers issued by a supervisory authority

- adherence to approved code of conducts and

- any other aggravating or mitigating factor applicable to the circumstances of the case.

Impact of Safe Harbor and the adoption of the EU-US Privacy Shield

On 6 October 2015, the European Court of Justice (**ECJ**) ruled that the Commission's decision in relation to the adequacy of the US Safe Harbor Framework (**Safe Harbor**) is no longer valid. Austrian national Maximillian Schrems brought a claim to the

Irish Data Protection Commissioner (Irish Commissioner) in relation to Facebook Ireland Limited's transfer of his personal data to Facebook Inc. (in the US). As a result of such transfer, his personal data was being subject to the NSA/PRISM surveillance program (as uncovered by Snowden in 2013) and he argued that Safe Harbor did not offer sufficient protection against such surveillance. The Irish Commissioner rejected Schrems' claim on the basis that Facebook Inc. had signed up to Safe Harbour and the Irish Commissioner was bound by the European Commission Decision as to the adequacy of Safe Harbor.

In the UK the ICO released a statement that businesses relying on Safe Harbor will need to review their personal data procedures. Although it is arguably implicit in the Schrems judgement that even Model Clauses are flawed, the ICO recommends that adequate contractual safeguards may be put in place in a number of other ways including using Model Contract Clauses, Binding Corporate Rules or Binding Corporate Rules for Processors (BCRs). Where adequate safeguards are established, the rights of data subjects can continue to be protected even after their data has been transferred outside the EEA. In February 2016 the European Commission announced agreement of a new framework for transatlantic data flows, the EU-US Privacy Shield (Privacy Shield). This was formally adopted on 12 July 2016 by the European Commission

The new arrangement provides clear and strong obligations on businesses based in the US to protect Europeans' personal data more adequately, and provides clear limitations and safeguards on US government access. A useful guide can be found on the European Commission's website: http://ec.europa.eu/justice/data-protection/files/eu-us_privacy_shield_guide_en.pdf.

In terms of GDPR, this imposes further restrictions on the transfer of personal data outside of the EU and makes specific reference to BCRs and standard Model Clauses adopted by the Commission as being appropriate safeguards. While the Privacy Shield and the GDPR impose similar obligations, the GDPR imposes far stricter requirements on companies. Businesses will therefore need to carefully consider the impact of the various legal frameworks when transferring data abroad.

Health and Safety

The **Health and Safety at Work etc. Act 1974** (**HSWA**) sets out the core health and safety duties of a company and its employees.

Responsibility of employer for its employees

Every employer is responsible for its employees. It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees (Section 2 HSWA).

In particular, employers owe the following duties to their employees:

- to provide and maintain **safe plant and systems of work**
- to have arrangements to ensure safety and **remove risks to health** in connection with the use, storage and transport of articles and substances
- to provide **the necessary information, instruction, training and supervision** to ensure the employees' health and safety at work
- to ensure the **safe maintenance of any place of work** and
- to provide and maintain a **safe working environment**.

Responsibility of employer to persons other than employees

Every employer is also responsible for non-employees, including visitors, members of the public and contractors. It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety (Section 3 HSWA).

In particular, employers owe the following duties to non-employees:

- not to expose such persons to health or safety risks and

- to provide such persons information about the way in which the employer conducts his business or undertaking that might affect their health or safety.

Responsibility for premises to persons other than employees

Each person who has control of premises has a duty owed to persons who are not employees, but use the premises as a place of work. That duty is to ensure that:

- the premises
- access to and exit from the premises and
- any plant or substances in the premises
- are safe and without risks to health (Section 4 HSWA).

Responsibility of employees at work

Each employee while at work has a duty to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions (Section 7 HSWA).

Health and Safety Regulations

Regulations are introduced under HSWA and supplement the general duties in respect of what is required of employers. At the time of publication, 157 sets of regulations have been made and are enforced by the Health and Safety Executive or the Local Authority and include, but are not limited to the following:

- The Management of Health and Safety at Work Regulations 1999
- The Provision and Use of Work Equipment Regulations 1998
- The Lifting Operations and Lifting Equipment Regulations 1998
- The Work at Height Regulations 2005
- The Construction (Design and Management) Regulations 2015
- The Manual Handling Operations Regulations 1992
- The Control of Substances Hazardous to Health Regulations 2002
- The Control of Asbestos Regulations 2012
- The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013

Offences

In the event of conviction for an offence under HSWA, which can include a breach of the Regulations, a convicted company or person can have imposed on it an **unlimited fine**. Individuals can be **imprisoned for up to 2 years**.

Historically, for offences involving a fatality, the starting point for a fine was **£100,000**. However, since the introduction of new sentencing guidelines in February 2016, a large company, if convicted, could now be fined up to **£10 million**, the highest fine to date being £5 million which was imposed following a non-fatal incident. A company with a turnover of £50million or more, may fall outside the guidelines and receive an even higher fine.

An individual director or manager of a company can be held criminally responsible for a health and safety offence (*Section 37 HSWA*) where:

- the company itself is found guilty of a health and safety offence and

- the offence was committed with the consent or connivance of, or is attributable to the neglect of a person in a position of "real authority" within the business such as a director or manager.

In addition, directors can be disqualified from being a director for up to fifteen years.

Defence

Following a failure to comply with a duty under HSWA, it shall be **for the accused to prove that it was not reasonably practicable to do more** than was in fact done to satisfy the relevant duty under HSWA (Section 40 HSWA).

To understand what is reasonably practicable in respect of assessing and addressing any risk, a balancing exercise must be undertaken; on the one hand the risk and the likelihood of it eventuating must be measured, and on the other, the expenditure in time, money and effort required to minimise that risk to as low a level as possible. If the risk outweighs the expenditure then the **effort was not reasonably practicable**.

Employers should have reference to the Health and Safety Executive website when considering the implementation of a health and safety system in the workplace, and the measures it needs to adopt to ensure that it is acting in a reasonably practicable way. Such guidance could include **Managing for Health and Safety** (Health and Safety Guidance 65) and **Leading Health and Safety at Work (INDG417)**.

Corporate Manslaughter

The Corporate Manslaughter and Corporate Homicide Act 2007 (**CMCHA**) does not give rise to an additional duty on the company beyond those in HSWA. CMCHA is the vehicle by which corporate bodies could be prosecuted in the event that they breach a duty of care.

To be guilty of an offence under CMCHA, the following has to be proved:

- the organisation caused a person's death
- it owed a relevant duty of care to the deceased
- there was a gross breach of that duty and
- a substantial element of that breach was in the way those activities were managed or organised by senior management.

Once a relevant duty of care has been established, the breach must fall far below what could reasonably be expected in the circumstances.

A prosecution is not limited to those cases where an employee of an organisation dies; a case could arise where an employee of a subsidiary dies and the investigation shows failings in the management of a parent company. However, the fourth element of the offence is key here; it would be more difficult to establish liability for a company that is an additional step away from the deceased as compared with, for example, the employer, who has more direct control over the individual.

As corporate manslaughter prosecutions are criminal trials heard only in the Crown Court, they are in front of a jury (HSWA prosecutions can be tried in both the Magistrates' and Crown Court). CMCHA gives direction on what a jury must consider in these cases and it includes failures to comply with health and safety legislation. A jury may also, "consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure or to have produced tolerance of it" and "any health and safety guidance that relates to the alleged breach". This would include internal policies and documents.

The role of senior management in this incident under examination would be scrutinised. This term is used to describe those persons who play a significant role in making decisions about how the whole or a substantial part of its activities are managed or organised; or the actual managing or organising of the whole or a substantial part of those activities.

The prosecution can aggregate the failings of a number of individuals to show that the company failed in its duty. Before the introduction of the new sentencing guidelines in February 2016, in the event of conviction, an organisation could have been fined around £500,000. The new sentencing guidelines now mean that fines could be as much as £20 million for large companies. However, companies with significant turnovers of £50 million or more, may fall outside of that sentencing exercise structure and incur a much larger fine.

An additional sentencing option available to the court is a publicity order, in which organisations could be forced to publicise the fact of its conviction in any medium required, including on marketing material. A recent example of this is the conviction of Baldwins Crane Hire Limited in December 2015 following the death of an operator in which the company has been ordered to publicise the conviction on its own website for 6 months (please see http://www.baldwinscranehire.co.uk/news/2015/12/03/response-to-corporate-manslaughter-conviction.html) and in a trade journal.

This legislation applies to deaths that occur in the UK only, and only those occurring after 6 April 2008.

Gross Negligence Manslaughter

The introduction of corporate manslaughter has led to an increased focus on the activities of senior management and has arguably led to the increase in the prosecution of individuals, even where corporate manslaughter is not prosecuted. Individuals cannot be prosecuted under corporate manslaughter legislation. They can, however, be prosecuted for the common law offence of gross negligence manslaughter, which requires there to have been a breach of a duty of care, which resulted in a death, and was so serious that it should attract the attention of the criminal courts. Gross negligence manslaughter is punishable with life imprisonment.

Plainly it is easier to establish a duty of care where a manager or director is in the same company as the person who has been injured, but a duty of care will not only be found when there is an employment relationship. It could exist for example in loco parentis, between a doctor and patient, or between someone who has created a state of affairs and all those who could come into contact with it e.g. a workman removing a man-hole cover from the road and pedestrians in the vicinity.

A British subject can be indicted for manslaughter in England and Wales even when he commits the offence outside the jurisdiction. The nationality of the victim is irrelevant.

Product liability

Overview

The legislative landscape governing product liability in the UK and the EU is increasingly rigorous, complex and constantly evolving. The main objective of the legislation is to safeguard public health. Manufacturers, distributors and retailers should bear in mind the over-arching The General Product Safety Regulations 2005 as amended (GPSR) which implemented European Directive 2001/95/EC as amended, and the Consumer Protection Act 1987 (CPA).

Criminal liability for unsafe products

It is a criminal offence under the GPSR to put an unsafe product on the market, which could result in fines and imprisonment. There are also sanctions for failure to take appropriate action, such as not withdrawing an unsafe product from the market. Contravention of the safety regulations is also an offence under Part II of the CPA with sanctions including fines and imprisonment.

The GPSR applies to all new, second hand and reconditioned products. Key provisions include:

- A "safe" product is broadly one which under normal conditions of use presents the minimal risk compatible with the products use, consistent with a high level of safety
- Factors taken into account when assessing a product's safety include: the characteristics of the product, including packaging and instructions; its effect on other products; its presentation, labelling and any warnings; and the categories of consumers at risk when using the product – in particular children and the elderly
- There is a defence of due diligence but compliance with a relevant European or British Standard is not an absolute defence
- In considering safety issues, be guided by the "precautionary principle", summed up by the maxim "better safe than sorry"
- Strict time limits apply to the requirement to notify unsafe products to enforcement authorities

- Authorities can order suspension, withdrawal or recall of a product and / or additional markings or warnings
- Offences can be committed by both corporate bodies and individuals. Conviction can result in unlimited fines and up to 12 months imprisonment

Specific regulations

Be aware that some products are also subject to further specific regulations, the breach of which also gives rise to criminal liability. These include, but are not limited to, the list below. The GPSR outlined above will apply where its provisions go further than the existing specific regulations:

- The Toys (Safety) Regulations 2011
- The General Food Law Regulation (EC) 178/2002 (as amended) and The General Food Regulations 2004 (as amended)
- The Gas Appliances (Safety) Regulations 1995 (as amended)
- The Radio Equipment and Telecommunications Terminal Equipment Regulations 2000 (as amended)
- The Ecodesign for Energy-Related Products Regulations 2010 (as amended)
- The Medical Devices Regulations 2002 (as amended)
- The Cosmetic Products Enforcement Regulations 2013
- The Furniture and Furnishings (Fire) (Safety) Regulations 1988
- The Pyrotechnic Articles (Safety) Regulations 2015
- The Supply of Machinery (Safety Regulations 2008 (as amended)
- The Construction Products Regulations 2013

Safety legislation does not specifically address individual products, so it is important to review the legal requirements and undertake risk assessments of products in order to identify any areas in which they fall short which could cause a risk of injury. Certain categories of products must bear CE marking if they are intended to be sold in the EU or EEA. Provided the product satisfies the legal requirements, the CE mark can be added as a trustworthy badge of safety in order that the product can be sold within the EU and the EEA. Some products also require additional marking to indicate conformity with EU standards. It is also important to ensure that the product packaging and labelling complies with relevant safety marking requirements and includes adequate safety instructions and warnings.

Civil liability for unsafe products

The Consumer Protection Act 1987 (**CPA**) implemented European Directive (85/374/EEC) and gives people injured by unsafe products the right to sue for damages. The CPA applies strict liability. This means an injured person does not need to prove a manufacturer has been negligent in order to claim damages: it is enough if the product is proved to be defective and the defect caused the injury.

A product is defective if is not as safe "as persons generally are entitled to expect" (CPA s3). This includes defective component parts. In assessing safety, similar considerations to those in the criminal context (above) are taken into account. The Court will consider all the relevant circumstances, including but not limited to:

- The manner in which the product has been marketed, its get up and any instructions for, or warnings given with it
- What might reasonably be expected to be done with the product
- The time when the product was supplied by its producer to another

There are defences available, including that the state of scientific and technical knowledge at the time was not such that the producer might be expected to have discovered the defect, if it had existed in his products whilst they were under his control.

Action can be taken against the producer/manufacturer, importer and in some circumstances suppliers such as wholesalers and retailers. "Own branders", importers or suppliers who cannot identify who supplied them may be liable to consumers.

A business which produces or distributes a defective product may also be liable in tort to anyone who suffers injury or damage and in contract to any direct contracting party.

Where a product is intended to be sold to trade it may be categorised as an article for use at work and may fall to be considered under section 6 of the Health and Safety at Work etc Act 1974 (**HSWA**) where other more specific product safety law does not apply. HSWA places a general health and safety obligation on anyone in the supply chain, so far as reasonably practicable, for when articles in use at work are being used, set, cleaned or maintained. This obligation includes providing information and instructions on safe use, including any subsequent revisions to that information. Failure to comply with the HSWA is a criminal offence and can result in an unlimited fine and imprisonment.

Bribery and corporate crime

The Bribery Act 2010 (**Act**) which came into force in July 2011 replaced antiquated law which has been criticised for being complex and rarely enforced. The Act has given the UK some of the toughest anti-bribery legislation in the world.

In broad terms there are four types of offence in the Act which are:

- A general offence of paying a bribe
- A general offence of accepting a bribe
- A specific offence prohibiting the bribery of foreign public officials
- A corporate offence of failing to prevent bribery

In respect of the first two offences, there is no doubt that the Act represents little more than a simplified approach. In most cases, behaviour that will give rise to an offence under the Act would also have fallen foul of the previous law.

The critical changes for corporates are contained in section 6 (bribery of a foreign public official), section 7 (the corporate offence) and the broad international reach of the Act.

Contrary to section 6, a person is guilty of an offence if by the inducement, his intention is to influence the foreign public official in their official capacity in order to win business.

Section 7 makes a company strictly liable for a corrupt act committed anywhere in the world by someone performing services on its behalf. Paying a bribe (section 1) and bribing a foreign public official (section 6) give rise to the corporate offence. A commercial organisation has a defence only if it can show that it had in place adequate procedures designed to prevent bribery. The government has published detailed guidance on what those "adequate procedures" might look like.

Finally, in relation to jurisdiction, if an offence is committed by a British national, corporate or even by a person who is ordinarily resident in the UK, they could be prosecuted - even if the criminal act or omission takes place outside of the UK. The corporate offence applies to any corporate or partnership (wherever it is registered, incorporated or conducts its main activities) as long as it carries on a business, or part of a business, in the UK. It also applies to conduct that takes place outside of the UK. This ambit is broader than the US Foreign Corrupt Practices Act 1977.

Anti-money laundering and fraud

Money Laundering

The Fourth EU Money Laundering Directive came into force on 26 June 2015. Member States have until 26 June 2017 to implement the Directive into national law.

The Fourth EU Money Laundering Directive focuses on terrorist financing and imposing heightened customer identification and verification requirements and it will lead to amendments to the Money Laundering Regulations 2007.

Under the Proceeds of Crime Act 2002 (**POCA**), the Terrorism Act 2000 (**TA**) and the Money Laundering Regulations 2007, there are essentially three "substantive" money laundering offences. A person (including an individual or a firm) commits a money laundering offence if he:

- conceals, disguises, converts or transfers the proceeds of criminal conduct or of terrorist property (section 327 POCA) (section 18 TA)
- becomes concerned in an arrangement to facilitate the acquisition, retention or control of, or to otherwise make available the proceeds of criminal conduct or of terrorist property (section 328 POCA) (section 18 TA) and
- acquires, possesses, or uses property while knowing or suspecting it to be the proceeds of criminal conduct or of terrorist property (section 329 SOCA) (section 16 TA)
- There are three further offences, the first two only apply to those in the "Regulated Sector":
- failure to disclose that a third party has committed one of the above offences (sections 330 & 331 POCA)
- tipping off of persons engaged in money laundering or terrorist financing as to any investigation (section 333A POCA) (section 21D TA) and
- prejudicing an investigation in relation to money laundering or terrorist financing offences (section 342 POCA) (section 39 TA)

The provisions of POCA and the TA apply to all legal persons, individual and corporate, so fines can be imposed not only on corporate entities but also on individual directors, managers and officers, who can also be imprisoned for up to 14 years.

To assist the investigatory and enforcement processes involved in tackling money laundering and terrorist financing, law enforcement agencies have wide ranging powers including to enforce disclosure, undertake account monitoring and powers of seizure, civil recovery and confiscation. The most significant of these are contained in POCA, TA and the Anti-terrorism, Crime and Security Act 2001 (**ATCSA**) as well as The Serious Crime Act 2007 (SCA) and the Counter Terrorism Act 2008.

The Fraud Act 2006

Until the Fraud Act 2006 was brought into force on 15 January 2007, English criminal law did not include a general offence of "fraud", nor did it include a specific definition of that term. Instead, a series of separate offences under the Theft Acts 1968 and 1978 sought to cover the same ground.

The Fraud Act 2006 was passed in order to simplify the law and, in line with the Government's intention, to enhance the prospects of successful prosecutions in future fraud cases. Section 1 of the new Act creates a general offence of fraud which can be committed in three ways, which are:

- by false representation (section 2)
- by failing to disclose information (section 3) and
- by abuse of position (section 4)

The Fraud Act 2006 also creates new offences of obtaining services dishonestly (section 11) and of possessing (section 6) or making and supplying (section 7) articles for use in frauds.

In relation to the fraudulent behaviour of companies, the existing offence of participating in fraudulent business carried on by a company, provided for by the Companies Act 1985, was amended by section 10 of the Fraud Act 2006, bringing the maximum penalty from 7 years imprisonment to 10 years. There is also a further offence of participating in fraudulent business carried on by a sole trader (section 9).

Further, section 12 of the Fraud Act 2006 provides that where an offence of fraud is committed by a body corporate, but was carried out with the "consent or connivance" of any director, manager, secretary or officer of the body, or any person purporting to be such, then that person, as well as the body itself, is liable. An important difference between this and the Theft Act is that the Fraud Act 2006 offences do not require there to have been a victim.

The Fraud Act 2006 is in many respects to be welcomed, in that it simplifies a formerly complex area of the law.

Concerns for business - bribery, money laundering and fraud

As well as potentially heavy fines, damage to reputation and value, it is important to mention that companies in the UK and EU convicted of fraud, bribery, corruption or money laundering will be debarred from tendering for public contracts under the Public Contracts Regulations 2015, which implements the EU Consolidated Directive on Public Procurement 2014. However, unlike under its predecessor, the Public Contracts Regulations 2006, a company can now recover eligibility for public contracts and their term of debarment can be ended where they satisfactorily demonstrates "self-cleaning".

Real estate

English land law consists of a framework of rules, now generally contained within various acts of parliament from The Law of Property Act 1925, to the Land Registration Act 2002.

The different types of interests which you can hold in land in England and Wales are called "estates", of which there are two: freehold and leasehold.

The owner of a freehold has no limit of time on its ownership, whereas a leaseholder does. Another point of difference between the freeholder and the leaseholder is that the latter is a tenant. The shorter the duration of the lease then the more value there is in the lease from the landlord's point of view (as the tenant will usually be paying a monthly or quarterly rent), and the more onerous the obligations on the tenant. Long leases (which tend to be over 99 years) are usually granted for a premium and at a very low annual rent.

As well as being able to own a freehold or leasehold interest, the English legal system distinguishes between legal and equitable owners. This is a distinction between those (for example trustees) who hold the legal title and the responsibilities of ownership and those (for example the beneficiaries of a trust) who are entitled to the benefits of ownership (for example the sale proceeds) but not burdened by the responsibilities.

When purchasing a legal interest in freehold or leasehold land, the ownership must be recorded as such on the public records maintained by the Land Registry. It was not always the case that ownership had to registered with the Land Registry. However, registration is now compulsory (except for leases of 7 years or less).

There are no specific restrictions on a foreign incorporated company owning Real estate within England and Wales, but there are requirements when registering the foreign company's ownership. These relate to the Land Registry ensuring that the foreign entity has signed the relevant documents in a valid way within its jurisdiction and also that it is incorporated in the foreign jurisdiction.

Any entity acquiring any interest in land in England and Wales may have to pay Stamp Duty Land Tax (depending on the price and the availability of any reliefs that may be available) and potentially an annual tax charge on certain residential property owned by a corporate entity. Also there may be Land Registry fees to pay.

Existing law is stated as it applied in March 2017.

USEFUL CONTACTS		
Financial Conduct Authority 25 The North Colonnade Canary Wharf London E14 5HS	**Competition and Markets Authority** Victoria House Southampton Row London	**Confederation of British Industry** Cannon Place 78 Cannon Street London

USEFUL CONTACTS		
(+44) 20 7066 1000 www.fca.org.uk	WC1B 4AD (+44 20 3738 6000) general.enquiries@cma.gsi.gov.uk www.gov.uk/government/organisations/competition-and-markets-authority	EC4N 6HN (+44) 20 7379 7400 Fax: (+44) 20 7379 7200 enquiries@cbi.org.uk www.cbi.org.uk
The Law Society The Law Society's Hall 113 Chancery Lane London WC2A 1PL (+44) 20 7242 1222 Fax: (+44) 20 7831 0344 DX: DX 56 London/Chancery Lane www.lawsociety.org.uk	**Information Commissioner** Information Commissioner's Office Wycliffe House Water Lane Wilmslow Cheshire SK9 5AF (+44) 1625 545 745 www.ico.org.uk	**HMRC** Euston Tower 286 Euston Road London NW1 3UL (+44) 843 504 0633 https://www.gov.uk/contact-hmrc

▸ Further information

▸ Key contacts at Addleshaw Goddard LLP

CORPORATE		
Andrew Carpenter Partner	(+44) 20 7880 5764	andrew.carpenter@addleshawgoddard.com
Will Chalk Head of Corporate Governance	(+44)161 934 6429	will.chalk@addleshawgoddard.com

FRAUD REGULATORY & CORPORATE CRIME		
Nichola Peters Partner	(+44) 20 7160 5948	nichola.peters@addleshawgoddard.com

TAX		
Justine Delroy Partner	(+44) 161 934 6770	justine.delroy@addleshawgoddard.com

COMMERCIAL		
Jonathan Davey Partner	(+44)) 161 934 6349	jonathan.davey@addleshawgoddard.com

COMPETITION		
Bruce Kilpatrick Partner	(+44) 20 7544 5214	bruce.kilpatrick@addleshawgoddard.com

LITIGATION		
Michael Barnett Partner	(+44) 20 7544 5302	michael.barnett@addleshawgoddard.com

REAL ESTATE		
Adrian Collins Partner	(+44) 20 7160 3048	adrian.collins@addleshawgoddard.com

EMPLOYMENT		
Malcolm Pike Partner	(+44) 20 7788 5566	malcolm.pike@addleshawgoddard.com

INTELLECTUAL PROPERTY		
James Whittaker Partner	(+44) 161 934 6329	james.whittaker@addleshawgoddard.com

E-COMMERCE		
Emma Armitage Partner	(+44) 20 7788 5521	emma.armitage@addleshawgoddard.com

PRODUCT LIABILITY		
Louisa Caswell Partner	(+44) 20 7788 5174	louisa.caswell@addleshawgoddard.com
Erin Shoesmith	(+44) 161 934 6554	erin.shoesmith@addleshawgoddard.com

PRODUCT LIABILITY		
Legal Director		

addleshawgoddard.com

Aberdeen, Doha, Dubai, Edinburgh, Glasgow, Hong Kong, Leeds, London, Manchester, Muscat, Singapore and Tokyo*

*a formal alliance with Hashidate Law Office